

Editorial

The Duress Mess

Canada's statutory and common law defences have long been a complicated mess. The Supreme Court's decision in *R. v. Ryan* (2013), 290 C.C.C. (3d) 477, 98 C.R. (6th) 223, 353 D.L.R. (4th) 387 (S.C.C.) recognizes this unsatisfactory state of affairs and attempts to rectify it. Unfortunately, it makes the mess worse.

Section 17 of the *Criminal Code* has long been criticized as a restrictive defence. The Court in *R. v. Ruzic*, [2001] 1 S.C.R. 687, 153 C.C.C. (3d) 1, 41 C.R. (5th) 1 (S.C.C.) responded to some of the worst features of the defence. It found that the "gun at the head" requirements of threats of immediate death or bodily harm from a person present violated s. 7 of the Charter because they could punish morally involuntary behavior that no reasonable person could resist.

The *Ruzic* Court could have put s. 17 out of its misery by invalidating it in its entirety and allowing one consistent common law duress defence informed by moral involuntariness to apply to all offenders. Unfortunately, the Court preserved a two defence approach requiring juries to apply s. 17 if they find that the accused was a principal offender while applying the more lenient common law defence to those who act as parties. It is unfair and perverse to require juries to apply two different defences based on a distinction between principal and secondary offenders that makes no difference to criminal liability.

Section 17 has no redeeming features. It requires only subjective belief that threats will be carried whereas other excuses (and even self-defence) require an objective basis for such beliefs. The Supreme Court in *Ryan* responded to this anomaly by reading in a requirement of a reasonable basis for such beliefs. This is unobjectionable as a policy matter because as the Court recognized the end result is to bring s. 17 "in line with the principle of moral involuntariness". *Ryan*, at para 52.

Nevertheless the way the Court achieved this result is objectionable on an institutional basis. First, the Court's approach is very complicated. It adds

the common law requirements of no safe avenue of escape and close temporal connection to s. 17 in order to ensure that there is a reasonable basis for the accused's belief that the threats will be carried out. *Ibid.*, at paras 48-52. It is not clear how these new requirements will affect s. 17 beyond requiring a reasonable basis for the accused's belief that threats will be carried out.

Second, the Court ignored clear legislative language requiring only subjective belief and did this in the absence of any finding of unconstitutionality. Parliament may have been theoretically inconsistent in its choice of language, but that language should prevail absent a concern about constitutionality.

Third, the Court used its interpretative powers to narrow a defence. It is one thing to read down an offence or a restrictive defence such as s. 17, it is another matter to interpret the *Criminal Code* in a creative fashion so as to expand the ambit of criminal liability.

Of course what the Court did was not unprecedented. It similarly imposed complex and creative restriction on the s. 43 correction of children defence in *Canadian Foundation for Children, Youth & the Law v. Canada (Attorney General)*, (*sub nom.* Canadian Foundation for Children v. Canada) [2004] 1 S.C.R. 76, 180 C.C.C. (3d) 353, 16 C.R. (6th) 203 (S.C.C.). The fact that the Court has done this before does not make it right.

Section 17 categorically excludes a ridiculously long list of offences from murder to robbery to arson. It effectively tells people to take a bullet in the head rather than to set a fire. The Court in *Ruzic* could have struck down such categorical legislative exclusions as inconsistent with moral involuntariness while still retaining proportionality requirements to be applied in individual cases. Its decision in *R. v. Latimer*, [2001] 1 S.C.R. 3, 150 C.C.C. (3d) 129, 39 C.R. (5th) 1 (S.C.C.) illustrates how such requirements can sensibly be applied by judges and juries on a case-by-case basis. The focus should be on the difficult dilemmas that the accused faces and not the politician's instinctive sense that every crime is serious.

The Court in *Ryan* confirmed its reluctance to tackle the problem of excluded offences. The constitutionality of such categorical exclusions will have to be litigated on a case-by-case basis. Section 17 will only be invalidated when courts have struck down the last excluded offence. This may happen given the Court's sensible conclusion in *Latimer* not to exclude even the most serious offence of murder on a categorical basis. The day that s. 17 is completely struck down will be a happy one. But it is not clear when or if that day will come.

Ryan entrenches another anomaly in the law by holding that while duress and necessity both have the same juristic basis, slightly different proportionality tests should apply. Following *Latimer*, a strictly objective proportionality standard will apply for necessity but a slightly more

forgiving contextual standard will apply for duress. The Court unpersuasively attempts to justify these differences on the basis that “the temporality requirement for necessity is one of imminence, whereas the threat in a case of duress can be carried out in the future”. *Ibid.*, at p. 74.

If necessity is indeed limited to imminent dangers (contrary to say self-defence and perhaps even the constitutional principle of not punishing morally involuntary behaviour), then one might think that its proportionality requirement would be less not more demanding than duress which (within the requirement of close temporal connection) applies to future harms. These are, however, scholastic quibbles. It defies common sense to have slightly different proportionality tests for defences as similar as necessity and duress. The different proportionality tests will remain an unwitting trap for trial judges and law students.

Finally, the Court in *Ryan* reads in the problematic exclusion in s. 17 of accused who are “a party to a conspiracy or association whereby the person is subject to compulsion” into the common law defence duress. This provision seems based more on the politician’s instinctive distaste for criminality than principle. Chief Justice Dickson was correct in *R. v. Perka*, [1984] 2 S.C.R. 232, 14 C.C.C. (3d) 385, 42 C.R. (3d) 113 (S.C.C.) to hold that a person should not be excluded from the necessity defence simply because they are engaged in illegal activities when the necessity arose.

If the common humanity of all people, including criminals, is to be recognized and if people are not to be punished for their prior bad associations, then duress should be available regardless of a person’s prior actions. The s. 17 provision seems to require a robber to take a bullet to the head rather than commit an assault or an arson to avoid a threat of death from his or her co-conspirators. Such a harsh rule will punish people for morally involuntary behavior that no reasonable person could in the same circumstances resist. It is unfortunately understandable why Parliament might enact such a harsh rule that denies the humanity of those who conspire or associate with criminals. It is difficult to understand why the Supreme Court would go out of its way to read such a rule into the common law.

But perhaps the robber coerced by others to commit arson or an assault can still benefit from the duress defence. The Court imposes the new restriction only to retreat by stressing that the accused must have subjectively known that the threat would be carried out as a result of the conspiracy or association. *Ryan*, at para. 80. This requirement should restrain the application of the conspiracy exception to both the s. 17 and the common law defence.

In the end, duress is more messy and confusing than ever. The Court has read in a reasonableness requirement into s. 17 while reading into the common law s. 17’s problematic exception for conspirators. The Court limits the conspiracy theory by requiring that the accused must subjectively

be aware of the likelihood that co-conspirators will threaten them. Most of the complications of the two defences remain. Duress remains a landmine for trial judges and law students.

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