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THE EXCUSE OF DURESS

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THE EXCUSE OF DURESS : WORKING PAPER NO.9

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> If... someone is really threatened with death or serious injury unless he does what he is told to do is the law to pay no heed to the miserable agonising plight of such a person? For the law to understand not only how the timid but also the stalwart may in a moment of crisis behave is not to make the law weak but to make it just. In the calm of the courtroom measures of fortitude or of heroic behaviour are surely not to be demanded when they could not in moments for decision reasonably have been expected even of the resolute and the well disposed.
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> Lord Morris in D.P.P. for Northern Ireland v. Lynch
> [1975] A.C. 653, [1975] All E.R. 913 (H.L.) at 670 (A.C.).

SUMMARY OF ISSUES FOR CONSIDERATION

Section 17 of the Criminal Code of Canada attempts to codify the excuse of duress. The Law Reform Commission of Canada (LRCC) has proposed to replace section 17 with a restatement of the excuse.

> 3(8) **Duress.** No one is liable for committing a crime in reasonable response to threats of immediate serious harm to himself or another person unless he himself purposely causes the death of, or seriously harms, another person.

On the basis of a comparison of the common law formulation of duress and the existing or proposed provisions in different jurisdictions, and a review of the literature and case law, the following issues have been identified as requiring further consideration.

• **Type of harm threatened**: Should the "serious harm" be restricted to mean (a) death, and (b) serious physical injury? Should serious harm also include (c) serious mental or psychological injury, and (d) significant harm to personal property? Alternatively, should the type of threatened harm be very broadly described and should the courts be encouraged to define and apply that term in each specific instance?

• **Timing of the threat**: Rather than describing the threat as immediate, should one or both of the phrases (a) "immediately able to carry out that threat," and (b) "if not immediately, before the accused can escape or obtain police or some other official protection" be employed? Or perhaps the common law phrasing would be more appropriate: "present and continuing, imminent and impending"?

• **Source of the threat**: Should the excuse include a description of a source of the threat? If yes, should the source of the threat be described as "from a person who is immediately able to carry out that threat"?

• **Cognitive requirement**: Should the accused belief regarding a threatened harm be (a) honestly and reasonably held, or (b) honestly but not necessarily reasonably held?

• **Criteria for assessing the accused's response to the threat**: Should the accused be permitted to hold an honest, but not necessarily reasonable belief regarding (a) the type of harm threatened, (b) that he or she had no other alternative but to commit the crime, or (c) other important factors? Alternatively, should the accused be required to hold an honest and reasonable belief regarding the above factors? Should the standard include a consideration of all the circumstances the accused faced, as well as any of his or her personal circumstances which may have affected the gravity of the choice he or she had to make? Or should the standard be a strict objective one: would a person of reasonable firmness in his or her situation have been unable to resist the threat?

• **Exclusions**: Should there be exclusions to the excuse of duress? Or should it be available in all criminal charges? If there are to be exclusions, should those exclusions be precisely and exhaustively listed, as is currently the case in section 17? Should murder continue to be an

excluded offence? What of other offences? Should persons who were parties to an association or conspiracy who knew they could become subject to threats from other members continue to be denied the excuse? Alternatively, should the excluded offences be described in general terms? Should parties (as opposed to perpetrators) to any of these or any other offences be excused or should they be specifically included?

• **Application of duress**: Should duress be only a partial excuse? Or should duress by threats continue to operate as a full excuse?

• **Availability of the common law excuse**: Should the common law formulation of the excuse of duress be abolished as it applies to criminal charges? If not, should there be any restriction placed regarding access to the common law version? For example, should parties to an offence be able to rely on the common law excuse, but not principals?

INTRODUCTION

This paper offers commentary on the Law Reform Commission of Canada's (LRCC) proposal to restate the excuse of duress, currently set out in section 17 of the Criminal Code of Canada.

In framing some of the issues relating to the LRCC's proposal, the Federal Department of Justice summarized the duress provisions existing or proposed in four other jurisdictions: Australia, New Zealand, the United Kingdom and the United States. The wording of the common law formulation of duress, section 17, the LRCC's proposal, and the four foreign provisions were studied in this paper. Appendix "A" contains the full text of seven versions of the excuse of duress.

The key elements of the excuse were abstracted and the common law wording and the six different provisions were compared based upon those elements. The chart in Appendix "B" summarizes this comparison.

A review of the literature and recent case law was also undertaken. A recent book by Prof. Stanley Yeo was particularly useful.[1]

The comparison and review have resulted in the identification of a number of issues relating to the LRCC's proposed new wording for the excuse of duress. These are framed as Issues for Consideration throughout the text and have been summarized above.

Some comments on the burden of proof are offered in the final section of this paper.

AN EXCUSE, A JUSTIFICATION OR A DEFENCE?

While it is commonly expressed as a defence, duress is more accurately described as an excuse. This is because of the manner in which the claim of duress affects the culpability of an accused.

The availability of duress in section 17 of the Criminal Code of Canada or through the common law reflects a decision that someone who is "guilty" of a criminal act should nonetheless be absolved. Stuart has explained the impact of duress on culpability as a matter of public policy.[2]

> If the defence of duress is viewed like any other justification or excuse as based squarely on policy considerations allowing one who has committed an *actus reus* with *mens rea* to escape in certain circumstances, the policy issues are focussed without confusing the matter as one of *mens rea*. If duress were held relevant only to intent it would also mean that such a defence would not be available in the case of any offence for which *mens rea* was not required. This would be an

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1 Yeo, S.M.H., COMPULSION IN THE CRIMINAL LAW, Law Book Co. Ltd, 1990.

2 (a) Stuart, D., CANADIAN CRIMINAL LAW: A TREATISE (2nd edtn.), Carswell, 1987 at 388.
(b) See also the discussion by Rosenthal, P., "Duress in the Criminal Law" (1990), 32 Crim. L.Q. 199 at 202-8.

arbitrary and unfortunate limitation.

Yeo offers a different approach. He has applied the theory of justification and excuse and finds that this theory clarifies the jurisprudential basis of three criminal defences: self-defence, necessity and duress. His summary of the difference between justification and excuse, and how they relate to culpability are worth quoting in full.[3]

> A person who claims a justification acknowledges her or his responsibility for the harmful conduct but contends that it was done in circumstances which made the conduct rightful in the eyes of society. Since society encourages or at least tolerates the performance of such conduct, the actor deserves praise or permission rather than blame and consequent punishment. Society determines whether conduct is justifiable on the basis of social utility: if the actor's conduct causes less harm than the harm which he or she thereby avoids, the conduct is justified. ...
>
> A person who claims an excuse concedes that the harm caused by her or his conduct is greater than that which it avoids. Accordingly, a plea of excuse is relevant only after it has been determined that the actor's conduct was unjustified and therefore wrong in society's eyes. After all, if the conduct was justified, there would be nothing to excuse. What an excuse does is to conclude that while the conduct was wrong, some characteristic of the actor which is tested by the threatened danger makes it inappropriate for society to punish him or her. Criminal responsibility is not attached to the actor because society both recognises and has compassion for the human frailty found in him or her. Such compassion is imparted because society assesses the actor as having acted in the way an ordinary person could have acted when placed in similar circumstances. It would be harsh for society to demand more from the actor than it would from its other members. In such cases, while praise is not bestowed on the actor, pardon is.

Wilson J. has also commented on the distinction between an excuse and a justification.[4]

> [C]riminal theory recognizes a distinction between justification and excuse. In the case of justification the wrongfulness of the alleged offensive act is challenged; in the case of excuse the wrongfulness is acknowledged but the ground for the exercise of judicial compassion for the actor is asserted. ...
>
> Thus, the nature of an excuse is to personalise the plea so that, while justification looks to the rightness of the act, excuse speaks to the compassion of the court for the actor.

In summary, an excuse is concerned with the culpability of the actor after the *actus reus* and the *mens rea* have either been proven or admitted. A justification looks to the rightfulness of the act after a similar determination or admission. For these reasons, I will use "excuse of duress" which I believe is the more accurate term, rather than "justification of duress" or "defence of duress".

A BRIEF HISTORY OF THE EXCUSE OF DURESS

The historical development of the excuse of duress has been slow and has received little attention from the courts and academics until fairly recently. From its earliest days, duress has been treated as an excuse, but the courts and commentators of the 20th century paid scant attention to the theory of justification and excuse. It appears as though these two concepts have been used interchangeably. In some instances, the juristic basis for duress has been inappropriately built on the balance of harms approach of justifications, rather than the impairment of freedom conception of excuses. There has also been a corresponding tendency to focus solely on the act performed, rather than considering the constraint upon the will of the actor due to the threat. Yeo believes that

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3 *Supra*, footnote 1 at 6.

4 Perka v. The Queen (1985), 14 C.C.C. (3d) 385 (S.C.C.) at 413-14.

the failure to distinguish between the theories of justification and excuse and how they contribute to defining duress has led to serious discrepancies in the common law.[5]

From 1892, when it was first enshrined in the Criminal Code of Canada,[6] our law of duress has not changed a great deal.[7] Legislative drafters have refined some of the wording during the production of the various Revised Statutes and there have been a few exceptions added, but the basic wording remains the same. The current wording of the excuse is:

> 17. A person who commits an offence under compulsion by threats of immediate death or bodily harm from a person who is present when the offence is committed is excused from committing the offence if the person believes that the threats will be carried out and if the person is not a party to a conspiracy or association whereby the person is subject to compulsion, but this section does not apply where the offence that is committed is high treason or treason, murder, piracy, attempted murder, sexual assault, sexual assault with a weapon, threats to a third party or causing bodily harm, aggravated sexual assault, forcible abduction, hostage taking, robbery, assault with a weapon or causing bodily harm, aggravated assault, unlawful causing bodily harm, arson or an offence under sections 280 to 283 (abduction and detention of young persons).

As recently as 1966, section 17 was thought to codify exhaustively the common law defence of duress.[8] Ten years later, the Supreme Court of Canada determined that section 17 applied only to actual perpetrators and not to other parties.[9] By virtue of section 7(3) which preserves common law defences, someone who is a party to a murder by virtue of section 21(2) but not the actual killer could avail themselves of the common law defence while the killer could not.[10] Borins J. has summarized the current situation.[11]

> [Section] 17 is available as a defence only to the actual perpetrator of an offence to which the section applies, while the common law defence of duress is available to those charged with any offence, including those excluded by s.17, (except rape) as a party to its commission pursuant to s.21(1)(b), (c) and (2).

While the distinction between the perpetrator and a participant may be difficult to make,[12] the rule in Paquette has been applied in other Canadian cases.[13] On the other hand, without a codified excuse of duress to contend with, the British courts have determined that duress is not

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5 *Supra*, footnote 1 at 35-45.

6 S.C. 1892, c.29, s.12.

7 In R. v. Bergstrom (1981), 59 C.C.C. (2d) 481, 20 C.R. (3d) 347, 123 D.L.R. (3d) 584 (S.C.C.) McIntyre J. reviewed the history of the development of s.17.

8 R. v. Carker (No. 2) [1967] S.C.R. 114 (S.C.C.).

9 R. v. Paquette (1976), 30 C.C.C. (2d) 417 (S.C.C.), where the Court applied the reasoning of the House of Lords' decision in D.P.P. for Northern Ireland v. Lynch [1975] A.C. 653, [1975] All E.R. 913 (H.L.). For a critique of the reasoning in Paquette and Lynch, see Borins J., S. "The Defence of Duress", (1982), 24 C.L.Q. 191 at 200-2.

10 For a commentary on this result, see R. Cross "Murder Under Duress" (1978), 28 U.T.L.J. 369. Borins J., *supra*, footnote 9 at 199 has described this as an "anomalous result." Rosenthal, *supra*, footnote 2(b) at 217 has opined: "The Supreme Court of Canada has artificially circumvented the provision of the Criminal Code in holding that s.17 applies only to actual perpetrators of crimes and that the common law defence remains for aiders and abettors."

11 *Supra*, footnote 9 at 202.

12 See for example the comments of G. Williams in TEXTBOOK OF CRIMINAL LAW (2nd edtn.), Stevens & Sons. 1983 at 629-231.

13 See the cases summarized by Stuart, *supra*, footnote 2(a) at 396 and by Borins J., *supra*, footnote 9 at 202-3. See also the comments of Rosenthal, *supra*, footnote 2(b) at 217 and Review of Commonwealth Criminal Law, *infra*, footnote 50 at 128.

available to either the actual perpetrator or any party to murder.[14]

The Commonwealth statutory and common law conception of the excuse appear to be at different levels of development. Some parts are well-established, yet others appear to be changing and uncertain. What has the common law said about duress? Yeo has identified the Australian decision of R. v. Hurley and Murray from the mid-1960s and believes it is the major reference point for clarifying the uncertainty in the law of duress. In that case, Mr. Justice Smith from the Supreme Court of Victoria offered the following working definition of duress.[15]

> Where the accused has been required to do the act charged against him (i) under threat that death or grievous bodily harm will be unlawfully inflicted upon a human being if the accused fails to do the act and (ii) the circumstances were such that a person of ordinary firmness would have been likely to yield to the threat in the way the accused did and (iii) the threat was present and continuing, imminent and impending... and (iv) the accused reasonably apprehended that the threat would be carried out and (v) he was induced thereby to commit the crime charged and (vi) the crime was not murder, or any other crime so heinous as to be excepted from the doctrine and (vii) the accused did not, by fault on his part when free from the duress, expose himself to its application and (viii) he had no means, with safety to himself, of preventing the execution of the threat, then the accused in such circumstances at least, has a defence of duress.

For those jurisdictions which have not had to grapple with the constraints of a codified excuse of duress, the above statement would appear to adequately summarize the common law definition of this excuse. There have been subsequent refinements, but they appear to reflect the unique facts facing the particular court and have not substantially modified this statement.[16]

In 1987, the LRCC proposed a new provision to replace the current wording of section 17:[17]

> 3(8) **Duress**. No one is liable for committing a crime in reasonable response to threats of immediate serious harm to himself or another person unless he himself purposely causes the death of, or seriously harms, another person.

Will this proposal significantly improve the situation in Canada or will it simply compound the existing problems?

COMMENTARY

The LRCC's proposal is the most succinct of the six provisions studied in this paper. While its brevity is useful and certain undesirable features of section 17 have been removed, the proposed wording does have some short-comings. The following will identify and discuss these problems.

A) Type of harm threatened

Section 17 currently uses the term "death or bodily harm" to describe the type of harm threatened for which the excuse will be available. Until recently, the phrase was "death or grievous bodily harm", but "grievous" was dropped in 1982.[18]

In its proposal, the LRCC has dropped the word "death" and replaced "bodily harm" with a new phrase: "serious harm". The Commission has also proposed a definition of harm in section 1(2) of its Report: "harm means to impair the body or its functions permanently or temporarily."

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14 R. v. Howe [1987], 1 All E.R. 711, [1987] 2 W.L.R. 568 (H.L.).

15 R. v. Hurley and Murray, [1967] V.R. 526 (S.C. Victoria) at 543.

16 See Yeo's discussion, *supra*, footnote 1 at 42-43.

17 Law Reform Commission of Canada (LRCC), RECODIFYING CRIMINAL LAW, Report #31, 1987 at 35.

18 S.C. 1980-81-82, c.125, s.4.

The LRCC proposal raises a number of questions: How "serious" does the harm have to be? Does "serious harm" include death? Does it include harm to property? Mental or psychological harm?

Stuart has suggested that some serious threats to property, such as a threat to blow-up one's home or damage a treasured possession, for some people might be as agonizing a choice as a threat of serious injury or even death.[19] However, the courts have apparently rejected this proposition and have drawn the line at threats of death or serious bodily harm.[20]

It should be easy to argue that serious harm includes death. But should serious harm also includes threats of mental or psychological harm? If it does, this would considerably broaden the existing scope of section 17, and possibly the ambit of the common law excuse if the LRCC's proposal is to replace the common law (see section 9, below).

There would be obvious problems in identifying and quantifying the potential mental or psychological harm a threat could inflict, as distinct from the potential physical harm. Indeed, for most threats it is likely that the physical harm will be the dominant element of the threat. Some might consider threats to a mother to kidnap and take her child out of the country as constituting serious psychological harm to the mother, if not the child. Nonetheless, it has been determined that this type of threat is not one included in the excuse.[21]

Cross is of the opinion that the British common law conception of "serious personal injury" would include a threat of injury to the mental health of the accused.[22] Indeed, the United Kingdom draft Criminal Code defines "personal harm" to mean harm to body or mind and includes pain and unconsciousness. However, because of the significant difficulties in describing the nature of the mental harm which a threat may invoke, a threat of mental harm which is not also composed of a threat of physical harm may be a difficult ground on which to sustain the excuse of duress.

Judicial recognition of certain types of harm have been piecemeal; death and serious harm are the most consistent and clearly identified types of harm in those jurisdictions which have not codified the excuse. Threat of imprisonment has been considered, as have threats of lesser personal violence.

As the chart in Appendix "B" shows, most of the proposals contain a direct reference to death or some form of bodily harm. Describing or listing specific threats is consistent with the excuse theory, which leaves to society the right to impose restrictions that have to be met before compassion will be granted to the wrongdoer.[23]

On the other hand, it has been suggested that there should be no restrictions on the type of threatened harm which should be recognized as grounds for applying the excuse of duress. Yeo has put the argument this way.[24]

> The type of threatened harm to be recognized under the defence of duress must be determined according to the underlying rationale of the defence. As an excusatory defence, the rationale for allowing duress is societal compassion for human frailty in the face of extreme pressure or danger. This being the case, it could be argued that *every* type of threatened harm has the potential of being recognised provided that such harm has the effect of overwhelming a person of normal fortitude standing in the same position as the particular accused.

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19 *Supra*, footnote 2(a) at 404.

20 *Supra*, footnote 1 at 71, and *supra*, footnote 9 at 195. See also Prowse J., J.A.S. WORKING MANUAL OF CRIMINAL LAW, (loose leaf current to August, 1989), Carswell at 32.1.

21 R. v. Robins (1982), 66 C.C.C. (2d) 550 (Que. C.A.).

22 *Supra*, footnote 10 at 379.

23 *Supra*, footnote 1 at 72.

24 *Supra*, footnote 1 at 69.

Issues for consideration:
(1) Should the "serious harm" be restricted to mean (a) death, and (b) serious physical injury? Should serious harm also include (c) serious mental or psychological injury, and (d) significant harm to personal property?
(2) Alternatively, should the type of threatened harm be very broadly described and should the courts be encouraged to define and apply that term in each specific instance?

B) Timing of the threat

The requirement in the current wording of section 17 that the threat be "immediate" and that the person who made the threat be "present" has been problematic. Thus, a prisoner isolated in his cell who was threatened by other rioting inmates with serious physical harm if he did not damage his cell was denied the excuse of duress. The court determined that it is not sufficient that the threat could be carried out in the future.[25] Canadian courts have also ruled that the situation must be one where the threat arose suddenly and not a situation, in particular a common criminal venture, which has evolved over time when the accused could have extricated him or herself before the threat was made.[26] Finally, if someone had an obvious and safe avenue of escape, the threat is no longer considered to be so immediate as to sustain the excuse of duress.[27]

It appears as though the Canadian courts have read more into the word "immediate" than it can reasonably support. They could have avoided this had the description of the time element in section 17 been stated as "imminent" and not "immediate". Imminent denotes a threat that is overhanging or impending and allows a time interval between the making of the threat and it being carried out, so long as it was continuous. On the other hand, immediate is a narrower term that signifies occurring at once or without delay. While the threatened harm must be imminent, the harm need not necessarily be immediate. Therefore, as suggested in Hurley and Murray, the threat should be: "present and continuing, imminent and impending" before the excuse will be granted. The law should also recognise the time interval between the making of the threat and the commission of the offence. Thus, "the threat must be shown to have continued to affect the mind of the accused throughout this period for the defence to succeed."[28]

The "immediate" requirement in section 17 stands in contrast to the concept of imminence which has been adopted in the common law. Even though the threatened injury may not follow instantly but after an interval, the existence at that moment of the threat should be sufficient to destroy the accused's will. The English Law Commission has adopted this position indirectly by requiring that, where the threatened harm may not be carried out immediately, the accused must take any reasonable opportunity to escape and seek protection.[29] The Australians have made a similar requirement. Such an obligation is supported in the case law.[30]

The British proposal has wording not found in the Australian code: "the threat will be carried out immediately if he does not do the act." This is similar to the New Zealand provision: "immediately able to carry out that threat." Only the United States model code is silent with respect to the timing of the threat.

The LRCC's proposal has dropped the current requirement in section 17 that the threatener be "present". This would help avoid a decision similar to that reached in Carker (No.2), where the Supreme Court of Canada effectively ruled that the threatener had to be physically present (i.e.

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25 *Supra*, footnote 8.

26 R. v. Gardiner (1983), 34 C.R. (3d) 237 (B.C. Co. Ct.).

27 R. v. Mena (1987), 57 C.R. (3d) 172, 34 C.C.C. (3d) 304 (Ont. C.A.). See also Lynch.

28 *Supra*, footnote 1 at 85.

29 However, the British have gone further and qualified their requirement by stating that: "It is immaterial that the person doing the act believes, or that it is the case, that any official protection available in the circumstances will or may be ineffective."

30 *Supra*, footnote 12 at 632.

within the accused's cell).[31] The Commission has recommended this change on the grounds that the threatener's presence would be a factor that would be considered in determining the reasonableness of the accused's response. But the Commission has retained the requirement of a threat of "immediate" serious harm. This would no doubt continue the problems regarding the timing of the threat which have plagued section 17.

> Issues for Consideration
> (3) Rather than describing the threat as immediate, should one or both of the phrases (a) "immediately able to carry out that threat," and (b) "if not immediately, before the accused can escape or obtain police or some other official protection" be employed? Or perhaps the common law phrasing would be more appropriate: "present and continuing, imminent and impending"?

C) Source of the threat

The LRCC's proposal is silent with respect to the source of the threat. This may avoid the problem with the current wording of section 17: "a person who is present when the offence is committed".

New Zealand describes the source as: "from a person who is immediately able to carry out that threat." With this phrasing, therefore, the person making the threat need not be present, but could be acting at some distance from where the offence is being committed. The other jurisdictions have not specified what the source of the threat would be.

The absence in the LRCC's proposal regarding the source of the threat should be welcomed. It should provide the trier of fact with some latitude in identifying the source of the threat and assessing the type of harm threatened. Alternatively, it might be useful to adopt the approach taken in New Zealand.

> Issues for Consideration
> (4) Should the excuse include a description of a source of the threat? If yes, should the source of the threat be described as "from a person who is immediately able to carry out that threat"?

D) Subject of the threat

Unlike other jurisdictions which have codified the excuse, Canada's section 17 does not explicitly state that a threat of harm directed to another person is within the excuse. In 1982, Borins J. observed that: "it has not been determined whether threats of death or grievous bodily harm to someone other than the accused - such as members of his family - would come within s.17, as the section does not specifically state to whom the threats must be made."[32] In contrast, the courts have extended the scope of the common law version of the excuse to include threats directed to other persons.[33]

The LRCC has concluded that this potential discrepancy needs to be addressed and has suggested that either the person charged or some other person could be the subject of the threat. As can be seen in Appendix "B", this is in keeping with the wording used or proposed in other jurisdictions. It is also in step with the current judicial interpretation of the common law. Therefore, this addition should be supported and need not be raised as an issue for consideration.

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31 *Supra*, footnote 8.

32 *Supra*, footnote 9 at 196.

33 *Supra*, footnote 15; R. v. Morrison and McQueen (1981), 54 C.C.C. (2d) 497 (Ont. Dist. Ct.).

E) Cognitive requirement

We will first consider the cognitive requirement of the different formulations of the excuse of duress to identify the emphasis that each has placed on the importance of the accused's state of mind. This will be followed by a discussion of the criteria that could be used to assess the reasonableness of the accused's response to the threat.

Only three of the six provisions specifically state a cognitive requirement. The requirement that the accused must have held some belief regarding the type of harm threatened at the time it was made is missing from the LRCC's proposal, but a similar statement is also absent from the provisions of New Zealand and the United States.

Australia uses a more complex formulation of the accused's knowledge and belief, and details some of the specific factors the accused must show he or she believed (or knew).

> (2) A person does an act under duress if:
>
> (a) the person does the act because he or she knew or believed that:
>
> (i) a threat had been made that, if carried out, would have resulted in the death of any person, serious physical injury being caused to any person or a serious sexual assault being made upon any person; and
>
> (ii) if the act was not done, the threat would have been carried out before protection against the threat could be obtained from police or other authorities; and
>
> (b) the person believed that there was no way, other than doing the act, of preventing the threat from being carried out.

The English proposal is very similar and contains the same features as the Australian provision.[34] Both have used what can be describe as the "no option" response: the accused must believe that there was no other way of preventing the threat from being carried out.

Canada's section 17 uses "believes that the threats will be carried out." This phrase requires that the trier of fact engage in an inquiry to determine what was in the mind of the accused at the time the threat was made. Thus, individual strengths or weaknesses appear to be relevant. Yeo has opined that the accused's belief or perception of a threatened harm must be reasonably held or based on reasonable ground.[35]

> Only an honest and reasonable belief in the existence of excusing circumstances can provide a sufficient basis for an excuse. ... The accused's belief must be reasonable before society will be prepared to render her or him blameless for the wrongdoing. Society imposes this precondition because it views the accused from the standpoint of a person who has satisfied all the elements of the offence. Pleading an excuse is therefore the only recourse open for the accused to be exculpated of criminal liability. Before society is prepared to exercise compassion in this way, it is entitled to demand that the accused lack any blameworthiness in relation to the plea relied upon. An unreasonable belief as to the threatened danger constitutes the kind of blameworthiness which prevents the accused from being excused.

Later, he states:[36]

> Society is prepared to exercise compassion for an actor who has committed a wrong provided the actor had done so under a mistaken but reasonable belief that he or she would otherwise suffer harm. The discounting of blame is therefore determined according to the accused's own perception of the threatening circumstances rather than the actual circumstances. It follows that it would be quite out of keeping with the nature of excuse for the law to render an accused blameless only when the threatened harm he or she feared was real.

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34 One major difference is that the English have added this proviso: "It is immaterial that the person doing the act believes, or that it is the case, that any official protection available in the circumstances will or may be ineffective." No other jurisdiction has included a similar condition.

35 *Supra*, footnote 1 at 19.

36 *Supra*, footnote 1 at 199.

The state of law regarding belief is not clear, because the courts have not been settled whether the accused belief need be honest and reasonable (i.e. a reasonable person's belief), or whether an honest but potentially unreasonable belief would suffice (i.e. the accused's reasonable belief).[37] The former would be an objective standard, while the latter would be require a subjective standard.

There has been a recent movement to incorporate the honest and reasonable belief position into the law of duress. The English Law Commission has proposed the most subjective formulation. That Commission stressed the importance of the actors' knowledge or belief: "the defence of duress depends essentially upon a state of mind."[38] They note that their proposal departs from recent cases, in particular Howe, where it was held that, for the excuse to be applied, a person's belief in the existence of a threat must be reasonably held by an objective standard.

The English proposal appears just and balanced. To require a strict objective standard of reasonableness would be inconsistent with trends in our criminal law which increasingly take the personal circumstances and perspective of the accused into consideration in judging the *mens rea* of the crime.[39]

Recent Canadian decisions appear to support the notion that a sober person of reasonable firmness, sharing the characteristics of the accused, should have believed that the threat would be carried out if he or she refused to comply.[40] (Again, this test is different than the subject test which currently is set out in section 17.) Yeo has suggested that the Canadian and other Commonwealth courts have not hesitated to require an objective standard of reasonableness on the accused's belief, because that belief is part of the defence element.

> Society will not excuse a person who has caused harm by acting on an unreasonable (or negligently held) belief. The elements of reasonableness draws the necessary limits beyond which society will be loathe to excuse a person from criminal wrongdoing.[41]

Issues for Consideration

(5) Should the accused belief regarding a threatened harm be (a) honestly and reasonably held, or (b) honestly but not necessarily reasonably held?

A determination of the reasonableness of the accused's belief is intertwined with a determination of the reasonableness of his subsequent response. An analysis of the cognitive requirement is linked to a consideration of how the accused responded to the threat. This leads to a discussion of the criteria that have been established for assessing that response.

F) Criteria for assessing the accused's response to the threat

Yeo has identified two parameters that have been used by the courts to evaluate the reasonableness of the accused's response: (i) whether the response was proportionate to the threatened harm, and (ii) whether the harmful response was the minimum necessary.

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37 *Supra*, footnote 12 at 625.

38 English Law Commission, CRIMINAL CODE FOR ENGLAND AND WALES: COMMENTARY ON DRAFT BILL, Vol. 2 at 230.

39 Cross, *supra*, footnote 10 at 379 has described this as "individualization of excuses".

40 R. v. Logan (1988), 46 C.C.C. (3d) 354; R. v. Mena (1987) 34 C.C.C. (3d) 304; and R. v. Morrison and McQueen (1980), 54 C.C.C. (2d) 447.

41 *Supra*, footnote 1 at 230.

(i) Proportionality between response and threatened harm:

When deciding that an accused was justified in the harm he or she created, the rule of proportionate response or balancing of harms focuses on the act, rather than the actor. In contrast, when proportionality is viewed in the context of excuse, Yeo would argue that it should recede into the background because society has already determined the accused's act to be wrongful and for having caused more evil than the threatened danger.

> The underlying rationale for the [excuse of duress] is not that it condones the less evil or promotes the greater good but that the law ought to exculpate an accused who succumbed to a threat when others of normal fortitude could have succumbed as well. The emphasis has consequently moved from the accused conduct and how that compares with the threat confronting her or him to the kind of person the accused is.[42]

Yeo is critical of those decisions or articles which have framed their analysis on the balancing of harms.[43] He notes that once it has been determined that the accused submitted to the threat and that an ordinary person would have likewise submitted, there is no need to inquire further whether the accused's harmful response was proportionate to the harm threatened. Also, to insist on a proportionate response is to insist that the accused acted rationally at a time when he or she was under the sort of pressure which could have caused an ordinary person to behave irrationally.[44]

If one accepts that proportionality between the harmful response and the threatened harm is not an integral component of an excuse, this does not mean that the balancing of harms must be abandoned altogether. Proportionality is often an important factor which goes to the evidence and allows the jury to assess the accused's blameworthiness. Therefore, a separate rule of proportionality appears to be inconsistent with the concept of an excuse, because the issue is not the desirability of the act, but the blameworthiness of the accused and his or her level of self control. These are probably matters best left to the finder of fact who will decide whether a person of ordinary firmness could have succumbed to the threat and do what the accused did.[45]

(ii) Minimum necessary harmful response:

With the excuse of duress, Yeo believes it is reasonable to require that the harmful response be the minimum necessary to counter the threatened harm. The duty to avoid the demanded harm or employ the minimum necessary response appears to embody this minimum response.

An alternative formulation, but one that is achieving the same point, is the duty to escape or otherwise avoid a harmful response should a reasonable and safe opportunity present itself. Underlying this duty is the concept of prior fault, which holds that before an actor will be excused for the wrongful conduct, he or she must have been blameless in finding themselves in that situation. Consequently, a failure to escape with reasonable safety or failure to take a reasonable opportunity to avoid the threat would make the accused blameworthy. The demands on the accused to avail themselves of such opportunities should not be seen as too onerous.[46]

This requirement has also been codified; see for example the proposal of the English Law Commission. This requirement is also grounded on the defence being an excuse. What are the criteria for assessing the accused's response to the threat?

There are no criteria set out in section 17 which provide direction to Canadian courts regarding how the accused's response to the threat should be assessed. As noted above, section

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42 *Ibid*, at 113.

43 One example might be the discussion on proportionality undertaken by Rosenthal, *supra*, footnote 2(b) at 225. In fairness, he ends his review at 226 with: "It is respectfully submitted that any rigid *a priori* restriction of the defence of duress will, in some cases, lead to results that are inconsistent with the principle that criminal liability requires moral fault."

44 *Supra*, footnote 1 at 114.

45 For a further discussion on this point, see Yeo, *ibid*, at 103, 104-5 and 112 to 115.

46 *Ibid*, at 103 and 122.

17 seems to require that a subjective test be employed. In this regard, Borins J. has commented:[47]

> [F]or the defence to apply, the accused must be of the belief "that the threat will be carried out". Thus, the section creates a subjective test with respect to whether or not death or grievous bodily harm will follow if the accused does not comply. It is the belief of the accused which is paramount, and not, for example, what a reasonable person would do in the circumstances. In this regard, I must respectfully question the *obiter dictum* in the Falkenberg case which would appear to impose an obligation on the accused to retreat from the threat or seek assistance in order to utilize the defence. Such a requirement, which appears to be imported from the common law, is not within the language of s.17 and certainly seems to be contrary to the subjective test created by that section.

In a similar fashion, Rosenthal has concluded:[48]

> Section 17 specifies that it suffices that the accused 'believes that the threats will be carried out'. That is, there is a purely subjective test of the substance of the threats. In the common law, however, there is an objective test: the defence fails if it is held that a person of reasonable firmness (with the characteristics of the defendant) would not have yielded to the threats.

Despite the apparent subjective nature of section 17, it appears the Canadian courts have been influenced by the test set out by the House of Lords in Howe. (The test set out in Howe was whether the threat was of such gravity that it might well have caused a reasonable man placed in the same situation to act in the same way as the accused has acted and whether a sober person of reasonable firmness sharing the characteristics of the accused would have responded to the threat by taking part in the crime.) The Canadian courts have departed from the subjective standard set out in the Code. In its place, they have applied an objective standard to judge the reasonableness of the accused's behaviour.[49]

The Howe test has been adopted in Australia and the United States, and is reflected in their respective draft Codes.[50] They both use very similar wording. The Australians have framed a test as: "a person of reasonable firmness would not, in the same circumstances, have resisted such a threat" which sets out an objective test to evaluate the accused's response to the threat. The Australian Review of Commonwealth Criminal Law has observed that: "[a]s a matter of public policy the accused should be required to have the steadfastness reasonably to be expected of the ordinary citizen." [51] The Americans have employed a similar standard.

These are not tests which take into consideration the person's unique circumstances, the so called modified objective test proposed for the United Kingdom. The British would assess the threat from all the circumstances, including personal circumstances that affect the gravity of the threat. The accused would benefit from the excuse if the threat was one which he or she could not reasonably be expected to resist in the circumstances. Those circumstances would include the nature of the offence, the defendant's belief and other relevant personal matters. Thus, "[t]hreats directed against a weak, immature or disabled person may well be much more compelling than the

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47 *Supra*, footnote 9 at 196.

48 *Supra*, footnote 2(b) at 219

49 *Supra*, footnote 2(a) at 399. In her loose leaf service, Madame Justice Prowse, *supra*, footnote 20 at 33, has stated that the test to be applied in deciding if the threat existed is an objective test; the same as that which is to be applied in cases of self-defence.

50 On the other hand, as pointed out by the Review of Commonwealth Criminal Law, INTERIM REPORT : PRINCIPLES OF CRIMINAL RESPONSIBILITY AND OTHER MATTERS, Australian Government Publishing Service, 1990 at 130, the Criminal Codes of Queensland, Western Australia and Tasmania have all adopted the subjective test: whether the accused acted "believing himself to be unable otherwise to escape the carrying of the threats into execution." But the Northern Territory's Code sets out an objective test.

51 *Ibid*, at 139.

same threats directed against a normal healthy person."[52]

Stuart is amongst those who favour the British modified objective standard, one which takes into account some of the individual's characteristics and beliefs. He comments: "In general, the English Law Commission sensibly tries to balance the need to be more compassionate in a wider defence of duress against the need to bolster community values."[53]

In summary, the accused's conduct in response to the threat must satisfy various requirements which incorporate the notion of reasonableness before the accused can be exculpated.[54]

> The requirement of reasonableness [for an excuse] is not intended to ensure the accused's commission of the lesser harm for that is immaterial so far as excuse is concerned. Rather, reasonableness serves as an precondition to society exercising its compassion on the accused for her or his wrong doing. In other words, society will be prepared to render blameless the accused's wrongful conduct only if her or his reaction to the threatened danger fell within acceptable bounds. A response which exceeded this bounds amounts to blameworthiness on the accused's part with the consequence of the excuse being denied to her or him. Unlike the case of justification where the focus is on the reasonableness of the accused's act, reasonableness in excuse is expressed in terms of whether a reasonable *person* could have responded in the same way as the accused did. Hence, although the subject-matter is still very much the accused's response, that response is examined according to standards of human fortitude and resilience.

The LRCC's version is less precise than this. As noted above, the LRCC's proposed wording does not make any direct reference to the state of mind of the accused, but it has proposed that the accused's response to the threat should be a "reasonable response". Unfortunately, the LRCC does not provide any further detail regarding how "reasonable" is to be determined. Presumably, the trier of fact will make such a determination in each case. But, does this wording require the application of an objective or a subjective test, or some combination of the two? And what specific factors are relevant in determining the reasonableness of the belief?

Yeo has opined that the "reasonable response" of the LRCC's proposal "obscures the nature of the duress with its emphasis on ordinary human resistance to intense pressure."[55] He has criticized the LRCC for grounding its discussion of duress on the balance of harms approach and the consequential omission of the critical notion in duress of resistance or yielding to the threat.[56] Yeo has suggested that the "honest but reasonable belief" would be an acceptable intermediate position to take.[57] This would involve the application of a "person of ordinary firmness" test. The jury would be required to decide whether the accused's response was reasonable in the circumstances. This is what the British have proposed.

> Issues for Consideration:
> (6) Should the accused be permitted to hold an honest, but not necessarily reasonable belief regarding (a) the type of harm threatened, (b) that he or she had no other alternative but to commit the crime, or (c) other important factors? In other words, should the accused be allowed to hold an honest belief that he or she had no other alternative but to commit the crime, even if that might not be a belief that someone of reasonable firmness in his or her situation would also have held?
> (7) Alternatively, should the accused be required to hold an honest and reasonable belief regarding the above factors?

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52 *Supra*, footnote 37 at 230.

53 *Supra*, footnote 2(a) at 405, with reference to R. Cross, "Murder Under Duress" (1978), 28 U.T.L.J. 369 at 378-79.

54 *Supra*, footnote 1 at 18.

55 *Ibid*, at 233 in footnote 117.

56 *Ibid*, at page 40, footnote 59.

57 *Ibid*, at 232.

(8) Should the standard be like the British one and include a consideration of all the circumstances the accused faced, as well as any of his or her personal circumstances which may have affected the gravity of the choice he or she had to make? Or should the standard be a strict objective one, like the Australian and American test: would a person of reasonable firmness in his or her situation have been unable to resist the threat?

G) Exclusions

The greatest variation in wording across the different formulations of the excuse of duress arises with respect to what acts are excluded. As can be seen in the chart in Appendix "B", the long list of specific exceptions in Canada's section 17 stands in contrast to the more broadly framed exclusions set out in the other provisions.

Stuart has observed that the large number of excluded offences in section 17 have created for Canadian courts, but that such problems do not exist to the same extent in other jurisdictions.[58] Further, the description of some of the excluded offences in section 17 has created anomalies with respect to what offences are "in" and which are "out".[59]

Some writers have commented that there should be no exclusions; that no offence should be automatically excluded, including murder.

> [T]he accused's harmful response is wrong by society's standards. An argument could therefore be tendered that some responses are so evil or heinous that society will refuse to excuse the actor. Having come from the position of condemning the actor's response, society has every right to decide which kind of response it will excuse and which it will not. However, this argument makes the harmful response or act the focal point of excuses when under the excuse theory the focus should really be on the person of the actor. Hence, how evil the act might be is not the primary determinant; it is whether the actor had committed the act under circumstances which makes punishing her or him unjust. It is therefore submitted that there is again no harmful response or offence which should be excluded from the operation of excuses. Provided that the various requirements of the defences are met (such as the type of threatened harm, the use of minimum necessary force and the absence of prior fault in creating the need for the defence), the [excuse of duress] can be successfully pleaded against all offences.[60]

Rosenthal has observed that: "an absolute prohibition on the availability of the defence of duress on a murder charge (or, on any other charge) could lead to the most extraordinary injustice."[61] Cross has noted that duress has been justified on the grounds that: "the agent is confronted with a choice of evils and the law permits him to treat the harm with which he is threatened as a greater evil than the harm which he does in order to avoid the threat."[62] It has been suggested, therefore, that duress should only be available if the harm threatened to the accused was greater than the harm the accused inflicted because of the threat. If the accused's action was not a lesser evil, his or her actions should not be excused.[63] But this "balancing of harm" approach,

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58 *Supra*, footnote 2(a) at 395.

59 For instance, in Robins, *supra*, footnote 21, the Quebec Court of Appeal held that, while duress is not available to someone charged with forcible abduction, it can be a defence to the more serious crime of kidnapping.

60 *Supra*, footnote 1 at 142. See also Stuart's discussion, *supra*, footnote 2(a) at 402.

61 *Supra*, footnote 2(b) at 213. Rosenthal goes on to discredit reliance on prosecutorial discretion not to prosecute and the prerogative to pardon as reliable avenues to avoid injustice.

62 *Supra*, footnote 10 at 372.

63 *Supra*, footnote 2(a) at 402. Cross, *ibid*, at 373 refers to a pre-1973 version of the Statutes of Hawaii whereby a defendant was deemed not to be responsible for an act to the doing of which he was compelled by force which he could not resist or from which he could not escape, but the excuse operated only if the threatened danger was of greater harm than that which the accused inflicted by succumbing to the threat (my emphasis). A subsequent section required the accused to prove that the

where one evil is weighed against another, is unlikely to be successful in all cases. But more importantly, as Yeo has observed, this approach is not consistent with the rationale for excuses. Yeo counters with the observation: "[f]airness and justice demand that the accused be aligned not with the heroes in the community but with those ordinary people who would succumb to the threat."[64]

Murder (and sometimes serious forms of treason) are excluded by statute, law reform proposals and the common law with varying degrees of clarity. Yeo argues that, simply because the majority of ordinary people would yield to the threat (and kill an innocent person), it does not follow that the mere existence of people who are capable of refusing the threat and making the ultimate sacrifice means it is reasonable to expect every member of the community also to be heroes. To allay fears that the defence could become a "charter for terrorists", Yeo points out that there are very stringent requirements which have to be met before the defence will succeed:

> (i) the modified objective test that a person of ordinary fortitude with the accused's characteristics could also have resisted the threat (which will invariable require that the threat be death or serious harm and would probably exclude someone who was unusually cowardly or weak-minded);
> (ii) the accused used the minimum necessary force (which imposes a duty to escape when reasonable or, if no such opportunity arises, cause less harm than killing someone); and
> (iii) the accused not be blameworthy in creating the need for the excuse in the first place (which requires the accused to have reasonably expected that by an association he could be coerced into committing a violent act, thereby excluding most members of terrorist groups from invoking the defence);
> (iv) as a practical matter, a jury is more likely to be circumspect in its compassion where the wrongful act was the murder of an innocent person.[65]

Sometimes we must draw a line. In the current wording of section 17, a number of lines have been drawn, but it is not always clear why every line was drawn. In its proposal, the LRCC has drawn a single, broad line: when the accused "purposely causes the death of, or seriously harms, another person". Stuart has applauded the LRCC's proposal, but he remains concerned that the excuse will continue to be unavailable if the accused intended to kill or seriously harm. He sees this as a return to the higher morality of the past, "which is an inappropriate barometer for punishment."[66] He believes the proposed limit is arbitrary and not as flexible as it could be. The Commission has justified its position by stating that: "no one may put his own well-being before the life and bodily integrity of another innocent person."[67] According to Yeo, this argument is acceptable with respect to justifications, but it runs counter to the rationale for excuses.

The Model Penal Code prepared by the American Law Institute contains no exclusions, although about one half of the US states have excluded duress on a charge of murder, and a few have also added other offences.[68]

> Issues for Consideration
> (9) Should there be exclusions to the excuse of duress? Or should it be available in all criminal charges?
> (10) If there are to be exclusions, should those exclusions be precisely and exhaustively listed, as is currently the case in section 17? Should murder continue to be an excluded offence? Sexual assault? Robbery? What of other offences? Should persons who were parties to an association or conspiracy who knew they could become subject to threats from

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threat of imminent danger was greater than the injury he afflicted.

64 *Supra*, footnote 1 at 147.

65 *Ibid*, at 147.

66 *Supra*, footnote 2(a) at 404.

67 *Supra*, footnote 17 at 35.

68 *Supra*, footnote 2(b) at 212.

other members continue to be denied the excuse? Alternatively, should the excluded offences be described in general terms?
(11) Should parties (as opposed to perpetrators) to any of these or any other offences be excused or should they be specifically included?

H) Application: An excuse or a ground to mitigate punishment?

Some scholars have argued that, when temptation is strongest, the law should speak most clearly to halt temptation. Society will suffer more if criminals can "confer impunity upon their agents by threatening them with death or violence if they refused to execute their commands."[69] They argue that the person committing the crime under duress is less "guilty" than those who act outside of duress, and therefore duress should apply to reduce the punishment upon conviction of most crimes.

Duress can also be a full or a partial excuse, depending on the extent to which the accused was overwhelmed by the threats. A partial excuse would lead to a finding of guilt on a lesser charge or a reduction in the sentence. It has been suggested that it should be left to the jury to decide whether the killing should be excused wholly or partially, whereby the jury would determine the extent to which the accused was overwhelmed by the threatened harm.

This suggestion has not been adopted in the common law and is not part of the statutory law or common law of the jurisdictions studied. The counter proposal has been stated by Cross:[70]

> If the situation is such that any punishment would be unjust, surely it is right, in a case concerned with the higher morality, that the law should strive to avoid a conviction. An absolute discharge or an instant release under the prerogative of mercy are strange methods of enforcing absolute moral prohibitions.
>
> ...
>
> It may well be the case that we have to set up moral standards higher than our estimates of our ability to act morally, but, in that event, we should eschew legal punishment for non-compliance with those standards even if we believe that it would increase the general happiness. ... [U]tilitarian theories of punishment are subject to the limitation that the punishment must be deserved.

Yeo has opined:[71]

> Once a defence is regarded as a justification, there should be no doubt that it operates to exculpate the accused. The accused's conduct being socially approved, he or she should not be subjected to any negative impact such as the stigma of a conviction let alone punishment. If it only when a defensive plea is rejected as a justification that the question arises as to whether it serves to exculpate the accused of criminal responsibility altogether or only to mitigate punishment. This is because the accused's conduct is socially condemned and consequently the question becomes one of the extent of societal compassion for the wrongdoer. Full compassion is exercised by regarding the plea as an excuse: the accused is held blameless and accordingly exonerated from the wrongful conduct. Partial compassion occurs when society regards the plea as only a mitigating factor in sentencing for then the accused is held blameworthy for the wrongful conduct and deserving of conviction and some punishment. Important policy considerations are involved in whether the compassion should be full or partial. These considerations can be fully appreciated only after it is first resolved that the conduct in question is wrongful and not justified.

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69 *Supra*, footnote 2(a) at 394.
70 *Supra*, footnote 10 at 376-7.
71 *Supra*, footnote 1 at 13-14.

In a similar fashion, Rosenthal has observed that: "evidence of duress can and should be taken into account in sentencing in cases where, for whatever reason, the evidence is not sufficient to support an acquittal."[72]

Issues for Consideration

(12) Should duress be only a partial excuse? In other words, should it apply after a finding of guilt to mitigate the sentence? Or should duress by threats continue to operate as a full excuse?

I) Availability of the common law excuse

It is not entirely clear that the LRCC wishes to prevent persons charged as parties to murder or attempted murder from availing themselves of the common law excuse. As noted above, the Supreme Court of Canada in Paquette has ruled that the common law excuse of duress is available in all cases where a person is charged as a party to an offence, except rape. Subsequent Canadian decisions have followed that ruling. The ambit of the common law excuse is much wider than that under the current wording of section 17.[73] It would also appear that the common law is also wider than what the LRCC is proposing.

The LRCC has commented that its proposal "provides the same rule for all parties".[74] With respect, this is not clear from the proposed wording. There is nothing in the proposal to prevent the court from creating an exception to the exclusion, as it did in Paquette, and thereby allowing parties to an offence access to the common law formulations of the excuse.

Cross has gone so far as to suggest that we give up trying to codify the excuse of duress and simply state that duress is available to all charges, coupled with a simple definition of "duress", and leave the judiciary to fill in the details about how the defence will be applied. He asks: "[I]n situations in which the common law is undeveloped, why curtail the existing powers of the judiciary?"[75] Rosenthal has made a similar point:[76]

> Many of the restrictions that statutes and judges have introduced into the law would undoubtedly be factors jurors would take into account in evaluating any defences put forward under [the LRCC's proposal]. In particular, jurors would balance the harm committed and the gravity of the threat in determining whether the accused's response was "reasonable". It is submitted that justice would be better served if jurors were free to consider these factors flexibly, in light of the circumstances of each case, rather than being forced to attempt to follow artificial guidelines. For those who are concerned about the possible breadth of the proposed defence, the dictum of Mr. Justice Martin ... bears repeating: "The common sense of a jury may be relied upon to reject spurious defences of duress."

Issues for Consideration

(13) Should the common law formulation of the excuse of duress be abolished as it applies to criminal charges?

(14) If not, should there be any restriction placed regarding access to the common law version? For example, should parties to an offence be able to rely on the common law excuse, but not principals?

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72 *Supra*, footnote 2(b) at 209. For a similar observation, see Williams, *supra*, footnote 12 at 628.

73 *Supra*, footnote 9 at 203.

74 *Supra*, footnote 17 at 35.

75 *Supra*, footnote 10 at 380.

76 *Supra*, footnote 2(b) at 226.

BURDEN OF PROOF

It is generally accepted that, after the accused has presented evidence of what could constitute an excuse of duress, the burden of proof is on the Crown to prove that the accused did not act under duress.[77] The accused need not submit a great deal of evidence; he or she need only adduce enough evidence to put the excuse in issue.[78] On the other hand, the Crown need not anticipate duress and put in evidence in advance to destroy it by a pre-emptive strike. However, once some evidence has been adduced by the accused, the Crown must then negate the excuse with further evidence, if the need be.[79]

The accused must also present evidence on each essential elements of the excuse. The Crown, in turn, would have to present evidence to counter each element, unless the accused did not provide sufficient evidence to address each element. The Crown must prove beyond a reasonable doubt that the accused did not act under the alleged duress.[80]

The LRCC's proposal did not address the issue of the burden of proof and I do not believe that they needed to. The law appears to be clear on these issues and in no need of reform.

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77 *Supra*, footnote 12 at 624.

78 Borins J., *supra*, footnote 9 at 210 has opined that it is difficult to determine the precise test that should be applied to determine whether or not the accused has met the proper evidential burden, although perhaps any attempt to describe the quantity or quality of such evidence would become a semantic exercise of limited utility.

79 In R. v. Ingraham (1991), 66 C.C.C. (3d) 27 (Ont. C.A.) it was held that, where the defence has obtained fresh evidence of a prior association after the trial and has done so despite reasonable efforts to obtain that evidence before the trial, and the evidence counters the Crown's evidence that undermines the excuse of duress, such evidence should be admitted and be considered at a new trial.

80 *Supra*, footnote 9 at 207-11, and *supra*, footnote 2(a) at 392-3.

APPENDIX "A"
TEXT OF THE EXCUSE OF DURESS FROM THE COMMON LAW AND SELECTED JURISDICTIONS

THE COMMON LAW

Mr. Justice Smith of the Supreme Court of Victoria in R. v. Hurley and Murray, [1967] V.R. 526 (S.C. Victoria) at 543 provided the following working definition of duress. This definition appears to adequately summarize the common law version of the excuse.

> Where the accused has been required to do the act charged against him (i) under threat that death or grievous bodily harm will be unlawfully inflicted upon a human being if the accused fails to do the act and (ii) the circumstances were such that a person of ordinary firmness would have been likely to yield to the threat in the way the accused did and (iii) the threat was present and continuing, imminent and impending... and (iv) the accused reasonably apprehended that the threat would be carried out and (v) he was induced thereby to commit the crime charged and (vi) the crime was not murder, or any other crime so heinous as to be excepted from the doctrine and (vii) the accused did not, by fault on his part when free from the duress, expose himself to its application and (viii) he had no means, with safety to himself, of preventing the execution of the threat, then the accused in such circumstances at least, has a defence of duress.

AUSTRALIA: Crimes (Amendment) Act 1990

3U(1) Subject to subsection (3), a person is not guilty of an offence if the relevant act was done under duress.

(2) A person does an act under duress if:

(a) the person does the act because he or she knew or believed that:

(i) a threat had been made that, if carried out, would have resulted in the death of any person, serious physical injury being caused to any person or a serious sexual assault being made upon any person; and

(ii) if the act was not done, the threat would have been carried out before protection against the threat could be obtained from police or other authorities; and

(b) the person believed that there was no way, other than doing the act, of preventing the threat from being carried out; and

(c) a person of reasonable firmness would not, in the same circumstances, have resisted such a threat.

(3) Subsection (1) does not apply if:

(a) the person acted with the intent to kill another person; or

(b) the person knowingly, and without any reasonable excuse, exposed himself or herself to the risk of such a threat.

(4) Except where subsection (1) applies, a woman is not to be excused from criminal liability only because of the coercion of her spouse.

CANADA: Criminal Code of Canada
17. A person who commits an offence under compulsion by threats of immediate death or bodily harm from a person who is present when the offence is committed is excused from committing the offence if the person believes that the threats will be carried out and if the person is not a party to a conspiracy or association whereby the person is subject to compulsion, but this section does not apply where the offence that is committed is high treason or treason, murder, piracy, attempted murder, sexual assault, sexual assault with a weapon, threats to a third party or causing bodily harm, aggravated sexual assault, forcible abduction, hostage taking, robbery, assault with a weapon or causing bodily harm, aggravated assault, unlawful causing bodily harm, arson or an offence under sections 280 to 283 (abduction and detention of young persons).

CANADA: Law Reform Commission of Canada, "Recodifying Criminal Law", Report No. 31 (1987)
3(8) Duress. No one is liable for committing a crime in reasonable response to threats of immediate serious harm to himself or another person unless he himself purposely causes the death of, or seriously harms, another person.

NEW ZEALAND: draft Crimes Bill (1989)
31(1) A person is not criminally responsible for any act done or omitted to be done because of any threat of immediate death or serious bodily harm to that person or any other person from a person who is immediately able to carry out that threat.
(2) Sub-section (1) does not apply where the person who does or omits the act is a party to any association or conspiracy and knew at the time of joining that he or she could thereby become subject to such threats.

UNITED KINGDOM: English Law Commission, "A Criminal Code for England and Wales", Report No. 177 (1989)
42(1) A person is not guilty of an offence [to which this section applies] when he does an act under duress by threats.
[(2) This section applies to any offence other than murder or attempt to murder.]
(3) A person does an act under duress by threats if:
(a) he does it because he knows or believes
(i) that a threat has been made to cause death or serious personal harm to himself or another if the act is not done; and
(ii) that the threat will be carried out immediately if he does not do the act or, if not immediately, before he or that other can obtain official protection; and
(iii) that there is no other way of preventing the threat being carried out; and
(b) the threat is one which in all the circumstances (including any of his personal circumstances that affect its gravity) he cannot reasonably be expected to resist.
(4) It is immaterial that the person doing the act believes, or that it is the case, that any official protection available in the circumstances will or may be ineffective.
(5) Subsection (1) does not apply to a person who has knowingly and without reasonable excuse exposed himself to the risk of such a threat.
(6) A wife has no defence (except under this section) by virtue of having done an act under the coercion of her husband.

where in s.6... "personal harm" is defined to mean harm to body or mind and includes pain and unconsciousness.

TED STATES: American Law Institute, Model Penal Code (1962)

Duress

is an affirmative defense that the actor engaged in the conduct charged to constitute an offense
ıse he was coerced to do so by the use of, or a threat to use, unlawful force against his person
: person of another, that a person of reasonable firmness in his situation would have been
le to resist.

he defense provided by this Section is unavailable if the actor recklessly placed himself in a
ion in which it was probable that he would be subject to duress. The defense is also
ailable if he was negligent in placing himself in such a situation, whenever negligence suffices
ablish culpability for the offense charged.

is not a defense that a woman acted on the command of her husband, unless she acted under
coercion as would establish a defense under this Section. [The presumption that a woman
g in the presence of her husband is coerced is abolished.]

/hen the conduct of the actor would otherwise be justifiable under Section 3.02, this Section
not preclude such defense.

APPENDIX "B"
COMPARISON OF THE KEY ELEMENTS OF THE EXCUSE OF DURESS

	JURISDICTION						
ESSENTIAL ELEMENT	**THE COMMON LAW**[1]	**Australia Crimes (Amendment) Act 1990**	**Canada, Criminal Code of Canada**	**Canada, Law Reform Commission of Canada (1987)**	**New Zealand draft Crimes Bill (1989)**	**United Kingdom draft Criminal Code (1989)**	**United States Model Penal Code (1962)**
Nature of the compulsion	• threat • inducement	• threat	• threat	• threat	• threat	• threat	• use of, or a threat to use
Type of harm threatened	• death or grievous bodily harm... unlawfully inflicted	• death, serious physical injury, or serious sexual assault	• death or bodily harm	• serious harm	• death or serious bodily harm	• death or serious personal harm	• unlawful force
Timing of the threat	• present and continuing, imminent and impending	• if act was not done, the threat would have been carried out before protection against the threat could be obtained from police or other authorities	• immediate	• immediate	• immediately able to carry out that threat	• threat will be carried out immediately if he does not do the act or, • if not immediately, before he or that other can obtain official protection[2]	*not expressly stated*
Subject of the threat	• a human being	• any person	*not expressly stated*	• himself or another person	• that person or any other person	• [the person charged] or another	• his person or the person of another
Source of the threat	*not expressly stated*	*not expressly stated*	• from a person who is present when the offence is committed	*not expressly stated*	• from a person who is immediately able to carry out that threat	*not expressly stated*	*not expressly stated*
Cognitive requirement	• reasonably apprehended that the threat would be carried out	• knew or believed that (i) a threat had been made that, if carried out, would have resulted in the death of any person, serious physical injury being caused to any person or a serious sexual assault being made upon any person; and (ii) if the act was not done, the threat would have been carried out before protection against the threat could be obtained from police or other authorities • the person believed that there was no way, other than doing the act, of preventing the threat from being carried out	• believes that the threats will be carried out	*not expressly stated*	*not expressly stated*	• knows or believes (i) that a threat has been made to cause death or serious personal harm to himself or another if the act is not done; and (ii) that the threat will be carried out immediately if he does not do the act or, if not immediately, before he or that other can obtain official protection; and (iii) that there is no other way of preventing the threat being carried out	*not expressly stated*
Criteria for assessing the accused's response to the threat	• the accused reasonably apprehended that the threat would be carried out	• a person of reasonable firmness would not, in the same circumstances, have resisted such a threat	*not expressly stated*	• [a] reasonable response to threats	*not expressly stated*	• the threat is one which in all the circumstances (including any of his personal circumstances that affect its gravity) he cannot reasonably be expected to resist	• a person of reasonable firmness in his situation would have been unable to resist [the threat or use of force]
Exclusions	• the crime was not murder, or any other crime so heinous as to be excepted from the doctrine • the accused did not, by fault on his part when free from the duress, expose himself to its application • he had no means, with safety to himself, of preventing the execution of the threat	• the person acted with the intent to kill another person • the person knowingly, and without any reasonable excuse, exposed himself or herself to the risk of such a threat	• the person is not a party to a conspiracy or association whereby the person is subject to compulsion • high treason or treason, murder, piracy, attempted murder, sexual assault, sexual assault with a weapon, threats to a third party or causing bodily harm, aggravated sexual assault, forcible abduction, hostage taking, robbery, assault with a weapon or causing bodily harm, aggravated assault, unlawful causing bodily harm, arson or an offence under sections 280 to 283 (abduction and detention of young persons)	• unless he himself purposely causes the death of, or seriously harms, another person	• where the person who does or omits the act is a party to any association or conspiracy and knew at that time of joining the he or she could thereby become subject to such threats	• murder or attempt to murder[3] • a person who has knowingly and without reasonable excuse exposed himself to the risk of such a threat	• if the actor recklessly placed himself in a situation in which it was probable that he would be subject to duress • if he was negligent in placing himself in such a situation, whenever negligence suffices to establish culpability for the offense charged
Effect of the excuse	• the accused in such circumstances at least, has a defence of duress.	• a person is not guilty of an offence	• a person ... is excused from committing the offence	• no one is liable for committing a crime	• a person is not criminally responsible for any act done or omitted to be done	• a person is not guilty of an offence	• it is an affirmative defense

[1] As stated by Smith, J. in R. v. Hurley and Murray, [1967] V.R. 526 at 543.

[2] This provision is qualified by: "It is necessary that the person doing the act believes, or that it is the case, that any official protection available in the circumstances will or may be ineffective."

[3] The English Law Commission originally felt that there should be no exceptions to the application of duress, but in apparent deference to the House of Lords' decision in Howe, they included this exception in their proposal, but stated at 229: "we place this aspect of the clause within square brackets, as an indication that our recommendation has not been abandoned."