

'They key to understanding duress, as a defence, can be found in the phrase: "*a concession to human frailty*". Discuss.

Plan

Introduction

Duress

Two types of duress – duress of threats / duress of circumstances

Duress of threats – 60 + years

Rarely seen in courts since last 40 years

Duress of Circumstances

Graham Test - (Graham 1982)

Willer (1986)

Conway (1989)

Martin (1989)

Pommell (1995)

Duress of Threats

DPP for Northern Ireland v Lynch (1975)

Shepard (1987)

Sharp (1987)

Howe (1988)

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Graham (1992)

Gotts (1992)

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Main Argument

Introduction

The phrase 'a concession to human frailty' refers to the allowance of the courts to individuals who break the law under serious violence or death, or in a threatening situation. This was set out by the cases, Whelan (1934) and Valderamma-Vega (1998). It establishes an excuse via the courts and establishes in what situations an individual may break down under the pressures of what offences can be committed. The main discussion topic will be looked at through the concession in relation to duress of circumstances and duress of threats. The most accepted defences will be looked at and in what situations the courts do allow a concession other than that of murder and attempted offences.

Duress

There are two forms of duress. The first is known as the duress of threats and the other is known as the duress of circumstances. The first of the two have been in existence for over sixty years, however have been referred to more in courts within the last forty or so years. Duress of threats is where a person's will is overcome by threats of death or serious injury. As a result he may commit a crime in which otherwise he would not carry out. An example could be: the defendant may be threatened to be seriously injured unless he helps out in a robbery or other crime.

Duress of circumstances is a newer defence and is where the defendant commits a crime in order to avoid a dangerous situation, for example driving illegally through an alleyway in order to avoid a potentially dangerous situation.

When looking at the two stated defences, two Judges' statements will be used in particular. These are Lord Morris' and Lord Hailshams' in the cases of DPP of Northern Ireland v Lynch (1975) and Howe (1987), especially when considering the more serious offence of murder.

Duress of Circumstances

'The Concession to human frailty' is widely accepted under the duress of circumstances due to the lacking of severity of the cases and offences committed under such defences. The first case of this particular type of duress was seen in Willer (1986). Here the defendant was charged with reckless driving, because he felt threatened by a gang of youths. As a result the court excused the criminal conduct, resulting in a full acquittal. This highlights that the defendant yielded in his moral weakness and committed a crime in order to avoid a dangerous situation. The courts accepted that there is "A concession to human frailty" when it comes to the defence of duress by acquitting him. The jury followed with the sets of rules that were set out in the 'Stephens Digest of Criminal Law 1883'. These were:

- (1) The act was done in order to avoid the consequences which could not have otherwise been avoided
- (2) Those consequences, if they had happened, would have inflicted inevitable and irreparable evil
- (3) That no more was done than was reasonably necessary for that purpose
- (4) That the evil inflicted was not disproportionate to the evil avoided

Also, in order to establish the defence, the Graham Test needs to be set out and approved by both the judge and the jury. This test was set out in the case of Graham (1982) (this will be discussed below). It takes both the objective and subjective view on behalf of the defendant.

The outcome of Willer was overturned in the case of Conway (1989). In this case, the passenger of the defendant had been shot a few weeks earlier. Two men came towards him, thinking they were the same people, he then yelled at the defendant to drive off, so he did. However they were actually plain clothed policemen. As a result he was charged with reckless driving. Conversely the Court of Appeal quashed the conviction and ruled that a defence of duress of circumstances was available if, on a subjective standpoint, the defendant was acting in order to avoid a threat of death or serious injury.

Therefore it is clear that the concession to human frailty is accepted within the courts. This means they are sympathetic to pressure that the average man can withstand before being forced to commit an act against the state. However this is only in reference to driving cases. These are known as regulatory offences, due to the lack of the severity of the offence itself.

Another case suggesting this would be that of Martin (1989), where the defendant's wife became hysterical and threatened herself with suicide unless he drove her son to work. The defendant had been disqualified from driving, but he still drove the vehicle. On appeal it was ruled that duress of circumstances could be available as a defence.

As stated in the case of Conway, the title affecting the defence is irrelevant, although Martin is a perfect example of necessity. The courts are willing to offer a concession to human frailty as it applied in the Graham Test, would have failed upon the objective account regarding the reactions of a 'reasonable man' to a particular situation, and acquitted the individual of the charge.

It was not until the case of Pommell (1995) in which the defendant was found by the police lying in bed with a loaded sub-machine gun against his leg. He told the police that he had taken it off another man who was going to 'use it to do some people some damage'. The defendant said that he had intended getting his brother to give the gun into the police station that morning. At his trial the judge ruled that his failure to go to the police straight away prevented him from having any defence. The defendant was consequently convicted. He appealed to the Court of Appeal who held that the defence of duress of circumstances was available for all offences except murder, attempted murder and treason.

This again shows the willingness of the courts to allow a concession to human frailty as it allowed a man to act heroically and prevent a worse evil from being committed. Lord Justice Kennedy stated in his judgment of the case:

‘Where someone commendably infringes a regulation in order to prevent another person from committing what everybody would accept as being a greater evil with a gun. In that situation it cannot be satisfactory to leave it to the prosecuting authority not to prosecute’

The defence of duress of circumstances is very willing in the terms of providing a concession to human frailty, with no major case to remove the concession. It clearly outlines the defence and the willingness of the concession to exist.

Duress of Threats

For the case of DPP for Northern Ireland v Lynch (1975), Lord Morris presented in his judgement:

‘In my view the law has recognised that there can be situations in which duress can be put forward as a defence. Someone who acts under duress may have a moment of time, even one of the utmost brevity, within which he decides whether he will or will not submit to a threat. There may consciously or subconsciously be a hurried process of balancing the consequences of disobedience against the gravity or the wickedness of the action that is required. The result will be that what is done will be done most unwillingly but yet intentionally.

Terminology may not however matter. The authorities show that in some circumstances duress may excuse and may therefore be set up as a special defence’.

The defendant in this case was deemed not guilty because the judge realised the defendant is not the only individual that would act the way he did. This illustrates that the courts have accepted that when a defendant is in a threatening situation and commits a criminal act, they have excused the criminal conduct, and given a full acquittal.

Although the defence of duress was given in the case of Lynch (1975), in the case of Howe (1987) the judges decided the defendant would not gain the defence of duress. In this case the defendant, with others, took part in torturing and abusing a man, who was strangled by one of the other participants. On a second occasion another man was tortured, abused and then strangled by the defendant. On trial the judge ruled that the defence of duress was available to the first killing since he was only a secondary offender but that it was not available for the second killing since he was the principle offender. The court of appeal agreed with this. However the House of Lords held that duress was not available as a defence for either murder. This case, therefore, overruled the case of Lynch.

In Howe (1987) Lord Hailsham stated:

“I do not at all accept in relation to the offence of murder it is either good moral, good policy or good law to suggest...that the ordinary man of reasonable fortitude is not to be supposed to be capable of heroism if he is asked to take an innocent life rather than sacrifice his own”.

According to Lord Hailsham the defendant should have been the hero. But several questions to ask yourself would be: ‘Should a person really be liable to convicted for murder, because he failed to be a hero?’ ‘Are there not circumstances in which a person of reasonable fortitude would submit to threats?’

In Howe the courts refused the defendant the defence of duress, following the words of the Abettors and Accessories Act 1861, which stated:

'Whoever shall aid, abet, counsel, or produce the commission of [any indictable offence], whether the same be [an offence] at common law or by virtue of any Act passed or to be passed, shall be liable, indicted, and punished as a principle offender'

Lord Hailsham also gave two other statements, the first of which is:

- (1) 'The concession to human frailty is not more than to say that in such circumstances a reasonable man of average courage is entitled to embrace as a matter of choice the alternative which a reasonable man could regard as a lesser of two evils. Other considerations necessarily arise where the choice is between the threat of death or serious injury and deliberately taking an innocent life is at least as valuable as his or that of his loved one. In such a case a man cannot claim that he is choosing the lesser of two evils. Instead he is embracing the cognate but morally disreputable principle that the end justifies the means'.
- (2) 'Neither just nor humane which withdraws the protection of the criminal law from the innocent victims and places the cloak of its protection upon the coward and the platoon in the name of concession to human frailty'.

The second point was made in reference to heroism and sanctity of life. Therefore according to Lord Hailsham, the ordinary man, rather than kill another, might be expected to sacrifice his own life. Such a view imposes a fundamentally false standard of criminal conduct. There is unashamedly not a duty of heroism in the criminal law. The standard is that of the reasonable man, not the reasonable hero. To suggest otherwise is absurd and this requirement makes obligatory a form of self-sacrifice which would be regarded as supererogatory. In the eyes of Lord Hailsham, the concession to human frailty is not present and he refuses to accept that there are weaknesses within the human being. It cannot be expected that all human beings are to be heroes.

According to the rigidity of the law there is not "A concession to human frailty" when it comes to a charge of murder. A key case for duress of threats and this point is that of Graham (1982). In this case the defendant was a homosexual who lived with his wife and another homosexual man. The other man was violent and often bullied the defendant. After both the defendant and the other man had been drinking heavily, the other man put a flex around the wife's neck and told the defendant to pull the other end of the flex. The defendant did this for about one minute. The wife died. The defendant claimed he had only held the flex because of his fear of the other man. His conviction was upheld. Within this case the two-stage test was created known as the subjective and objective test, they are as follows:

- (1) Was the defendant compelled to act as he did because of what he reasonable believed he had good cause to fear serious injury or death?
(Subjective test)
- (2) And if so, would a sober person of reasonable firmness, sharing the characteristics of the accused have responded in the same way?
(Objective test)

If the defendant fulfils the requirements, he will gain the defence of duress. This highlights that there is 'A concession to human frailty' when it comes to the defence of duress. If the defendant conceded or surrenders in his moral weakness when faced with a threatening situation, it is possible for the courts to excuse the criminal conduct which would lead to a full acquittal. Therefore the phrase "A concession to human frailty" is relevant. However according to the rigidity of the law there is not when of comes to a charge of murder.

In the case of Gotts (1992), in which the father of a 16-year-old boy threatened him with violence unless he stabbed his mother. The boy did stab his mother, but this only caused her serious injury and not death. He was convicted of attempted murder. In this case Lord Jauncey stated:

'I can see... no justification in logic, morality or law in affording to an attempted murderer the defence which is withheld from a murderer'

This suggests two points firstly that the offence of murder is more perilous, than that of murder since the intention is to kill, rather than the intention to kill or cause serious harm. And secondly that the relevance of the phrase "A concession to human frailty" when it comes to the defence of duress to a charge of attempted murder is not relevant.

Lord Jauncey refuses to accept that there is a concession to human frailty, and refuses to accept that as humans we do have weaknesses. However, he believes with the view that human's do have weaknesses and do possess fears, when put into a dangerous and threatening situation.

Conclusion

I believe that the concession to human frailty to exist under the defence of duress, with the exceptions of murder under Howe (1988) and attempted murder under Gotts (1992), and that this is both fair and just due to the protection of civil liberties, that the purpose of the law must be created. Although, it may be unfair to the victims, I do believe that it is fair to also protect the rights of the offenders in certain situations.

Bibliography

A2 Criminal Law – Jacqueline Martin – Hodder Arnold 2006 – page 195
www.statue law
Sarina Worley – essay competition
Matt Nesling – essay competition