IN THE PROVINCIAL COURT OF NOVA SCOTIA
Citation: R. v. Pleau 2013 NSPC 116

Date: 20131202
Docket: 2516854/2516855
Registry: Amherst

Between:

Her Majesty the Queen

v.

Roger Pleau

Judge:	The Honourable Judge Paul B. Scovil
Heard:	25 September 2013 in Amherst, Nova Scotia
Written decision:	2 December 2013
Charge:	THAT HE on or about the 4th day of October A.D. 2012 at, or near Upper Nappan, Nova Scotia, did while his ability to operate a motor vehicle was impaired by alcohol, did operate a motor vehicle contrary to section 253(1)(a) of the Criminal Code; AND FURTHERMORE on or about the 4th day of October in the year 2012 at the Town of Upper Nappan in the said Region, having consumed alcohol in such a quantity that the concentration thereof in his blood exceeded eighty milligrams of alcohol in one hundred millilitres of blood did operate a motor vehicle contrary to section 253(1)(b) of the Criminal Code.
Counsel:	Mr. Bruce Baxter, for the crown Mr. Jim O'Neil, for the defence

By the Court:

[1] There are any number of reasons for individuals to quit the habit of smoking. This case outlines another one. Roger Pleau and his friend Eldon Deegan were spending the evening drinking beer at Mr. Deegan's apartment while their wives attended "the bingo" locally in Amherst, Nova Scotia. Not being allowed to smoke in the apartment of Mr. Deegan, Mr. Pleau and Mr. Deegan left the residence located on the second floor of an apartment complex, to proceed down a flight of stairs, through a locked set of entrance doors to the outside, there to conflagrate a cigarette. Mr. Deegan stumbled on the stairs, gashing his scalp on an iron hand rail, resulting in a concussion. The pair found themselves outside. But as misfortune has it, Mr. Deegan's key to the building was with his wife at bingo. Apparently the Deegans and Pleaus were close friends and the Deegans had given a spare outside key to the Pleaus. Naturally, this spare key was entrusted to Mrs. Pleau. She was at bingo. Neither Mr. Pleau nor his friend Mr. Deegan possessed a cell phone. Mr. Deegan was somewhat incoherent and having breathing difficulties. Mr. Pleau panicked and drove his friend to the local hospital. At the hospital the attending nurse realized that Mr. Pleau had drivn to the hospital and was intoxicated, resulting in the nurse calling the police. The police attended, and as a result Mr. Pleau was later found to have blood alcohol readings of 110 and 100 milligrams of alcohol in 100 millilitres of blood. Obviously if Mr. Pleau and Mr. Deegan were non-smokers none of this would have occurred.

[2] At trial, Mr. Pleau admitted the case by the crown. Mr. Pleau argues that here he has made out a case of necessity regarding the driving of his compatriot to the hospital while impaired. This is a result of his companion having fallen and gashed his head.

[3] The defence of necessity was considered in *Perka v. The Queen* [1984] 2 S.C.R. 232 where the court stated:

> If the defence of necessity is to form a valid and consistent part of our criminal law it must, as has been universally recognized, be strictly controlled and scrupulously limited to situations that correspond to its underlying rationale. That rationale, as I have indicated,

is the recognition that it is inappropriate to punish actions which are normatively "involuntary". The appropriate controls and limitations on the defence of necessity are, therefore, addressed to ensuring that the acts for which the benefit of the excuse of necessity is sought are truly "involuntary" in the requisite sense.

In *Morgentaler, supra,* I was of the view that any defence of necessity was restricted to instances of non-compliance "in urgent situations of clear and imminent peril when compliance with the law is demonstrably impossible". In my opinion this restriction focuses directly on the "involuntariness" of the purportedly necessitous behaviour by providing a number of tests for determining whether the wrongful act was truly the only realistic reaction open to the actor or whether he was in fact making what in fairness could be called a choice. If he was making a choice, then the wrongful act cannot have been involuntary in the relevant sense.

The requirement that the situation be urgent and the peril be imminent, tests whether it was indeed unavoidable for the actor to act at all. In LaFave & Scott, *Criminal Law* (1972), at p. 388, one reads:

> It is sometimes said that the defence of necessity does not apply except in an emergency–when the threatened harm is immediate, the threatened disaster imminent. Perhaps this is but a way of saying that, until the time comes when the threatened harm is immediate, there are generally options open to the defendant to avoid the harm, other than the option of disobeying the literal terms of the law--the rescue ship may appear, the storm may pass;

> and so the defendant must wait until that hope of survival disappears.
>
> At a minimum the situation must be so emergent and the peril must be so pressing that normal human instincts cry out for action and make a counsel of patience unreasonable.
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> The requirement that compliance with the law be "demonstrably impossible" takes this assessment one step further. Given that the accused had to act, could he nevertheless realistically have acted to avoid the peril or prevent the harm, without breaking the law? *Was there a legal way out?* I think this is what Bracton means when he lists "necessity" as a defence, providing the wrongful act was not "avoidable". The question to be asked is whether the agent had any real choice: could he have done otherwise? If there is a reasonable legal alternative to disobeying the law, then the decision to disobey becomes a voluntary one, impelled by some consideration beyond the dictates of "necessity" and human instincts.
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> The importance of this requirement that there be no reasonable legal alternative cannot be overstressed.

[4] The Justice went on to say:

> It is now possible to summarize a number of conclusions as to the defence of necessity in terms of its nature, basis and limitations: (1) the defence of necessity could be conceptualized as either a justification or an excuse; (2) it should be recognized in Canada as an excuse, operating by virtue of s. 7(3) of the *Criminal Code*; (3) necessity as an excuse implies no vindication of the deeds of the actor; (4) the criterion is the moral involuntariness of the wrongful action; (5) this

> involuntariness is measured on the basis of society's expectation of appropriate and normal resistance to pressure; (6) negligence or involvement in criminal or immoral activity does not disentitle the actor to the excuse of necessity; (7) actions or circumstances which indicate that the wrongful deed was not truly involuntary do disentitle; (8) the existence of a reasonable legal alternative similarly disentitles; to be involuntary the act must be inevitable, unavoidable and afford no reasonable opportunity for an alternative course of action that does not involve a breach of the law; (9) the defence only applies in circumstances of imminent risk where the action was taken to avoid a direct and imminent peril; (10) where the accused places before the Court sufficient evidence to raise the issue, the onus is on the Crown to meet it beyond a reasonable doubt.

[5] This was further considered in *R. v. Latimer* [2001] 1 S.C.R. 3:

> We propose to set out the requirements for the defence of necessity first, before applying them to the facts of this appeal. The leading case on the defence of necessity is *Perka v. The Queen*, [1984] 2 S.C.R. 232. Dickson J., later C.J., outlined the rationale for the defence at p. 248:
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> > It rests on a realistic assessment of human weakness, recognizing 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. The objectivity of the criminal law is preserved; such acts are still wrongful, but in the circumstances they are excusable. Praise is indeed not bestowed, but pardon is....

Dickson J. insisted that the defence of necessity be restricted to those rare cases in which true "involuntariness" is present. The defence, he held, must be "strictly controlled and scrupulously limited" (p. 250). It is well established that the defence of necessity must be of limited application. Were the criteria for the defence loosened or approached purely subjectively, some fear, as did Edmund Davies L.J., that necessity would "very easily become simply a mask for anarchy": *Southward London Borough Council v. Williams,* [1971] Ch. 734 (C.A.), at p. 746.

Perka outlined three elements that must be present for the defence of necessity. First, there is the requirement of imminent peril or danger. Second, the accused must have had no reasonable legal alternative to the course of action he or she undertook. Third, there must be proportionality between the harm inflicted and the harm avoided.

To begin, there must be an urgent situation of "clear and imminent peril": *Morgentaler v. The Queen*, [1976] 1 S.C.R. 616, at p. 678. In short, disaster must be imminent, or harm unavoidable and near. It is not enough that the peril is foreseeable or likely; it must be on the verge of transpiring and virtually certain to occur. In *Perka*, Dickson J. expressed the requirement of imminent peril at p. 251: "At a minimum the situation must be so emergent and the peril must be so pressing that normal human instincts cry out for action and make a counsel of patience unreasonable". The *Perka* case, at p. 251, also offers the rationale for this requirement of immediate peril: "The requirement...tests whether it was indeed unavoidable for the actor to act at all". Where the situation of peril clearly should have been foreseen and avoided, an accused person cannot reasonably claim any immediate peril.

The second requirement for necessity is that there must be no reasonable legal alternative to disobeying the law. *Perka* proposed these questions, at pp. 251-52: "Given that the accused had to act, could he nevertheless realistically have acted to avoid the peril or prevent the harm, without breaking the law? *Was there a legal way out?*" (emphasis in original). If there was a reasonable legal alternative to breaking the law, there is no necessity. It may be noted that the requirement involves a realistic appreciation of the alternatives open to a person; the accused need not be placed in the last resort imaginable, but he must have no reasonable legal alternative. If an alternative to breaking the law exists, the defence of necessity on this aspect fails.

The third requirement is that there be proportionality between the harm inflicted and the harm avoided. The harm inflicted must not be disproportionate to the harm the accused sought to avoid. See *Perka*, per Dickson J., at p. 252:

> No rational criminal justice system, no matter how humane or liberal, could excuse the infliction of a greater harm to allow the actor to avert a lesser evil. In such circumstances we expect the individual to bear the harm and refrain from acting illegally. If he cannot control himself we will not excuse him.
>
> Evaluating proportionality can be difficult. It may be easy to conclude that there is no proportionality in some cases, like the example given in *Perka* of the person who blows up a city to avoid breaking a finger. Where proportionality can quickly be dismissed, it makes sense for a trial judge to

> do so and rule out the defence of necessity before considering the other requirements for necessity. But most situations fall into a grey area that requires a difficult balancing of harms. In this regard, it should be noted that the requirement is not that one harm (the harm avoided) must always clearly outweigh the other (the harm inflicted). Rather, the two harms must, at a minimum, be of a comparable gravity. That is, the harm avoided must be either comparable to, or clearly greater than, the harm inflicted. As the Supreme Court of Victoria in Australia has put it, the harm inflicted "must not be out of proportion to the peril to be avoided": *R. v. Loughnon*, [1981] V.R. 443, at p. 448.

Before applying the three requirements of the necessity defence to the facts of this case, we need to determine what test governs necessity. Is the standard objective or subjective? A subjective test would be met if the person believed he or she was in imminent peril with no reasonable legal alternative to committing the offence. Conversely, an objective test would not assess what the accused believed; it would consider whether in fact the person was in peril with no reasonable legal alternative. A modified objective test falls somewhere between the two. It involves an objective evaluation, but one that takes into account the situation and characteristics of the particular accused person. We conclude that, for two of the three requirements for the necessity defence, the test should be the modified objective test.

The first and second requirements - imminent peril and no reasonable legal alternative - must be evaluated on the modified objective standard described above. As

expressed in *Perka*, necessity is rooted in an objective standard: "involuntariness is measured on the basis of society's expectation of appropriate and normal resistance to pressure" (p. 259). We would add that it is appropriate, in evaluating the accused's conduct, to take into account personal characteristics that legitimately affect what may be expected of that person. The approach taken in *R. v. Hibbert*, [1995] 2 S.C.R. 973, is instructive. Speaking for the Court, Lamer C.J. held, at para. 59, that

> it is appropriate to employ an objective standard that takes into account the particular circumstances of the accused, including his or her ability to perceive the existence of alternative courses of action.

While an accused's perceptions of the surrounding facts may be highly relevant in determining whether his conduct should be excused, those perceptions remain relevant only so long as they are reasonable. The accused person must, at the time of the act, honestly believe, on reasonable grounds, that he faces a situation of imminent peril that leaves no reasonable legal alternative open. There must be a reasonable basis for the accused's beliefs and actions, but it would be proper to take into account circumstances that legitimately affect the accused person's ability to evaluate his situation. The test cannot be a subjective one, and the accused who argues that <u>he</u> perceived imminent peril without an alternative would only succeed with the defence of necessity if his belief was reasonable given his circumstances and attributes. We leave aside for a case in which it arises the possibility that an honestly held but mistaken belief could ground a "mistake of fact" argument on the separate inquiry into *mens rea*.

The third requirement for the defence of necessity, proportionality, must be measured on an objective standard, as it would violate fundamental principles of the criminal law to do otherwise. Evaluating the nature of an act is fundamentally a determination reflecting society's values as to what is appropriate and what represents a transgression. Some insight into this requirement is provided by G. P. Fletcher, in a passage from *Rethinking Criminal Law* (1978), at p. 804. Fletcher spoke of the comparison between the harm inflicted and the harm avoided, and suggested that there was a threshold at which a person must be expected to suffer the harm rather than break the law. He continued:

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

The evaluation of the seriousness of the harms must be objective. A subjective evaluation of the competing harms would, by definition, look at the matter from the perspective of the accused person who seeks to avoid harm, usually to himself. The proper perspective, however, is an objective one, since evaluating the gravity of the act is a matter of community standards infused with constitutional considerations (such as, in this case, the s. 15(1) equality rights of the disabled). We conclude that the proportionality requirement must be determined on a purely objective standard.

[6] The defence of necessity has as well been considered in the light of impaired driving cases. In *R. v. Costoff* [2010] O.J. No. 1261 a 24 year old accused was playing pool in his basement with a friend and had consumed a number of beers. His friend slipped and hit his head on a wood moulding, resulting in a one and a half inch gash to his head. His friend was going in and out of consciousness and another friend advised him that he could not contact an ambulance. The accused drove his friend to a hospital, but went off the road. There the defence of necessity was made out. (See also *R. v. Valauskas* [2012] O.J. No. 6233.)

ANALYSIS

1. Imminent danger and peril

[7] Whether the accused faced an urgent situation of clear and imminent harm must be evaluated on a modified objective standard. I must consider whether in fact the person was in peril with no reasonable alternative, taking into account the situation and characteristics of Mr. Pleau.

[8] Mr. Pleau was faced with an injured man with a gash to his head. Mr. Deegan became short of breath and incoherent. Mr. Pleau thought his friend was going to die. I accept what Mr. Pleau testified to. He gave evidence in a forthright and credible manner. No doubt credibility is key in cases like this. While the scenario testified to may appear to be an incredible series of occurrences, having heard the evident of the defence, I have found it to be credible. Mr. Pleau struck me as an unsophisticated man with an ordinary demeanour. There was no evidence before me of any first aid or medical training on behalf of the accused, and he would be unlikely to have the skills to evaluate the medical condition of Mr. Deegan with the corresponding ability to react appropriately. His inability to call 911, the panic of being locked out of the apartment building with someone in obvious medical distress would lead the accused to take the action that he did. While we can all assume the position of an armchair quarterback and put forward a multitude of “what ifs”, I find that this accused in those circumstances surrounding him at the time of this matter would be concerned that Mr. Deegan was in imminent peril given Mr. Deegan’s gash to the head, breathing difficulties and incoherency.

2. No reasonable legal alternative

[9] Again whether the accused found himself in a situation for which there was no reasonable legal alternative is a matter to be assessed on the basis of a modified objective standard. To some extent I have answered this question above. Mr. Pleau found himself outside the apartment of Mr. Deegan with no key. While the Pleaus held a spare key to the apartment it, along with Deegan's key, were with their wives at bingo. The apartment had no buzzer to obtain entrance from other residents. The outside door automatically locked and neither individual thought to reserve a manner of reentry once they went outside to smoke. Pleau had no cell phone. While there were alternatives such as going elsewhere for help, it must be remembered that the medical situation of Mr. Deegan was serious. Any reasonable alternative to driving would have taken time that Mr. Pleau did not think that he had. Both Mr. Pleau and Mr. Deegan were ordinary unsophisticated gentlemen faced with an extraordinary situation. Given the time pressures of the situation and his lack of medical background to assess the situation, Mr. Pleau would have felt he had no other legal alternative other than to transport his friend to the hospital. As stated in *Latimer* (supra), Mr. Pleau should not be placed in the last resort imaginable.

3. Proportionality between harm inflicted and harm avoided

[10] This third aspect of the test for the defence of necessity must be measured in an objective manner. It is difficult to evaluate the aspect of proportionality. It is clear that I must find the harm of impaired driving must be comparable to, or lesser than, the harm of Mr. Deegan being without medical assistance. In this case there appeared to objectively be a sincere and dire medical emergency. Were Mr. Deegan to suffer irreparable harm as a result of delay in obtaining medical attention, it would surely outweigh the harm brought on in this case of the impaired driving.

[11] Having found herein that all three tests for a defence of necessity have been made out, I accordingly acquit the accused. This should not be taken as condoning impaired driving. Nor should the public think that the defence of necessity is an easy one to make out. Rare is the case that such evidence would be accepted, but this is such a case.

PCJ