DRIVING FORCE: SELF-DEFENCE AND DANGEROUS DRIVING

In *Riddell* [2017] EWCA Crim 413, [2017] 1 W.L.R. 3593, the Court of Appeal held that self-defence could be a defence to an offence not inherently involving the use of force, namely, dangerous driving.

Riddell (R) had taken a taxi home, gone inside briefly and then left in her own car. The taxi driver (M) waited outside, because he claimed that R had not paid. He followed her when she drove away, trying to catch her attention with lights and horn. Eventually both vehicles stopped. M alighted to speak to R, and it was alleged that R drove slowly into him. M sat on R's bonnet, whereupon R accelerated away. M fell, suffering bruising and a cut.

R was charged with two offences. First, she was charged with dangerous driving, an allegation focussing on the standard of R's driving. Striking M was an aggravating feature. Secondly, and alternatively, R was charged with assault occasioning actual bodily harm (ABH), an allegation focussing on the use of the car as a mechanism to assault M, causing more than "merely transient and trifling" harm (*Donovan* [1934] 2 K.B. 498, 509).

R sought to rely on self-defence against both allegations, claiming that she had both reasonably and honestly feared for her safety throughout, being followed by an unknown man (she claimed not to have recognised M). She said it was reasonable to use her car to move M to escape that perceived threat.

All parties agreed that duress of circumstances was available as a defence to dangerous driving, consistent with cases such as *Martin* (1989) 88 Cr. App. R. 343. R was equally uncontroversially allowed to raise self-defence to the ABH allegation. The trial judge refused, however, to leave self-defence to the jury on the dangerous driving count.

Whilst finding that the conviction for dangerous driving was safe, based on the evidence, the Court held that the trial judge had nevertheless fallen into error. There were two main reasons why the Court decided that self-defence should have been left to the jury on dangerous driving. First, there was no authority prohibiting this course of action. Existing cases where only duress was left had not involved using a vehicle as a defensive weapon. Additionally, *Symonds* [1998] Crim. L.R. 280 suggests that self-defence ought to have been left in relation to both counts in *Riddell*. Symonds was acquitted of assault after he had driven off with the complainant's arm trapped in his car door, believing that the complainant was intending him harm. Despite holding that there were theoretical difficulties allowing self-defence to offences not requiring proof that the defendant used force on another, the Court concluded that the matters on which Symonds relied to demonstrate self-defence could have been raised, in respect of the driving offence, under the emerging defence of duress of

circumstances. The Court did not consider the crucial differences of objective and subjective tests in *Symonds*, but its conclusion is consistent with *Riddell*.

Secondly, it would be unsatisfactory for a defence's availability to be affected by the prosecution's charging decision. The Court in *Riddell* worked from the premise that all offences arising from one set of facts should have the same defence(s) available to prevent unfairness to the defendant and/or jury confusion.

The potential unfairness arises from the differing requirements of self-defence and duress of circumstances. Self-defence requires an honestly perceived risk of immediate harm to a person in response to which the defendant uses reasonable (i.e. necessary and proportionate) force (*Beckford* [1988] A.C. 130). As confirmed in s. 76 of the Criminal Justice and Immigration Act 2008 (CJIA), when pleading self-defence, the reasonableness of the defendant's action is subjected to a mixed subjective and objective test. The first stage of analysis is subjective: the defendant must honestly believe that force is necessary, but this belief need not be reasonable. Section 76(4) CJIA's drafting allows consideration of factors such as mental illness causing the defendant to perceive danger unusually easily (clarifying the effect of authorities such as *Martin (Anthony)* [2001] EWCA Crim 2245, [2003] Q.B. 1). The second stage, however, is objective: when faced with the threat honestly perceived by the defendant, would a reasonable person have used that level of force?

Contrastingly, duress of circumstances is objective throughout. It requires that the defendant reasonably believed there was a threat of death or serious injury posed to the defendant (or someone for whom she could reasonably regard herself as being responsible), and that the defendant reacted reasonably to it (*Hasan* [2005] UKHL 22, [2005] 2 A.C. 467). The thoroughly objective nature of duress makes it a harder defence to plead than self-defence. It will be easier for the prosecution to disprove that the defendant held a reasonable belief than an honest (if unreasonable) belief. Far from being academic, the defences available to R made a real difference to her prospects of acquittal. The trial judge had consequently deprived R of the more easily-fulfilled defence when he withdrew self-defence on the dangerous driving count.

Although the decision in *Riddell* addresses this potential unfairness, it risks inconsistency in approach. The Court's conclusion relied on the distinction regarding the application of force for its coherence; the underlying principle was that using force to avert a threat of personal harm is self-defence, regardless of the charge. Whether self-defence should be left to the jury in dangerous driving cases would depend on the specific facts – whether the car had been used to deploy defensive force against an assailant. However, this judgment increases risks of inconsistency in judicial approach due to the specificity of its application to the facts, which may

not be clear until the trial is well underway. A witness statement may say that X struck Y with his car, but in live evidence the witness may not be sure there was contact. This causes practical difficulties for counsel advising defendants on defences, and cross-examining witnesses based on the defences available. It might also mean that defences put to one witness are not even raised on the evidence of another. Clarity as to the defences available is necessary prior to evidence being given if re-calling witnesses, and confusing the jury, are to be avoided.

The risk of jury confusion was central to the second aspect of the decision in *Riddell*. The court was anxious to avoid the confusion that may result from having different defences for offences arising from the same facts. The Court in *Riddell* was clearly concerned by the charging of the two offences as alternatives. It is, however, for the Crown to select which offences it charges, and where there is more than one, they can be offered as alternatives. There can be no objection to this practice in general. Because the elements of each offence are different, the Crown could have founded the two counts on different parts of the factual matrix – the ABH count on her striking him with the car, the injury being bruising and a cut finger, and the dangerous driving count on her driving at him (regardless of whether she hit him). The Court's criticism would have been more aptly targeted at the Crown's decision in *Riddell* to rely on the same facts for each count.

Because there can be no criticism of charging alternative offences, the consequence must be that, if different defences are available, all available defences for each count must be left to the jury in fairness to the defendant. There can therefore be no criticism of the ratio of *Riddell*, that self-defence can be pleaded in driving cases involving a direct application of force by the defendant to the complainant using the vehicle.

Despite the outcome in *Riddell* being sound overall, it is disappointing that the Court in *Riddell* did not express a view on the wider issue of whether the distinction between the conditions of self-defence and duress of circumstances is itself satisfactory. The Court merely noted that the law was settled at the Court of Appeal level (at [29]). One account of the difference is premised on the distinction between justifications and excuses. Self-defence, commonly regarded as justificatory, recognises the instinctive nature of the defendant's response, and the defendant's right to defend against the unjustified threat they have perceived. Duress, by contrast, is an excuse: the defendant's breaking of the law is still regarded as wrongful, but not blameworthy. Hence the graver threat required in duress, and the wholly objective standard. C.M.V. Clarkson argues that this distinction is otiose ("Necessary Action: A New Defence?" [2004] Crim.L.R. 81): regardless of the source of extreme pressure exerted upon a defendant, the reality is that the defendant's response is underpinned by the same reasons and should be assessed in the same way. The Court of Appeal's

dissatisfaction in *Riddell* should have been directed at the law's unnecessary distinction between conditions of functionally similar defences, rather than the prosecution's charging decisions. *Riddell* illustrates the attraction of Clarkson's suggested "necessary action" defence to remove this distinction. The justification/excuse dichotomy no longer has any practical utility – quite the opposite.

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DEFERRED PROSECUTION AGREEMENTS: COOPERATION AND CONFESSION

SIR Brian Leveson's approval of the third deferred prosecution agreement (DPA) in *Serious Fraud Office v Rolls-Royce plc* [2017] Lloyd's Rep. F.C. 249 is the most significant addition to the growing canon of case law on DPAs. This new enforcement tool was added to the UK prosecutors' armoury by the Crime and Courts Act 2013. Following the successful use of deferrals to tackle corporate crime in the US, the Act allows an organisation to avoid prosecution for certain corporate crimes by entering into an agreement with a designated prosecutor, under court supervision, whereby prosecution is deferred pending successful compliance with certain conditions, which may include payment of a substantial fine.

Rolls-Royce, the UK engineering giant, made corrupt payments to local agents to secure contracts across seven countries, over three decades and in three of its business streams. In Indonesia and Thailand, it paid cash bribes and gave a luxury Rolls-Royce car to intermediaries, to secure contracts for the provision of aircraft engines to Garuda Indonesia and Thai Airways. To facilitate its defence business in India, Rolls-Royce used sham contracts and falsely recorded the bribes to local agents as legitimate consultancy fees. In order to secure aircraft engine orders from China Eastern Airlines, Rolls-Royce offered cash credit to the airlines' employees, who used the funds to pay for a Master of Business Administration course at Columbia University, four-star accommodation and lavish activities.

The conduct of Rolls-Royce was described by Sir Brian Leveson P. as the "most serious" breach of criminal law in bribery and corruption (at [4]); it covered 12 counts of conspiracy to corrupt, false accounting and failure to prevent bribery. It was unlike the conduct that gave rise to the first DPA in *Serious Fraud Office v Standard Bank plc* [2016] Lloyd's Rep. F.C. 102, which concerned a single failure to prevent bribery by a sister company, where the Bank was not complicit in the corruption. It was also unlike the conduct that gave rise to the second DPA in *Serious Fraud Office v XYZ* [2016] Lloyd's Rep. F.C. 509, which involved a