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http://digitalcommons.osgoode.yorku.ca/sclr/vol67/iss1/14

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R. v. Ryan and the Principle of Moral Involuntariness

Kimberley Crosbie

I. INTRODUCTION

In R. v. Ryan, the Supreme Court of Canada overturned an acquittal premised on the defence of duress. Ms. Ryan, who by the time of the appeal was using her family name, Doucet, had been subjected to a "reign of terror" by her husband and feared that, after their separation, he would carry through on his long-standing threats to kill both her and their daughter. She attempted to hire someone to kill him before he could kill her. This became known to the police and an undercover officer met with Ms. Doucet under the pretence that he would kill her ex-husband. She was subsequently charged with counselling the commission of an offence not committed contrary to section 464(a) of the Criminal Code.1

Ms. Doucet raised the defence of duress at her trial and was acquitted.2 The Nova Scotia Court of Appeal dismissed the Crown’s appeal.3 However, the Supreme Court of Canada reversed this appellate decision, holding that the defence of duress had no application to the facts at bar.4 Despite this ruling, a majority of the Court refused to order a new trial. They held that the ordeal Ms. Doucet had suffered and the change in position by the Crown from trial to appeal resulted in one of those clearest of cases in which a stay of proceedings was required.5

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5 Ryan SCC, id., at paras. 34-35.
The Supreme Court’s decision on the defence of duress afforded much-needed clarity to the law. In many respects, the decision was consistent with past jurisprudence and was logically coherent. However, Ryan left much to be desired with respect to those who may find themselves in the same situation as Ms. Doucet. The Court could have, with equal clarity and logic, upheld the decision of the Nova Scotia Court of Appeal. Ms. Doucet, on all the facts accepted by the trial judge, was in a truly terrible situation with no way out. Her actions were found, by both the Nova Scotia Supreme Court and the Court of Appeal, to be “morally involuntary” — the principle that underlies the defence of duress and is embedded in section 7 of the Canadian Charter of Rights and Freedoms as a principle of fundamental justice. It dictates that “morally involuntary” conduct should not be punished. That there was no legal “excuse” for Ms. Doucet’s morally involuntary actions was, to many, as will be discussed below, an affront to justice.

For the next Ms. Doucet, the defence of duress is off the table. However, with the proclamation of the new self-defence provisions in the Criminal Code, a new interpretation of a traditional defence may afford further safeguards for vulnerable women in similar plights. In this paper, I consider both the procedural history and the underlying facts of Ryan, and offer a critical assessment of the Supreme Court’s decision. In Part II, I provide an overview of facts as found by the trial judge. I am

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8 Criminal Code, s. 34 (in force March 11, 2013).
9 The Ryan decision has been successfully applied to a situation in which a woman committed an offence to escape her husband’s physical violence. Ms. Mazerolle was charged with impaired driving. She testified that on the night in question, she and her husband both had been drinking. It was about 1:30 or 2:00 a.m. Her husband was very angry and was yelling insults at Ms. Mazerolle. He punched furniture and got more and more agitated. He became “enraged” and picked her up, pushed her and threw her to the floor. He got on top of her and squeezed her arms and shook her. She was about half of his weight. She somehow managed to get away and when running out the door she grabbed her car keys. There had been several past incidents in which he had used violence against her. During one incident, four months earlier, she called the police and her husband had been charged. She knew she had to escape. She got into her car and drove down a country road for about a minute. She pulled over and sat there for about 45 minutes thinking about where she could go, all the while worrying that he would come and find her. She decided she would drive to her parents’ house. It was on her way there that she was pulled over by the police. The trial judge unreservedly accepted her evidence and her explanations for her actions. Applying Ryan, the trial judge found that the Crown had failed to prove that the elements of the defence had not been established. R. v. Mazerolle, [2013] N.B.J. No. 413, 2013 NBPC 21 (N.B. Prov. Ct.).
careful to acknowledge the disputed status of “the facts” in this case, specifically as contained in academic criticism subsequent to the decision. In Part III, I present the state of the law with respect to duress as it was at the time of the Ryan decision. I consider its application at Ms. Ryan’s trial, and the ruling of the Nova Scotia Court of Appeal affirming its use. In Part IV, I summarize the Supreme Court’s decision overturning the Nova Scotia Court of Appeal. I first consider the Court’s ruling that the defence was not applicable to the facts of the case at bar. I then turn to assess the state of the law following the Ryan decision, which I ultimately characterize as having obtained much needed clarity as a result of Ryan. In Part V, I turn to critique the Court’s decision. I argue that the Court took too restrictive an approach with respect to interpreting the law of duress, and failed to take account of both the realities of domestic violence and prevailing Charter values. In Part VI, my analysis takes on a more prospective nature. I consider the possibilities of the new self-defence provisions found in section 34, and argue that Ms. Doucet could have availed herself of them if they were in force at the time. I conclude by offering a normative declaration with respect to the potential of the newly enacted section 34, namely, that in order to preserve and develop the potential in the new self-defence provisions to help women like Ms. Doucet, counsel should ensure that section 34 is interpreted through the lens of Charter values and with a contextualized understanding of the realities of male violence against their intimate partners.

II. OVERVIEW OF THE FACTS

An overview of the facts of Ryan cannot be presented without acknowledging the fierce controversy surrounding “the facts”. Indeed, the factual summary in the facta of the appellant and respondent on appeal to the Supreme Court paint two very different pictures. The former presented Ms. Doucet as a woman who had no good reason for wanting Mr. Ryan killed and concocted the plan in order to get back at him for the difficulties encountered during the civil proceedings relating to their separation. The respondent spoke of years and years of abuse — physical, sexual and emotional — and of a woman who was still in the
grips of a reasonable and deeply held fear that her ex-partner would kill her and their young daughter.\(^{10}\)

Without doubt, aspects of the disputed facts had to be reconciled. As the Court of Appeal noted, “at first blush, one might be highly skeptical of Ms. Doucet’s assertion that she had no choice but to see her husband killed”.\(^{11}\) The Court noted that she was no longer with Mr. Ryan, she had a good job, a solid support network and custody of their daughter. The “last explicit threat” he made against her was uttered a couple of months before Ms. Doucet sought to hire the undercover officer.\(^{12}\) Further, it is understandable that some would question her assertion that she had no other avenues of escape. How can it be — with a secure job, supportive family and support networks that are supposed to be in place in Canada — that she had no other option?

However, the Supreme Court of Canada, three judges of the Nova Scotia Court of Appeal, and, importantly, the trial judge, accepted Ms. Doucet’s account of the facts, that she had lived through a “reign of terror” and legitimately feared for her life. It is the facts as found by the presiding trial judge that are presented in this paper, and relied upon over the course of the analysis.\(^{13}\) As elaborated below, the facts included years of physical, sexual and emotional abuse; almost weekly threats of death, at times accompanied by a detailed plan of how she and her daughter would be killed and their bodies disposed of; and having a gun held against her head on four occasions. Further, there was corroboration in the form of testimony from the principal and vice-principal of the school where Ms. Doucet taught; a teacher she worked with; her counsellor; a man who experienced Mr. Ryan’s wrath during a road rage incident; and medical records that showed Mr. Ryan had a persistent issue with “anger management”. With this as the record, it is difficult to reconcile some of the considerable suspicion and opposition to her plight. It is also

\(^{10}\) After the decision, Mr. Ryan put up a YouTube video criticizing the Court’s decision not to re-try the case. He called the decision “a farce and a disgrace to our Canadian judicial system”. See Christin Schmitz, “Court clarifies duress as a defence” *The Lawyer’s Weekly*. Mr. Ryan’s new spouse posted a message in a blog about the case stating that the allegations levelled against Mr. Ryan were all lies.

\(^{11}\) *Ryan NSCA, supra*, note 3, at para. 5.

\(^{12}\) *Id.*

\(^{13}\) But see Joseph Hanna, “*R. v. Ryan: Some Answers, Some Questions and a Curious Result*” (April 2013) Ontario Bar Association – Criminal Justice Section [hereinafter “Hanna”] (where the author reviews the original trial transcripts and highlights such evidence as Ms. Doucet having only complained of verbal threats unaccompanied by physical violence on multiple occasions).
possible that the controversy over the facts is linked to a broader pattern wherein women’s accounts of domestic violence are discounted and undermined.\footnote{For such discussion, see generally Elizabeth Sheehy, Defending Battered Women on Trial: Lessons from the Transcripts (Vancouver: UBC Press, 2014) [hereinafter “Sheehy”].}

Ms. Doucet and Mr. Ryan were married for about 15 years. Mr. Ryan served in the military, which took them to Ontario, Alberta and Nova Scotia.\footnote{Ryan NSCA, supra, note 3, at para. 5.} They had one child together, a daughter, born in 2000.\footnote{Id., at para. 11.} Mr. Ryan was considerably larger than Ms. Doucet, six foot, three inches and 230 pounds, compared to her five feet, three inches and 115 pounds.\footnote{Id., at para. 17; Ryan NSSC, supra, note 2.}

Over the course of their relationship, Mr. Ryan physically, sexually and emotionally abused Ms. Doucet. In the first incident of violence, he yelled and swore at her, forced her against a wall, punched the wall and held his hand around her neck. He continued to pin her against the wall about once a week thereafter, sometimes leaving her with bruises.\footnote{Id., at paras. 15-16, 20.} He also threw things at her, punched his fist against walls and frequently forced her to have sex.\footnote{Id., at para. 33.} The threat of violence against her was often “imminent”.\footnote{Id., at para. 30.} Many times, he threatened to kill or “destroy her”.\footnote{Id., at paras. 27, 34-35. Mr. Ryan also abused and killed family pets (id., at para. 36).} Four incidents of threatening death were accompanied by holding a gun to Ms. Doucet’s head.\footnote{Ryan NSCA, id., at para. 40.} At one point, he told Ms. Doucet that he would dig a six-foot deep trench in the back of their property to bury her and their daughter.\footnote{Ryan NSSC, supra, note 2, at para. 45; Ryan SCC, supra, note 4, at para. 7.} He claimed that he would pile garbage on top so that no one would notice anything. During another incident he threatened to “burn the fucking house down” while she and their daughter were inside.\footnote{Ryan NSCA, supra, note 3, at para. 27.} Mr. Ryan further threatened her with retaliation if she ever tried to leave him. His abusive behaviour intensified after their daughter was born.\footnote{Id., at paras. 31-32.} It got to the point that she was often afraid to leave the house. She was lost; she was isolated; she was without much hope.

In the summer of 2007, after one of his “flings” that lasted longer than usual, Ms. Doucet summoned the courage to ask for a divorce.
Mr. Ryan responded with violence and threats. Later that fall, after a dispute with him over her mother’s money, she became so fearful that she left their home to hide from him, living in different places. She continued to gravely fear Mr. Ryan and was convinced he would follow through on his threats to kill. She exhibited both physical and emotional effects of the abuse and her fear, as described in the testimony of the principals of the school in which she taught. It was around this time that Ms. Doucet started to think of having her husband killed.

Ms. Doucet said that she had called both the police and victim services many times for help. The police told her to “go away”, and that no assistance would be provided for “civil matters”. She also sought an 810 peace bond for protection but was told by the Crown and victim services that a peace bond would not protect her. In February 2008, Mr. Ryan showed up at her school, described as her “place of refuge”. This caused her considerable concern for her safety. Her anxiety escalated each time she saw him around. She felt that she had no way out, stating:

There was no escape. Mr. Ryan knew me to a tee. He knew everything about me. He knew how I behaved. He knew my routine. I knew when he said something, he always acted upon it. I was trapped. I was trapped and I had no way out, none. Nobody wanted to help.

As the Nova Scotia Court of Appeal put it, “Ms. Ryan was in a very vulnerable state, she had lost a considerable amount of weight, was dissociated and despondent. She had an intense fear of Mr. Ryan, was feeling helpless, felt she had lost control and felt she was threatened with annihilation.” It was around this time that the police got wind of her attempt, and set up a sting operation. She was subsequently charged.
III. THE LAW OF DURESS IN THE COURTS BELOW

1. The General State of Duress until Ryan

Until Ryan, the law of duress was a “mess”.34 It is a defence both under the Criminal Code and the common law. Given the Ryan decision itself, and the focus of this paper, little will be said about how duress worked (or did not work) in the past. A few points, however, need to be considered in order to set the context for the Ryan decision and lay the foundation for the ensuing discussion.

Section 17 of Criminal Code defines duress as follows:

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 for 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, unlawfully causing bodily harm, arson or an offence under sections 280 to 283 (abduction and detention of young persons).35

The Supreme Court long ago held that this provision is meant to apply to principals of a crime who have allegedly committed a non-enumerated offence.36 By contrast, parties to an alleged offence must resort to the common law defence of duress, which is preserved by virtue of section 8(3) of the Criminal Code.37 Further, some courts have found certain entries of the statutory list of excluded offences unconstitutional.38
In addition, the Supreme Court in *Ruzic* determined that aspects of the statutory limitations built into section 17 to be unconstitutional — specifically the wording requiring that the threats in question be directed towards “immediate” bodily harm by a person who was “present” at the time the offence was committed. The Court reasoned that these limitations offended an accused’s section 7, Charter rights because an accused who was threatened with future harm and who had “no way out” would be denied a legitimate defence. The Court explained:

The underinclusiveness of s. 17 infringes s. 7 of the Charter, because the immediacy and presence requirements exclude threats of future harm to the accused or to third parties. It risks jeopardizing the liberty and security interests protected by the Charter, in violation of the basic principles of fundamental justice. It has the potential of convicting persons who have not acted voluntarily.\(^\text{39}\)

However, to fill the gap left when the immediacy and presence requirements were struck out, the *Ruzic* court supplemented section 17 with elements of the common law, namely, that there be:

- no safe avenue of escape;
- a close temporal connection between the act and the threat; and
- a proportionate response.

This was the general state of the law when it was applied at Ms. Doucet’s trial.

2. Duress at Ms. Doucet’s Trial and the Crown’s First Appeal

At Ms. Doucet’s trial, the Crown took the position that the defence of duress had not been established on the facts. Justice Farrar of the Nova Scotia Supreme Court disagreed and acquitted Ms. Doucet. He determined that the defence was not only available to her, but that the Crown had failed to prove beyond a reasonable doubt that each element of the defence had not been made out. The trial judge accepted her testimony about the years of abuse she said she suffered, without

\(^{39}\) *R. v. Ruzic*, supra, note 7, at para. 90. Ms. Ruzic was from Serbia. She was charged with smuggling drugs into Canada. She pleaded that she had been ordered to bring the drugs in under threat of bodily harm against her mother. She did not think that she could realistically turn to the police for assistance. However, under the then stricter confines of s. 17, duress was unavailable because the person who threatened her was not “present” and the threat was one that would occur in the future.
qualification. He found that her fear of Mr. Ryan was justified. Concerning her evidence about Mr. Ryan, the trial judge said the following: “I have no difficulty in concluding that Mr. Ryan was a manipulative, controlling and abusive husband, that sought at every turn to control the actions of his wife …”.40

In appealing Ms. Doucet’s acquittal, the Crown argued that the defence of duress could not apply to her situation. The Crown submitted, in essence, that her claim of duress was nothing more than “an inappropriate back-door plea of self-defence”. The Nova Scotia Court of Appeal unanimously upheld Ms. Doucet’s duress-based acquittal. In doing so, the Court thoughtfully and thoroughly considered the legal history of duress.

In its determination that the law of duress could apply to the facts at hand, the Nova Scotia Court of Appeal focused on whether Ms. Doucet’s conduct was “morally involuntary”. The Court was clearly concerned about Ms. Doucet’s plight, a plight where none of the self-defence provisions in force at the time applied.41 The Court recognized, however, that her situation did not easily “fit” within the parameters of the defence of duress. To apply duress to her circumstances would require the Court to take the defence of duress “where it has never gone before”.42 After acknowledging this, MacDonald C.J.N.S. asked:

Yet if Ms. Doucet truly had “no way out,” would it be just to deny her a defence simply because her circumstances did not fit neatly into the

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40 Ryan NSSC, supra, note 2, at para. 56.
41 Ryan NSCA, supra, note 3, at paras. 60-64. The appellate Court also questioned whether self-defence should apply, given that it is a justification-based defence and not just an excuse-based defence. The difference between the two was described this way in Perka, supra, note 7, at 246, 248-49:

Criminal theory recognizes a distinction between “justifications” and “excuses”. A “justification” challenges the wrongfulness of an action which technically constitutes a crime. The police officer who shoots the hostage-taker, the innocent object of an assault who uses force to defend himself against his assailant, the Good Samaritan who commandeers a car and breaks the speed laws to rush an accident victim to the hospital, these are all actors whose actions we consider rightful, not wrongful. For such actions people are often praised, as motivated by some great or noble object. The concept of punishment often seems incompatible with the social approval bestowed on the doer.

In contrast, an “excuse” concedes the wrongfulness of the action but asserts that the circumstances under which it was done are such that it ought not to be attributed to the actor. The perpetrator who is incapable, owing to a disease of the mind, of appreciating the nature and consequences of his acts, the person who labours under a mistake of fact, the drunkard, the sleepwalker: these are all actors of whose “criminal” actions we disapprove intensely, but whom, in appropriate circumstances, our law will not punish.

42 Ryan NSCA, id., at para. 73.
traditional parameters of one of our enumerated defences. In other words, must the defence of duress be limited to those situations where the victim is a third party? If so, would there be a principled basis for such a prerequisite? To answer these questions, I harken back to Dickson, J. in *Perka*, where he invites us to concentrate on the rationale of such defences, which is to excuse involuntary conduct.

Thus, my inquiry should focus less on who did what to whom’s presence and more on the accused’s predicament and whether or not her actions were truly involuntary. In other words, did Ms. Doucet have an avenue of escape short of the “crime” she committed? On this basis, should it matter that Ms. Doucet targeted her assailant as opposed to the conventional third party? One would think not, but yet a closer look at this defence is in order.\(^{43}\)

Further, the Court noted that in order to properly interpret the defence of duress, it must “fully understand the plight of battered spouses (most often women) ... having reacted to threats from their abusive partners”.\(^{44}\) It was with this understanding that the Court determined that the defence had to be “sufficiently flexible to, when appropriate, accommodate the dark reality of spousal abuse”.\(^{45}\)

After undertaking a review of duress, the Nova Scotia Court of Appeal concluded that the defence was available to a woman who tries to hire someone to kill her abusive husband. In so doing, the Court commented:

I return to the rationale for this defence — to excuse morally involuntary conduct. Viewed in this light, I can see no principled basis to justify a distinction between the aggressor as opposed to a third party being the targeted victim. After all, had Ms. Doucet attacked her husband directly, self-defence would represent a potential avenue of defence (based on *Lavallee, supra*). Therefore, it would be ironic indeed to see her denied a defence for an indirect attack.\(^{46}\)

IV. THE DECISION OF THE SUPREME COURT OF CANADA

1. The Defence Does Not Apply to the Facts at Hand

The main issue for the Supreme Court was whether the defence of duress was available to an accused person who tried to commit an

\(^{43}\) *Id.*, at paras. 74-75.

\(^{44}\) *Id.*, at para. 91.

\(^{45}\) *Id.*

\(^{46}\) *Id.*, at para. 99.
offence against the threatening party. This contrasts with the paradigmatic example of duress whereby the accused commits an offence because he or she is under the duress of the threatening party to do so. The Crown, supported by the Ministry of the Attorney General for Ontario, took the position that duress had no applicability to Ms. Doucet’s situation. Ms. Doucet’s position was supported by the Criminal Lawyers’ Association ("CLA"), the Canadian Association of Elizabeth Fry Societies ("CAEFS") and the Women’s Legal Education and Action Fund ("LEAF").

As we know, the Supreme Court found that the defence of duress is only available when a person commits an offence while under compulsion of a threat made for the purpose of compelling her to commit the very offence in question. In coming to its determination the Court injected much-needed clarity and harmonization of the law in this area.47

The Court began its analysis of the issue with a look at its previous decision in Hibbert, wherein Lamer C.J.C. noted the similarities and dissimilarities between self-defence, as compared to duress and necessity. Referring to the former, the Chief Justice said that:

... the victim of the otherwise criminal act at issue is himself or herself the originator of the threat that causes the actor to commit what would otherwise be an assault or culpable homicide. ... In this sense, he or she is the author of his or her own deserts....48

Speaking of duress and necessity, the Chief Justice said that “the victims of the otherwise criminal act ... are third parties, who are not themselves responsible for the threats or circumstances of necessity that motivated the accused’s actions".49

A further distinction between self-defence and duress is that with self-defence it is the victim who attacks the accused, the motive for which is irrelevant. With duress, the threat is aimed at compelling criminal action. Accordingly, “self-defence is an attempt to stop the victim’s threats or assaults by meeting force with force; duress is succumbing to the threats by committing an offence” 50


48 Hibbert, supra, note 7, at para. 50, cited in Ryan SCC, supra, note 4, at para. 18.

49 Hibbert, id., at para. 50, cited in Ryan SCC, id., at para. 18.

50 Ryan SCC, id., at para. 20.
These two distinctions, namely, the role of the victim and the compulsion to commit the offence in question, were part of what led the Supreme Court to determine that it was an inappropriate stretch to apply duress to the actions of Ms. Doucet. In addition, the Court noted two other important points that informed its reasoning and conclusion. First, Parliament codified the self-defence provisions and established what its strictures would be. In contrast, duress is partly codified and partly common law.\footnote{51}

The second important point underlying the Court’s decision was the distinct rationales for the defences. With a successful claim of duress, an accused is “excused” for his or her actions. The actions themselves, while excusable, are nonetheless seen as wrong. The defence is excused-based because it rests on the premise that only voluntary behaviour should attract penal consequences.

The rationale underlying duress is that of moral involuntariness, which was entrenched as a principle of fundamental justice in \textit{R. v. Ruzic}, 2001 SCC 24, [2001] 1 S.C.R. 687, at para. 47: “It is a principle of fundamental justice that only voluntary conduct — behaviour that is the product of a free will and controlled body, unhindered by external constraints — should attract the penalty and stigma of criminal liability.” It is upon this foundation that we build the defences of duress and necessity. As Lamer C.J. put it in \textit{Hibbert}, the underlying concept of both defences is “normative involuntariness”, in other words, that there is “no legal way out”: para. 55. While the test to be met is not dictated by this generally stated rationale underlying the defence, its requirements are heavily influenced by it. As was discussed in \textit{Perka}, defences built on the principle of moral involuntariness are classified as excuses. The law excuses those who, although morally blameworthy, acted in a morally involuntary manner. The act remains wrong, but the author of the offence will not be punished because it was committed in circumstances in which there was realistically no choice: \textit{Ruzic}, at para. 34; \textit{Perka}, at p. 248. The principle of moral involuntariness is “[a] concessio[n] to human frailty” in the face of “agonising choice”: \textit{Ruzic}, at para. 40; [other citation omitted]. The commission of the crime is “remorselessly compelled by normal human instincts”: \textit{Perka}, at p. 249. As LeBel J. put it in \textit{Ruzic}: “morally involuntary conduct is not always inherently blameless” (para. 41).\footnote{52}
With self-defence, the accused’s actions are justified. The actions which are said to be criminal are not even seen as “wrong” — they are seen as “right”. 53

This distinction carried with it two conclusions. First, defences based on justification should be, and are, more “readily available” than excuse-based ones. It would be incongruous, the Court determined, if a person’s actions were not justified under the more readily available self-defence but were covered by the more circumscribed excuse of duress. To hold otherwise would result in incoherence in our criminal law. 54

Second, following up on an earlier point the Court made, because self-defence is entirely codified, courts cannot overstep their bounds and “use the flexibility of the common law to develop duress” in such a way that would intrude on the role of Parliament.

Duress cannot be extended so as to apply when the accused meets force with force, or the threat of force with force in situations where self-defence is unavailable. Duress is, and must remain, an applicable defence only in situations where the accused has been compelled to commit a specific offence under threats of death or bodily harm. This clearly limits the availability of the offence to particular factual circumstances. The common law elements of duress cannot be used to “fill” a supposed vacuum created by clearly defined statutory limitations on self-defence. 55

After its determination that duress was not available to Ms. Doucet, the Court then turned to the appropriate remedy. Eight of the nine justices found that a combination of factors resulted in an exceptional situation that warranted an exceptional remedy, a stay of proceedings. 56 The four factors identified by the Court were as follows: 57

(1) The law of duress was, at the time of her trial and appeal, unclear.

(2) The Crown changed its position about the law between the trial and the appeal. As such, Ms. Doucet tried her case based on the Crown’s original position and she might have conducted her case differently.

53 Id., at paras. 23-25.
54 Id., at paras. 27, 31.
55 Id., at paras. 28-29, 32. It should be noted that the Supreme Court did not address whether self-defence was potentially available to Ms. Doucet (id., at para. 31).
56 The usually defence-leaning Fish J. took exception to the stay and would have ordered a new trial. Id., at para. 90.
57 Id., at paras. 34-35.
had the Crown taken the position it did on appeal at her trial. Those decisions may not be undone.

(3) Mr. Ryan’s abuse had taken an “enormous toll” on Ms. Doucet — as had the five years of trial and appellate proceedings.

(4) “[T]he disquieting fact” that it appears the authorities were much quicker to intervene to protect Mr. Ryan from harm than they were to protect Ms. Doucet.

2. Adding Clarity to Confusion

As stated above, the Court took the opportunity this case offered to provide much-needed clarity to the law of duress. The Court stated that the defence of duress pursuant to section 17 and under the common law form is, for the most part, identical, each sharing the following common elements:

- First, there must be an explicit or implicit threat of present or future death or bodily harm. The threat to cause harm can be directed either at the accused or at a third party.
- Second, the accused must reasonably believe that the threat will be carried out if they do not act as directed.
- Third, there is no safe avenue of escape. The defence does not apply to persons who could have legally and safely removed themselves from the situation. This element is to be evaluated on a modified objective standard of the reasonable person similarly situated.
- Fourth, there must be a close temporal connection between the threat and the harm that is being threatened. The connection must cause the accused to lose their ability to act freely. The Court explained that there is some interplay between this element and the third. As the Ruzic Court had explained it, a threat that is “too far removed in time

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58 However, certain differences between the two remain, namely: s. 17 applies to principals and the common law defence to parties to an offence; and s. 17 lists a number of offences that are excluded from its reach. The Court recognized that these differences create an inconsistent result. Principals who commit one of the enumerated offences in s. 17 cannot rely on the defence of duress, whereas parties to those very same offences can. However, the Court was not prepared to grapple with that issue. Id., at paras. 83-84.

59 Id., at paras. 47, 81.
... would cast doubt on the seriousness of the threat and, more particularly, on claims of an absence of a safe avenue of escape”.

- Fifth, there must be proportionality between the harm threatened and the harm inflicted by the accused. The harm caused by the accused must not be greater than the harm avoided. In other words, there must be a demonstrated “fortitude” or “resistance” to the threat. This element is also evaluated on a modified objective standard.

- Sixth, to avail themselves of this defence, an accused cannot be “a party to a conspiracy or association whereby the accused is subject to compulsion and actually knew that threats and coercion to commit an offence were a possible result of this criminal activity, conspiracy or association”.

The Ryan Court explained that the elements of belief that the threat will be carried out, no safe escape and a close temporal connection must be analyzed “as a whole”. As the Court wrote, “the accused cannot reasonably believe that the threat would be carried out if there was a safe avenue of escape and no close temporal connection between the threat and the harm threatened”.

Furthermore, the particular elements that the Court added into section 17 when it struck out the immediacy and presence requirements in Ruzic “tempered” the straight subjective belief standard that the wording of section 17 required. In so doing, the interpretation of section 17 was brought into line with the principle of moral involuntariness. To have one’s actions considered to be “morally involuntary” there must be certain factors present, such as no safe avenue of escape and a close temporal connection. The actions also must be in response to threats that “‘a person of reasonable firmness’ with the characteristics and in the situation of the defendant could not have been expected to resist”.

The actions of the accused must further be proportionate to the threat in order to fall under the principle of moral involuntariness. Proportionality is described as being “inherent” in this principle and is evaluated, on a modified objective basis, with two things in mind: first, the difference between the harm threatened and the harm the accused

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60 Ryan SCC, id., at paras. 48-51, 81; Ruzic, supra, note 7, at para. 65.
61 Ryan SCC, id., at paras. 54, 81.
62 Id., at paras. 54, 81.
63 Id., at para. 51.
64 Id., at para. 52.
caused; and second, a “general moral judgment” about the accused’s behaviour. As Dickson J. explained in Perka:

There must be some way of assuring proportionality. No rational criminal justice system, no matter how humane or liberal, could excuse the infliction of a greater harm to allow the actor to avert a lesser evil. ...

... Determining this threshold is patently a matter of moral judgment about what we expect people to be able to resist in trying situations. A valuable aid in making that judgment is comparing the competing interests at stake and assessing the degree to which the actor inflicts harm beyond the benefit that accrues from his action.65

V. ISSUES WITH THE SUPREME COURT’S DECISION

As noted above, the Court’s decision in Ryan provide much-needed clarity on the law of duress. For some, however, the decision was incredibly disappointing. It has been criticized for failing to reflect the realities of domestic violence and for not according with Charter values. As the interveners CAEFS and LEAF informed the Court, in Canada, a woman is killed by her former or current male domestic partner every six days. Most frequently, these homicides occur within two years of a separation and sometimes children (and other family members) are also killed.66 Many of the factors understood as risk factors for lethal violence were present in Ms. Doucet’s situation. Accordingly, the interveners argued, the Court was required to assess the case in recognition of the realities of women’s lives. After the decision, LEAF and CAEFS released a joint statement criticizing the decision for failing to “capture the diversity of human experience”. Others asserted that the Court cared more about conceptual stability than about the evolution of the common law.67

This criticism stands in stark contrast to the reception advocates and some academics gave to the Nova Scotia Court of Appeal’s decision. Advocates for abused women applauded the decision. A Ms. Magazine

65 Id., at paras. 54, 70-74, citing Perka, supra, note 7, at 252.
blog called it “a beacon of hope”. Professor Elizabeth Sheehy, an expert on criminal law and male violence against women, identified it a “legal breakthrough”.

The Supreme Court could have followed the Nova Scotia Court of Appeal’s flexible and contextual interpretation of the defence. To do so would have been to recognize the grim reality faced by Ms. Doucet. She was “a person who commit[ed] an offence under compulsion by threats”. The threats were “temporally connected” and were from a person who she reasonably believed would carry out those threats. She believed she had “no other safe avenue of escape”. Her actions were seen by both courts below as proportional. Her actions satisfied the requirements of “morally involuntary”. She was not a party to a conspiracy or association and she was not charged with one of the excluded offences listed in the section. All of the six elements of the defence could have been met, and were recognized as having been met by both the Nova Scotia Supreme Court and the Court of Appeal.

Arguably, adopting the interpretation of the provision in the courts below would not have intruded any further into Parliament’s role than it did in Ruzic. The Nova Scotia Court of Appeal did not base its decision on “filling in a gap” that the inapplicability of the old self-defence provisions created. The appellate court simply noted that self-defence could not have applied and then moved on to separately assess whether the defence of duress, as advanced, was available.

The fact that duress had never “gone there before” also does not serve as compelling grounds against affirming the Court of Appeal’s decision. Many celebrated cases from the Supreme Court took the law in a new direction, with Lavallee and Ruzic being instructive examples. The defining characteristic of duress, as Professor Coughlan pointed out in his case comment on the Court of Appeal case, is the nature of the threats. Duress, he noted, could “with no reinterpretation be applicable where the target of the offence is the aggressor: ‘assist me in committing suicide or I will shoot you.’ for example”. It is disappointing that the Supreme Court showed such trepidation when faced with an individual whose actions were properly viewed as morally involuntary. The Court

had an opportunity to further the limits of the common law in a way consistent with the principles of fundamental justice, but declined to do so. Fortunately, the Court’s overly cautious deferential approach may not be the last word for women who find themselves in Ms. Doucet’s plight, and Parliament itself may have afforded the solution to this dilemma.

VI. COULD THE NEXT MS. DOUCET AVOID HERSELF THE NEW SELF-DEFENCE PROVISION?

In March 2013, a new self-defence provision came into force, replacing the prior provisions contained in sections 34 to 37. These old provisions were complicated and often subject to academic and judicial criticism. Indeed, if duress was seen before as a “mess”, self-defence was an all-out disaster. The new provision contained in section 34 is essentially a reasonableness test:

34(1) A person is not guilty of an offence if
(a) they believe on reasonable grounds that force is being used against them or another person or that a threat of force is being made against them or another person;
(b) the act that constitutes the offence is committed for the purpose of defending or protecting themselves or the other person from that use or threat of force; and
(c) the act committed is reasonable in the circumstances.

(2) In determining whether the act committed is reasonable in the circumstances, the court shall consider the relevant circumstances of the person, the other parties and the act, including, but not limited to, the following factors:
(a) the nature of the force or threat;
(b) the extent to which the use of force was imminent and whether there were other means available to respond to the potential use of force;
(c) the person’s role in the incident;
(d) whether any party to the incident used or threatened to use a weapon;
(e) the size, age, gender and physical capabilities of the parties to the incident;
(f) the nature, duration and history of any relationship between the parties to the incident, including any prior use or threat of force and the nature of that force or threat;

(f.1) any history of interaction or communication between the parties to the incident;

(g) the nature and proportionality of the person’s response to the use or threat of force; and

(h) whether the act committed was in response to a use or threat of force that the person knew was lawful.

(3) Subsection (1) does not apply if the force is used or threatened by another person for the purpose of doing something that they are required or authorized by law to do in the administration or enforcement of the law, unless the person who commits the act that constitutes the offence believes on reasonable grounds that the other person is acting unlawfully.

This new provision could apply to the next Ms. Doucet, as academic commentators have already noted. Section 34 may justify an accused committing any crime in defence of themselves or others if it is reasonable to do so. In thinking about the enumerated factors through the lens of Ms. Doucet’s situation, and the commentary surrounding Ryan, a number of points can be made.

Many questioned the legitimacy of Ms. Doucet’s evidence because she had not previously disclosed the physical and sexual violence. It must be kept in mind, however, the instruction from R. v. Lavallee (and what advocates for abused women have been saying for years) that a “manifestation of this victimization is a reluctance to disclose to others the fact or extent of the beatings”. As with the doctrine of recent complaint in the context of sexual offences, the law must be careful not to impose artificial and discriminatory beliefs. While prior disclosure may prove corroborative, the lack thereof may signify nothing more than the reality that many women, for various reasons, do not disclose abuse.

Further, there are many and various reasons why women do not report abuse. For Ms. Doucet, it was because she was afraid of the

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consequences from Mr. Ryan and the lack thereof from the justice system:

I was afraid. I was afraid because of what he would do if I ever refused. I just had to protect [their daughter]. I had to protect myself. You keep the peace. If you don’t disobey, you’re keeping the peace. You don’t know what to do. You feel helpless. You feel worthless. You don’t even feel like a human being anymore, but you know that you have to do it in order to be safe.

... if I would have reported him, my life wouldn’t have been worth living, because the only thing that the RCMP officers would have done would have been to come and ask him, “Did you do that?” and he would deny everything, paint them a pretty picture like he always does and then they would just leave me alone there with him and that would have been too dangerous to take the chance.73

Ms. Doucet’s actions were also considered highly suspicious because the last threat Mr. Ryan had uttered was weeks in the past. This view ignores that reality that the violence and control the abuser has inflicted are not isolated, separate acts. As LEAF and CAEFS submitted to the Supreme Court in Ryan, “acts of coercion and control through physical, psychological and sexual violence … constitute an aggregate pattern of coercive control, intended to keep women in a state of constant dread and to induce compliance with the abuser’s demands”.74 In finding that Ms. Doucet reasonably apprehended mortal danger, the trial judge properly considered the preceding 15 years of violence and control by Mr. Ryan, the ongoing effects of his conduct on Ms. Doucet and the heightened lethal danger posed by abusive men who stalk their spouses following separation. The question that had to be asked is “was there sufficient evidence to establish … that a woman like Ms. Doucet, abused for years, would have acted similarly?”75

The reference to “other means” in subsection 34(2)(b) will invariably import the notion from previous case law that there be “no other safe avenue” before one’s actions are deemed “morally involuntary”. This is an essential factor that must be considered. If there was another avenue or means of escape, the law should not pass moral judgment lightly.

73 Ryan NSCA, supra, note 3, at para. 21.
74 Factum of the interveners, at para. 10.
75 Ryan NSCA, supra, note 3, at para. 121 (emphasis added).
Ms. Doucet, many offered, should have gone to a shelter. But as noted above, it is not just the degree of violence that affects how a woman experiences her situation and her available options — it is the extent and degree of the control and coercion she has been subjected to during her relationship. The assessment of whether conduct is “voluntary” — the product of “free will” and a controlled body unhindered by external constraints — must reflect this reality. Given the number of women killed in Canada by their ex-partners each year, it cannot be said that leaving or going to a shelter, is always a “safe avenue of escape”. The danger women are in when they leave their abusers should not be overlooked or minimized in this assessment.

In the context of discussing “no safe avenue of escape”, I must point out what I see as a fundamental contradiction — and a highly problematic one — in how some viewed Ms. Doucet’s actions and the “castle doctrine” as it is understood in the context of self-defence. This doctrine holds that a person need not retreat from their “castle” in order for their actions in defending themselves to be excused. For example, a man like Mr. Angelis, who is almost twice the size of his wife, did not have to duck out the door of his apartment, only feet away, before his act of killing her could be seen as potentially justifiable. Not “excusable” — but all-out justifiable. In fact, in Ontario, under Forde and Docherty, a trier of fact is not even permitted to consider whether simply walking out the door may have been a “safe avenue of escape” and may have saved the victim’s life. In many cases it would be untenable to require that one should retreat from one’s home before being able to legitimately defend oneself. It is also unrealistic to think that leaving would necessarily ensure one’s safety. However, it should be one of many factors that a trier of fact should be able to consider when assessing whether taking another’s life was justified.

When advancing a claim of self-defence based on the new provision, the defence, at least at this point, will have to call expert evidence about the impact on the accused of violence and coercion in order for the trier
to be able to assess whether their actions were “reasonable”. However, I cannot leave it unsaid that in many cases defences are advanced and accepted without any expert evidence. As Susan Chapman and Howard Krongold argued for the Criminal Lawyers’ Association in Ryan, to always require expert opinion in such cases would be akin to imposing a corroboration requirement on women’s evidence:

[I]t is important to recognize that expert evidence may not always be necessary to demonstrate the battered spouse’s perspective. To always demand expert evidence in such a case is to impose a sort of corroboration requirement on the evidence of a woman accused of a crime. This is neither fair nor justified. One day it may not be necessary for a woman to call expert evidence to corrobore the reasonableness of her belief that a man who has for many years raped her, threatened her life and the life of her child, provided details as to his planned disposal of their bodies, held a gun to her head, etc. represents an ongoing threat to her life and the life of her child. Until then, the option to adduce expert evidence in order to put the accused’s perspective into proper context remains a crucial component of both a self-defence and a duress claim.80

Further, and of course, we cannot always expect women to defend themselves like men do, in “hand to hand combat”. Ms. Doucet was not on the same footing with Mr. Ryan size-wise, nor did she have the ease of access to guns that he had. Admittedly, there is “something” that is unsettling about hiring a hit man. But had she killed him herself — had her size or strength or access to guns allowed her to — she would have been able to claim self-defence. Further, as Professor Elizabeth Sheehy posits:

[H]ow can women who are trapped by a terrifyingly violent male partner ensure that they save their own lives without “planning”? ... Is there a moral difference between spontaneous self-defence, where a woman happens upon a weapon at just the right moment to fend off a potentially murderous attack, and planned self-defence, where the woman tries to guarantee her own survival by preparation? With no other option that would demonstrably save her life, seeking aid from a third party may well be a woman’s last resort. Jane Hurshman tried and failed to hire a hit man to kill Billy Stafford. In the end she committed the homicide herself, but does that change the fact in either scenario she was acting in self-defence?81

80 Factum of the Criminal Lawyers Assn., at para. 22.
81 As quoted by LEAF and CAEFS in their Factum, at para. 25.
Finally, not all “battered women” fit one mould, a mould some thought Ms. Doucet — being educated with a full-time job — did not fit. The comments of McLachlin and L’Heureux-Dubé JJ. in their decision in Malott remain instructive:

It is possible that those women who are unable to fit themselves within the stereotype of a victimized, passive, helpless, dependent, battered woman will not have their claims to self-defence fairly decided. For instance, women who have demonstrated too much strength or initiative, women of colour, women who are professionals, or women who might have fought back against their abusers on previous occasions, should not be penalized for failing to accord with the stereotypical image of the archetypal battered woman. … Needless to say, women with these characteristics are still entitled to have their claims of self-defence fairly adjudicated, and they are also still entitled to have their experiences as battered women inform the analysis. Professor Grant … warns against allowing the law to develop such that a woman accused of killing her abuser must either have been “reasonable ‘like a man’ or reasonable ‘like a battered woman’”. I agree that this must be avoided. The “reasonable woman” must not be forgotten in the analysis, and deserves to be as much a part of the objective standard of the reasonable person as does the “reasonable man”. …

The legal inquiry into the moral culpability of a woman who is, for instance, claiming self-defence must focus on the reasonableness of her actions in the context of her personal experiences, and her experiences as a woman, not on her status as a battered woman and her entitlement to claim that she is suffering from “battered woman syndrome” … By emphasizing a woman’s “learned helplessness”, her dependence, her victimization, and her low self-esteem, in order to establish that she suffers from “battered woman syndrome”, the legal debate shifts from the objective rationality of her actions to preserve her own life to those personal inadequacies which apparently explain her failure to flee from her abuser. Such an emphasis comports too well with society’s stereotypes about women. Therefore, it should be scrupulously avoided because it only serves to undermine the important advancements achieved by the decision in Lavallee.  

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VII. Conclusion

Our law will always have a healthy skepticism to some defences. As McLachlin J. wrote in McIntosh, “[l]ife is precious; the justification for taking it must be defined with care and circumspection”. The new self-defence provisions, as they may apply to situations like Ms. Doucet’s, must be advanced and understood in recognition of the realities of domestic violence and its varying impact on women’s lives and the “choices” they make.