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Article 9

Paquette v. The Queen

Edward Claxton

Paquette v. *The Queen*

By EDWARD CLAXTON*

The case of *Paquette* v. *The Queen*[1] gave the Supreme Court of Canada the rare[2] opportunity to review the defence of duress in the case of murder. In his judgment, Martland J., for the court, threw a new light on the defence; however, the short reasons did not fully examine the jurisprudential basis for the decision. In view of the potential impact of this decision, a broader examination of the case is required.

The facts of the case are not complicated. Clermont, an acquaintance of the accused, telephoned the accused for a ride because his own car was broken down. Paquette obliged.

In his statement to the police, Paquette set out the events which led to a murder charge:

> When [Clermont] asked me where I used to work I told him the Pop Shop, then he told me to drive him there. I asked him why, he said he wanted to rob the place. When I told him I didn't want any part of it, he pulled his gun out, he told me he was going to blow my head off if I didn't go. So I didn't have any choice they [Clermont and Simard] made me drive to this place in Hull where they picked up the rifle. One guy picked up the rifle, the other stayed in the car. So then after that we drove to the Pop Shop and he wanted me to wait beside the building and I told him no, it was too close, I would park near where the body shop was. Then when they left the car and went into the store, about 15 seconds later, this other car pulled in the yard and I seen them, the people in the other car took off just as fast as they come. When I saw that I left them. They had told me if I didn't wait for them there they would catch up with me later. Then I didn't know what to do I was nervous, I went around the block once, then I seen them come running one had a rifle and a bag, the other guy, I didn't see if he had the pistol in his hand or not, he was running too. I was going about 15 mph, one guy, the one with the rifle came to grab the door, when I saw this I took off. He hit my car when I took off. I kept going straight on Belfast and I went about a quarter mile, I made a U-turn and I came back to see what was going to happen and on the way back, just at the railway tracks they both tried to stop me but I kept going, then I met the police car and I got scared and I took off. That's it.[3]

During the course of the robbery a customer in the store was shot and killed. The application of the *Criminal Code* s. 213,[4] the felony murder rule,

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* Mr. Claxton is currently articling in Ottawa.

[1] (1976), 70 D.L.R.(3d) 129; 30 C.C.C.(2d) 417.

[2] The last and, apparently, only case of a similar nature to reach the Supreme Court of Canada was *Dunbar* v. *The Queen*, [1936] 4 D.L.R. 737; 67 C.C.C. 20.

[3] Reproduced from police statement, March 19, 1973, quoted in *R.* v. *Paquette* (1970), 5 O.R. (2d) 1 at 4 (C.A.).

[4] R.S.C. 1970, c. C-34, as am. R.S.C. 1970, 11, 44, s. 213.

and s. 21(2),[5] the common intention rule, led to the charge of murder against Paquette, along with Simard and Clermont.

Simard and Clermont eventually pleaded guilty, but Paquette pleaded not guilty, relying on duress as a defence. He was acquitted at trial. Houlden J. had charged the jury:

> . . . if Paquette joined in the common plot to rob the Pop Shoppe under threats of death or grievous bodily harm, that would negative his having a common intention with Simard to rob the Pop Shoppe, and you must find Paquette not guilty.[6]

The charge clearly went against the statement of law in *Dunbar* v. *The King*[7] where it was held that duress in these circumstances was a mere motive for intentional acts and therefore could not be said to negative common intent. The accused's common intention was to be found in his objective actions not in his subjective reasons.

The Crown held the view that the *Dunbar* case could not be distinguished and appealed. The Court of Appeal

> . . . held that such evidence was relevant on the issue as to whether the Crown had proved the intent prescribed by s. 21(2) and was not merely a question of motive. . . . However, in view of [their] reading of the majority judgment in the *Dunbar* case, [they felt] precluded from holding otherwise than that the learned trial Judge did err in this case in leaving to the jury that the evidence of duress or compulsion was relevant to the defence of the accused on the charge of murder.[8]

A new trial was ordered. The defence took the issue to the Supreme Court of Canada. In giving judgment for the Court, Martland J. did not waste many words in disposing of the "motive" analysis of s. 21(2) which had carried the day in *Dunbar*. He stated, "I am not in agreement with this view and I am of the opinion that it should not be followed."[9] The Supreme Court does not often reverse itself with such unequivocal language. The jury's verdict was restored.

Initially, the issue in this case appears to be whether the defence of duress will avail in a charge of murder, but upon reflection (which is borne out by the course of argument in the *Paquette* case) it becomes obvious that the pivotal question is whether the accused was a party to the crime. This is so because of the nature of the *Criminal Code* and in particular s. 21. Paquette was charged as a party to the offence under s. 21(2) in that he formed an intention in common with the co-accused to commit the offence of

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[5] Id., s. 21(2). The section reads:

> 21(2) Where two or more persons form an intention in common to carry out an unlawful purpose and to assist each other therein and any one of them, in carrying out the common purpose, commits an offence, each of them who knew or ought to have known that the commission of the offence would be a probable consequence of carrying out the common purpose is a party to that offence.

[6] Charge to the jury, Appeal Book, Vol. II at 369-70. Reproduced in Appellant's Factum at 5.

[7] *Supra*, note 2.

[8] *R.* v. *Paquette*, *supra*, note 3 at 8 *per* Gale C.J.O., Dubin and Martin JJ.A.

[9] *Supra*, note 1 at 135 (D.L.R.); 423 (C.C.C.).

robbery, and was charged with murder under s. 213, the felony murder rule. The relevance of s. 17[10] on duress, and its interaction with s. 21 on common intention will depend largely on the interpretation of the scope and effect of s. 17. With this in mind, it is clear that duress is a sub-issue which may be applied at two stages.

At the first stage, the accused may plead compulsion as a defence to having formed an intention in common. If he succeeds, he will not be a party to the crime and that is the end of the matter. If he fails at this stage, although he will be a party, he may, as stage two, raise duress as a defence to the substance of the charge. It seems unlikely that an accused would fail at stage one and succeed at stage two, but the distinction must be maintained if the law is to be coherent.

As pointed out earlier, the "motive" analysis applied to s. 21(2) by the Supreme Court in *Dunbar* was rejected in *Paquette*. Martland J. did not canvass the reasons for this rejection, but was satisfied with setting out what he saw as the proper interpretation of s. 21(2).[11]

Both sides of the issue were set out in *Dunbar*. In this case, the accused, who by his own account was not a party to a conspiracy, was forced at gunpoint to drive a car to a bank, where, in the course of a robbery, a teller was shot and killed. The accused pleaded duress but the trial judge did not let it go to the jury. The Supreme Court upheld the conviction on the grounds that a party to murder is, under the provisions of (the now) s. 17, not permitted to plead duress.

The minority view of the "party to crime" question, as expressed in Crocket J.'s dissent, was that duress operated to negative the common intention required by s. 21(2). The logic was straightforward. *Prima facie*, the accused had gone along with the plan to commit the offence, but his assistance was obtained by threats of violence. It was contended that Dunbar, since he was threatened, had "the right to set up the threat of death as an excuse for his act."[12] If the jury accepted this excuse, then intention in common, a basic element of the offence, could not be proved. The result was that in law the accused was not a party to the crime and could not have engaged his criminal liability. Since he was not a party, the defence of duress, so far as it related to murder, became irrelevant to the issue.

On the other hand, the majority view, expressed in Hudson J.'s judgment, was that the threats of violence were a mere motive for participation.

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[10] *Supra*, note 4, s. 17. The section reads:

> 17. A person who commits an offence under compulsion by threats of immediate death or grievous bodily harm from a person who is present when the offence is committed is excused for committing the offence if he believes the threats will be carried out and if he is not party to an association whereby he is subject to compulsion, but this section does not apply where the offence that is committed is treason, murder, piracy, attempted murder, assisting in rape, forcible abduction, robbery, causing bodily harm or arson.

[11] *Supra*, note 1 at 133 (D.L.R.); 421 (C.C.C.).

[12] *Supra*, note 2 at 740 (D.L.R.).

The accused's intentions were made plain by his objective conduct; his reason or motive for so acting was irrelevant. The logic from this point on has a grim simplicity: the accused (by his objective conduct) had formed an intention in common to commit a crime; the accused had therefore engaged his criminal liability; the accused relied on s. 17 for a defence; the section excludes this crime from its protection — therefore, the accused was guilty.

As noted earlier, Martland J. specifically rejected this second view[13] but did not explain why this "motive" analysis should be rejected. Unless there is solid argument for rejecting this view, counsel faced with a similar case may be left in a quandry. The jurisprudential wind may change and the Court may once again rely on the "motive" analysis.

There are two reasons for rejecting Hudson J.'s "motive" analysis. First, it defeats the policy reason for allowing the plea. The policy was set forth in *Director of Public Prosecutions for Northern Ireland* v. *Lynch*.[14] Lord Edmund-Davies pointed out that allowing the plea did not condone the accused's action; it merely excepted the conduct from condemnation and punishment. The judicial and no doubt social policy for allowing the accused to be exculpated is that a duty of heroism may be required only in the most extreme circumstances.

The corollary of this is that duress does not act to overbear the will (i.e., become a motive for actions) but it is an excuse for intentional actions. This is important to the policy consideration because the measure of the duty of heroism will be based on the balance of harm. The issue which will be argued by counsel and deliberated on by the trier of fact will be whether the harm avoided by submission to compulsion is substantial enough to excuse the intentional conduct. The motive analysis ignores the balance of harm and therefore defeats the whole policy.

Second, by introducing the amorphous motive and intention concepts, the issues are more likely to be clouded than resolved. The problem is best illustrated by *Rex* v. *Steane*,[15] a case which succeeded in saddling the English courts with a confused analysis of the elements of the defence of duress. Steane had broadcast radio programs from Germany contrary to the wartime regulations[16] relating to assisting the enemy. Steane pleaded duress on the basis that his family, living with him in Germany, would have been killed if he had not made the broadcasts.

Rather than weighing the gravity of the threat to assess whether a person of ordinary character should be excused, the court found that protecting his family from harm was a motive, but because motive provides no justification in law, it was necessary for the court to equate this motive with intent. The court then directed the jury that the accused did not have the requisite intent because his actions were overborne by fear.

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[13] See text accompanying note 9, *supra*.

[14] [1975] A.C. 653; [1975] 1 All E.R. 913 (H.L.N.I.).

[15] [1947] K.B. 997; [1947] 1 All E.R. 813.

[16] Defence (General) Regulations 1939, reg. 2A, S.R. & O. 1939/927.

On this analysis one is always faced with the metaphysical question of whether an accused's reason for his action is a mere motive, as in *Dunbar*, or is related to intent, as in *Steane*. These imponderables are best left alone. The rationale of *Steane* was "much pressed"[17] in *D.P.P.* v. *Lynch*, but Lord Simon dismissed it saying, "It was a hard case; but in several ways it seems to me to be an unsatisfactory authority .... the direction to the jury was misleading and inadequate."[18]

Unfortunately, the "motive" analysis in the *Dunbar* case may remain a skeleton in the closet because Martland J., by neglecting to set out his reasons for rejecting the analysis, has failed to lay it to rest.

The second major issue dealt with in the *Paquette* case was the scope and effect of s. 17 of the *Criminal Code*.[19] It has appeared for some time that any reliance on the common law defence of duress which might have been allowed under s. 7(3),[20] has been precluded by Ritchie J.'s statement in *The Queen* v. *Carker* that, "... for an offence under the *Criminal Code* the common law rules and principles respecting 'duress' as an excuse or defence have been codified and exhaustively defined in s. 17...."[21] It seems to have been accepted that this statement applied to all parties to any offence. The *Paquette* case exploded this idea.

Mr. Justice Martland took a strict approach to the interpretation of the section. Examining the section he noted that by its terms, the section provides an excuse for those who "commit" a crime.[22] Section 21 sets out who is a *party* to an offence. By the terms of the section, the following may be parties: anyone who (1) a) actually commits, b) aids, c) abets or, (2) forms an intention in common to commit a crime. Comparing the two sections it becomes obvious that s. 17 applies only to s. 21(1)(a) because it relates to persons who "commit" a crime and not to "parties." It follows that ss. 21(1)(b),(c) and 21(2) are governed by the common law defences as permitted by s. 7(3). Martland J. clearly stated this conclusion:

> In my opinion, s. 17 codifies the law as to duress as an excuse for the actual commission of a crime, but it does not, by its terms, go beyond that.[23]

This development will stifle the "motive" analysis if it should arise in the future. Should a court refuse to follow Martland J.'s analysis of s. 21 and,

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[17] *Supra*, note 14 at 699 (A.C.); 942 (All E.R.).

[18] *Id.*

[19] *Supra*, note 10.

[20] *Supra*, note 4, s. 7(3). The section reads:

> (3) 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 the Parliament of Canada, except in so far as they are altered by or are inconsistent with this Act or any other Act of the Parliament of Canada.

[21] *The Queen* v. *Carker*, [1967] S.C.R. 114 at 117; 2 C.R.N.S. 16 at 17; 2 C.C.C. 190 at 191.

[22] *Supra*, note 1 at 133 (D.L.R.); 421 (C.C.C.).

[23] *Id.*

adopting the "motive" analysis hold that a person who aids, abets, or forms an intention in common cannot raise duress as a defence to the "party to crime" stage of the offence, the full range of the common law defence will still be open at the "substantive" stage because s. 17 has now been confined to cases where the party actually commits the offence.

Following his remarks on the scope of s. 17, Martland J. attempted to distinguish *Paquette* from two other "duress" cases.

> The appellant, in the present case, did not himself commit the offence of robbery or of murder. *He was not present* when the murder occurred, as was the case in *R.* v. *Farduto* and *R.* v. *Warren*.[24] (emphasis added)

Surely presence is irrelevant. Clearly both Farduto, who had provided a razor to the murderer, and Warren, who assisted his brother in disposing of the body and other evidence of the murder, were aiders or abettors.

Distinguishing these cases on the basis of "presence" is a most unfortunate digression which can only confuse the issue. It should have been pointed out that both accused, as parties to offences under s. 21(1)(b) or (c) were in a position *similar* to Paquette and *should have* had open to them the common law defences.

The development of the common law defence of duress which was arrested by Ritchie J.'s judgment in *The Queen* v. *Carker*[25] has been given a new lease on life by the *Paquette* decision. While the judgment of the Court in *Paquette* did not fully set out the nature or scope of the defence, the whole question of duress at common law was dealt with recently by the House of Lords in *D.P.P.* v. *Lynch*,[26] of which Mr. Justice Martland approved. In view of the fact that *Lynch* was only decided by a three to two majority and further that the common law relating to duress will, in the future, be important in Canada, this matter should be more fully explored.

The starting point must be with Hale:

> Again, if a man be desperately assaulted, and in peril of death, and cannot otherwise escape, unless to satisfy his assailant's fury he will kill an innocent person then present, the fear and actual force will not acquit him of the crime and punishment of murder, if he commit the fact; for he ought rather to die himself, than kill an innocent . . .[27]

An examination of this statement in the context of Hale's overall commentary leads to the conclusion that duress may be a defence in cases other than murder so long as: there is a threat of grievous injury, the person threatened has reason to believe the threat is real and immediate (i.e., the fear is well founded), there is no method of escape, and the crime will be carried out immediately. With this in mind, the fuller examination of the common law principles can begin.

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[24] *Id.*

[25] *Supra*, note 21.

[26] *Supra*, note 14.

[27] Hale, *Historia Placitorum Coronae. The History of the Pleas of the Crown*, Vol. 1 (1736) at 51.

There has been no dearth of opinion by the text writers. Stephen[28] is emphatic that duress should not even be admitted as a defence. He argues that when a person is "placed between two fires,"[29] the needs of society must be placed first or criminals would be able to set up a countervailing force through which their agents, acting under duress, could act with impunity. His position is clear:

> [I] think that compulsion by threats ought in no case whatever to be admitted as an excuse for crime, though it may operate in mitigation of punishment in most though not all cases.[30]

Stephen's views had a great influence on the Royal Commission[31] which studied the criminal law of England and put forward the *Draft Code* of 1879.

His approach to the defence of duress was given effect in the *Draft Code* as s. 23. Although the *Code* was never adopted in the United Kingdom, it has been implemented with slight modifications in many Commonwealth jurisdictions; s. 23 of the *Draft Code* appears as s. 17 of the Canadian *Criminal Code.*

It is apparent that the Canadian Parliament did not wholeheartedly adopt Stephen's philosophy, although the list of exceptions indicates a general sympathy for his views as far as commission of more serious crimes is concerned.

On the other side, some legal scholars do not accept the proposition that the strict approach constitutes an accurate reflection of the common law. The opinion of Glanville Williams,[32] for example, is that duress is a defence to most crimes save murder. With respect to aiders and abettors he says:

> The defence should likewise apply if the accused's part in the killing, though sufficient for complicity apart from duress, was nominal or minor, and particularly where his resistence, while resulting in his own death, would not have saved the victim.[33]

Clearly, text writers have divergent views, the strictest school holding that duress is only a mitigating factor while more liberal writers would only exclude it as a defence to murder by principals.

There is not a great deal in the way of direct judicial authority since the decisions of many ordinarily common law jurisdictions are coloured by codified principles. However, the judgments in a number of old cases[34] show that

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[28] J. Stephen, *History of the Criminal Law of England,* Vol. 2 (New York: Burt Franklin, 1964) at 107 ff.

[29] *Id.* at 107.

[30] *Id.* at 108.

[31] *Report of the Royal Commission Appointed to Consider the Law Relating to Indictable Offences,* (1879; C. 2345).

[32] G. Williams, *Criminal Law: The General Part* (2d ed. London: Stevens & Sons, 1961).

[33] *Id.* at 761.

[34] *M'Growther's Case* (1746), Fost. 13; 168 E.R. 8; 18 St. Tr. 391. *Oldcastle's Case* (1419), 1 Hale P.C. 50; 1 East P.C. 70; *The King* v. *Stratton* (1779), 1 Dougl. 239; 99 E.R. 156.

the defence of duress was available, although not always successfully pleaded, in treason at least. Lord Chief Justice Denman broadly disagreed in the murder case of *R.* v. *Tyler and Price*.[35] He charged the jury that,

> . . . yet that circumstance [i.e., fear of personal violence] has never been received by the law as an excuse for his crime . . . the apprehension of personal danger does not furnish any excuse for assisting in doing any act which is illegal.[36]

The earlier cases are evidence against such a proposition. Lord Denman's pronouncement is an obvious excess, no doubt prompted by an aversion to the brutal manner[37] in which the deceased was murdered on the command of a man who was undoubtedly insane.

The present state of the law is discussed in a number of more contemporary cases. First, Murnaghan J., in *Attorney-General* v. *Whelan*[38] after an extensive review of the texts and old cases concluded:

> It seems to us that threats of immediate death or serious personal violence so great as to overbear the ordinary power of human resistance should be accepted as a justification for acts which would otherwise be criminal. The application of this general rule must however be subject to certain limitations. The commission of murder is a crime so heinous that murder should not be committed even for the price of life and in such a case the strongest duress would not be any justification. We have not to determine what class of crime other than murder should be placed in the same category. . . . Where the excuse of duress is applicable it must further be clearly shown that the overpowering of the will was operative at the time the crime was actually committed, and, if there were reasonable opportunity for the will to reassert itself, no justification can be found in antecedent threats.[39]

While this case indicated that murder is excluded, the reference is *obiter* because the issue was whether the defence was available on a charge of receiving stolen goods. Aside from indicating that duress was a justification for otherwise criminal acts, the case is helpful in so far as it sets out the requirements: that the threat be great, that the duress must be operative when the crime is actually committed and, the person must take reasonable opportunities to escape.

In an Australian case[40] where the accused pleaded duress to the charge of aiding and abetting escapees, Mr. Justice Smith set out the following test:

> Where the accused has been required to do the act charged against him i) under a threat that death or grievous bodily harm will be inflicted unlawfully 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

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[35] (1838), 8 Car. & P. 616; 173 E.R. 643.

[36] *Id.* at 620-21 (Car. & P.); 645 (E.R.).

[37] After John Thom, the principal, had shot the deceased, he ordered his men to hack the deceased with swords and then to throw the still living body into a ditch. Thom was later killed in a raid by the military. It may also be relevant that the accused had probably joined Thom because they were attracted to his promises, not in fear for their lives; they also had ample opportunity to leave him. The accused were held guilty of murder as principals in the first degree.

[38] [1934] I.R. 518 (C.A.).

[39] *Id.* at 526.

[40] *R.* v. *Hurley and Murray*, [1967] *V.R.* 526 (C.A.).

> threat in the way the accused did and iii) the threat was present and continuing, imminent and impending (as previously described) 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) that the crime was not murder, nor 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 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.[41]

This is a very extensive list of the requirements which, despite its being a dissenting opinion, fairly sets out the requirements essential to establishing the defence. The majority decision was based primarily on matters of fact related to the voluntary participation of the accused, which left Mr. Justice Smith's test unimpeached.

In *R.* v. *Kray*,[42] one Barry was charged with murder in the second degree because he carried a gun to the scene of the murder. His defence was that he brought the gun to the murderer out of fear for his life if he did not do as ordered. On a technical point which concerned the admissibility of defence evidence, the court allowed that the evidence in question was admissible to prove duress. It was not argued that duress could not be argued as a defence. Lord Justice Widgery simply stated that the court was satisfied with the basis on which the trial judge left the defence to the jury, namely, "that by reason of threats he was so terrified that he ceased to be an independent actor . . ."[43] In a rather round-about fashion, the Court of Appeal accepted the proposition that duress is an exculpatory defence to a charge of murder in the second degree.[44]

More explicitly, in the joint appeal of perjury convictions in *R.* v. *Hudson*, *R.* v. *Taylor*,[45] Widgery L.J. expressed the opinion that duress is a defence to all crimes, except possibly treason and murder as a principal. He was clearly wrong about treason, as the cases both ancient[46] and modern[47]

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[41] *Id.* at 543.

[42] (1969), 53 Cr. App. Rep. 569. *N.B.* this is the only unabridged report. The other reports (e.g., [1970] 1 Q.B. 125) do not contain the relevant passages.

[43] *Id.* at 578.

[44] In the case of *R.* v. *Hercules*, [1954] 3 S.A. 826 (C.A.), it was held that duress goes to mitigation of sentence where a person is guilty of murder in the second degree. The court in that case relied on Roman-Dutch civil law commentators so that the decision, although nominally in a common law jurisdiction, is not of much weight.

In an appeal to the Privy Council in *Sephakela* v. *The Queen*, [1954] High Comm. Terr. L.R. 60; *Times*, July 14, 1954; (partly reported) 1954. *Crim. L. Rev.* 723 (P.C.), on the question of whether duress was available in the case of assisting in a ritual murder, the Board apparently assumes the defence is available. Lord Keith says,

> . . . [T]he evidence fell far short of what was necessary in law to establish such a defence . . . there was nothing in the evidence on which it could be held that the appellant was in such fear of death or serious bodily injury as to establish the defence of compulsion (at 63-64 (High Comm. Terr. L.R.); 724 (*Crim. L. Rev.*)).

[45] [1971] 2 Q.B. 202 at 206; [1971] 2 All E.R. 244 at 246 (C.A.).

[46] *Supra*, note 34.

[47] *Supra*, note 15, *R.* v. *Purdy* (1946), 10 *J. Crim. L.* 182.

show. He was ready to admit, and on the authorities reviewed here it seems rightly so, that duress may be a defence to murder in the second degree.

Chief Justice Bray of the Australian Supreme Court, after an extensive review of the text writers and case law, also came to the conclusion that duress may be pleaded as an exculpatory defence. The majority opinion in this case,[48] that duress is a mitigating factor only, cannot, in the Chief Justice's view, be supported by the authorities. He remarked:

> I can only repeat that in my view the trend of later cases, general reasoning, and the express authority of the Privy Council in *Sephakela's Case*[49] prevent the acceptance of the simple proposition that no type of duress can ever afford a defence to any type of complicity in murder. I repeat also that as at present advised I do not think duress could constitute a defence to one who actually kills or attempts to kill the victim.[50]

The decision of the South African courts in *State* v. *Goliath*[51] stretches the concept to the limit. The court, after much consideration of common law and Roman-Dutch authority, came to the conclusion that duress must be admitted as a complete defence, not merely as a mitigating factor. The case was one of assisting in murder, and all but one of the Justices concurred in Mr. Justice Rumpff's opinion that the matter turned on reasonableness in the circumstances of the particular case. The court indicated that the defence could be raised in respect of murder by a principal. Mr. Justice Rumpff noted:

> It is generally admitted, among others by writers on ethics, that for the ordinary man his own life is, in general, of greater importance than the life of another. Only he who is endowed with the quality of heroism will purposely give his life for another. For the criminal law to maintain that duress should never avail as a defence to the charge of murder would therefore be to require, irrespective of the circumstances, that a man who had killed another under duress should have conformed to a standard higher than that of the average man.[52]

The one dissenting judge would have followed *R.* v. *Hercules*[53] and admitted the defence as mitigating only. The case appears to be a departure in so far as it is the only decision from which it can be inferred that the defence would avail even in murder by a principal.

This departure, which had also been raised in *Sephakela*'s case, has been rejected by the Privy Council. In *Abbott* v. *The Queen*,[54] an appeal from Trinidad and Tobago, their Lordships held by a three to two majority that the defence could not be pleaded by a person charged in the first degree.

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[48] *The Queen* v. *Brown and Morley*, [1968] S.A.S.R. 467 (C.A.).

[49] *Supra*, note 44.

[50] *Supra*, note 48 at 499.

[51] [1972] 3 S.A. 1.

[52] *Id.* at 25. Translation by C. Turpin, [1972A] *Camb. L.J.* 204. See also the translation used by Lord Edmund-Davies in the *Lynch* case, *supra*, note 14 at 711-12 (A.C.); 953 (All E.R.).

[53] *Supra*, note 44.

[54] [1976] 3 All E.R. 140 (P.C.).

Lords Wilberforce and Edmund-Davies, who had reserved judgment on this point in *D.P.P.* v. *Lynch*,[55] dissented. In *Lynch*, Lord Wilberforce had said,

> So I find no convincing reason, on principle, why, if a defence of duress in the criminal law exists at all, it should be absolutely excluded in murder charges whatever the nature of the charge; hard to establish, yes, in case of direct killing so hard that perhaps it will never be proved: but in other cases to be judged, strictly indeed, on the totality of facts.[56]

Although the majority in *Abbott* did not accept this view, the policy enunciated by Lord Wilberforce seems both just and reasonable.

In every case, the issue which should face the trier of fact is the balance of harm. The measure of culpability should be whether, given the circumstances, the threat was of a nature that an ordinary person would have submitted to the threat. Surely the sensibility of the jury is such that they can, given the facts, discern whether the excuse is acceptable. Indeed, the jury, reflecting community mores, is probably the best judge of the plea of duress.

The exposition of the case law shows a division of judicial opinion, but the main thrusts are clear: the defence is exculpatory (i.e., provides a complete defence and excuses the crime); the defence is open in all cases except possibly murder by a person who actually commits the offence; and, the measure of culpability is the balance of harm.

The *Paquette* case is significant for three main reasons. First, it disposes of the "motive" analysis of duress as it relates to parties to an offence under s. 21(2). Second, it confines the operation of s. 17 to those who are parties to the crime by virtue of s. 21(1)(a) — i.e., persons who actually commit an offence. Third, it reopens the common law defence of duress to those who are parties to crime by virtue of s. 21(1)(b) and (c) and 21(2) — i.e., persons who are aiders, abettors or form a common intention to commit a crime.

The scope of s. 17 has been confined, and it is clear from the review of the common law that the statutory list of exceptions is much longer than the common law list which now appears to include only murder. There is no reason to believe that s. 17 is now a codification of the common law. It is time for the legislature to make the statutory exceptions more consonant with the common law and to allow the plea to be argued on its proper basis — balance of harm. The *Criminal Code* should not be a straight jacket binding the courts to unjust results for, in the words of Lord Morris, "[A]ny rational system of law should take fully into account the standards of honest and reasonable men."[57]

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[55] *Supra*, note 14 at 685 (A.C.); 930 (All E.R.) *per* Lord Wilberforce; at 714 (A.C.); 955 (All E.R.) *per* Lord Edmund-Davies.

[56] *Id.* at 681 (A.C.); 927 (All E.R.).

[57] *Id.* at 670 (A.C.); 917 (All E.R.).