

THE MOVE TOWARDS PRE-EMPTION IN THE CRIMINAL LAW*

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I INTRODUCTION

In his recent and somewhat controversial book, *Preemption – A Knife That Cuts Both Ways*,¹ Professor Alan Dershowitz, the distinguished American scholar, writes as follows:

From the beginning of recorded history, prophets have attempted to foresee harmful occurrences, such as flood, famine, pestilence, earthquake, volcanic eruption, tsunami, and war. Attempting to predict crime – to determine who is likely to become a criminal – has also captured the imagination of human kind for centuries.²

There is no doubt that so-called ‘experts’ have long claimed the ability to spot the mark of the potential criminal before he or she has committed serious crimes. The results have been mixed, at best. Nonetheless, it is still widely believed that there are ways of distinguishing real criminals from law-abiding citizens, even before they have committed any crimes.

Traditionally, liberal democracies have eschewed the use of early intervention to prevent criminal acts. Until comparatively recently, it was widely assumed that the very idea of confining someone preventively, under some variant of what is sometimes described as a ‘precautionary principle’, was anathema to the rule of law, as it applies in Anglo-American jurisprudence. Denning LJ put the matter this way: ‘[i]t would be contrary to all principle for a man to be punished, not for what he has already done but for what he may hereafter do’.³ To the same effect was the following observation by Jackson J, when sitting as a judge of the United States Court of Appeals for the Second Circuit:

it is ... difficult to reconcile with traditional American law the jailing of persons by the courts because of anticipated but as yet uncommitted crimes. Imprisonment to protect society from predicted but unconsummated offenses is ... unprecedented in this country and ... fraught with danger of excesses and injustice.⁴

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** Judge, Victorian Court of Appeal. I wish to express my gratitude to Brad Barr, Research Associate to the Court of Appeal, who provided considerable assistance to me in the preparation of this paper. The views expressed are, of course, my own. They should not be taken as reflecting the views of the Court, or any other member of the Court.

1 Alan Dershowitz, *Preemption – A Knife That Cuts Both Ways* (2006).

2 Ibid 3.

3 *Everett v Ribbands* [1952] 2 QB 198, 206.

4 *Williamson v United States*, 184 F 2d 280, 282 (2nd Cir 1950).

Of course, there have been exceptions to this principle. The preventive confinement of more than 100 000 Japanese-Americans during World War II is perhaps the high watermark example.

It is intriguing to note that the common law, as a general rule, did not penalise those who attempted to harm others, but did not succeed in doing so. Professor Dershowitz proffers the explanation that punishment only came to be severed from reparation at a comparatively late stage of historical development.⁵ There are still some theorists who hold to the view that the precautionary principle has no place in a system of criminal justice that conforms to Western ideals.⁶ That ideal is gradually eroding. Increasingly, and possibly as a result of events such as the terrorist attacks of 9/11, legislatures are broadening the ambit of criminal offences so as to enable early intervention in order to prevent what are seen as disastrous consequences. The amendments to the Commonwealth *Criminal Code*, dealing with terrorism offences, provide a useful example of this development.

There is also a strong body of scholarly opinion against this trend. It draws comfort from research which indicates that 'experts' are no better at predicting dangerousness than anyone else. For example, empirical data suggests that, contrary to public opinion, sexual offenders do not have high recidivism rates in comparison with other categories of offenders.⁷ In general, child molesters do not recidivate any more than sex offenders who target adults. Professor Kate Warner, drawing upon the literature, comments that:

a meta-analysis of 61 recidivism studies covering six countries revealed that just over 13% of sexual offenders were known to have recidivated sexually, with an average rate of 19% among rapists and 13% among child molesters. The rapists also had higher violent and general recidivism rates than the child molesters.⁸

Judges are, of course, expected to consider the likelihood of recidivism whenever they sentence anyone convicted of a serious offence. Most States and Territories now have statutes which allow offenders to be sentenced to terms of imprisonment which are disproportionate to the gravity of their offending.⁹ These

5 Dershowitz, above n 1, ch 1.

6 See, eg, Jerome Hall, *General Principles of Criminal Law* (2nd ed, 1960).

7 Denise Lievore, *Recidivism of Sexual Assault Offenders: Rates, Risk Factors and Treatment Efficacy* (2004); Donald West, 'The Sex Crime Situation: Deterioration More Apparent Than Real?' (2000) 8 *European Journal on Criminal Policy and Research* 399.

8 Kate Warner, 'Sentencing Review 2004–2005' (2005) 29 *Criminal Law Journal* 355, 367.

9 See, eg, *Sentencing Act 1991* (Vic) pt 2A s 6D(b). In Victoria, serious sexual and serious violent offenders, as defined, are sentenced in accordance with a legislative fiat which requires the protection of the community to be the principal purpose for which sentence is imposed. When sentenced, the presumption is that there will be cumulation rather than concurrency absent exceptional circumstances. Finally, the legislation empowers the courts to sentence persons convicted of serious offences to indefinite terms of imprisonment irrespective of the maximum penalty prescribed. The court must be satisfied, to a high degree of probability, that the person is a 'serious danger to the community' before fixing any such sentence. See generally Elizabeth Richardson and Arie Freiberg, 'Protecting Dangerous Offenders from the Community: The Application of Protective Sentencing Laws in Victoria' (2004) 4 *Criminal Justice* 81.

provisions stand in stark contrast to the common law which has always regarded proportionality as a fundamental tenet of sentencing.¹⁰ Indeed, the notion of ‘just deserts’ lies at the heart of most modern theories of punishment.

All of this is, in a sense, now ‘old hat’. There is, however, a more recent trend towards legislation which goes much further than merely disproportionate sentencing. Legislation passed in Victoria in 2004 established a regime for the extended supervision of child-sex offenders after their release from prison. That legislation was later broadened to encompass all serious sex offenders. It focuses upon regulating the danger potentially inherent in these individuals by maintaining ongoing control over them after they have served the entirety of their prison sentence.

Provisions of this kind are new to this country, though they are not unknown in other parts of the world. My purpose in this paper is to summarise this legislation, and explain some of the legal difficulties to which it has already given rise. It is for others to consider whether, as some contend, it violates fundamental principle by allowing for the further confinement of those who have offended in the past, beyond their punishment, and without a conviction for intervening offences.¹¹

II SEX OFFENDER EXTENDED SUPERVISION ORDERS

In *RJE v Secretary to the Department of Justice*,¹² the Victorian Court of Appeal considered whether a judge of the County Court had erred in ordering that the appellant be subjected to an extended supervision order (‘ESO’) for a period of 10 years. Under s 11(1) of the *Serious Sex Offenders Monitoring Act 2005* (Vic) (‘*Monitoring Act*’), a court could only make an ESO in respect of an offender:

if it is satisfied, to a high degree of probability, that the offender is likely to commit a relevant offence if released in the community on completion of the service of any custodial sentence that he or she is serving, or was serving at the time at which the application was made, and not made subject to an extended supervision order.¹³

At the time that the application for the ESO was made, the appellant was approaching the end of a term of imprisonment of 10 years and three months. The offences for which he was sentenced included sexual offences against girls aged 15 and 16 respectively. One of the girls was his stepdaughter.

10 *Veen v The Queen* (1979) 143 CLR 458.

11 See generally Bernadette McSherry, ‘Indefinite and Preventive Detention Legislation: From Caution to an Open Door’ (2005) 29 *Criminal Law Journal* 94.

12 [2008] VSCA 265 (Unreported, Maxwell P, Nettle and Weinberg JJA, 18 December 2008) (‘*RJE*’).

13 *Serious Sex Offenders Monitoring Act 2005* (Vic) s 11(1).

III THE JOINT JUDGMENT

Maxwell P and I upheld the appeal on the basis that '[t]he judge erred in concluding, on the evidence presented, that [the appellant] was likely to commit a relevant offence if released unsupervised into the community'.¹⁴ We found that in the context of s 11(1), 'likely to commit' meant 'more likely than not to commit'. In other words, 'the Court must be satisfied that there is a greater than 50% chance that a relevant offence will be committed if the offender is released unsupervised'.¹⁵ We considered a number of alternative definitions of 'likely'.¹⁶ According to each of these definitions, 'likely' connoted a lower degree of probability than 'more likely than not'. Adopting a lower standard would have made it more probable that the appellant would be subject to an ESO. However, we favoured the interpretation which produced the least infringement of common law rights. We therefore adopted the strongest of the available meanings of likely; that is, 'more likely than not'.¹⁷

We considered that the earlier decision of the Court of Appeal in *TSL v Secretary to the Department of Justice*,¹⁸ that a less than 50 per cent chance might suffice for the purpose of the term 'likely', should be overruled. We regarded *TSL* as plainly wrong, in that respect. In our view, *TSL* could not be supported because it seemed to us that it merged the distinct element of 'high degree of probability' with the likelihood that a relevant offence would be committed.¹⁹ As the issue was one that directly affected the liberty of the subject, we concluded that there was 'good reason why the error should not be perpetuated'.²⁰ Therefore, we adopted the conclusion of McClellan CJ at CL in *Attorney-General (NSW) v Winters*²¹ and Mason P (dissenting) in *Tillman v Attorney-General (NSW)*²² that the contextual meaning of the word 'likely' was 'more likely than not'.²³

This was also the preferred view of the majority judges in *Tillman*, although they opted to adhere to the *TSL* approach in the interests of comity between intermediate appellate courts.²⁴ There is some irony in the fact that the Victorian Court of Appeal felt less constrained by the principle of *stare decisis* in relation to one of its own earlier decisions, which it regarded as incorrect, than did the New South Wales Court of Appeal in relation to the same decision.

14 *RJE* [2008] VSCA 265 (Unreported, Maxwell P, Nettle and Weinberg JJA, 18 December 2008) [2].

15 *Ibid* [21].

16 *Ibid* [37].

17 *Ibid*.

18 (2006) 14 VR 109 (Callaway AP, Buchanan JA and Coldrey AJA) ('*TSL*'). Maxwell P and I noted that the result in *RJE* would have been the same even if *TSL* applied: *ibid* [21].

19 *RJE* [2008] VSCA 265 (Unreported, Maxwell P, Nettle and Weinberg JJA, 18 December 2008) [42], [48].

20 *Ibid* [48].

21 [2007] NSWSC 1071 (Unreported, McClellan CJ, 26 September 2007) [44] ('*Winters*').

22 (2007) 178 A Crim R 133 (Mason P, Giles and Ipp JJA) ('*Tillman*').

23 *RJE* [2008] VSCA 265 (Unreported, Maxwell P, Nettle and Weinberg JJA, 18 December 2008) [53].

24 *Tillman* (2007) 178 A Crim R 133, 147 [88] (Giles and Ipp JJA). See *Cornwall v A-G (NSW)* [2007] NSWCA 374 (Mason P, Giles and Hodgson JJA, 19 December 2007) ('*Cornwall*'); *Farah Constructions Pty Ltd v Say-Dee Pty Ltd* (2007) 230 CLR 89, 151 [135].

It was also noted, in *RJE*, that the extrinsic materials direct s 11(1) towards ‘high risk offenders’, and hence the offender should only be subject to an ESO if the chance of his or her re-offending is greater than even.²⁵ In relation to the standard of proof, we held that the phrase ‘to a high degree of probability’ in s 1(1) imposed a standard that is *sui generis*.²⁶ Although we did not explore this matter in depth, we found that this standard is no less stringent than the criminal standard of ‘beyond reasonable doubt’, and it ‘requires the judge before making an ESO to feel a high degree of satisfaction’.²⁷ As we adopted the interpretation that least encroached on individual freedoms, we did not deem it necessary to consider the operation of the *Charter of Human Rights and Responsibilities Act 2006* (Vic) (‘the *Charter*’).²⁸

IV THE DECISION OF NETTLE JA

Nettle JA reached the same conclusion as the majority, although according to different reasoning. His Honour agreed that, in the context of s 11, the preferred interpretation of ‘likely’ is ‘at least more likely than not’.²⁹ However, his Honour decided that ‘it would be facile to construe the *Act* as if it were unique to Victoria and the problem of its construction were of merely parochial concern’.³⁰ Therefore, in the interests of comity between intermediate appellate courts,³¹ his Honour followed the decisions in *TSL*, *Tillman* and *Cornwall*³² that ‘likely’ is capable of meaning ‘less likely than not’. His Honour held that the reasons of Maxwell P and myself did not provide a compelling reason to depart from these cases.³³

Nettle JA then considered the effect of the *Charter* in order to construe s 11 in a way that was compatible with the appellant’s rights to freedom of movement, privacy and liberty.³⁴ His Honour held that this required a departure from the *TSL* interpretation because:

if ‘likely’ in s 11 of the Act is construed as including a less than even chance, it is capable of rendering the requirement for satisfaction to a high degree of probability illusory. ... [A] relatively low risk of re-offending could provide a sufficient basis for making an order. Even giving full weight to the purpose of s 11, I cannot conceive of the potentially far-reaching restrictions on rights provided for in the Act as being capable

25 *RJE* [2008] VSCA 265 (Unreported, Maxwell P, Nettle and Weinberg JJA, 18 December 2008) [38].

26 *Ibid* [23].

27 *Ibid* [25].

28 *Ibid* [54].

29 *Ibid* [97]–[99].

30 *Ibid* [104].

31 See *Farah Constructions Pty Ltd v Say-Dee Pty Ltd* (2007) 230 CLR 89, 151 [135].

32 [2007] NSWCA 374 (Mason P, Giles and Hodgson JJA, 19 December 2007).

33 *RJE* [2008] VSCA 265 (Unreported, Maxwell P, Nettle and Weinberg JJA, 18 December 2008) [104].

34 *Ibid* [105]–[106]. See also the *Charter of Human Rights and Responsibilities Act 2006* (Vic) s 32.

of demonstrable justification in the relevant sense unless the risk of an offender committing a relevant offence is at least more than even.³⁵

His Honour held that even if *TSL*, *Tillman* and *Cornwall* were correctly decided, the effect of the *Charter* was that the intention of Parliament had changed in respect of s 11.³⁶ Therefore, it was necessary to adopt an interpretation of 'likely' that was consistent with the appellant's rights to freedom of movement, privacy and liberty.³⁷

It was held that 'more likely than not' was 'within the permissible ambit of interpretation, well short of the forbidden territory'³⁸ of the Court itself legislating. Hence Nettle JA ultimately reached the same conclusion as to the interpretation of 'likely' as Maxwell P and myself.

V LEGISLATIVE RESPONSE

On 11 February 2009, the *Serious Sex Offenders Monitoring Amendment Act 2009* (Vic) (*Amendment Act*) commenced. The *Amendment Act* was enacted by Parliament in order to 'clarify the test to be applied by the court in making an extended supervision order'.³⁹ The *Amendment Act* overruled the decision in *RJE* that 'likely' means 'more likely than not' by inserting two new subsections into s 11 of the *Monitoring Act*:

- (2A) For the purposes of subsection (1), an offender is likely to commit a relevant offence if there is a risk of the offender committing a relevant offence and that risk is both real and ongoing and cannot sensibly be ignored having regard to the nature and gravity of the possible offending.
- (2B) For the avoidance of doubt, subsection (1) permits a determination that an offender is likely to commit a relevant offence on the basis of a lower threshold than a threshold of more likely than not.

The *Amendment Act* also inserted a new s 52 into the *Monitoring Act*, which provides that the interpretation of 'likely' in s 11 is taken to have always required a lower threshold than 'more likely than not'. However, s 52(2) provides that this does not affect the rights of any of the parties in *RJE*.

VI CONCLUSION

RJE provides a useful illustration of the move towards pre-emption in the criminal law. What began as a provision of limited application, confined to child

35 Ibid [107].

36 Ibid [114].

37 Ibid [113], [117].

38 Ibid [117].

39 *Serious Sex Offenders Monitoring Amendment Act 2009* (Vic) s 1.

sex offenders, has since been applied to sex offenders generally. What was once regarded, as the Court held in *RJE*, as a power that was to be exercised sparingly, and on the most cogent evidence only, is now more readily available to be used, with a significantly lower threshold to be overcome.

Developments of this nature have profound implications. They illustrate the difficulties that confront the courts when Parliament enacts laws that are poorly drafted, and seemingly infringe fundamental precepts of our criminal justice system. The issues raised by provisions of this type, and the incorporation into our criminal law of preventive theory and an ever-expanding precautionary principle, seem to me to go to the very heart of the rule of law. It is one thing to punish somebody who has committed a serious offence 'disproportionately' in order to protect the community. It is quite another to confine an offender who has served his or her sentence in its entirety under the guise that this is not punishment, but is merely preventive treatment because they pose some stipulated, but necessarily arbitrary, risk of re-offending. Certainly, the debate surrounding this issue should not be approached semantically, simply by denying that such confinement is punitive.⁴⁰

There seems to be no going back. The move towards pre-emption as a key feature of social regulation is inexorable. It has democratic legitimacy, at least in so far as it is the product of legislative will, and, almost certainly, popular opinion. There are dangers in all this, however. This new approach puts to one side traditional values which the common law has long cherished. Those values should not be forgotten.

40 *Al-Kateb v Godwin* (2004) 219 CLR 562.