Compulsion and self-defence

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I INTRODUCTION

Two statutory defences which have attracted greater judicial and academic interest in recent years are compulsion[1] and self-defence.[2] Together they provide legal protection to persons who use force to protect themselves or others from actual or perceived physical attacks and to those who commit offences while subject to overwhelming threats. The ethical basis for each defence is that the powerful human instinct of self-preservation should, within reasonable limits, justify conduct that would otherwise be criminal.[3] However, although each defence is grounded in the motive of fear only the person who acts in self-defence is protected both against criminal conviction and civil liability. The person subject to compulsion is protected only from criminal responsibility.

The reasons for this distinction are rooted in the Common Law of crimes. But generally, it is argued, a person who commits an offence while subject to overwhelming threats ought, as a concession to human frailty, to be excused because punishment in such a case is pointless.[4] Any normal person similarly placed would probably have done the same thing. A person who acts in legitimate self-defence, however, is deemed to be acting within the law provided he uses no more force than is reasonable in the circumstances. In repelling an unlawful attack he will be regarded at law as not having committed any offence, even if in the event he kills or injures his assailant. In effect, the law applauds his conduct.

As will appear, self-defence as currently defined is a broad-based justification which allows a fair degree of latitude to persons who respond to aggression with force.

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1 See Crimes Act 1961 s 24. The statutory defence is substantively amended in cl 31 of the Crimes Bill, as to which see discussion in Part II below.

2 See Crimes Act 1961 s 48. The provision is unamended in cl 41 Crimes Bill.

3 Both defences are closely related to necessity in the sense that the accused's conduct is excused on the ground that the harm he inflicted was necessary to preserve his interests. In self-defence the defender injures the creator of the evil situation; in compulsion he may harm a person who was in no way responsible for the imminent danger. For a fuller discussion of the relationship to necessity see Hall, *General Principles of Criminal Law* (2 ed (1960)), 425-435; Brookbanks, *The Defence of Compulsion - an Overview* (Legal Research Foundation no 20, 1981) 7-12, 25-27.

4 Compare "[the] residual defence of necessity ... rests on a realistic assessment of human weakness, recognising that a liberal and humane criminal law cannot hold people to the strict obedience of laws in emergency situations where normal human instincts, whether of self-preservation or of altruism, overwhelmingly impel disobedience". *Perka* v *The Queen* (1984) 14 CCC (3d) 385, 398, per Dickson J. But as to whether conduct in situations of self-preservation is inexorably fixed for all human beings, see Hall, above n 3, 445-6.

Compulsion, on the other hand, is statutorily more circumscribed, providing only a "narrow release from criminal responsibility where its strict requirements are met".[5] Arguably, however, because the motivational factor in each case is precisely the same, the law ought to treat with equal latitude those whose conduct is coerced as opposed to those who are, or who perceive themselves about to be, attacked.

The purpose of this essay therefore will be to examine the two defences in the light of recent case law developments, and changes proposed in the Crimes Bill. It will be argued that compulsion under the new description "duress" has become a more open-ended defence capable of extending to all crimes, with the possible exception of murder. Self-defence substantially unaltered in the Crimes Bill will, it is submitted, continue to provide a broadly-based defence to those who use force in situations of extremity.

II THE DEFENCE OF COMPULSION

A *Statutory development*

The statutory defence of compulsion has been a part of New Zealand criminal law since 1893. During a period of nearly 100 years the defence has remained largely unchanged, and has given rise to surprisingly little case law.[6] Unlike self-defence, which since the 1980 amendment[7] has undergone something of a "revival" in New Zealand law, compulsion has always been seen as providing a very narrow exculpation where the strict terms of the statute are met. It is, therefore, not surprising that until relatively recently, there has been little judicial commentary on the defence in New Zealand. There has also been some judicial reticence in allowing any expansion of the scope of compulsion in New Zealand. This is probably traceable to Sir James Fitzjames Stephen, one of the architects of the Draft Code of 1879, from which our own criminal law has evolved. Stephen clearly did not approve of granting immunity to persons who committed offences induced by fear of threats of punishment or injury. In his view compulsion should never have been anything more than a matter to be considered in mitigation of penalty upon sentencing.[8] However, while it is fair to say that New Zealand judges have never fully subscribed to the radical approach advocated by Stephen, there has been a clear reluctance to allow any expansion of the defence beyond the clear words of the statute.

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5 *R* v *Teichelman* [1981] 2 NZLR 64, 66 per Richardson J.

6 The writer has been able to identify only nine reported decisions on compulsion in New Zealand. Of these, three were concerned with the now obsolete defence of marital coercion and were reported prior to 1900. There are no reported decisions on compulsion between 1896 and 1967. See *R* v *Howard* (1894) 13 NZLR 619; *R* v *Annie Brown* (1896) 15 NZLR 18; *R* v *McShane* (1876) 3 NZLA 314; *Salaca* v *The Queen* [1967] NZLR 421 (CA); *R* v *Joyce* [1968] NZLR 1070; *R* v *Pollock* [1973] 2 NZLR 491 (CA); *R* v *Teichelman* [1981] 2 NZLR 64; *R* v *Frickleton* [1984] 2 NZLR 670; *R* v *Raroa* (1987) 2 CRNZ 596.

7 See Crimes Amendment Act 1980 s 2(1). See also *Tuli* v *Police* [1988] NZ Recent Law 335 and comment.

8 *A History of the Criminal Law of England* (1883) vol 2, 102-106.

Section 24 of the Crimes Act 1961 provides:

> 24 Compulsion- (1) Subject to the provisions of this section, 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 protected from criminal responsibility if he believes that the threats will be carried out and if he is not a party to any association or conspiracy whereby he is subject to compulsion.

In *R* v *Teichelman*[9], the New Zealand Court of Appeal identified four critical features of the statutory provision.

1) There must be a threat to cause grievous bodily harm.
2) It must be to kill or inflict serious harm immediately following a refusal to commit the offence.
3) The person making the threat must be present during the commission of the offence.
4) The accused must commit the offence in the belief that otherwise the threat will be carried out immediately.

Although the Court identified these features having in mind the particular facts of the case before it , they have come to be regarded as the four critical features of the present law on compulsion.[10]

They do not, however, exhaust the definition of compulsion which is also concerned to define the status of persons party to any "association or conspiracy" when the compulsion arose, and those who commit any of the offences described in section 24 (2).

I shall examine each of these features later in considering the changes contemplated by clause 31 of the Crimes Bill. But first, what does compulsion, as a concept, actually mean?

B As a concept

Compulsion is one of a number of concepts in the criminal law which define conduct constrained by threats of external pressure or force. In the development of the criminal law compulsion has derived from the broader doctrine of necessity, which is generally concerned with conduct occurring under pressure of external forces or fear of death or serious injury.[11] However, whereas with compulsion the fear originates in

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9 Above n 5.

10 See *R* v *Raroa*, above n 6, 600.

11 Blackstone appears to distinguish five different types of necessity. These are characterised as 1) unavoidable force and compulsion, 2) the obligation of civil subjection, 3) duress *per minas*, 4) choice of evils, 5) circumstantial necessity. Of these category 1) might best be described as causal or absolute necessity. Category 2) no longer has a separate identity with the abolition of marital coercion. Category 3) embraces the present statutory defence of compulsion. Categories 4) and 5) are probably best regarded as being included within

threats from another person, in necessity the fear originates simply from the situation in which the person is found.[12] Jurisprudential writers have generally identified two species of necessity:[13]

1) Absolute necessity, where the conduct is the product of natural cause and effect and lacks voluntariness.
2) Hypothetical necessity where the proscribed conduct is not determined by antecedents so much as by the defendant's own choice where the ability to make a freely-willed choice is severely limited. In these situations it is not uncommon to characterise the choice as being effectively without volition or at least as a choice of evils, - where the person would never normally have chosen the course of conduct they did, apart from the overwhelming fear of the circumstances to which they were then subject.

The statutory defence of compulsion falls within the second category of hypothetical necessity, because of its characterisation as choice of evils. A person acting under compulsion though not lacking in intention and though "acting" with some measure of deliberation, is held not to be criminally responsible because the compulsion is deemed to override responsibility for both the actus reus and the mens rea of the crime. It is now not generally accepted that a person who commits an offence under compulsion lacks mens rea because their conduct is not voluntary.

At Common Law compulsion developed under the title duress *per minas*,[14] as opposed to coercion, which was a limited defence available to a wife who committed an offence while subject to the influence of her husband. In New Zealand, there is no longer any presumption that a woman who commits an offence in her husband's presence was subject to compulsion by him.

Some writers prefer to reserve the expression compulsion to situations of overpowering physical force, where there is arguably neither mens rea nor actus reus. However, this usage is inappropriate in New Zealand where the expression as used in statute is clearly limited to threats as the source of constraint.

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the residual Common Law defence of necessity or "duress of circumstances" - see IV *Blackstone's Commentaries* (1844) 27-32; see also *R* v *Conway* [1989] Crim LR 74 and commentary.

12 For a modern application of the defence of necessity see *R* v *Martin* [1989] 1 All ER 652. Compare "[m]ost commonly this defence arises as duress, that is pressure on the accused's will from the wrongful threats or violence of another. Equally, however, it can arise from other objective dangers threatening the accused or others" (per Simon Brown J, 653).

13 The distinction is attributable to Aristotle, but has been recognised and applied by modern students of criminal jurisprudence. See Aristotle, *Ethics* (Thompson ed) 77; see also Hall, above n 3, 419-421.

14 See above n 11.

C Changes contemplated by Clause 31 of the Crimes Bill

The Crimes Bill proposes to drop the expression "compulsion" in favour of the common law usage "duress". Two obvious changes to the existing statutory defence are made:

1) The definition of the defence has been "compressed".
2) The list of "excluded" offences in section 24(2) has been deleted.

In this section I wish to analyse the various components of the new draft provision with a view to determining the extent to which it is either consistent with, or departs from, the existing law.

(i) "A person is not criminally responsible..."

This expression replaces the clause occurring in section 24(1) "a person *who commits* ...". It would seem that in New Zealand a literal interpretation of the words "who commits" is not called for and there is some authority for the view that the expression extends to both principals and secondary parties.[15] The omission in the draft clause would seem to be deliberate and arguably signals the legislature's clear rejection of the narrow approach adopted in a line of recent Canadian cases[16] whereby it has been held that the phrase "who commits an offence" limits the availability of the defence to persons charged as actual perpetrators, or principals in the first degree. On this view, secondary parties would be denied the statutory defence, but would be able to plead the Common Law defence of duress, preserved by the equivalent of section 20 Crimes Act 1961. However, such a result is unnecessary in New Zealand following *Joyce*,[17] which clearly allows the statutory defence to secondary parties. The deletion of the words "aiding or abetting rape",[18] which appeared in the original enactment of section 24, obviated a possible construction of section 24(2) which in theory, at least, allowed aiders and abettors to plead compulsion even in respect of the excluded offences.

Since the new provision contains no specific reference to "aiding or abetting", and granted the abolition of the list of excluded offences in section 24(2), it is the writer's view that the legislature now intends that the defence of duress should in future be available to all persons involved in the commission of an offence, and will be available

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15 In *R* v *Joyce* [1968] NZLR 1070, 1074, the Court of Appeal held that "the offence" in section 24 includes the acts of a person charged as a party, having particular reference to that person's part in the transaction. See also Orchard, "The Defence of Compulsion" (1980) 9 NZULR 105, 110.

16 See *R* v *Paquette* (1976) 30 CCC (2d) 417 (SCC); *R* v *Curran* (1978) 38 CCC (2d) 151 (Alta SC); *R* v *Mena* (1987) 57 CR (3d) 172 (OSC); *R* v *Tewari* (1987) 36 CCC (3d) 150.

17 [1968] NZLR 1070.

18 See Crimes Amendment (No 3) Act 1985, s 7.

for all statutory offences in New Zealand. I shall argue, however, that the defence should not be extended to the crime of murder.[19]

(ii) "... any act done or omitted to be done ..."

This section replaces the phrase in the present section 24(1) "... an offence". The evident intention is that the actus reus of an offence committed under compulsion may include either a positive act or an omission, whereas given a strict construction of the present provision, the phrase " who commits an offence" could be interpreted as limiting compulsion to offences defined as positive acts. However, the matter has not, to the writer's knowledge, ever been litigated. Omissions liability is still comparatively rare in the criminal law of New Zealand and the relevance of criminal forebearance in this context is likely to be limited to those provisions which define common law duties of care[20]. However, it is possible to conceive of other offences defined as omissions where the defence of compulsion might be pleaded. Consider the example of a person forced under threats of death to drive a vehicle in circumstances where an accident occurs. Failing to stop, in such circumstances, being an offence under the Transport Act 1962 and an omission, would be an offence to which duress could be pleaded pursuant to clause 31. However, the issue is seldom likely to arise because in most cases threats operate to cause conduct defined as acts rather than omissions.

(iii) "... any threat of immediate death or serious bodily harm ..."

The test concerning the nature of the harm threatened is quite specific in clause 31. Nothing less than threats of "death or serious bodily harm" will suffice. In *R* v *Teichelman*[21], interpreting the current phrase "immediate death or *grievous* bodily harm", the Court of Appeal held that it is the "belief in the inevitability of immediate and violent retribution for failure ... to comply with the threatening demand", that constitutes the gravamen of the defence.[22] There is no legal significance in the adoption of "serious" in favour of "grievous". It is now established in Common Law that "grievous bodily harm" should be given its ordinary meaning of "really serious harm".[23] The emphasis in *Teichelman* on the "strict requirements" of the statute would seem to militate against the acceptance in New Zealand of lesser threats, including threats of serious "hurt" to a person's "comfort", or threats to property.[24] However, the words of the statute are sufficiently broad to include threats to infect a person with a fatal disease

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19 It is acknowledged, however, insofar as the explanatory note is a guide to legislative intent, it supports the view that "[i]n general ... [the] 'defence' [of duress] is available in all cases" (vii).

20 See Crimes Act 1961, ss 151-157; compare Crimes Bill, cll 118-121.

21 Above n 5.

22 Above n 5, 67.

23 See *DPP* v *Smith* [1961] AC 290, 334; see also *R* v *Waters* [1979] 1 NZLR 375, 379 per McMullin J.

24 For a thoughtful discussion of the arguments in favour of allowing lesser threats see Aldridge, "Developing the Defence of Duress" [1986] Crim LR 433, 435-437.

and would extend to the situation where, for example, a person is threatened with the infliction of the AIDS virus if they fail to comply with the demand made.[25]

Under the present law "mere apprehension" is not enough to give rise to the defence of compulsion.[26] The person must fear the particular type of harm set out in section 24. Often this will involve proof of a verbal threat communicated to the offender. However, there is no requirement that the threat must be communicated verbally.[27] At Common Law it could be express or implied by words or conduct. It has been suggested that there is no reason to suppose that section 24 does not include implied threats although such cases may provide more room for disputing whether the threat was of the kind required by statute.[28] One such case was *R* v *Raroa*[29] where the Court of Appeal held that a threat need not be in words for the purposes of section 24, but must be a particular kind of threat associated with a particular demand. There the defendant's failure to point to any evidence of actual threats or any belief on his part that he would be shot if he did not assist in the disposal of the bodies of the victims of a double homicide, was fatal to his defence of compulsion.

However, the Court does not appear to doubt that threats implied and "inherent in the situation" in which the defendant found himself would support a compulsion defence, in appropriate circumstances.[30] The Court was unwilling to accept the proposition that even in the absence of an actual threat, an honest and reasonable belief in the existence of circumstances which, if true, would have amounted to a defence under section 24(1), was a sufficient basis for a defence of compulsion. Bisson J delivering the judgment of the Court, held that the language of section 24, requiring "threats of immediate death or grievous bodily harm" meant that a non-existent threat could not give rise to compulsion.[31]

But if, as is generally accepted, the law judges people according to what they believed the facts to be rather than what the facts are in reality, then surely the difference between a belief in implied threats and a belief in non-existent threats is likely in many cases to be very marginal.[32] It is certainly doubtful that culpability should turn upon such a tenuous distinction. Nor does it follow that "mere apprehension" (a fear that something may happen) is the same as an honestly held belief, however unfounded in

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25 For a discussion of the general issues involved in this example, see Kirby, "Legal Implications of Aids" *Legal Implications of Aids* (Legal Research Foundation, 1989) 3.

26 *R* v *Frickleton* [1984] 2 NZLR 670, 672. See *R* v *Tyler & Price* (1838) C&P, 616, 620, "... [fear of the other] has never been received by the law as an excuse for his crime".

27 See I Hale PC 51, *R* v *McGrowther* Fost (1746) 13,14; Stephen, *Digest*, Art 10; *DPP for Northern Ireland* v *Lynch* [1975] AC 635 (HL). In *Lynch* evidence of duress was allowed to go to the jury although there had been no express threat.

28 See Orchard, above n 15, 112.

29 Above n 6, 602.

30 Above n 6, 603.

31 Above n 6, 603-4.

32 Compare Hall, above n 3, 363 "... moral obligation is determined not by the actual facts, but by the actor's opinion regarding them".

fact, that something is presently happening. It is the belief in the imminence of the perceived threat, not its existence in fact, which should determine liability.

To allow an honest, albeit mistaken, belief in the existence of threats to establish a compulsion defence, does not threaten the integrity of the statutory provision.[33] Defendants would still be required to discharge an evidentiary onus that they genuinely believed they were being threatened. Evidence of a belief that was simply the product of defendants' over-anxious imagination or unreasonable fears would be relevant to the issue of whether or not it was genuinely held.

(iv) *" ... to that person or any other person..."*

This phrase resolves a question left at large in the judicial interpretation of section 24. It has been a matter of uncertainty in New Zealand whether the threat required by section 24(1) must be a threat of harm to the accused or whether it may be threatened to another.[34] In *R* v *Hurley and Murray*[35] the Victorian Full Court held that threats of death or physical violence directed to a person other than the accused would suffice. Smith and Hogan[36] suggest that the principle established in *Hurley and Murray* would extend to D's family and others to whom he owed a duty and, possibly, even to a complete stranger. Threats that a person held as a hostage would be killed if D did not participate in the crime, on this view, would suffice.

The matter has never been directly considered by a New Zealand court. However, the suggestion has been made that the "natural interpretation" of section 24(1) requires threats against the accused only. That interpretation is, nevertheless, challenged.[37]

Clearly, under clause 31 threats communicated to the accused, regardless of whom they are aimed at, will suffice for the purposes of "duress". This is consistent with the fact, as one commentator has observed, that the degree of pressure to which the accused is subjected does not necessarily depend upon the identity of the proposed victim, and that when another is threatened the defence has more merit because the element of self-preservation is absent.[38]

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33 Thus in *R* v *Gladstone Williams* [1987] 3 All ER 441; 78 Cr App R 276; it was held in the context of private defence that D should be judged on the facts as he believed them to be. "... [I]t seems inconsistent in principle to apply a different test for duress" JC Smith and B Hogan, *Criminal Law* (6 ed, 1988) 236.

34 It is suggested that on its "natural interpretation" section 24 seems to require threats directed against the person alleging compulsion. See Adams, *Criminal Law and Practice in New Zealand* (2 ed, 1971) para 484.

35 [1967] VR 526.

36 Above n 33, 234.

37 See Orchard, above n 15, 112.

38 See Orchard, above n 15, 112.

(v) "....from a person who is immediately able to carry out that threat ..."

Section 24 requires threats "from a person who is present when the offence is committed" and "[belief] that the threats will be carried out". In that context, immediacy is related to the harm threatened, not the physical proximity of the person offering the threats. The threat must be one that the harm will follow "immediately" upon failure of the accused to comply with the demand. At Common Law, following the decision in *R* v *Hudson and Taylor*,[39] there need not be a threat of "immediate" harm, provided there is an overbearing of the accused's will at the time of the offence. In that case the Court of Appeal was influenced by the fact that, in its view, police protection could not be effective and that the threat was no less compelling because it could not be carried out on the spot, if it could be carried out in the streets the same evening.

However, the requirement under section 24 of "immediate" harm would make *Hudson* a decision of doubtful authority in New Zealand,[40] despite the fact that the requirement of presence was evidently satisfied there. In *Salaca*[41] the fear that a witch-doctor would "do something" to the accused, was held to be insufficient to satisfy the requirement of "immediate" harm "from a person who is present". The defence of compulsion on a charge of bigamy failed.

Recent developments in New Zealand suggest that the requirement that the threatener be present when the offence is being committed is nothing less than requiring that he be "in a position to carry out the threat or have it carried out *then and there*".[42] This "radical" immediacy, in contrast to be "constructive" immediacy of the Common Law, appears to be constitutive in the new clause 31.

Although the new provision does not specifically require the threatener's "presence", the requirement of immediate ability to carry out the threat points logically to the implication that physical presence is also required.

In *R* v *Raroa*[43] the Court of Appeal approved the following direction of the trial Judge:

> 3. The person making the threats *must be present* whilst the offence is committed *so that his ability to carry out the threat is apparent*, and there is no chance of escape.

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39 [1971] 2 QB 202.

40 See Garrow and Caldwell, *Criminal Law* (6 ed, 1981) 50. A consequential anomaly resulting from this restriction is that compulsion apart from possible "in-court mayhem", will never be a defence to oral perjury in New Zealand, although that offence is not expressly excluded by s 24(2). See Orchard, above n 15, 114; O'Regan, *New Essays on the Australian Criminal Codes* (1988) 100.

41 Above n 6

42 *R* v *Teichelman* above n 5, cited with approval in *R* v *Raroa* above n 6.

43 Above n 6, 600.

When the two italicised sections are considered together it is clear that ability to carry out threats is dependent upon actual presence. It is the writer's view that, although unexpressed, the legislature in drafting clause 31 must have intended physical presence of the person offering the threats to be an implied element in the definition of duress.

Considered in this light, the requirement that the person be "immediately able" to carry out the threat may be read as including a reference to the accused's perception in the sense that it must be *apparent to him* that the threats will be carried out immediately if he fails to comply. To argue otherwise would be, it is submitted, to suggest that by deleting reference to the accused's belief and including the phrase "immediately able", the legislature intended to make this part of the compulsion defence dependent upon an objective test of liability regardless of the accused's actual beliefs. Such an approach would be contrary to the general principle in that it would constitute an unwarranted restriction upon the general requirement that criminal liability depends upon proof of a particular state of mind.

D Opportunity to escape

Neither section 24 nor clause 31 contain reference to the ability of the accused to escape from the threatened harm. Subject to the decision in *Hudson*,[44] the Common Law position has been that compulsion fails if the accused did not take "an obviously safe avenue of escape".[45]

In New Zealand the present law has been clarified by the comments of Bisson J in *R* v *Raroa*.[46] In proposition 3 of the trial judge's summary of the statutory requirements it was stated that there must be, inter alia, "no chance of escape". The inclusion of this phrase in the statutory requirements together with the requirement in proposition 2 that "there is no opportunity of seeking help or protection" were challenged by the defence on the ground that they were unnecessary restrictions on the application of section 24.

Bisson J referred to *Lynch*[47] where Lord Morris had cited with approval a statement of the Court of Appeal in *Hudson* where it was said:

> ... it is always open to the Crown to prove that the accused failed to avail himself of some opportunity which was reasonably open to him to render the threat ineffective and that on this being established the threat in question can no longer be relied on by the defence. In deciding whether such an opportunity is reasonably open to the accused the jury should have regard to his age and circumstances, and to any risks to him which may be involved in the course of the action relied on.

Considering the dictum in *AG* v *Whelan*[48] that "... if there were reasonable opportunity for the will to reassert itself no justification can be found in antecedent

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44 Above n 39.
45 Orchard, above n 15, 116.
46 Above n 6.
47 Above n 27, 644.
48 [1934] IR 518.

threats", Bisson J concluded that the words should not be taken as absolute requirements of the defence of compulsion, but as factors to be taken into account by a judge or jury in determining the belief of the accused.[49]

There is no reason to doubt that this will remain the position under the new provision. Although there is no statutory requirement to escape the threat where that possibility exists, if there is a chance of escape the claim that one nevertheless acted under compulsion might be questioned.[50] In each case it will be a question of fact relevant to the belief of the accused at the time he claims to have acted in the way he did under compulsion.[51]

E Conspiracies and associations

Section 24(1) of the Crimes Act excludes compulsion from a person who is a party to any "association or conspiracy whereby he is subject to compulsion". The same basis for exclusion is carried over by clause 31(2) in respect of a person party to any association or conspiracy who "knew at the time of joining" that he or she might become subject to threats.

Upon a literal interpretation section 24(1) would remove compulsion from a defendant who is party to any "association or conspiracy". However, it was held in *R* v *Joyce*[52] that the defence should be excluded only when:

> the very nature of the association was such that the offender as a reasonable man should have been able to foresee that the association was of a kind that at least rendered it possible that at a later stage he might be made subject to compulsion.

It has been noted that as a result of *Joyce*, "association" may be taken as including "conspiracy" because in that case the appellant had voluntarily entered a conspiracy to commit theft.[53] Orchard takes the view that it is likely that the qualification upon the availability of the defence will not be satisfied unless the association was such that violence was a foreseeable result of it.[54]

The Canadian Law Reform Commission has recommended[55] that reference to a person being a party to a conspiracy etc, should be omitted on the ground that whether or not the accused has previously subjected himself to compulsion, he is now "on the

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49 Above n 6, 601.

50 *Raroa*, above n 6, 600. See *Osborne* v *Goddard* (1978) 21 ALR 189; *R* v *Lawrence* [1980] 1 NSWLR 122; *R* v *Williamson* [1972] 2 NSWLR 281 concerning factors applicable to the determination of whether D should reasonably have availed himself or herself of an avenue of escape.

51 *Raroa*, above n 6, 601.

52 Above n 6, 1076.

53 Orchard, above n 15, 118.

54 Orchard, above n 15, 118.

55 *The General Part - Liability and Defences* (Working Paper 29, 1982) 90.

spot", and, presumably, because of the emergent necessity should not be held culpable simply because of antecedent fault.[56]

At Common Law, the defence will only be taken away if the accused fails to take the opportunity to escape the duress or has joined a group *known* to use violence, such as an illegal paramilitary organisation or a gang of armed robbers. In *R* v *Sheppard*[57] the English Court of Appeal has held that duress is available to a defendant where he had voluntarily allied himself to the person who exercised the duress only in circumstances where he failed to appreciate the risk of violence and could not be said to have exposed himself and submitted himself to such compulsion.

Clause 31 clearly suggests that the legislature has now opted for the narrower construction of the qualification by requiring proof of the defendant's knowledge that the association was one that might subject him to compulsion. This is consistent with developments at Common Law and the approach advocated by the English Law Commission.[58]

F The scope of the defence

Section 24(2) currently excludes compulsion from the offences specifically named therein, including treason and murder.[59] Clause 31 of the Crimes Bill, however, by deleting the list of exclusions, purports to make compulsion available "in all cases".[60]

Until quite recently the position at Common Law was that while duress was available to excuse a person charged as a principal in the second degree to murder,[61] it was not available to a person charged as a principal in the first degree (the actual perpetrator).[62] However, in the recent decision in *R* v *Howe and Bannister et ors*[63] the House of Lords unanimously overruled its earlier decision in *Lynch*,[64] while approving and applying the Privy Council decision in *Abbott* v *R*. The effect of this decision is to take the law relating to duress and murder back to the pre-1975 position, declaring that

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56 Such an approach, whatever its merits, is at least consistent with developments in Canada concerning the defence of necessity. In *Perka* v *R* (1984) 14 CCC (3d) 385 the Supreme Court of Canada held, inter alia, that the fact an accused person was engaged in illegal or immoral conduct when the emergency arose, will not disentitle him from relying on the necessity defence.

57 (1988) 86 Cr App R 47; compare *R* v *Sharp* [1987] 1 QB 853. Held duress not available to a person who voluntarily and with knowledge of its nature joined a criminal organisation, which he knew might bring pressure on him to commit an offence, and was an active member when he was put under such pressure.

58 Law Commission, *Report on Defences of General Application* (Law Comm No 83, 1977).

59 See s 24(2)(e).

60 See explanatory note to the Bill, vii.

61 See *DPP for Northern Ireland* v *Lynch*, above n 2).

62 See *Abbott* v *R* [1977] AC 755 (PC).

63 *R* v *Howe and Bannister et ors* (1987) 85 Cr App R 32, 42.

64 Above n 27.

the defence of duress is no longer available either to a principal in the first degree to murder (the actual killer) or to the principal in the second degree (the aider and abetter). Essentially, their Lordships were of the opinion that the loss of a clear right to a defence justifying or excusing the deliberate taking of an innocent life in order to emphasise the sanctity of a human life was not an excessive price to pay.[65] Lord Hailsham spoke of the availability of administrative as distinct from purely judicial remedies for the hardships that might otherwise occur in the most agonising cases.[66] Lord Griffiths considered it "inconceivable" that in extreme situations involving innocent persons, for example, a woman motorist being high-jacked and forced to act as a getaway driver, such persons would be prosecuted.[67]

Two major grounds of objection have been suggested by critics of the decision in *Howe*. First, it is argued that a "morally innocent person" should not be left to the mercy of administrative discretion on a murder charge, if indeed it is realistic to suppose that Parliament intended to leave it to the discretion of the police not to prosecute in such cases.[68] Secondly, it is noted that there is an "indefensible anomaly" in allowing a defence of duress if, with the mens rea for murder, the defendant only injures his victim, while taking the defence away if the victim dies within a year and a day.[69]

Dealing with the first of these objections, it seems a rather startling proposition that a person who, with full mens rea kills another innocent person, should be deemed to be morally innocent, simply because what is done is done out of fear, however well-grounded. The fact that it may seem pointless to punish in such cases, is not to say that the actor is morally blameless. Such a judgment could be made only if the victim of a coerced attack represented a value that was not worth preserving in law or morality. That is clearly not the case. Considered in this light, then it is not unreasonable for the law to declare that taking innocent life under compulsion is morally reprehensible, regardless of the options that may be available to reflect the diminished culpability of the offender.

As to the "indefensible anomaly" argument, their Lordships concede that there are anomalies inherent in their decision, but that these are a consequence of the fact that murder is a result-related crime with a mandatory penalty.[70] As Lord Hailsham observes, consistency and logic, though inherently desirable are not always prime characteristics of a penal code based on custom and common sense.[71] This may be an area where the demands of strict logic must defer to other moral principles aimed at maximising the

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65 Above n 63, 43, per Lord Hailsham; Lord Mackay emphasised the "repugnance" of the law recognising in any individual "in any circumstances" the right to choose that one innocent person should be killed rather than another.

66 Above n 63, 43.

67 Above n 63, 53. As a reason for not extending duress to murder this prognosis is critisised as being "over-optimistic" and a "complete evasion of the responsibilities of the House of Lords to avoid dealing with difficult cases". See Milgate, "Duress and the Criminal Law: Another About Turn by the House of Lords" [1988] CLJ 61, 70-71.

68 See *R* v *Burke* [1987] Crim LR 480, 481-485.

69 Above n 68, 483, compare Crimes Act 1961, s 162.

70 Above n 63, 64, per Lord Mackay.

71 Above n 63, 42.

protection of truly morally innocent persons. In any event, as an ethical principle, it is very doubtful whether automatic priority should be given to saving one's own life or whether a person ought always to be entitled to protect their own bodily integrity at any cost.

The clear weight of Common Law authority has been against extending exculpatory defences to those who in situations of extremity consider themselves forced to take innocent life. For these reasons I consider that the defence of duress ought not to be extended to persons charged as parties to murder.

To maintain the status quo in this regard would also achieve consistency with other Common Law jurisdictions, which generally exclude murder or attempted murder from the ambit of compulsion.[72]

III SELF-DEFENCE

A Formulating the test

The definition of self-defence in clause 41 of the Crimes Bill is identical to the present statutory definition. Section 48 of the Crimes Act 1961 provides:

> Everyone is justified in using, in the defence of himself or another such force as, in the circumstances as he believes them to be, it is reasonable to use.[73]

This test is identical in effect to the test for self-defence formulated by the Privy Council in *Beckford* v *The Queen*.[74] Lord Griffiths delivering the judgment of the Court said:

> [the] test to be applied for self-defence is that a person may use such force as is reasonable in the circumstances as he honestly believes them to be in the defence of himself or another.[75]

In that case their Lordships categorically rejected any requirement for reasonableness attaching to the defendant's actual belief on the ground that if the belief was in fact held, its unreasonableness as far as guilt or innocence is concerned, is irrelevant.[76]

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72 See Criminal Code of Canada, section 17; Indian Penal Code, section 94; Tasmanian Criminal Code, section 20; Queensland and Western Australian Criminal Codes, section 31.

73 Clause 41 merely substitutes the phrase "Every person" for the expression "Everyone" in section 48.

74 [1987] 3 WLR 611.

75 Above n 74, 620.

76 Above n 74, 619. The authors of Smith and Hogan argue that the principle of *Beckford* should be applicable to defences generally, referring in particular to duress, where at Common Law the defendant's belief in the alleged compelling facts must be based on reasonable grounds. Above n 33, 87-88.

Early in 1988 the Tasmanian Parliament incorporated a self-defence provision in identical terms to section 48 into the Tasmanian Criminal Code.[77]

In that context, it is suggested that the test has the virtue of simplicity, precision and fairness, in that no person should be convicted of murder where he or she has acted with an honest belief that it was necessary to do so in self-defence.[78]

The enactment of the present section 48 of the Crimes Act 1961, extending as it does to all offences involving the application or threat of force, followed the recommendation of the Criminal Law Reform Committee for a "simple comprehensive provision" that would require no "abstruse legal thought and no set words or formula to explain it".[79]

While there can be little doubt that this desirable goal has been achieved in the drafting of section 48, its very simplicity has given rise to new questions of construction. For example, what is the status of antecedent fault in relation to the belief in circumstances justifying use of force? Is the question of the reasonableness of the force used in self-defence a matter for the jury alone, or can the court hear evidence from the accused as to his belief in that regard? Finally, what constitutes "reasonable" force? Is excessive force necessarily fatal to a plea of self-defence particularly in homicide cases?

In this section I will attempt to address these questions with a view to determining the current scope of self-defence in New Zealand.

(i) Belief in circumstances justifying force and antecedent fault

A cardinal principle underlying criminal responsibility is that moral obligation is determined not by the actual facts but by the actor's opinion regarding them.[80] This principle has been well attested in case law on self-defence in New Zealand and elsewhere. In *R* v *O'Grady*,[81] the English Court of Appeal held that a sober man who mistakenly believes he is in danger of immediate death at the hands of an attacker is entitled to be acquitted of both murder and manslaughter if his reaction in killing his supposed assailant was a reasonable one. This is consistent with the approach taken in the earlier decision of the Court of Appeal in *R* v *Gladstone Williams*[82] which established that where the defendant might have been labouring under a mistake as to the facts he must be judged according to his mistaken view, whether the mistake was reasonable or not; an approach now affirmed in *Beckford* v *The Queen*.[83]

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77 See Criminal Code Amendment (Self-Defence) Act 1987. Noted in O'Regan, above n 40, 74 at n4.

78 See Byrne, "Self-defence as an Answer to Criminal Charges" [1988] ALJ 75, 77.

79 Criminal Law Reform Committee, *Report on Self-defence* (1978) 8.

80 Hall, above n 3, 363.

81 [1987] 3 WLR 321.

82 Above n 33.

83 Above n 74.

Nevertheless, in England a defendant is not entitled to rely, so far as self-defence is concerned, upon a mistake of fact which has been induced by voluntary intoxication.[84] However, this ruling was given expressly for public policy reasons in reliance upon the decision of the House of Lords in *R* v *Majewski*.[85] Since *Majewski* has not generally been accepted in New Zealand as a good authority for determining the status of the defence of intoxication in this jurisdiction[86] there is no reason to suppose that evidence of self-induced intoxication will necessarily be fatal to a defence of self-defence based upon a mistake of fact.[87] In England self-induced intoxication is rejected as a defence to basic intent offences because it implies antecedent fault on the actor's part, and is regarded in itself as a form of recklessness.

New Zealand courts, however, have not been quick to recognise antecedent fault as a condition for excluding the availability of defences. New Zealand judges seem generally to have been willing to allow the question of liability to turn upon the actual proof of mens rea, rather than issues of pre-existing fault.[88]

This would certainly appear to be the case with self-defence. In *R* v *Terewi*[89] the fact that the accused had spent the evening at an hotel prior to the incident in which he had allegedly threatened two constables with grievous bodily harm appears to have had little influence upon the Court's decision. The Court appears to have been ready to concede that his mistaken belief that he was about to be attacked by a person who had previously caused him trouble, was a good defence to the threatening charge.

In at least four recent unreported decisions in the High Court in which self-defence was an issue, alcohol or some other intoxicant was a significant factor of the factual context in which the claimed self-defensive action arose.[90]

In none of these cases is there any reference to the possibility of pre-existing fault relating to the defendant's consumption of alcohol as a factor tending to justify conviction despite the fact that in two cases[91] there were specific findings that the

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84 See *R* v *O'Grady*, above n 81.

85 [1977] AC 443.

86 For a general discussion of the issues arising see Criminal Law Reform Committee, *Report on Intoxication as a Defence to a Criminal Charge* (1984) 11 ff.

87 The authors of the *Report on Intoxication* suggest that "one very exceptional class of case" where it is "probable" that the effects of voluntary intoxication will never avail a defendant, is where a person forms an intention to commit an offence, or realizes that he is likely to commit it, and then consumes an intoxicant and commits the prohibited acts under its influence.

88 See *R* v *Kamipeli* [1975] 2 NZLR 610.

89 (1985) 1 CRNZ 623.

90 See *Tuialli* v *Police* Unreported, 19 March 1987, High Court, Auckland Registry AP 310/86, noted in [1988] NZ Recent Law 373; *Deans* v *Police* Unreported, 5 March 1987, High Court, Christchurch Registry AP 7/87; *King* v *Police* Unreported, 5 August 1987, High Court Dunedin Registry HP 11/87, noted in [1988] NZ Recent Law 45; *Crowe* v *Police* Unreported, 10 June 1988, High Court, Christchurch Registry AP 65/88.

91 See *Deans* v *Police* and *Crowe* v *Police*, above n 90.

appellants were affected by intoxicants prior to the alleged assaults. In *King*,[92] although there is no specific finding as to the effect of alcohol upon the defendant, the court on appeal accepted the District Court Judge's finding that he had been "spoiling for a fight" prior to the incident.

It would seem, therefore, that for the purposes of New Zealand law, the fact that a person was affected by voluntarily consumed alcohol or other intoxicants or was predisposed to a confrontation in which violence might be used, will not be fatal to a defence of self-defence, provided the court is satisfied that the defendant believed such force as was used to be necessary; and that in those circumstances it was reasonable to use the force that was used. What force then is reasonable?

(ii) Reasonable force

If a jury is satisfied that the force used by the accused was excessive, the plea of self-defence will fail. However, as McGechan J observed in *Jenkins* v *Police*[93] extreme circumstances may demand extreme remedies, and the requirement to use force in self-defence will usually be determined by what the actor believes to be necessary, rather than other objective criteria which might suggest that a necessitous situation has arisen.[94] Generally, the use of deadly force must meet special conditions if it is to be justified. Normally, death, serious bodily injury, kidnapping or sexual violation must be anticipated by the actor when he/she resorts to such extreme measures to protect himself.[95] However, whether there is a positive duty upon a defendant to retreat or attempt to do so, before using fatal force, must now be doubted. But where a threat does not involve a present danger, retreat or some other method may be an appropriate means of avoiding the future danger.[96]

In the absence of reasonable alternatives to the use of deadly force, such force may be both appropriate and justifiable as a matter of necessity. While it is now the law that a person may only use reasonably necessary force for the purposes of self-defence, one judge has observed that seriousness, in terms of anticipated injury, is often a matter in the eye of the beholder,[97] and it may be argued that a person cannot be blamed who, in an intuitive response to threatened violence, uses a degree of force that would have been unacceptable if there had been opportunity for cool reflection and careful deliberation.

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92 See note in [1988] NZ Recent Law 45.

93 (1986) 2 CRNZ 196.

94 See *Dixon* v *Police* [1986] NZ Recent Law 233. Held that stabbing the victim in the arm with a knife in response to an attack with a heavy electric flex was consistent with a genuine belief that the defendant was in danger.

95 Gross, *A Theory of Criminal Justice* (1979), 179.

96 *R* v *Terewi*, above n 89, 625. This is consistent with the approach of the Australian Code jurisdictions, where it is generally held that if an accused applies force instead of retreating when he had an opportunity to do so, he will lose the protection of the statutory defence.

97 *Jenkins* v *Police*, above n 93, 198.

Further support for this approach may be derived from *Crowe* v *Police*[98] where the appellant, a teenager, struck the complainant with a metal rubbish bin liner. In deciding whether the force used was reasonable in the circumstances believed by the appellant to exist, the Court said:[99]

> It depends ... upon what a person in the Appellant's situation believed about the circumstances... If he believed that at that time he and his friends were completely outnumbered by a group of older men who had been drinking and who were deliberately picking on them and engaging in fierce assaults on them, and he believed that his friend was receiving such a beating that he had to intervene on his behalf, then it might be possible to cogently claim that he was reasonably justified in using a nearby solid object to defend his friend.

In *Jenkins* v *Police*[100] throwing a milk bottle at the feet of pursuing assailants was a reasonable response to the fear of further serious assault: "It was perhaps a desperate situation and I do not see it in these particular circumstances as being unreasonable".[101]

Liability in these cases turns on the justifiability of the degree of force used relative to the threat to life or health perceived by the defendant so that "pushing off" an hotel bouncer with the result that the complainant fell through a window,[102] striking the deceased with a wooden baton to prevent him continuing an assault on a third person,[103] and striking the complainant in the face with a beer glass,[104] have all been held to constitute lawful force in situations of defensive necessity.

In such circumstances the courts in New Zealand have appeared willing to endorse the dictum of Lord Morris in *R* v *Palmer*[105] that a person need not "weigh to a nicety the exact measure of his necessary defensive action".[106]

(iii) Who determines the reasonableness of force?

If, as it appears, section 48 gives a defendant much greater latitude in determining when and whether force is necessary in response to physical aggression or its threatened use, the question then arises as to in whose eyes must the force be deemed reasonable - the defendant or the reasonable person? Is the test of reasonableness of the force used, in other words, essentially a subjective test with an objective element to be determined by

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98 Above n 90.
99 Above n 90, 6.
100 Above n 93.
101 Above n 93, 199.
102 See *Deans* v *Police*, above n 90.
103 See *R* v *B* Unreported, 20 May 1987, High Court, Auckland Registry T 51/87, Smellie J.
104 *King* v *Police*, above n 90.
105 [1971] AC 814.
106 Above n 105, 832. See eg *King* v *Police*, above n 90; *R* v *B*, above n 103, 3 ("... one's actions are not to be put under a microscope or weighed too finely or nicely"); *Crowe* v *Police*, above n 90, 6 ("... cannot be weighed with fine scales").

the defendant in the context of the facts as he or she believes them to be, or is it a purely objective test to be determined by the trier of fact?

Until quite recently there has been a conflict of judicial authority as to in whose evaluation the force must be reasonable. The early difficulties centered around a passage in the judgment of McMullin J in *R* v *Robinson*[107] where his Honour said: " ... to act in self defence is to act within the law if one uses such force *as one believes to be reasonable* in the circumstances as one believes them to be".[108]

The statement in italics does not accurately represent the statutory wording of section 48 and seems to imply that the evaluation of what is reasonable force may be made by the defendant.[109] This interpretation on face value represented a significant departure from the traditional way in which an objective standard in penal legislation is regarded. Traditionally objective liability postulates the application of a standard of liability external to what the accused may have actually known or intended. So to impute to a defendant the right to determine what is reasonable would seem to undermine the very purpose of an objective test of liability.

Nevertheless, the test of subjective belief in reasonable force was applied in *Tuli* v *Police*,[110] a decision of the High Court where Williamson J cited the controversial dictum of McMullin J in *Robinson*. The consequences of such a line of interpretation if accepted are disturbing. Granted that it is now open to a defendant to show that he has an honest even if unreasonable belief in the circumstances which justify his conduct in self-defence,[111] the interpretation of section 48 contended for would have meant that a defendant could unreasonably believe that the force he used to repel an assault was reasonable and yet be justified.

However, such an approach to section 48 is unwarranted and in the writer's view is inconsistent with the purpose of the legislation. Furthermore, not all judges agree with the proffered interpretation. In *R* v *Murray*,[112] an oral ruling in a prosecution for murder, Eichelbaum J was invited by defence counsel, relying on the *Robinson* dictum, to decide the issue of reasonable force on an subjective basis. In rejecting this argument, which

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107 (1987) 2 CRNZ 632.

108 Above n 197, 635.

109 Curiously, this is precisely the test approved by the High Court of Australia in interpreting the relevant provision of the Queensland Criminal Code, which refers to "such force ... as is necessary for defence". However, the requirement for an objective standard attaching to the defendant's belief in the necessity to use force, and not attaching to the evaluation of the force *per se*, is a peculiarity of the wording of the legislation in that jurisdiction and is of little assistance in the construction of section 48 in the New Zealand Crimes Act. See *R* v *Muratovic* [1967] QdR 15, 19; discussed in O'Regan, above n 40.

110 [1988] NZ Recent Law 335.

111 See *Tuialli* v *Police*, above n 90. "It must now be open to a defendant to show that he has an honest, even if unreasonable, belief in the circumstances which will still justify his conduct in self-defence ..." per Greig J.

112 Unreported, 21 October 1987, High Court, Wellington Registry T20/87.

he suggested was attributable to a "slip of language" in the way the matter had originally been expressed, Eichelbaum J stated:[113]

> It would be a startling, not to say dangerous proposition that the assessment of reasonable force was left subjectively to each individual accused. I propose to adhere to the view which so far as I am aware has consistently been followed by Judges of this Court in directing juries on s 48 namely that while the circumstances are to be taken as those perceived by the accused, the question of the reasonableness of the force used has to be determined on the basis that it is for the jury to make an assessment, on an objective footing, of what is reasonable in the particular circumstances which it decides the accused believed to exist.

This analysis is, it is submitted, preferable to that contended for by counsel in *Murray's* case and is consistent with the approach suggested by the Criminal Law Reform Committee.[114] The Committee said:[115]

> ... the jury having determined what the accused believed the circumstances to be, must decide whether the force used was no more than was necessary having regard to those circumstances. *That is a matter for the jury to decide and does not depend upon what the accused thought was necessary. It is an independent assessment to be made by the jury.*

This question, however, may now be regarded as having been conclusively settled by the decision of the Court of Appeal in *R* v *Ranger*.[116] In describing the operation of section 48, Cooke P made the following observations:[117]

> The first part of the section poses a subjective question and, when the accused herself explicitly testified that she believed the circumstances to be that he was going to kill her and her children, it would be a strong step for a Judge to say that that claim was so implausible that no reasonable jury could accept it. And once it is accepted that a reasonable jury could at least entertain a reasonable doubt about the state of mind of the accused, then that becomes material under the second and objective limb of the section, which requires consideration of whether the force used was reasonable in the circumstances, *as the accused believed them to be*. If this accused did really think that the lives of herself and her son were in peril because the deceased, enraged after the struggle, might attempt to shoot them with a rifle near at hand, then it would be going too far, we think, to say that the jury could not entertain a reasonable doubt as to whether a pre-emptive strike with a knife would be reasonable force in all circumstances.

This passage makes it clear that the evaluation of the reasonableness of force used in self-defence is an objective question to be determined by the jury, once it is established that the accused believed (subjectively) that defensive force was necessary.

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113 Above n 112, 4.
114 Above n 79.
115 Above n 79, italics supplied.
116 Unreported, 2 November 1988, Court of Appeal CA 146/88.
117 Above n 116, 7-8.

B Excessive self-defence

Normally self-defence will fail if the force used by the accused was excessive. Authority for penalising excessive use of force is provided by section 62 of the Crimes Act 1961 which states:

> Everyone authorised by law to use force is criminally responsible for any excess according to the nature and quality of the act that constitutes the excess.

The provision is re-enacted without substantive amendment in clause 52 of the Crimes Bill. Although the actual effect of the section is uncertain, it clearly has an important application in cases where an accused kills another by using excessive force in self-defence. The question that arises is whether, if excessive force is used in self-defence, the excess is necessarily fatal to the operation of the defence *in any degree.*

In *R* v *Godbaz*[118] the Court of Appeal held that excessive force in repelling an assault was not protected by self-defence and itself constituted an assault. Adams' view is that if the the defence fails on the ground that excessive force was used then section 62 applies, and the accused is guilty of whatever offence was involved in the act of excessive force, be it murder or any other.[119]

In Australia the rule which previously allowed a qualified defence of "excessive force" in self-defence has now been abandoned. In *Zecevic* v *DPP*[120] a majority of the High Court of Australia held that there should no longer be any rule, whereby, if a plea of self-defence to murder fails by reason only that disproportionate force is used by the accused person, the verdict should be not guilty of murder but guilty of manslaughter.[121] This development is consistent with the approach taken by the Privy Council in *Palmer* v *The Queen.*[122] In that case their Lordships, while allowing for a generous degree of latitude in determining the necessary measure of self-defensive force to repel a grave assault, concluded that if ultimately the prosecution have shown that what was done was not done in self-defence then the issue is eliminated from the case. In such an event the issue of manslaughter does not arise unless there is also a question as to whether there was provocation which may reduce murder to manslaughter.

In Canada the rule is that where an accused, acting self-defence in terms of section 34 of the Criminal Code, causes death by the use of an excess of force, then a verdict of manslaughter is not available, unless he lacks the requisite intent for murder. In *Reilly*

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118 (1909) 28 NZLR 977.
119 Above n 34, para 548.
120 (1987) 61 ALJR 375.
121 In this respect the legal position in Australia is now the same for both Code and Common Law states. See O'Regan, above n 40.
122 Above n 105

v *The Queen*[123] Ritchie J delivering the judgment of the Supreme Court cited with approval the unanimous judgment in *Faid*[124] in which Dickson J said:

> The position of the Alberta Court of Appeal that there is a 'half-way' house outside section 34 of the Code is, in my view inapplicable to the Canadian codified system of criminal law. It lacks any recognizable basis in principle, would require prolix and complicated jury charges and would encourage juries to reach compromise verdicts to the prejudice of either the accused or the Crown. Where a killing has resulted from the excessive use of force in self-defence the accused loses the justification provided under section 34. There is no partial justification open under the section. Once the jury reaches the conclusion that excessive force has been used the defence of self-defence has failed.

In New Zealand the question of whether there is a qualified defence of excessive use of force in self-defence has not been judicially considered. However, there is nothing in either section 48 or section 62 of the Crimes Act 1961 to suggest that a partial justification is available under those provisions. Nor is there anything to suggest that either section is intended to alter the Common Law concerning the use of excessive force.

Given the highly persuasive force of the authorities mentioned above, it is the writer's view that New Zealand courts as a matter of consistency and precedent ought to follow the developments of the law in the jurisdictions considered and reject the notion of a qualified self-defence rule. Such an approach has the advantages of simplicity and certainty and eliminates the necessity for"prolix and complicated jury charges" which the legislature in enacting the present section 48 was at pains to avoid.

IV CONCLUSION

Overall the expansion of the defence of compulsion is to be welcomed. Although the defence is still circumscribed - as it should be - the removal of the old list of exempted offences was long overdue. The question of whether homicide should be excluded is, however, a vexed one. In my view this needs reconsideration by the Select Committee considering the Bill with a view to adopting what is now the Common Law position.

Self-defence remains as a broadly-based, straightforward justification with few real problems. What judicial development there has been has clarified the defence. Some areas of uncertainty remain but they are minor and the uncertainty is, perhaps, more academic than real. Since 1980 the "new" defence of self-defence has served us well.

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123 (1984) 15 CCC (3d) 1 (SCC).
124 (1983) 2 CCC (3d) 513, 517 ff (SCC).