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## COMMON LAW DEFENCES

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1. Section 8(3) of the Criminal Code states:

Every rule and principle of the common law that renders any circumstance a justification or excuse for an act or a defence to a charge continues in force and applies in respect of proceedings for an offence under this Act or any other Act of Parliament except insofar as they are altered by or are inconsistent with this Act or any other Act of Parliament.

2. Section 8(3) has been in the Criminal Code since its enactment in 1892. This provision was necessary since the Canadian codifiers made no pretense to attempting to comprehensively codify all existing common law defences. The Canadian codifiers relied upon the view of the English Draft Criminal Code Commissioners of 1880 who were of the view that it would be exceedingly difficult to anticipate every future defence with acceptable precision.

3. Sir James Fitzjames Stephen favoured this approach for the following reasons:

[Quoted in G.L. Williams, "Necessity" (1978), Crim. L.Rev. at 129-30]

It appears to me that the two proposed enactments stand on entirely different principles. After the experience of centuries, and with a Parliament sitting every year, and keenly alive to all matters likely to endanger the public interests, we are surely in a position to say the power of declaring new offences shall henceforth be vested in Parliament only. The power which has at times been claimed for the judges of declaring new offences cannot be useful now, whatever may have been its value in earlier times.

On the other hand it is hardly possible to foresee all the circumstances which might possibly justify or excuse acts which might otherwise be crimes. A long series of authorities have settled certain rules which

can be put into a distinct and convenient form, and it is of course desirable to take the opportunity of deciding by the way minor points which an examination of the authorities shows to be still open. In this manner rules can be laid down as to the effect of infancy, insanity, compulsion, and ignorance of law, and also as to the cases in which force may lawfully be employed against the person of another; but is it therefore wise or safe to go so far as to say that no other circumstances than those expressly enumerated shall operate by way of excuse or justification for what would otherwise be a crime? To do so would be to run a risk, the extent of which it is difficult to estimate, of producing a conflict between the Code and the moral feelings of the public. Such a conflict is upon all possible grounds to be avoided. It would, if it occurred, do more to discredit codification than anything which would possibly happen, and it might cause serious evils of another kind. Cases sometimes occur in which public opinion is at once violently excited and greatly divided, so that conduct is regarded as criminal or praiseworthy according to the sympathies of excited partisans. If the Code provided that nothing should amount to an excuse or justification which was not within the express words of the Code, it would, in such a case, be vain to allege that the conduct of the accused person was normally justifiable; that, but for the Code, it would have been legally justifiable; that every legal analogy was in its favour; and that the omission of an express provision about it was probably an oversight. I think such a result would be eminently unsatisfactory. I think the public would feel that the allegations referred to ought to have been carefully examined and duly decided upon.

To put the whole matter very shortly, the reason why the common law definitions of offences should be taken away, whilst the common law principles as to justification and excuse are kept alive, is like the reason why the benefit of a doubt should be given to a prisoner. The worst result that could arise from the abolition of the common law offences would be the occasional escape of a person morally guilty. The only result which can follow from preserving the common law as to justification and excuse is, that a man morally innocent, not otherwise protected, may avoid punishment.

4. Section 8(3) has been relied upon in Canada for uncodified defences such as intoxication, automatism, mistake of fact, officially induced error, necessity, entrapment, de minimis, due

diligence for strict liability offences, and the common law defence of duress for parties to an offence other than the principal offender.

5. The advantage of section 8(3) is that it has facilitated a certain degree of growth in the area of common law defences. On the other hand, such a provision obviously detracts from one of the main purposes of codification - a comprehensive statement of the general principles of criminal law.

6. The Law Reform Commission of Canada in Report No. 31 (at p. 28) states that:

The new Code aims to include them all [substantive defences] in the interest of comprehensiveness. Defences of a procedural nature, however, such as entrapment, are left to be dealt with in the Code of Criminal Procedure.

The danger of this approach is exemplified by the fact that although the Commission purports to be comprehensive, they do not for example include a defence of *de minimis* (which perhaps they consider to be a procedural defence).

7. The Law Reform Commission does add (at p. 28) that "it remains open to the courts to develop other defences insofar as is required by the reference to 'principles of fundamental justice' in section 7 of the Charter." In the same vein, Professor Stuart in *Canadian Criminal Law* states (at p. 386):

The question of whether we should still continue to recognize common law defences now appears to be academic. Even if all defences were to be codified in a new Criminal Code, as the Law Reform Commission of Canada would appear to suggest, the Canadian Charter of Rights and Freedoms would still impose a mandate on courts to recognize defences in accordance with "principles of fundamental justice". Common law wisdom would no doubt be persuasive

whenever the courts encountered a gap or weakness in a defined defence or considered the possibility of a new defence such as those of old age, the Vietnam Syndrome or pre-menstrual tension.

8. I agree with Professor Stuart's comments. We could omit s. 8(3) and not include any other residual defence provision. However for the sake of comprehensiveness within the Criminal Code itself, I would favour the inclusion of a provision such as the following:

**No person shall be convicted of an offence if such conviction would in all the circumstances of the case constitute a violation of the principles of fundamental justice which violation cannot be reasonably justified in a free and democratic society.**