

CASES / VONNISSE

COMPARING SELF-DEFENCE AND NECESSITY IN ENGLISH AND SOUTH AFRICAN LAW

***R v Riddell* [2018] 1 All ER 62; [2017] EWCA Crim 413**

1 Introduction

Although a motor vehicle has been held not to be a “dangerous weapon” in terms of the dangerous weapon legislation (*S v Mnguni* 1977 (3) SA 63 (N); *S v Nyathi* 1978 (2) SA 20 (B); cf *S v Andrews* 1977 (2) SA 719 (E)), a motor vehicle can certainly be used as a “weapon of death” (*S v Desai* 1983 (4) SA 415 (N) 418G–H; see generally Hoctor “Accidentally on Purpose? The Purpose of Imposing Duties Following Road Traffic Collisions” 2003 *Obiter* 174). Can a motor vehicle then also be used as a means of defending one’s interests that are under attack? This is the issue that arose in the English case of *R v Riddell* [2018] 1 All ER 62; [2017] EWCA Crim 413, which is examined below in the broader context of a comparison between English and South African law on the defences of self-defence and duress, and private defence and necessity, respectively. (As is customarily the case, in this contribution the person accused of a crime is referred to as “the accused” where South African law is under discussion, and as “the defendant” where English law is discussed.)

2 Facts

Having driven the appellant from an address to her home, the complainant, a mini-cab driver, was told to wait while she collected money for the fare. However, the appellant did not re-emerge from the house for some ten minutes, and when she did, in a new change of clothes, she got into a VW Polo and drove off. The complainant followed her, and after unsuccessfully attempting to get her to stop by flashing his lights and sounding his horn, he stopped his vehicle in front of her, climbed out of his vehicle, and stood in front of the Polo, which had also come to a stop. The Polo then slowly edged forward, hitting the complainant several times on the knees as he retreated backwards. When the appellant turned the Polo, so as to get around the complainant, he sat on the bonnet of the Polo. The Polo then accelerated, causing the complainant to fall off the bonnet as the Polo drove away. As a result, the complainant suffered a cut finger and bruising. On the basis of these facts (par 6–11), a criminal trial resulted at Snaresbrook Crown Court,

where convictions of making off without payment, and dangerous driving, followed. (A further count of assault occasioning actual bodily harm was presented as an alternative to the dangerous driving charge, and the jury was discharged from returning a verdict in relation to this charge.) Following the majority jury verdict on these two counts, the court handed down a sentence of ten months' imprisonment, and disqualified the appellant from driving for three years, with a requirement for an extended retest (par 4). In the judge's summing-up to the jury, he included self-defence as a possible defence to the count of assault, and duress of circumstances as a defence in relation to the dangerous driving charge, while making it clear that these were alternative charges (par 17). The appellant, who had unsuccessfully argued in the trial court that she had not recognised the driver of the car as the complainant, and had at all times been acting in her own defence (par 12), appealed against conviction. The grounds of appeal related to the fairness of the trial in the court *a quo*, and (the principal ground of appeal) to the failure to allow the jury to consider self-defence as a defence to the count of dangerous driving.

3 Judgment

In the Court of Appeal, appellant counsel's first argument on appeal was that the judge's summing-up was unbalanced and unfair, particularly in underplaying key aspects of the defence case. This criticism left the court "wholly unimpressed", and it was held that "[t]here is nothing in this complaint" (par 22). A specific complaint that the court had mentioned the presence of witnesses in the summing-up (a point contested by the appellant) was further held not to have been capable of "impact[ing] itself on the fairness of the trial or the safety of the conviction" (par 24). The first argument on appeal was therefore dismissed by the court.

The second argument on appeal was that the court had erred by failing to allow the jury to consider self-defence as a possible defence on the count of dangerous driving (par 26). In this regard, the court noted the failure of appellant counsel to object to this matter when invited to comment (par 27), before setting out the difference between the defences of self-defence and duress of circumstances (par 29). (The nature of these defences is elaborated upon in the next section.) This was important in light of appellant counsel's contention that if the judge had put the issue to the jury in the context of possible self-defence (rather than duress of circumstances) in relation to the dangerous driving count, the appellant may have prevailed (par 30).

In response, the court noted that self-defence fails to feature in the leading textbooks as a possible defence in driving cases, although the defence of duress of circumstances has featured prominently in a number of reported driving cases (par 31). The court proceeded to examine a number of pertinent decisions in this regard, with appellant counsel arguing that self-defence was equally applicable in the context of driving charges (par 34). The key distinction between the two defences relates to the differing *mens rea* requirements:

“in self-defence a defendant is judged on the facts as he honestly believes them to be; whereas in duress the belief has, on settled authority, to be on reasonable grounds.” (par 37, reaffirmed by the court at par 39)

The court proceeded to examine whether self-defence could indeed be regarded as a defence where the offence in question does not typically include the application of force as part of the criminal conduct, and concluded:

“There seems to us no reason to deny altogether the availability of the defence simply because the charge is one of dangerous (or, for that matter, careless) driving. Whilst such a charge does not *of itself* convey the use of force, the alleged facts relating to the driving charge may nevertheless be such that force has indeed been applied in response to threatened or actual force. In the vast majority of driving cases, of course, a defence of self defence simply cannot arise: just because no force, as such, is being used at all by a driver to meet any actual or threatened force.” (par 41, original emphasis)

The court held that although cases where self-defence may be applicable will be rare, the present case did present such facts, and so the mere fact that a count of dangerous driving was in issue did not preclude the availability of relying on self-defence (as argued by prosecution counsel) (par 42), where “use of responsive force is indeed involved in the dangerous driving alleged” (par 41). The artificiality of the situation, requiring separate defences in law to be formulated for the jury’s consideration where the facts of the case are identical on both counts, was demonstrated by the court: on a charge of assault, self-defence was available, whereas only duress of circumstances could have applied to a count of dangerous driving (par 43). Moreover, self-defence would have been an available defence had the appellant alighted from the car and been involved in a physical altercation. Why should the position be different simply because she remained in the vehicle? (par 43). Furthermore, if the appellant were simply using the car as a means to defend herself against a threat of minor violence, why should self-defence be excluded as a possible defence against what was in substance a common assault if it were charged as a driving offence? (The defence of duress would also not be applicable (par 43)). The court noted that it seems unsatisfactory to limit the available defences in such circumstances to one solely based on the definition of the driving offence in question (par 43).

Thus, the court concluded, where both defences (self-defence and duress of circumstances) are potentially available, a judge should seek to adopt one to the exclusion of the other (par 44). *In casu*, the most appropriate defence on the facts in respect of the count of dangerous driving was indeed self-defence, albeit that this would not typically be the case (par 44). In principle, therefore, self-defence could be available, depending on the “use of force involved in the driving by reference to the particular circumstances of the case” (par 45). On the facts of the present case, the court held that the trial court could not be faulted in its approach, and that what the appellant did, which was clearly established on the basis of the evidence led in the case, could not be justified (par 47). The court therefore confirmed the conviction, although it deemed the sentence imposed by the trial court to be too harsh.

It therefore substituted a sentence of six months' imprisonment, suspended for 18 months, along with a period of disqualification of 18 months and an extended test (par 51–52).

4 The nature of the defences of self-defence and duress of circumstances in English law

The defences that arose for consideration in *Riddell* may be defined and distinguished as follows. Ormerod and Laird (Ormerod and Laird *Smith, Hogan, and Ormerod's Criminal Law* 15ed (2018) 381–382) explain that self-defence is governed by the common law, as “clarified” by s 76 of the Criminal Justice and Immigration Act 2008, and can usefully be described in terms of trigger and response:

“the trigger being D’s belief that the circumstances as he understands them render it reasonable or necessary for him to use force; and the response being the use of a proportionate or reasonable amount of force to the threat that D believes that he faces. The general principle is that the law allows such force to be used as is objectively reasonable in the circumstances as D genuinely believed them to be. The trigger is assessed subjectively (what did D genuinely believe); the response objectively (would a reasonable person have used that much force in the circumstances as D believed them to be).”

Thus, although the defendant must honestly believe that force is necessary, this belief is not required to be reasonable, as opposed to the requirement that the response be reasonable (Freer “Driving Force: Self-Defence and Dangerous Driving” 2018 *Cambridge Law Journal* 9 10).

In English law, the requirements for the defence of duress of circumstances parallel those for the defence of duress by threats, although the defences arise in differing factual circumstances – that is, conduct that may otherwise constitute an offence flowing from a threat issued by a threatener, as opposed to conduct that may otherwise constitute an offence flowing from a situation of emergency, which in turn informs the differences between these defences (Ashworth and Horder *Principles of Criminal Law* 7ed (2013) 205). Ashworth and Horder mention the following additional “subtle differences”: a) the threatener specifies the crime to be committed where there is duress by threats, whereas the defendant, in a case of duress of circumstances, chooses the otherwise criminal conduct that he or she believes is necessary to avert the threat; b) in duress by threats, the defendant is required to assess the likelihood of the threat being implemented in the event of non-compliance, whereas in duress of circumstances the defendant engages in a risk assessment of how likely the threat will so impact on him or her that the commission of the crime is the only reasonable option to avert it; and c) duress of circumstances overlaps with self-defence, unlike duress by threats (Ashworth and Horder *Principles of Criminal Law* 205–206). The general requirements for the two defences are summarised by Ashworth and Horder (*Principles of Criminal Law* 206–209) as follows:

- a) The defendant must be acting out of fear of death or serious injury, which “a sober person of reasonable firmness” would not have resisted.

- b) The threats or danger need not relate to the defendant personally.
- c) The threat or danger must be “present” and not a remote threat or danger of future harm.
- d) The defendant is not entitled to be judged on the facts as he or she believed them to be.
- e) The operation of the duress defence is subject to the doctrine of prior fault.

It is noteworthy that the defence of duress of circumstances has largely developed through a line of cases involving driving offences, from which it therefore follows that it was not surprising that the defendant in *Riddell* sought to raise this defence to dangerous driving in addition to assault (Kyd “Self Defence: R v Riddell (Tracey)” 2017 *Criminal Law Review* 637 639, see list of cases cited here). However, as Kyd points out (2017 *Criminal Law Review* 639), for successful reliance on duress of circumstances, a reasonable belief is required that the danger could give rise to really serious or even fatal harm, something that it would be very difficult to establish in the circumstances of the case. In essence: was it really necessary for the defendant to use her car as a weapon to avert death or serious harm? Was it reasonable to believe that she could? It was not.

Since the defence of duress of circumstances was accordingly not available to the appellant, the question whether self-defence (which does not require a reasonable belief in death or serious bodily harm) could possibly apply on the facts became crucial. As the court noted (par 31), self-defence has not been associated with driving cases in the past in English law. Despite the foundations for the court’s decision to allow reliance on self-defence in driving cases being regarded as “rather shaky”, it is clear that the effect of the judgment is that self-defence can arise in cases of dangerous driving or careless driving, where the defendant uses force in response to actual or threatened force (Kyd 2017 *Criminal Law Review* 639–640). As Freer (2018 *Cambridge Law Journal* 11) points out, if different defences are available to the defendant, in fairness, all such defences for each count must be left for the jury to consider, including self-defence (see also Herring “Mondeo Man, Road Rage and the Defence of Necessity” 1999 *Cambridge Law Journal* 268 270). Kyd comments that unlike duress of circumstances, which would be available as a defence to “a myriad of driving charges”, the availability of self-defence would be more limited, posing the question whether the defence would really apply in a case of careless driving: “[s]urely any use of force through the employment of a motor vehicle would, in and of itself, necessarily amount to *dangerous* driving?” (2017 *Criminal Law Review* 640, original emphasis). It follows that self-defence would not be available in the majority of driving offences – such as, for example, drink driving, driving while disqualified, or driving at excess speed, since these “necessarily do not involve the use of force” (Ormerod and Laird *Smith, Hogan, and Ormerod’s Criminal Law* 380).

Commentators on the *Riddell* judgment have raised the question whether the extension of self-defence to offences other than those involving an assault means that the distinction between duress and self-defence “ought to be collapsed to create one umbrella defence” (Kyd 2017 *Criminal Law*

Review 640), especially since the defences operate as “functionally similar” (Freer 2018 *Cambridge Law Journal* 12). This question was not addressed by the court in *Riddell*. Clarkson argues that regardless of the extreme pressure placed upon a defendant, the response of the defendant is underpinned by the same reasoning, and should therefore be assessed in the same way. He therefore postulates a “necessary action” defence in place of these defences (Clarkson “Necessary Action: A New Defence” 2004 *Criminal Law Review* 81). This novel approach would fly in the face of the traditional approach, in terms of which the different tests that are employed in respect of these defences reflect their alternative rationales (Kyd 2017 *Criminal Law Review* 640):

“Self-defence, commonly regarded as justificatory, recognizes 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.” (Freer 2018 *Cambridge Law Journal* 11)

5 South African law

It is instructive to compare the English legal position in relation to the defences discussed in *Riddell* with the position in South African law. In this note, the defences of private defence and necessity in South African law are juxtaposed with their English law counterparts, in order to compare and contrast the nature of the respective defences, and to consider whether South African law would take a similar approach to the factual scenario that arose in *Riddell*.

5.1 Private defence

Private defence (which includes self-defence (Burchell *South African Criminal Law and Procedure Vol 1: General Principles of Criminal Law* 4ed (2011) 121) operates in South African law as a justification ground, in terms of which *prima facie* unlawful conduct will be regarded as lawful, if it falls within certain grounds (Kemp (ed) *Criminal Law in South Africa* 3ed (2018) 98). As Snyman has indicated, there are two rationales for the justification ground of private defence: individual-protection theory, which is based on the individual’s right to defend her or his interests in the event of an unlawful attack; and upholding-of-justice theory, in terms of which an act of private defence operates to uphold the legal order (Snyman “The Two Reasons for the Existence of Private Defence and Their Effect on the Rules Relating to the Defence in South Africa” 2004 *SACJ* 178 180–181). Private defence may be defined as follows:

“A person acts in private defence, and her act is therefore lawful, if she uses force to repel an unlawful attack which has commenced, or is imminently threatening, upon her or somebody else’s life, bodily integrity, property or other interest which deserves to be protected, provided the defensive act is necessary to protect the interest threatened, is directed against the attacker, and is reasonably proportionate to the attack.” (Snyman *Criminal Law* 6ed (2014) 102)

The requirements for the defence are generally accepted among the commentators. As regards the attack, there must be: a) an unlawful attack, b) that is directed at a legally protected interest, and c) be in progress, but not yet completed (see Snyman *Criminal Law* 103–106; Kemp *Criminal Law in South Africa* 100–101; Burchell *Principles of Criminal Law* 4ed (2016) 122–125). In respect of the defensive act, it is required that: a) the defensive act was necessary to avert the attack; b) a reasonable response to the attack; and c) it must be directed against the attacker (see Snyman *Criminal Law* 106–111; Kemp *Criminal Law in South Africa* 101–104; Burchell *Principles of Criminal Law* 125–130). Snyman adds a fourth requirement to the defensive act: that the attacked person must be aware of the fact that she or he is acting in private defence (*Criminal Law* 111–112, but cf De Wet *Strafreg* 4ed (1985) 76–77).

The test for private defence is objective in nature (Snyman *Criminal Law* 112; Burchell *Principles of Criminal Law* 130; *S v Ntuli* 1975 (1) SA 429 (A) 436; *S v De Oliveira* 1993 (2) SACR 59 (A) 63*i*). However, there has been some uncertainty about what the nature of the test entails. Snyman states that it appears that courts “apply the reasonable person test merely in order to determine whether X’s conduct was reasonable in the sense that it accorded with what is usually acceptable in society” (*Criminal Law* 112–113, cited with approval in *S v Steyn* 2010 (1) SACR 411 (SCA) par 18). The difficulty with this statement is that it tends to blur the vital distinction between unlawfulness and fault in the form of negligence. Snyman warns against such confusion, but then proceeds to argue that “the criterion of the reasonable person is employed merely as an aid to determine whether X’s conduct was lawful or unlawful” and proceeds to add that “there can be no criticism of such an approach” (*Criminal Law* 113). The fallacy of this statement is demonstrated by the words of the court in *Steyn*, which cited Snyman’s assessment of the use of the reasonable person test:

“[I]n considering [lawfulness] the courts often do measure the conduct of the alleged offender against that of a reasonable person on the basis that reasonable conduct is usually acceptable in the eyes of society and, consequently, lawful.” (*S v Steyn supra* par 18)

The reasonable person test in South African law is not entirely objective in nature; in making the assessment, it is required that the notional reasonable person must be “placed in the circumstances in which X found himself at the critical moment itself [which] amounts to a certain degree of individuation or subjectivity of the test” (Snyman *Criminal Law* 213). Thus, although negligence is objectively assessed, it is premised on “what a reasonable person (with certain judicially attributed characteristics) would, in fact, have done *or believed* in the circumstances” (Burchell *Principles of Criminal Law* 131, original emphasis). In contrast, the test for unlawfulness of the accused’s conduct involves a diagnostic, *ex post facto* assessment that is purely objective in nature (see e.g., De Wet *Strafreg* 69), and which is “qualitatively different, broader and potentially anterior to the inquiry into negligence” (Burchell *Principles of Criminal Law* 131). To use a test that employs subjective criteria to enable a conclusive assessment of an entirely objective notion, as Snyman and the Supreme Court of Appeal in *Steyn*

would have us do, runs the real risk of confusion and error. In fact, in assessing the justification ground of defence, the accused's beliefs are not relevant. These only fall to be assessed in relation to fault.

In this regard, the accused's beliefs are most certainly relevant in relation to putative private defence – for the reasons set out in *S v De Oliveira* (*supra*):

“In putative private defence it is not lawfulness that is in issue but culpability ('skuld'). If an accused honestly believes his life or property to be in danger, but objectively viewed they are not, the defensive steps he takes cannot constitute private defence. If in those circumstances he kills someone his conduct is unlawful. His erroneous belief that his life or property was in danger may well (depending upon the precise circumstances) exclude *dolus* in which case liability for the person's death based on intention will also be excluded; at worst for him he can then be convicted of culpable homicide.” (63–64)

Putative private defence can therefore exclude conviction for a crime requiring intention where the accused honestly believes that he or she is entitled to rely on private defence, and can even exclude conviction for a negligence-based crime such as culpable homicide, where the court holds that the reasonable person in the circumstances of the accused would have made the same mistake (see e.g., *S v Sataardien* 1998 (1) SACR 637 (C)).

It is therefore evident that the justification ground of private defence in South African law is assessed entirely objectively, and in contrast to the English law formulation of self-defence, does not leave scope for a consideration of the accused's beliefs in the context of the inquiry into unlawfulness. Only once it has been established that the accused's actions were indeed unlawful, can the accused's beliefs become relevant in the context of establishing whether the accused also has the necessary fault to be found guilty of the crime – that is, whether the accused can rely on putative private defence.

Although, as in English law, it is not discussed in detail by the writers, there seems to be no reason that private defence in South African law cannot in principle apply to appropriate driving cases. Snyman elaborates on this question in the course of his explanation of how the individual-protection rationale informs the application of private defence in South African law:

“[While] a person [may not] rely on private defence as justification for stopping somebody else who is driving without a valid driver's licence and preventing such person from driving in order to protect society as a whole ... [i]t is submitted that a person should also, in private defence, have the right to force a drunken driver to stop, because drunken driving poses a real threat to the lives or physical integrity of other users of the road.” (2004 SACJ 182)

It is submitted that the appellant in *Riddell* would therefore have been able to plead private defence had the charges been brought in South Africa (although the facts of the case would have precluded such reliance on private defence being successful).

5.2 Necessity

In South African law, duress or compulsion is regarded as a species of the broader defence of necessity (Kemp *Criminal Law in South Africa* 111–112). It is clear that necessity operates as a justification ground, although in *S v Bailey* (1982 (3) SA 772 (A) 796A), Jansen JA stated that it may also operate as a ground excluding fault. It is submitted that this is simply a recognition that in addition to the justification ground of necessity, which operates to exclude unlawfulness, there is also a defence of putative necessity (see *S v Goliath* 1972 (3) SA 1 (A) 37E–H), where the circumstances of necessity exclude fault, even though the requirements for the justification ground are not met. Unfortunately, while this position can be reconciled with the dicta in *Bailey*, it is not expressed entirely lucidly in the *Bailey* judgment. Given the conundrum as to whether killing under duress or compulsion could be regarded as a justification ground (in light of the right to life and the right to equality, as this would amount to valuing one life more highly than another (Burchell *Principles of Criminal Law* 185–186)), it may be that putative necessity has an important role to play in this context (see *S v Mandela* 2001 (1) SACR 156 (C)).

The defence of necessity is closely related to that of private defence, in that both defences protect interests such as life, bodily integrity and property against threatening danger (Snyman *Criminal Law* 114–115). The differences between these justification grounds are that a) while private defence responds to an unlawful attack, necessity may either be as a consequence of an unlawful attack or circumstances; and b) in private defence, the defensive act is directed against the aggressor, whereas in necessity, either the interests of a third party are affected, or only a legal provision is infringed (Snyman *Criminal Law* 115). Burchell describes the defence of necessity as arising “when a person, confronted with a choice between suffering some evil and breaking the law in order to avoid it, chooses the latter alternative” (*Principles of Criminal Law* 164). The following requirements have been identified in relation to the justification ground of necessity: a) a legal interest must be endangered; b) the danger must have commenced or be imminent; c) the danger must not have arisen through the accused’s own fault; d) if the accused is legally obliged to endure the danger, he or she cannot rely on necessity; e) the accused must be conscious of acting in necessity; f) the accused’s act must be necessary to avert the danger; and g) the act must be reasonable and proportionate (for further discussion, see Kemp *Criminal Law in South Africa* 112–114; Snyman *Criminal Law* 118–120; Burchell *Principles of Criminal Law* 166–173). As a justification ground, the defence of necessity is objectively assessed (De Wet *Strafreg* 90). Should any of the requirements of the justification ground not be satisfied, the accused may still be able to rely on putative necessity – that is, although the accused’s act is unlawful, he or she nevertheless may lack liability on the basis of an absence of fault (De Wet *Strafreg* 90).

It is evident that in the context of South African law, the defence of necessity could, in principle, be pleaded by an accused in the factual scenario in *Riddell* – but that such defence would not meet with success.

There does not seem to be any obstacle to pleading necessity in respect of driving cases. Indeed, the defence would be available in cases where the justification ground of private defence would not find application, such as contravention of the speed limit (*S v Pretorius* 1975 (2) SA 85 (SWA)).

6 Concluding remarks

In comparing English and South African law in relation to the issues raised by the factual complex in *Riddell*, it may be concluded that in principle either self-defence (private defence) or necessity/duress could apply. However, it is submitted that South African law is clearer on the objectivity of the justification ground of defence; allowing the intrusion of subjective considerations into self-defence, as necessarily occurs in English law, does not add to legal clarity. Where a defence is based on the accused's conduct not being unlawful, it is by nature an *objective* inquiry. As we have seen, the accused's mental state, in the form of fault, may still be significant, but then it is appropriate to assess this according to the appropriate test. Thus, where an accused has not fulfilled the requirements of the justification ground of defence, he or she acts unlawfully, but may yet escape criminal liability for an intention-based crime where he or she genuinely believes that he or she is justified in relying on private defence. The basis for the accused not being convicted would be putative defence. This is the position in South African law, and it is surely preferable for the defence in question to be assessed on the basis of a test that reflects the proper nature of the inquiry: in general terms, this means an objective assessment for the *actus reus*, and a subjective assessment for *mens rea*.

A further important qualification is deserving of iteration at this point. Though negligence is essentially objectively assessed (unlike the assessment of other *mens rea* elements such as capacity and intent), the test for negligence incorporates subjective aspects – in that the reasonable person is placed in the circumstances of the accused. As a result, it is important to maintain the distinction between the test for objective reasonableness as it applies to the unlawfulness inquiry, and the test of the reasonable person, which relates to negligence.

Insofar as the necessity defence is concerned, it seems that the South African "single defence" is preferable to the splintering into differing components that happens in the English law distinction between duress by threats and duress by circumstances, as well as having a separate necessity defence. While this situation may be ascribed to the manner in which the respective defences developed in English law, the difficulties that the courts have experienced with labelling the differing defences (as noted by Ormerod and Laird *Smith, Hogan, and Ormerod's Criminal Law* 366, 369), and the single fundamental rationale upon which all these defences rest, are indicative of the benefits that a single structure and general appellation for the necessity defence would bring to English law. As discussed above, the South African law on necessity is not without its own curiosity. On the basis of the dictum in *Bailey*, leading South African writers have characterised the necessity defence as functioning as both a justification ground *and* a ground excluding fault (Snyman *Criminal Law* 116; Burchell *Principles of Criminal*

Law 166). A defence excluding fault is a *putative* defence, and ought to be described as *putative necessity* in this context, rather than alongside the true necessity defence, which serves to exclude unlawfulness.

The need to carefully describe the ambit of the defences under discussion within a principled framework (compare Ormerod and Laird *Smith, Hogan, and Ormerod's Criminal Law* 380, who refer to the English law of self-defence containing inconsistencies and anomalies as a result of its "haphazard growth") is reflected in the calls to conflate the defences of self-defence and duress in English law. Fortunately, this is not a debate that would gain traction in South African law, where the differing rationales for the defences under discussion, and the consequent basis for their independent existence, despite their evident similarities, are well established and clearly recognised.

Finally, in accordance with the approach of the Court of Appeal in *Riddell*, it may be concluded that there is no basis in logic or fairness for excluding the defences of private defence (self-defence in English law) or necessity (duress or necessity in English law) from any category of offences, including driving offences.

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