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In Defence of Self-Defence

R. v. Gill, 2004 BCCA 239

by **Martin F. Allen**

Brooks & Marshall, Victoria

Imagine that Parliament wrote a statutory defence into the *Criminal Code*. Imagine further that it was rather poorly drafted. Now, imagine that judges had trouble interpreting this particular provision and, at a certain point, just threw up their hands and said, well, this is all rather confusing, so let's not trouble the jury with it.

Wouldn't happen? Couldn't happen? It just did.

Mr. Gill brought a knife to a back-alley shoving match. Confronted and assaulted by three men, he said, and fearing for his life, he pulled out his knife and waved it at them, intending only to ward them off. One assailant grabbed at the blade, and was cut. Another, in some



manner, found himself impaled on the knife, and died.

The jury at Gill's trial, we are told by the Court of Appeal, heard "various accounts" of the fight. Gill testified that as the victim came at him, he "held the knife out" and the victim collided with him "with a lot of force"—the suggestion being that the wounding was unintentional. The Court of Appeal agreed that the trial judge's charge demonstrated no hint of disbelief that Gill did not intend to stab the victim, and that there was indeed an "air of reality" to the proposition that there was a lack of intent. Defence counsel at trial, however, had not argued that the killing had been accidental, and had not asked for a charge on *Criminal Code* s. 34(1). On appeal, Gill's position was that such a charge should have been given.

Donald J.A., Southin and Hall JJ.A. Concurring

The Court rejected the submission that in these circumstances a failure to instruct the jury on s. 34(1) was prejudicial to the defence. "No useful purpose", wrote Donald J.A., "would have been served by charging on that provision. S. 34(2) was fully adequate to deal with the situation".

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Citing the difficulty and confusion that “many judges” have experienced in dealing with the *Code* provisions on self-defence, Donald J.A. quoted approvingly from suggestions made by Mr. Justice Moldaver in *R. v. Pintar* (1996), 110 C.C.C. (3d) 402 (Ont. C.A.)

(“*Pintar*”):

To give effect to the functional approach, I would urge trial judges to consider the following guidelines when faced with the prospect of charging a jury on the law of self-defence:

(1) Consider the evidence carefully with a view to determining the essence of the claim to self-defence and the *Code* provision(s) realistically available to that claim.

(2) To the extent that the evidence fails the air of reality test in respect of one or more of the constituent elements of a particular provision, that provision should not be left with the jury.

(3) To the extent that the evidence clearly establishes one or more of the constituent elements of a particular provision, Crown counsel should be encouraged to admit the underlying facts and thereby avoid unnecessary legal instruction.

(4) Where a particular provision affords the accused a wider scope of justification than a companion provision, the narrower provision should only be put to the jury if the evidence lends an air of reality to the factual underpinnings of that provision, *and* the provision somehow fills a gap unaccounted for in the justification afforded by the wider provision.

...

On a practical level, in those cases where s. 34(1) remains theoretically available, it is often difficult, if not impossible, to imagine a scenario wherein the jury would reject the wider justification afforded by s. 34(2) and apply s. 34(1) to acquit. The question then becomes whether the risk of confusing the jury and complicating the charge justifies the inclusion of instruction on s. 34(1), when its application is at best tenuous and its scope of justification narrower than that available under s. 34(2).

In the circumstances of the case at bar, Donald J.A. went on, no gap had been left by the application of s. 34(2), and the jury would not have rejected s. 34(2) but then gone on to acquit on the basis of s. 34(1). *Pintar* had been adopted by our Court for the proposition that s. 34(2) applies whether or not the accused intended to cause death or grievous bodily harm (*R. v. Pawliuk* (2001), 151 C.C.C. (3d) 155 (B.C. C.A.) (“*Pawliuk*”), citing *R. v. Trombley* (1999), 134 C.C.C. (3d) 576

STATUTORY PROVISIONS

Criminal Code, Section 34

(1) Every one who is unlawfully assaulted without having provoked the assault is justified in repelling force by force if the force he uses is not intended to cause death or grievous bodily harm and is no more than is necessary to enable himself to defend himself.

(2) Every one who is unlawfully assaulted and who causes death or grievous bodily harm in repelling the assault is justified if

(a) he causes it under reasonable apprehension of death or grievous bodily harm from the violence with which the assault was originally made or with which the assailant pursues his purposes; and

(b) he believes, on reasonable grounds, that he cannot otherwise preserve himself from death or grievous bodily harm.

Criminal Code, Section 35

Every one who has without justification assaulted another but did not commence the assault with intent to cause death or grievous bodily harm, or has without justification provoked an assault on himself by another, may justify the use of force subsequent to the assault if

(a) he uses the force

(i) under reasonable apprehension of death or grievous bodily harm from the violence of the person whom he has assaulted or provoked, and

(ii) in the belief, on reasonable grounds, that it is necessary in order to preserve himself from death or grievous bodily harm;

(b) he did not, at any time before the necessity of preserving himself from death or grievous bodily harm arose, endeavour to cause death or grievous bodily harm; and

(c) he declined further conflict and quitted or retreated from it as far as it was feasible to do so before the necessity of preserving himself from death or grievous bodily harm arose.

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Criminal Code, Section 36

Provocation includes, for the purposes of sections 34 and 35, provocation by blows, words or gestures.

Criminal Code, Section 37

- (1) Every one is justified in using force to defend himself or any one under his protection from assault, if he uses no more force than is necessary to prevent the assault or the repetition of it.
- (2) Nothing in this section shall be deemed to justify the wilful infliction of any hurt or mischief that is excessive, having regard to the nature of the assault that the force used was intended to prevent.

(S.C.C.); and see also *R. v. Bogue* (1976), 30 C.C.C. (2d) 403 (Ont. C.A.).

The defence evidence of lack of intention exhibited an “air of reality”, yet was “implausible”, and was therefore outweighed by the risk of “creating confusion in the minds of the jury by discussing s. 34(1)”.

“Resort to s. 34(1) was unnecessary in this case. Section 34(2) applied in any event of the appellant’s intention. Since it is highly unlikely that the jury would have found the appellant did not intend to stab the victim, s. 34(1) takes on marginal importance at best. Given the risk of confusion by leaving too many provisions on self-defence with the jury, it was just as well not to mention s. 34(1).”

Analysis

The disposition of Gill’s appeal clearly builds upon the foundation of Moldaver J.A.’s propositions in *Pintar*. Once one gets past the inevitable qualms about yet another “functional” approach to statutory interpretation, those propositions in themselves generally make sense. Obviously, if there is no air of reality to a defence, it is not left with the jury. Conversely, if elements of a defence are clearly established, the jury should be told that is so.

The potential for injustice arises from the application to these defences of a false “wider/narrower” dichotomy. In *Gill*, that potential crystallizes, with seriously detrimental effect.

Yes, s. 34(2) can be said to grant a “wider” defence than s. 34(1), in the sense that the accused need not be the object of an initial unprovoked assault (*R. v. McIntosh* (1995), 95 C.C.C. (3d) 481 (S.C.C.)). Yes, it explicitly covers death to the victim, though s. 34(1) also goes that far (*R. v. Kandola* (1993), 80 C.C.C. (3d) 481 (B.C. C.A.); *R. v. Setrum* (1976), 32 C.C.C. (2d) 109 (Sask. C.A.)). And yes, as Donald J.A. highlights, it covers an actual intention to cause death, whereas s. 34(1) expressly does not.

But look at how much narrower s. 34(2) also is, for someone in Gill’s position. 34(2) is not for defence against some run-of-the-mill assault. This is for

situations where the accused is fighting for his life. The main distinction between subsections (1) and (2) lies in the requirement in the latter of a reasonable apprehension of death or grievous bodily harm, coupled with a second requirement that there be no other reasonable alternative to the use of deadly force in self-defence. These are two mighty thresholds to overcome for someone in Gill's position, that are not present if the circumstances are seen as falling within subsection (1)—two mighty thresholds that, for many accused persons, actually make s. 34(2) a far narrower defence than s. 34(1).

Yes, as Donald J.A. says, s. 34(2) applied "in any event of the appellant's intention". It did not apply, though, in any event of the appellant's belief.

With respect, what is so confusing here? The jury should have been told first about s. 34(1): in essence, if Gill did not provoke the assault upon him, and neither intended the killing, nor used more force than was necessary to defend against the assault, he is entitled to an acquittal. Then, if one or more of those conditions is not met, he might still be acquitted under s. 34(2): whether or not he provoked the assault on him, and whether or not he intended to kill, the killing was justified if he reasonably apprehended death or grievous bodily harm, and reasonably believed he could not preserve himself from it other than by what he did (see *R. v. Baxter* (1975), 27 C.C.C. (2d) 96 (Ont. C.A.)).

Now, imagine a jury listening to such an instruction. Assume there is ambiguous evidence about how the conflict started, so there is a doubt about provocation. There may also be doubt about intent, because Gill has testified he did not intend to wound, let alone kill. Maybe in those circumstances, what he did is not unreasonable, in the sense that brandishing a knife is not more than might be reasonably necessary to ward off three violent assailants. The jury acquits, on the basis of s. 34(1).

What if the same jury hears only of s. 34(2), as this jury did? How is it that Gill reasonably apprehended death or grievous bodily harm from his assailants? They were apparently unarmed and the degree of threat present seems to have been ambiguous. Gill testified to a subjective fear of death, but evidently that fear sounded unreasonable to this particular jury and, given the objective standard, the fact that Gill was intoxicated has no bearing on the evaluation (*R. v. Reilly* (1984), 15 C.C.C. (3d) 1 (S.C.C.)). Result: no defence under s.

34(2), and a conviction.

It appears that the *Gill* jury was also instructed on s. 37. In some respects, that would have covered extra ground, overlapping parts of both ss. 34(1) and (2). The problem with s. 37, though, where death has resulted, is that it includes a limiting proviso related to the severity of the consequences of the act of self-defence, rather than to the degree of force used. An incautious jury considering whether there was excessive hurt might well have rejected the defence in circumstances where, judging only the nature of the act that caused it, they might not.

If it is indeed desirable to eliminate from jury instructions anything that does not assist, but merely confuses, would it not have been preferable here to instruct fully on s. 34 and omit s. 37, which truly would have been redundant?

Conclusion

The result in *Gill* reflects a trend. It closely resembles that in *Pawliuk, supra*, in which the argument had been framed in a similar way: if s. 34(2) is "wider" in general, and covers the same ground as s. 34(1) in terms of the accused's intent as well as the result of his acts, is it necessary to instruct on both subsections, or is s. 34(1) just surplusage? Braidwood J.A. in *Pawliuk* disposed of the issue in a couple of dismissive paragraphs, but it is noteworthy that the case involved evidence that the accused had thought his assailant was reaching for a gun. Given the reasonable presumption that escalation of a confrontation into a gunfight will likely lead to death or grievous bodily harm, and that there are not many options in defending against gunfire, the issue of *Pawliuk's* beliefs was not really a live one (Ryan J.A., in separate and more thoughtful concurring reasons, underlined that necessary linkage between the particular facts of the case and the decision reached).

The reality is that s. 34(2) is actually neither "wider" nor "narrower" than s. 34(1), in any absolute sense; it simply covers somewhat different, and overlapping, grounds. Whenever the evidence might be accepted in various permutations, one or more of which fall exclusively within each of the grounds, both subsections must be put to the jury, or the result is in principle no more rational or just than denying the defence in its entirety.

As Dickson J. (as he then was), stated clearly in *R. v. Brisson* (1982), 69 C.C.C. (2d) 97 (S.C.C.):

Section 34(1) may only be invoked if there is no intention to cause death or grievous harm and no more force than is necessary is used. Section 34(2) is invoked where death or grievous harm has resulted but (i) the accused reasonably apprehended his own death or grievous harm and (ii) he believed on reasonable grounds that he had no other means of avoiding his own death or grievous harm.

Section 34(1) affords justification in circumstances where the force used was not intended to cause death or grievous harm and is not excessive.

Section 34(2) affords justification where there was an intention to cause death but under circumstances where objectively it was reasonable that the person accused believed he was going to be killed and subjectively he did so believe. Section 34(2) obviously provides for acquittal, despite the fact that the accused means to cause death or bodily harm that he knows is likely to cause death (emphasis added).

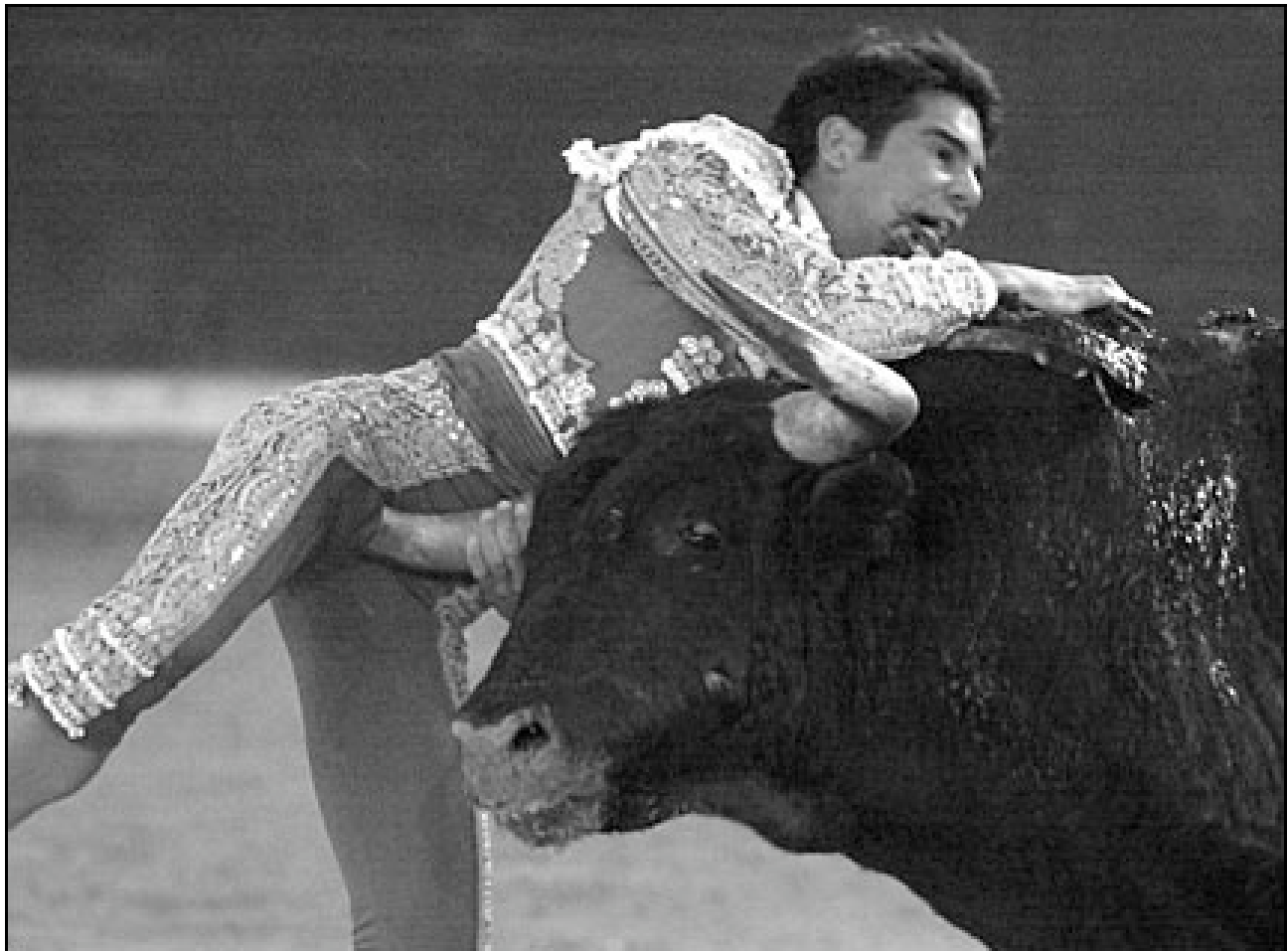
It is one thing to apply the propositions in *Pintar* with great care, on a case-by-case basis, ensuring that a provision is only kept from the jury where it is crystal-clear that there is absolutely no basis for instructing on it. It is quite another to “dumb down” jury instructions at

the expense of defences—however “implausible”—that pass the air of reality test. That test is passed at the point where evidence is led that, if believed, could reasonably found the defence (*R. v. Cinous* (2002), 162 C.C.C. (3d) 129 (S.C.C.), per McLachlin C.J.C., writing for the majority):

We conclude that on the authorities, a defence possesses an air of reality if a properly instructed jury acting reasonably could acquit the accused on the basis of the defence.

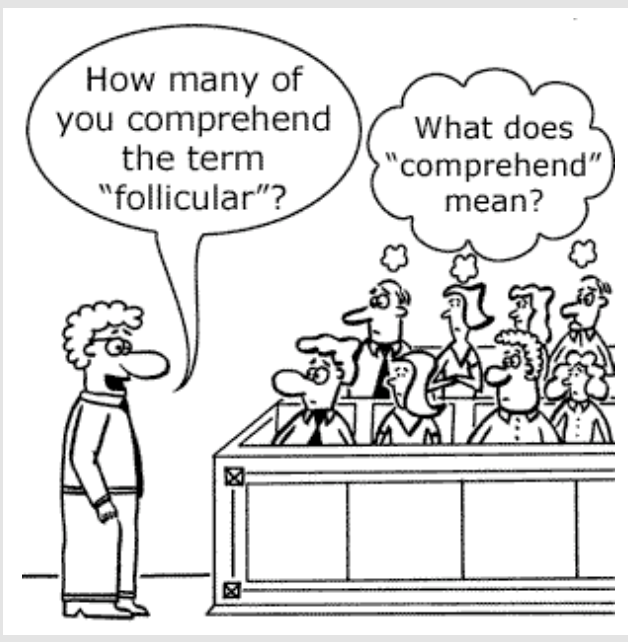
Gill himself led such evidence, the Court of Appeal agreed that it exhibited the required air of reality, and this writer’s respectful suggestion would be that it is not for an appellate court—usually well-disposed to deferring to factual findings at trial—to follow such a conclusion by further weighing the evidence from afar and dismissing it in favour of a tidier jury charge.

With respect, Mr. Gill was simply denied a defence available to him at law, and a fair trial.



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Further Comment...

It may be true that Mr. Gill's trial counsel did not raise accident or lack of intent to kill before the jury, and did not ask for instruction on those aspects of the evidence, but defence counsel can be in a difficult situation when choosing how to focus submissions and avoid contradictions.

In circumstances such as those present here, it is the duty of the trial judge to refer the jury to potential views of the evidence that might found any legally available defence—and instruct them on that defence—whether or not defence counsel has elected to put the defence forward (*Pawliuk, supra*).

The defence of accident, of course, is distinct from self-defence, and should have been left separately with the jury here, as a potential basis for acquittal (*R. v. Black* (1990), 55 C.C.C. (3d) 421 (N.S. C.A.)).

...and Still Further

Consider a situation in which Parliament has enacted a statutory defence that cannot be explained effectively to juries, either because the drafting is inept or because trial judges for some other reason cannot interpret or communicate it. What is the just result at the end of a trial where the evidence has raised that defence? Is the jury to be given some nonsensical instruction that leaves a real possibility that they will not have the required understanding of the law to render a just verdict?

Or should the result perhaps be a mis-trial? If our courts are not capable of explaining the law of self-defence to a jury, then perhaps an accused claiming the justification of self-defence is entitled to a judicial stay. Is that what we are really supposed to take from *Gill*?

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© Martin F. Allen, Bastion Law Corporation
203 – 1005 Broad Street
Victoria B.C. V8W 2A1
tel: (250) 595-2212; fax: (250) 385-4506
e-mail: mallen@bastionlaw.ca
web site: www.bastionlaw.ca