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PLAN

Legal definition of Duress (both kinds)

Cases Using Duress

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Conclusion

It is probably not human frailty if heroism is expected for murder; however the actual defence when applied does accept that. But for murder it does not. Discretion, however, is VITAL when you are allowing someone to get away with a crime they have done quite willingly.

LA2 – 3: The key to understanding duress as a defence can be found in the phrase ‘the concession to human frailty’

Introduction

Duress allows a person a defence to many offences if they have committed them under threats. In this respect, it is perfectly reasonable to assert that the very nature of the defence is based on the tendency of people to act in their own interest under extreme pressure. However, the defence is also very limited, and if it was truly compassionate it could be suggested that it would apply in all instances where ‘human frailty’, which can be seen as akin to fear, was a problem and could result in someone doing something they may not necessarily want to do due to threats; this is exemplified in the fact that duress can never be a defence to murder.

Types of Duress

There are two forms of duress, and whilst they serve the same purpose they do differ in terms of how long they have been around, and how easy or difficult they are to prove.

Duress by threats

Duress by threats is when a person cannot resist offending due to threats of death or serious injury, thus being forced to commit and act that they would not normally do. The availability of this defence depends on the severity and seriousness of it, how imminent the threat was (although not necessarily being immediate, as stated in Hudson and Taylor; Abdul-Hussain created the rules that there must be danger, on the defendant's mind at the time of the offence, even if it is not immediate) as well as whether there was an opportunity to escape (such as in Gill where the defendant did have time to alert the police and could not use the defence, which was confirmed in Hasan). Who is threatened is not a significant factor anymore, after cases such as Martin and Conway; it may be the defendant, but it might also be a friend or relative. There is currently no decision about strangers, but duress when a stranger is threatened would most likely be allowed as a defence (it has been proposed by the draft criminal code as well).

Duress by threats requires both a subjective and objective test – as laid out by the cases of Graham in the Court of Appeal and Howe in the House of Lords. The tests are whether the defendant acted reasonably (objective), and whether someone of reasonable firmness with the ‘same characteristics’ would have reacted the same way (subjective). The defendant's ability to act reasonably is caught between the conflicting decisions of Hasan and Martin; Hasan states that the belief must be general, whereas in Martin it was due to a mental disorder. Hasan is the more recent case, which may suggest that the subjective test is not entirely based on the ‘human frailty’ of every individual. The objective test is made clear by Bowen; the defendant can be judged on characteristics such as age, pregnancy, serious physical disability, recognised mental illness and gender (this last one is somewhat doubted by the Court of Appeal).

Duress of circumstances

This is a more recent provision accepted by judges where surrounding circumstances may cause the defendant to act illegally. This was first put forward in the case of Willer where the defendant had to drive on the pavement to escape from a gang threatening him. The availability of the defence has been expanded by cases such as Conway, where it was accepted that because a passenger in the defendant's car had been shot at several weeks before the offence, his reaction to seeing men he mistook for the shooters (driving away very fast) was acceptable on an objective point of view. In Martin, it was accepted that the threat of someone else committing suicide was enough to excuse the defendant from having driven whilst disqualified and that the test laid out in Graham should be applied.

In the case of Pommell in 1995, 6 years after Martin, it was decided that the defence could be available for all crimes except for murder, attempted murder and some forms of treason. The case law was further cleaned up in Cairns where it was decided that the court should consider whether the defendant saw a risk of serious injury or death if he did not act, even if it did not really exist. This decision fits in with human frailty especially well; For duress of circumstance, simple human frailty, I.E, giving in to the pressures of surroundings, such as a wife threatening suicide for something as small as driving a person to work but having to drive whilst disqualified to do so was acceptable, although it says something about changing attitudes in this regard that the defence only became available in 1986. Another problem with Duress is that Bowen established that a very low IQ could not be taken into account when considering duress of threats. This is a large negative for accepting human frailty, if human frailty is said to include the defendant's intelligence – in this regard the current law suggests that a particular weakness to threats arising from having a low IQ is not considered worth conceding to, and throws some doubt on whether it is entirely successful.

Concession to Human Frailty

In its most common applications, the defence of duress can be seen as being the concession to human frailty, because it is the admittance, as defined by Jacqueline Martin that "the defendant can be considered as so terrified that he ceases to be an independent actor". The other important consideration is that for it to be allowed by a judge the defendant must be the victim of serious threats in the first place. It is available, therefore, for most cases except for Murder, attempted murder and possibly treason. It can apply to any other crime though, and there are a variety of cases where it is acceptable, showing its diversity and the courts acceptance of it. However, there are several ways in which it cannot count, which is essential when a full defence is provided that allows a crime to have been committed under a rational state of mind with full mens rea and actus rea.

Threats can be considered cumulatively, as is shown by Valderrama-Vega, where the defendant was threatened with death and also the disclosure of his homosexuality. When taken into account with a death threat, this meant that the threats against the victim were enough to provide him with the defence. As Martin and Conway have shown, threats against other people, possibly even if the defendant does not know them, are enough to provide the defence. This shows that a form of emotional blackmail, especially as shown in Martin where the defendant's wife threatened to commit suicide, is acceptable and an acknowledged weakness and example of 'human frailty'. As well as this, in any case where there is a belief of threats, the case of Hasan states that as long as there is a 'reasonable' and 'genuine' belief in the threats, then duress can be used as a defence.

Although defendants do have a duty to alert the police if the opportunity presents itself, Hudson and Taylor acknowledges that sometimes “there were cases in which the police could not provide effective protection¹” and that in these cases it was acceptable to allow the defence, even if there had been an opportunity to alert the police. However, Hudson and Taylor was later denounced by the House of Lords in Hasan; it is probably the case now that the defence would not be allowed in similar circumstances. However, Hudson and Taylor does provide another extension of duress, namely the imminence of the threat; the Court of Appeal stated that the threat had to be ‘present’ but not immediate as originally thought; it had to ‘neutralise the will of the defendant at the time of committing the offence’.

This aspect of Hudson and Taylor was later shown in Abdul-Hussain, where the defendant’s had fled from possible deportation in Sudan (where they could have been sent back to Iraq where they would have been persecuted) by hijacking a plane. The Court of Appeal stated that the threat did not have to be immediate; but it had to be ‘imminent’ and ‘hanging over them’. They established the rules that there must be imminent peril of death or serious injury, or to those for whom he has responsibility, it must operate on the defendant’s mind at the time of committing the act, overbearing his will (this is to be put to a jury) and the execution of the threat need not be immediately in prospect. This shows the general acceptance that human frailty can be the cornerstone of the currently allowed areas of duress, which is seen as acceptable by the courts.

Duress of circumstance is even closer to the legal definition, allowing a defence when the person is sufficiently threatened to act criminally. This is usually a common sense decision; in Willer, the defendant had to break the law in order to escape, and in Conway, Martin and Pommell the law was further expanded to include more areas, dealing with threats of suicide in Martin, mistaken identity in Conway and a delay in actions in Pommell. Also significant is the case of Cairns, where it was decided that the defendant had to believe his actions were ‘actually necessary’ because they reasonably perceived a threat of serious physical injury or death. However, this is notably fairer than Duress of threats – Hasan has decided that Graham was correct to assert that there has been a reasonable and genuine threat – there was no *genuine* threat in Cairns, so Duress of circumstance is either an area of the law that is more accepting of human frailty, or the defence of Duress of threats in cases like Martin (DP) may continue to be valid.

Never a defence to murder

The main problem with duress not being a concession to human frailty is its application in terms of murder, attempted murder and possibly also treason. In these situations, although the threats may be just as severe, and the defendant is still gripped with fear, they can still face a life sentence if convicted, as they may not be able to use manslaughter as a defence. This is summed up by Lord Hailsham’s attitude that “the ordinary person should be capable of heroism”. This, generally, is an unreasonable assertion. Although it was stated in Howe by Lord Griffiths that it was “inconceivable” such a person would be prosecuted, it is still possible for it to happen. This means that, as in the example given by Jacqueline Martin, if it was brought to court that a young mother with two children was threatened with the death of her children unless she plants a bomb, she could face a more severe sentence than the mother in the case of Doughty who could use the provocation of her child crying as even a partial defence. It does not seem to be a concession to human frailty, by the

¹ OCR Criminal Law for A2, Pg. 187

courts, if Duress was simply ruled out in such a situation, which would be an impossible choice for anyone. However, for attempted murder, the sentence may be as little as placing the defendant on probation, as in Gotts, because the judge has more discretion in sentencing. This discrepancy is further exasperated by a number of cases that demonstrate what many people would believe to be an injustice; the thirteen year old in Wilson who was judged as not having a defence because he was too afraid of his father, or the sixteen year old in Gotts who was actually threatened with violence, but was not allowed a defence, and could have received a far harsher sentence than he did.

However, cases like Bowen, where the defendant had a very low IQ and this was decided to be irrelevant by the court of appeal in regards to directing the jury. Again, this is not an example of being sympathetic towards human frailty.

In non-murder cases, the ruling out of the defence is somewhat more understandable, but even so, the decision in Hudson that police protection is not completely foolproof and so in some examples may allow duress as a defence being condemned by Hasan means that in many ways the law is not getting any better; in fact, it is getting less sympathetic. Whereas it is understandable that in cases like Sharp, where the defendant joins a gang he knows to be violent and then was not allowed duress as a defence when he was threatened himself, it is less easy to understand in the case of Cole where the defendant was made to come up with money for a debtor by any means, and gained it by robbing building societies because he was desperate. The courts ruled that there was not a 'sufficient connection', even though he had been subjected to violence already and his girlfriend and child were threatened as well. This does not seem to be conceding to human frailty by accepting that a man with responsibility for his loved ones was guilty, just because he had not been *explicitly* told to rob businesses to come up with a large amount of money.

Conclusion

Duress is an extremely difficult area of law to judge fairly, because of the acceptance that you are allowing someone who has willingly committed a (often serious) criminal offence to be found completely innocent. However, in some areas, the law does tend to be very unambiguous and unforgiving, and is probably in need of reform. The comments by Lord Hailsham that heroism could be expected from ordinary people when asked to commit a murder could be true in some cases, but in others it is unfair and inappropriate; as well as this, cases like Cole show that the law is often too narrow even when a defence could be allowed. Because of this, although the law when applicable in many cases of Duress is down to the concession to human frailty, the way it does not cover murder, even partially, suggests it falls short of being such a fair law.

Sources:

www.lawsblog.co.uk