DURESS AND NECESSITY IN THE WHITE PAPER

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March 1994

Duress of Circumstances and Duress by Threats

The White paper proposes to codify defences of duress of circumstances and duress by threats. Duress of circumstances would replace the common law defence of necessity while duress by threats would replace the existing amalgam of a codified duress defence in s.17 of the Criminal Code and the residual common law defence of duress.

Desirability of Codification

This is an area where codification is desirable if only because of the unsatisfactory and confusing state of the present law. Section 17 of the present Code is almost universally criticized as providing too limited a defence of duress because of its long and somewhat incoherent list of excluded offenses and its requirements that the threats be of immediate death or bodily harm and be given by a person present when the accused commits the offence. Because of its limitations, the courts have revived the common law defence of duress, albeit in a confusing and uncertain manner.[1] These are all good reasons to engage in law reform, but they also provide a warning to would-be codifiers. If an overly restrictive provision such as the present s.17 is codified, the courts will find some way to mitigate its harmful effects.[2] This will add complexity and confusion to the law and thus defeat one of the fundamental purposes of codification.

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[1] R. v. Pacquette (1976) 30 C.C.C.(2d) 417 (S.C.C.)

[2] Today courts do not have to rely on statutory interpretation, but can invalidate a restrictive provision under the Charter and develop a constitutional common law in its place.

Codification of the necessity defence is in my view desirable in order to give more structure and certainty to this defence. There are very few cases on necessity and the paucity of the case law creates confusion. For example, the Ontario Court of Appeal's 1985 decision in Morgentaler[3] restricting the defence of necessity was controversial, but has not yet been resolved by the Supreme Court. Even basic issues such as whether necessity can provide a defence to murder have not been settled. Because of its rarity, the courts cannot be relied upon to flesh out the necessity defence, and there is a need for legislative guidance. At the same time, however, some of the present problems with the defence of necessity stem from categorical requirements which may not fit exceptional cases. Necessity serves an important role as a residual defence and the aim of codifiers should be to combine structure with flexibility.

Structure of the Proposed Defence

I found the structure of the proposed defence overly complex.[4] In fact, the section made me think of the self defence provisions in the present Code which are very difficult to explain to law students, let alone jurors! Section 36 provides for a two

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[3] (1985) 22 C.C.C.(3d) 353 rev'd on other grounds 37 C.C.C.(3d) 449 (S.C.C.).

[4] The LRCC's one paragraph approach to duress is simpler and more elegant, although their approach to necessity is almost as complex. Law Reform Commission of Canada Recodifying Criminal Law (1987) at p.35-6. The CBA's proposals for duress and necessity, in particular, their reliance on the concept that the accused not reasonably being expected to resist threats or respond otherwise to circumstances are also much simpler. Canadian Bar Association Principles of Criminal Liability (1992) at p.87, 93.

part defence and each defence has 4 points which may have to be explained to the jury.[5] Because of the exclusion of murder, the jury might also have to be told to consider duress on a manslaughter charge but not on a murder charge. In some cases, the jury might also have to consider both the separate defences of duress of circumstances and duress of threats.

Thought should be given to simplifying the structure of the defence by combining duress of threats and circumstances into one defence, collapsing some of the four separate parts and altering the exclusion of murder.

Re-categorizing Necessity as Duress of Circumstances

Both the LRCC and the CBA proposed separate defences of necessity and duress. This is certainly the more traditional structure of these defences.[6] Keeping necessity distinct from duress would also allow the judicial debate in Perka[7] to continue about whether necessity should be conceived, depending on the circumstances, as a justification as well as an excuse. The LRCC thought this was important and made no attempt to categorize a defence as either an excuse or a justification.

Although the debate has theoretical interest, I share Don

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[5] I suspect jury trials will be frequently used in these cases especially if the facts are sympathetic.

[6] Glanville Williams, however, believes necessity and duress are related but he see duress as an example of necessity. Criminal Law The General Part 2nd ed at p.760. In my view, duress is the more accurate description especially if the defence is conceived as an excuse rather than a justification.

[7] (1984) 14 C.C.C.(3d) 385 (S.C.C.)

Stuart's scepticism about its practical utility.[8] Incidentally, Charter defences may be one possible route to express a distinction between conduct that is justified as opposed to excused. Even if some justifications cannot be translated as Charter defences, however, I do not think there is enough practical differences between justifications and excuses to justify the complexity of importing that distinction into the defence of duress.

Exclusion of Murder: Section 36(1)

The proposal extends the defence of duress to all offenses except murder. This is a compromise between the LRCC which recommended that necessity and duress not apply if the accused "purposely causes the death of, or seriously harms, another person" and the CBA and the Thacker subcommittee which recommended that there be no excluded offenses. The exclusion of murder would presumably apply to those who actually do the killing and those who aid, encourage or counsel the murder,[9] but this point should be clarified given the trouble it has caused elsewhere.

There are a number of problems with any list of excluded offenses. Any list begs the question of why other crimes are not

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[8] Don Stuart Canadian Criminal Law 2nd ed. at pp.388-91. See also Eric Colvin Principles of Criminal Law 2nd ed at pp. 208-211.

[9] This follows Howe [1987] A.C.417 (H.L.) which overruled Lynch [1975] A.C.653 (H.L.). Nevertheless, parties to a murder may not have the necessary mens rea because of the duress. Alan Mewett and Morris Manning Criminal Law 3rd ed. c.15 (forthcoming). Depending on the fault level, duress may prevent the Crown from proving mens rea beyond a reasonable doubt for other offenses. See Hebert v. The Queen (1989) 49 C.C.C.(3d) 59 (S.C.C.) (non-immediate duress not a defence to perjury but may be relevant to the formation of the mens rea)

included. If duress can never excuse murder, why can it excuse attempted murder when the only distinction is often luck and early medical intervention?[10] If the criminal law has a moral, symbolic or educative role in stating that murder is never excusable, what about other offenses such as sexual assault? There is a problem of under-inclusiveness in any list of excluded offenses. On the other hand, a list such as that contained in s.17 of the present Code demonstrates the problems of over-inclusiveness. It contains offenses that are not unified around a coherent principle such as violence or domination. If the policy of excluded offenses is retained, I would prefer the LRCC approach which at least states a general principle which can be elaborated by judicial interpretation. A general principle would also be more satisfying from a moral, symbolic or educative perspective, although I do concede that murder does have a special significance in our criminal law.

The special significance of murder suggests to me, however, that this is exactly the offence in which we should be concerned about duress. In a necessity or duress situation, the accused may well have the subjective foresight of death necessary for a murder conviction and yet be acting in agonizing conditions. The present proposal could preclude duress when it is most needed, especially given the minimum sentence and stigma that accompany a murder conviction. Much would depend on whether the prosecutor exercised

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[10] R. v. Gotts [1992] 1 All.E.R. 832 (H.L.) (no common law defence of duress for attempted murder)

his or her discretion to reduce a murder charge to manslaughter for compassionate reasons. Given the special constitutional place of murder, it might not be far-fetched to imagine the courts holding the exclusion of murder violates s.7 of the Charter by allowing a morally innocent person to be convicted of murder. The murder exclusion might be the launching point for a constitutionalization of defences, not dissimilar from the constitutionalization of minimal mental elements. This would add uncertainty and in doing so defeat one of the central purposes of codification.

What is to be done about the murder exclusion? One option would be to follow the CBA route and allow duress to apply to all offenses. This would be the simplest solution. Nevertheless, I have some sympathy for the policy behind the exclusion of murder, while at the same time believing it could have overly harsh results in particular cases. A compromise would be to allow the defence to apply to all offenses, but include a separate provision that duress only reduces murder to manslaughter. This would allow the excusing circumstances to be considered both in terms of the verdict and the sentence while avoiding the moral harm of exonerating a person who has deliberately killed another.[11]

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[11] This would follow the practical result, but not the reasoning in Dudley and Stephens (1884) 14 Q.B.D. 273. It would also bear some resemblance to the notion that excessive (unreasonable but subjective) self defence should reduce murder to manslaughter. For a persuasive explanation of this limited defence see CBA Principles of Criminal Liability (1992) at p.79.

If a clear statement that taking a life is not a reasonable response to defence of property is not possible, a similar provision could be added to the proposed s.38 so that a person who murders in defence of property would be convicted of manslaughter.

Exclusion Because of the Accused's Exposure to the Danger or Threat

The defence of duress would not be available to accused people who "knowingly and without reasonable excuse" exposed themselves to the danger or the risk of threats. This would replace the present exclusion of parties in s.17 of the Code. I agree that this is a more straightforward approach than incorporating the parties rule. It would also displace Dickson J.'s suggestion in Perka [12] that necessity would not apply "if the necessitous situation was clearly foreseeable to the reasonable observer, if the actor contemplated or ought to have contemplated that his actions would likely give rise to an emergency requiring the breaking of the law..."

The requirement of subjective knowledge follows from the CBA's problematic argument that "this exclusion should only apply where the accused knew of the danger; it would violate fundamental principles of criminal liability to extend the exclusion to instances where an accused recklessly or negligently did not contemplate that his or her actions would likely give rise to an emergency requiring the breaking of the law."[13] I would prefer to leave the issue open to judicial interpretation by providing that the defence of duress is not available to accused who expose themselves to danger or threats without reasonable excuse.[14] In

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[12] (1984) 14 C.C.C.(3d) 385 at 403 (emphasis added)

[13] CBA Principles of Criminal Liability (1992) at p.92

[14] Another alternative would be to replace the "and" with "or". I would note, however, that the inclusion of the "and" now seems to indicate a concern that sometimes people might act reasonably even though they knowingly expose themselves to risks or dangers.

some cases, subjective knowledge might disqualify an accused while in others it might not. Likewise, the courts could decide whether a negligent approach to risks should disqualify an accused. This is the type of issue in which courts should be given considerable latitude to decide individual cases and not be bound by requirements of subjective knowledge which are not universal constitutional requirements for offenses let alone defences.

Imminence of the Harm Perceived

The present draft requires that the accused act "to avoid what the person believes to be significant danger of imminent and otherwise unavoidable death or serious bodily harm." The imminence requirement finds some support in the existing law as defined in the common law defence of necessity and s.17's requirement that a person face threats of "immediate death or bodily harm." Note, however, that this part of s.17, as well as the requirement that the person issuing the threat be present, have been criticized as unreasonable when applied in Carker[15]. In Hudson[16], the common law defence of duress was applied to future harms, although some doubt on this may have been cast by Martin J.A. in Mena.[17] In any

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[15] [1967] 2 C.C.C. 190 (S.C.C.)

[16] R. v. Hudson and Taylor [1971] 2 Q.B.202

[17] (1987) 34 C.C.C.(3d) 304 at 323 (Ont.C.A.) He held that the accused should not benefit from the defence of duress if he or she "failed to avail himself or herself of some opportunity to escape or to render the threat ineffective."

event, Lavallee[18] suggests that a traditional requirement of imminence may be unrealistic and have a disadvantaging effect on women and others who because of disparities of power cannot afford to wait until the threat is immediate.[19] Finally, the recent case of Langlois[20] suggests that the courts might use s.7 of the Charter to invalidate an imminence requirement on the basis that it would require the conviction of the morally innocent. In short, codification of an imminence requirement would preclude common law development; crystallize a rigid and outdated requirement and invite Charter challenges.

The CBA strongly criticized the imminence requirement in both necessity and duress defences and the Thacker committee found their

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[18] (1990) 55 C.C.C.(3d) 97 (S.C.C.). This case also casts doubt on the English Draft Code which would only allow the accused to respond to an immediate threat or "before he can obtain official protection."

[19] For an application of s.17 which may finesse its requirement for immediate harm see Smith (1977) 40 C.R.N.S. 390 (B.C.Prov.Ct.) (context somewhat similar to Lavallee)

[20] (1993) 80 C.C.C.(3d) 28 (Que.C.A.). That case involved threats to the accused's family. The Quebec Court of Appeal held that even though the threats were not of immediate death from a person present, they did create a condition of moral involuntariness. The Court of Appeal concluded that s.17's denial of the duress defence would result in the conviction of the morally innocent. Fish J.A. stated: "However forceful and paralysing the threat, however fleeting and reparable the wrong, s.17 would thus remain inaccessible to any person who is compelled to perform a prohibited act by threats of grave injury to a member of his or her family from a person, who though absent when the crime is committed, remains none the less positioned to actualize the threats soon if not immediately." ibid at 33. See also Parris (1992) 11 C.R.R.(2d) 376 (Ont.Ct.Gen.Div.) holding that s.17's immediacy requirements violate s.7 of the Charter. For commentary see Patrick Healy "Innocence and Defences" (1994) 19 C.R.(4th) 121.

criticisms persuasive. With respect to necessity they suggested, following Eric Colvin, that people could act in an involuntary fashion even though they were not responding spontaneously to an immediate danger. They added the following important point:

> The public is not at risk by keeping this option open, as an accused arguing necessity would have to satisfy the trier of fact that, even after deliberation, he or she could not have been expected to act otherwise.[21]

With respect to duress, they similarly argued that the "immediacy of the threat is only one of the factors which need to be assessed in determining whether the accused's response was reasonable."[22]

In my view it is unwise and possibly unconstitutional to codify an imminence requirement and prevent case by case examination of the reasonableness of the accused's actions. There are several amendment options. One is to delete this requirement and to rely on the courts to factor in the immediacy of the threat in determining the proportionality or reasonableness of the response. A more minimal amendment would be to change "and" in "significant danger of imminent and otherwise unavoidable death..." to "or". This would at least allow an accused to argue that the threat was inevitable but not necessarily immediate.

Inclusion of Threats to Third Persons

The inclusion of threats to third persons follows both the recommendations of the LRCC and the CBA. This seems to be a

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[21] CBA Principles of Criminal Liability at p.91

[22] ibid at 97

sensible proposal and it would be difficult, if not impossible, to limit the category of third persons to family, friends etc.

Exclusion of Threats to Property

The LRCC, the CBA and the Thacker subcommittee all proposed to include threats of serious harm to property while the present proposal does not. I believe there are dangers in allowing threats to one's property to excuse serious and especially violent crimes.[23] I would note that the common law took the position that threats to property were not a sufficient excuse.[24] I also think it is significant that the protection of property was deliberately excluded from s.7 of the Charter. Codification should take its clues from the wider constitutional environment.

Subjective v. Objective Perception of Harm: Sections 36(2)(a) and 36(3)(a)

One of the most significant changes to defences that the White Paper proposes is to instruct the courts to consider the accused's subjective belief that he or she faces significant harm.[25] Section 17 of the Code only requires the accused to have a subjective

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[23] I would note, however, that s.38 providing for defence of property while requiring that defence of property be reasonable and proportionate does not, like duress, categorically exclude murder.

[24] J.Ll.J. Edwards "Compulsion, Coercion and Criminal Responsibility" (1951) 14 Mod.L.Rev. 297 at 302,308.

[25] This approach is also proposed with respect to other defences, most notably self-defence and defence of property. In his papers on these subjects, Tim Quigley notes that this would change the law, but argues that it is appropriate reform. As will become apparent, I prefer to retain the requirement that the accused reasonably perceive the harm while continuing to encourage the courts to continue to adapt the reasonableness standard to the capacities of the accused.

belief that the threats will be carried out, but as discussed above, this defence is then restricted by requirements that the threats be immediate and a long list of excluded offenses. The common law defence of duress generally requires the accused to act reasonably both in terms of perception of harm and response, as does the common law defence of necessity. This means that a mistake about threats or circumstances will generally have to be reasonable.[26]

The White Paper's approach opens the possibility for an accused with idiosyncratic and false perceptions of harm to qualify for the defence.[27] I am concerned about an accused who has unreasonable and false perception of threats and dangers. These perceptions may even be habitual, but not necessarily qualify for the mental disorder defence. I do not believe that pure subjectivism is acceptable in defences just because they are categorized as excuses and not justifications. At the end of the day, the remedy is an acquittal and there is a need for social protection from those who unreasonably respond to what they think are threats or dire circumstances and have, it must be remembered, committed the criminal act with the relevant fault element. The

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[26] R. v. Graham [1982] 1 All.E.R. 801 at 806 (C.A.). For a similar requirement applicable to the law of self-defence see Reilly v. The Queen (1984) 15 C.C.C.(3d) 1 (S.C.C.).

[27] The requirement that the accused believe that harm be significant, imminent and otherwise unavoidable eliminates some of these risks, as may the proportionality and reasonableness requirements discussed below. Nevertheless, these latter requirements seem to suggest that proportionality and reasonableness be judged on the basis of the danger and threat the accused subjectively believes exists.

alternative to the White Paper's approach is to require a reasonable basis for the accused's perceptions of harm. This raises problems concerning how reasonableness should be judged and whether the reasonable person should resemble the particular accused. I will return to this issue below.

Proportionality of the Accused's Response: Sections 36(2)(b) and 36(3)(b)

Neither the LRCC or the CBA proposed a requirement for proportionality with respect to duress, although the LRCC included a proportionality requirement for necessity. It can be argued that 1) proportionality concerns are adequately caught by reasonableness requirements 2) proportionality is not required once duress and necessity are conceived as excuses and not justifications[28] and 3) elimination of this provision would simplify an already complex defence. Eliminating this provision would allow courts to decide on a case by case basis whether and when to stress proportionality as a requirement of reasonableness.

On the other hand, the reasonableness requirement clearly incorporates the accused's subjective perception of the danger that exists while the proportionality requirement is somewhat more objective in tone.[29] To the extent that there are dangers in not requiring the accused's perception of the harm to be reasonable,

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[28] The requirement in Perka that there be proportionality has generally been seen as inconsistent with the majority's recognition that necessity should be conceived as an excuse, not a justification. Colvin Principles of Criminal Law 2nd ed at p.245

[29] It does, however, suggest that the relevant consideration is the harm that the accused "seeks to avoid."

elimination of the proportionality requirement may be troublesome.[30] It may allow an accused to be acquitted simply because he or she acted reasonably to an unreasonably perceived threat. Nevertheless, a more direct approach to this risk would be to require the perceptions of threats to be reasonable and/or to eliminate the subjective portion of the reasonableness requirement.

Reasonableness of the Accused's Response: Sections 36(2)(c) and 36(3)(c)

This incorporates the reasonableness requirements proposed by the LRCC, but subtly changes its orientation to require that the person not only act reasonably but "cannot reasonably be expected to act otherwise in response to the danger or the threat." This reassembles the CBA's proposal for necessity.[31] Courts could interpret this as requiring some form of moral involuntariness [32] whereas the LRCC duress proposal would only require that the accused's response be reasonable. In my view, this is not disturbing given that some very serious crimes may be excused under

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[30] Patrick Healy has also noted that a concern about importing the accused's subjective perceptions may have led Dickson J. to stress the objective requirement of proportionality in Perka. See Healy "Innocence and Defences" (1994) 19 C.R.(4th) 121 at 130.

[31] The requirement that the accused "cannot reasonably be expected to act otherwise" in the CBA's necessity proposal is arguably more restrictive than the requirement that the accused "cannot reasonably be expected to resist" in their duress proposals. CBA Principles of Criminal Liability at p.87,93.

[32] I note in passing that s.38 governing defence of property seems to be less demanding of the accused in simply requiring the response to be reasonable and proportionate. In my view, it is unjustified to make defence of property easier than defence of life, liberty or security of the person.

this section. In order to qualify for an excuse, the accused should be in an agonizing position in which he or she cannot be reasonably expected to do anything but the crime.

A more problematic feature is the requirement that in determining reasonableness the court must consider the danger or threat that the accused subjectively believes exists. Again my concern is with the accused who has a mistaken and unreasonable belief in duress. If Lavallee suggests that courts can adjust reasonableness requirements to incorporate legitimate perceptions and differences between accused people, I do not see why courts should be bound to accept the accused's subjective perception of harms. On the other hand, concerns have been expressed that Lavallee is underinclusive and unfairly excludes women who do not fit into battered woman's syndrome.[33] If this criticism is accepted, the subjective standard as proposed may seem preferable.

I would caution, however, against some of the implications of taking the accused's subjective perceptions as the standard in all cases. Think of the Bernhard Goetz and Roy Ebsary cases.[34]

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[33] See for example Martha Shaffer "Lavallee: A Review Essay" (1990) 22 Ottawa L.Rev. 607

[34] George Fletcher A Crime of Self-Defence (1988). Fletcher describes how the New York Court of Appeals affirmed in People v. Goetz 497 N.E.2d 41 (1986) that state's statutory requirements that the perception of threats be reasonable, but that the jury ignored this requirement in their decision to acquit the "subway vigilante" of attempted murder. In this case, the accused may have had unreasonable fears because the victims were young African-American males. In other cases, the accused may have unreasonable fears directed at other disadvantaged groups or simply unreasonable fears.

Roy Ebsary pleaded self-defence in the killing of Sandy Seale. His first trial ended in a hung jury, his conviction at a second

Subjectively they both may have believed they were being threatened when they were asked for money, but do we as a society want to take their subjective perceptions as conclusive when deciding whether their violent acts should be excused? It will not always be an answer to say that honest but unreasonable perceptions of threats will be checked by requirements that the accused then act proportionally and in a reasonable fashion. What if the mistaken perceptions are of serious threats, for example that a person was about to use a gun or a knife? It will also not be sufficient to posit that the jury is unlikely to accept evidence that an accused had patently unreasonable perceptions. Similar claims were often heard with respect to Pappajohn, but the recent amendments to the sexual assault law suggest the criminal law has a symbolic or normative function beyond decisions made by triers of fact in individual cases. In my view, there is something morally wrong in having defences that require acceptance of the accused's subjective beliefs about the existence of threats and perception of harm, however unreasonable and invidious an accused's mistake may be.

There are difficulties with administering the reasonableness standard, but Lavallee shows promise. For example, the Ontario Court of Appeal has interpreted Lavallee as requiring consideration of the accused's diminished mental capacity.[35] Thought should be given to how courts can be encouraged and guided to make the

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trial was overturned in part because of errors in the trial judge's instructions on self-defence and he was convicted of manslaughter on a third trial. R. v. Ebsary (1984) 15 C.C.C.(3d) 38 (N.S.C.A.).

[35] Nelson (1992) 71 C.C.C.(3d) 449 at 465-470

reasonableness standard more sensitive to the capacities of individual accused. For example, the CBA proposed that courts be instructed to consider the accused's personal characteristics as they affected the gravity of threats. The courts could also be instructed to consider the accused's personal characteristics as they affect his or her capacity to perceive threats and dangers. I would prefer language that encourages courts to determine reasonableness with respect to the accused's capacities as opposed to his or her personal characteristics. Any list of personal characteristics raises dangers of potential under or over inclusiveness. Moreover, the notion of capacity seems more in line with what Justice Wilson has called the "principles of equality and individual responsibility" which underlie the objective standard.[36] Although individualizing the reasonable person has been controversial in other areas, there is no reason to think the courts will not respond adequately if they are specifically instructed to do so.

Conclusion

In my view, the most important issues that should be discussed are 1) whether murder should be excluded from the defence of duress 2) whether the threats must be of imminent harm and 3) whether accepting the accused's subjective, but perhaps mistaken and unreasonable, belief in the existence of threats or dangers will threaten social protection. Thought should also be given to redrafting and simplifying the defence.

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[36] Hill (1986) 25 C.C.C.(3d) 322 at 347

On the first issue, the CBA approach could be followed and no offenses excluded from the defence of duress. A compromise of diminished culpability from murder to manslaughter is also possible. It would avoid the harshness of a murder conviction as well as the symbolic harm of excusing the deliberate taking of a life.

Strong arguments can be made that the imminence requirement goes against the spirit of Lavallee and most common law decisions on duress. Moreover, an imminence requirement has in some cases be found to violate s.7 of the Charter and if included in a new general part would again be challenged, adding uncertainty to the law. In my view it should be abandoned and the imminence of the harm factored in as a consideration in determining whether the perception of harm and the response to the harm were reasonable.

On the third issue, there are dangers with either a purely subjective or objective approach to perceptions of harm. Thought should be given to blending these requirements and instructing courts to consider the accused's capacity both to perceive duress and act in circumstances of duress.

Finally, as a matter of drafting, I think the defence can and should be simplified by eliminating the requirement to instruct the jury to consider proportionality and by combining the separate defences of duress of circumstances and duress by threats.