

In source four (Special Study Materials) Lord Jauncey, in R v Gotts [1992], states: "I can see ... no justification in logic, morality or law in affording to an attempted murderer the defence which is withheld from a murderer."

Discuss, in light of the relevant case law, whether you agree with this statement.

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Introduction

As one can see Lord Jauncey's statement made in the case of **Gotts (1992)** in which he 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'*. Has caused much debate within English law, where to draw the line and whether it should be a defence to an attempted murderer or not has caused much confusion between academics alike. The defence in question here is duress, which is set under the binding precedent of **Dudley and Stephens (1884)**. There are two forms of duress known as duress of threats and duress of circumstances. The main defence to be looked at here is duress of threats; however duress of circumstances will be touched upon. The main question here is whether Lord Jauncey's statement is justified morally and logically, and it is indeed completely justified. The action of an attempted murder is no less an evil than that of a murderer, and as stated by Lord Jauncey in the same speech *'A man shooting to kill but missing a vital organ by a hairs breadth can justify his action no more than can the man who hits that vital organ. It is pure chance that the attempted murderer is not a murderer'*. Henceforth this essay intends to be in favour of Lord Jauncey's statement.

Definition of Lord Jauncey's statement

Firstly, in order to fully understand whether Lord Jauncey's statement is morally and logically justified, we must understand the meaning behind the statement, Lord Jauncey in essence, is saying that since the defence of duress is not available for the offence of murder, for which the intent is to cause death or serious harm, then it should not be given to an attempted murder, for which the intent is to kill. The offence of attempted murder has often been described as an offence more evil than that of murder since the intent is more malicious. However this will be looked at, in great detail, later within the essay.

Gotts (1992)

The case of *Gotts* is one of attempted murder. A sixteen year old boy was threatened by his father and told that he must kill his mother otherwise he would be beaten up. The boy did as his father said but did not kill his mother; instead he seriously injured her and as a result was convicted of attempted murder. His case went to appeal on the grounds that the defence of duress was not made available to him during his instant trial. It was at this first trial that Lord Jauncey displayed his view that there is '*no justification in logic, morality or law in affording to an attempted murderer the defence which is withheld from a murderer.*' On appeal the decision was upheld. This essay will now look at the defence of duress, and the offence of attempted murder, in order to determine whether Lord Jauncey's view can be justified morally and logically.

Duress

In order to fully understand whether Lord Jauncey's statement is justified or not we must look at the history of the defence of duress. The defence of duress of threats has been in existence for many centuries, although it has been rarely seen within the courts, during the last forty years or so the defence has become more developed and defined, yet there is still confused as to when the defence can be used or not in light of an attempted murder. The defence of duress of circumstances, in contrast to duress of threats, has only recently been given the recognition of a defence. But like the defence, duress of threats, judges are still relatively confused on how and when it can be used in more serious situations, such as attempted murder. The defence of duress is a complete defence, operating in favour of those who commit crimes because they are forced to or compelled to do so, by either the circumstances that they find themselves in or by a threat from another person. Duress can be used as a defence to all crimes, except murder, attempted murder and possibly treason.

Duress of threats- history of the defence

Duress of threats is where a person's will is overborne by threats of death or serious injury, so that he commits an act which he would otherwise not do. An example of this is when a person may be threatened with death unless they help in committing an armed robbery. The threat must be of death or serious injury, anything less will not suffice. It was also held within the case of Valderrama-Vega (1985) that a threat to disclose a previous conviction is not sufficient for duress. However, provided there are serious threats, the cumulative effect of the threats can be considered. The first case to deal with duress is the case of DPP v Lynch (1975) in which it was held that the defence of duress was available to a secondary party on a charge of murder. This means that the defence would be given to someone who had participated in a murder such as assisting to the murder, but not actually performing the act of killing. In order to establish whether a person will gain the defence of duress by threats, a two-stage test has been created, which was established in the case of Graham (1982) in which the defendant was a homosexual who lived with his wife

and another homosexual man, K. K was violent and often bullied the defendant. After both the defendant and K had been drinking heavily, K 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 a minute, resulting in the death of the wife. The defendant claimed he had only held the flex because of his fear of K. The defendant's conviction for murder was upheld. The two-stage test is made up of a subjective and objective nature, they are as follows:

1. *Was the defendant compelled to act as he did because he reasonably believed he had good cause to fear serious injury or death? (subjective test)*
2. *If so, would a sober person of reasonable firmness, sharing the characteristics of the accused have responded in the same way (objective test)*

If these tests are fulfilled then the defendant will gain the defence of duress of threats. However, it was then held in the case of Martin (DP) (2000) that the correct test should have been whether, in view of his condition, he may have reasonably feared for his own or his mother's safety. In the case of Bowen (1956) the defendant who had a low IQ, obtained goods, by deception, for two men because of a petrol bomb threat. It was then held by the courts that they cannot consider low IQ, but can consider age, pregnancy, recognised mental illness and sex. In the case of Gill (1963) the defendant was threatened so that he would steal a lorry, but had time to escape and raise the alarm. It was therefore held that a person cannot use duress if he had a 'safe avenue of escape'. In the case of Hudson and Taylor (1971), two girls lied under oath because of threats made to 'cut them up'. It was then held in this case that the threat need not be capable of being carried out immediately. In the case of Abdul-Hussain (1999) the defendants hijacked a plane to escape from persecution in Iraq. The courts held that the threat must be 'imminent' and operating on the defendants mind when he commits the offence.

Overall from looking at the history of duress of threats we can infer how this has influenced Lord Jauncey's statement.

Duress of circumstances-history of the defence

As already stated, duress of circumstances is a relatively new defence, it has often been compared and seen in the same light as the defence of necessity. Duress of circumstances was first recognised in the case of Willer (1986) in which the defendant was charged with reckless driving, because he felt threatened by a gang of youths. However the case of Conway (1989) first established the defence of duress of

Circumstances. In the case of Conway (1989) a passenger in the defendant's car had been shot at by two men a few weeks earlier. The car was stationary when the passenger saw two men running towards the car. He thought they were the two, who were after him, but it was in fact policemen in plain clothes, and he yelled at the defendant to drive off. Conway did at a fast pace, and as a result he was charged with reckless driving. The trial judge refused to leave duress for the jury to consider and, as a result, the defendant was convicted. On appeal the conviction was quashed, and it was ruled that a defence of duress of circumstances was available if, on an objective standpoint, the defendant was acting in order to avoid a threat of death or serious injury. Another case in which duress of circumstances was considered is Martin (1989) in which the defendant's wife became hysterical and threatened herself with suicide unless the defendant 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 and the same two-stage test put forward in Graham (1982) for duress by threats could be used. In the case of Pommell (1995) 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 to do some people some damage. The defendant said that he has 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 preventing 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 some forms of treason. They quashed the defendant's conviction and sent the case for retrial.

When looking at the defence of duress of circumstances it brings light to the reasons behind Lord Jauncey's statement '*I can... see no justification, in logic, morality or law in affording to an attempted murderer the defence which is withheld from a murderer*'. It highlights that it would be unjust for the courts to open the floodgates for potential attempted murderers to be allowed to get away free from a serious crime. The courts would also be transmitting the message that it is a normal practice to attempt to murder somebody as there would be a defence available to them. Therefore, as suggested from this, Lord Jauncey's view can be fully justified morally and logically.

Dudley and Stephens (1884)

In order to fully understand Lord Jauncey's statement it is imperative that we understand the binding precedent behind it. In the case of Dudley and Stephens (1884) the two accused, with a third man and the deceased, a 17-year-old boy, were

cast away in an open boat, 1,600 miles from land. When they had been eight days without food and six days without water, the accused killed the boy, who was weak and unable to resist but did not assent to being killed. The men fed upon his body and blood for four days when they were picked up by a passing vessel. At the trial for murder, the jury found by a special verdict that if the men had not fed upon the boy they would probably not have survived the four days. The jury held that there was no appreciable chance of saving life except by killing; but that there was no greater necessity for killing the boy than any of the three men. The finding of the jury was referred to the Queen's Bench Division for its decision. It was here that they decided necessity is not a defence to murder. Therefore, because of this ratio it has affected all future necessity cases and, in turn, affected future duress cases. Therefore the precedent set within this case shows the reasoning behind Lord Jauncey's statement.

Howe and Banister (1987)

In the case of Howe and Banister (1987) the defendant, with others, took part in torturing and abusing a man who was then strangled by the others. On a second occasion another man was tortured, abused and then strangled by the defendant. The defendant claimed that he took part in the killings because of threats to him. The trial judge ruled that duress was available to the defendant for the first killing where the defendant was only a secondary party to the killing, but that it was not available for the second killing where the defendant was a principal offender. The Court of Appeal ruled that this was correct, but the House of Lords held that duress was not available as a defence for either murder. Therefore this case set the precedent that duress could not be available to a secondary offender, this consequently changes the previous precedent set in the case of Lynch (1975). It was only Lord Griffiths who expressed a clear view that duress is not a defence to attempted murder. However this was only an obiter statement, therefore it was not binding upon the courts, although this is the line the two out of three judges took within the case of Gotts (1992).

When looking at the case of Howe and Banister (1987) it is clear to how Lord Jauncey came to his view that the defence of duress should not be available to an attempted murderer.

Lord Hailsham's view

In the case of Howe and Bannister (1987) Lord Hailsham stated '*I do not at all accept in relation to the defence of, under it is either good morals, good policy or good law to suggest...that the ordinary man of reasonable fortitude is not to be suppose to be capable of heroism if he is asked to take an innocent life rather than sacrifice his own*'. To an extent one does not agree with the argument made by Lord Hailsham he is saying that the

ordinary man, rather than kill another, might be expected to sacrifice his own life. Such a view imposes a fundamentally false standard on criminal conduct. There is unashamedly no 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 should be regarded as supererogatory. However, although this is one view, it could be suggested that Lord Hailsham's view in one that is consistent with the law; although Lord Hailsham, and the other four Lords made it clear that they were in agreement, that Parliament should consider the defence of duress and come to a decision as to whether it should exist and, if so, what its extent should be. Overall this supports the entirety of Lord Jauncey's statement, it highlights that the defence of duress should not be given as a defence to murder; and although Lord Hailsham does not speak of attempted murder it does highlight that no matter how the action has occurred, the defence of duress will not be given to serious crimes.

The mens rea and actus rea of murder/ attempted murder

As has been seen earlier the mens rea of murder is an intention to cause death or serious harm, the actus reus is complete when the killing has taken place. Although for attempted murder the offence does not have to be complete the mens rea is the intention to kill. Therefore the intent for attempted murder is far more malicious than that of murder, and thus, if a person cannot gain the defence of duress through murder, they should not gain it through attempted murder. Take for example, a defendant that shoots their victim in the foot who subsequently gets an infection and dies would be charged with murder and refused the defence of duress. On the other hand, a defendant that intends to kill their victim and shoots them through the chest but does not kill them would be charged with attempted murder and the defence of duress would be available to them. This seems illogical and unjust and so it can be indisputably said that Lord Jauncey is correct in saying it is justified not to allow the defence to an attempted murderer when it is not allowed for a murderer.

Is Lord Jauncey's statement justified?

From the evidence shown within the essay, Lord Jauncey's statement can be justified. It is not just that a person who attempts to kill, but for due to the circumstances does not fulfil the actus reus, does not give them the right to duress; it would be both immoral and illogical to allow the defence. Therefore Lord Jauncey's statement *'I can... see no justification, in logic, morality or law in affording to an attempted murderer the defence which is withheld from a murderer'*, is completely justified.

Conclusion

As one can see we have examined Lord Jauncey's statement *'I can... see no justification, in logic, morality or law in affording to an attempted murderer the defence*

which is withheld from a murderer'. And have come to the conclusion that his statement is both morally and logically justified. Lord Jauncey's view that the defence of duress should not be given to an attempted murderer is undoubtedly correct, the intention for this offence is far more malicious, and therefore the defence should not be available. Henceforth one does agree with the statement of Lord Jauncey.

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