

‘Necessity is never a defence to murder’

In answering this you should show analytical thought and demonstrate all aspects of the law associated with the doctrine of judicial precedent.

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Introduction

Over a number of years the defence of necessity has been debated upon as to whether it is moral of the courts to prosecute an individual of a crime that they were forced by threats into doing. However, it is also very obvious that by letting that person off would ignore the concept of stare decisis and create uncertainty within today’s legal system.

This essay will discuss and analyse the law’s current attitude towards the defence of necessity while also considering the word ‘never’ used within the quote in terms of the future of the defence.

Necessity as a defence

The defence of necessity occurs when an individual is forced to act in a criminal manner due to the dangerous circumstances in order to prevent a ‘worse evil from occurring’¹. The defence of necessity is put into place to allow the defendant to claim that due to the circumstances, the act was committed in order to avoid a greater evil from happening. However, there needs to be a ‘balance of probability’ between the threat and the crime committed otherwise the defence cannot be considered in any circumstance. Although the defence of necessity has similarities to that of duress of circumstances, the courts have so far been reluctant to recognise necessity as a defence in its own right.

Dudley and Stephens (1884)

The case of Dudley and Stephens (1884) is the leading criminal case to affect the area of law in terms of necessity.

The case consists of two defendants and a 17-year-old cabin boy, who had been adrift in the ocean 1600 miles from any land. They had been without food for eight days and without any water for 6 of those days. Out of choice, the defendants decided to kill and eat the cabin boy who they perceived lower and weaker than them. Four days later, a passing ship stopped and rescued them ashore. Although the jury decided that the defendants had killed the cabin boy, they wished to record a special verdict due to the circumstances. This verdict established that the men had little hope of an early rescue and would have probably have died if they had not committed the act. However, the act was not committed under a threat, all three men were in the same desperate situation, only because of social status and current health was the boy chosen to be sacrificed. The Divisional Court was not prepared to allow the defence in these circumstances and the defendants were found guilty and charged with murder.

In this case, necessity never was a defence to murder however; I personally feel that the word ‘never’ is an absurd one to use in light of the defence. This is because the literal meaning of the word taken from the Oxford dictionary means ‘not ever, not at all’. How is it possible to be able to make an accurate statement that something will never happen when they have no power to know the knowledge of future cases or circumstances which have never arisen before the English courts.

¹ Criminal law for A2 by Jacqueline Martin

With regards to the case of Dudley and Stephens (1884), Lord Coleridge stated that 'if necessity was once allowed in such circumstances, it might be made the legal cloak for unbridled passion and atrocious crime', clearly exclaiming that the defence would be too easy to raise and too difficult to disprove. On the other hand, this very old case can hardly be generalised to current and everyday times due to its situational circumstance and most if not all cases pleading the necessity defence could distinguish from the facts of the case. Dudley and Stephens does not illustrate the idea of the 'lesser of two evils' it clearly only shows a selfish act that was not committed due to a proportional threat which the defence requires. For the purposes of illustration, an example has been created in order to indicate a situation that would have to allow the defence of necessity in order to prevent public uproar and to prevent the judiciary from looking extremely harsh and immoral.

Sophie is taking her usual weekly jog around her local area. She suddenly stops at the top of the hill feeling a huge shake beneath her. Looking beside her she sees that the sides of a dam are giving in and is put into a dilemma. There is a 'fork' route within the area; one route the water could take is straight into the village, which resides 10,000 people who would drown along with their houses being ruined. The alternative route the water could take is through a forest. To do this Sophie would have to press the 'Emergency overflow button', which would block off the route into the village. As she decides to press the button she sees her ex-husband walking his dog. She screams to him to get out of the forest however, he is listening to his I-Pod and cannot hear her, believing that she is shouting abuse he smiles and continues to walk. Sophie chooses to press the button and save the village. The village and all of its residents stay safe, however her ex-husband and his dog both die in the flood. Sophie is seen as a hero by the village and is congratulated for her brave decision. However, she is arrested the next day for the murder of her ex-husband and his dog.

Looking at this scenario logically, it is obvious that saving a village and 10,000 people is far more morally correct although it led to the death of one man and therefore the defence of necessity should surely be available? If this scenario was one of real life, the courts could very easily distinguish the facts from the only murder and necessity case of Dudley and Stephens (1884). With regards to the defence, the law should be able to evolve cases by case with judges considering each situation and circumstance separately. This way, the floodgates would not be let open as if the Practice statement was used and it would allow the courts to make the best decision in light of the varied circumstances. With there being only one criminal case regarding the defence of necessity, it cannot be said that the rule will *never* be applied, as many circumstances would be extremely different and distinguishable from that of Dudley and Stephens.

Emergency situations and necessity

In the case of Buckoke and Others v Greater London Council (1971) Lord Denning in his obiter statement stated that he thought that the defence of necessity would not be available to emergency service drivers if they broke traffic laws in an attempt to get to an emergency quickly². He went on to say that a driver in such a situation should be congratulated for their actions and he hoped that such a person should not be prosecuted but given the defence of necessity. This opinion by Lord

² Criminal Law for A2 by Jacqueline Martin

Denning is extremely logical as any emergency service man or woman would not want to be the reason for an individual's death due to the fact they had to wait at traffic lights. Some may argue that a young child could be crossing the road or a car could be in an ambulance or fireman's route resulting in deaths. However there are endless 'ifs' and 'buts' that can be found in every day situations let alone in duress and necessity cases and problems would be caused everyday if individuals considered every 'what if' situation. Although the concept of stare decisis plays an extremely important role within the legal system, distinguishing and allowing the defence in different situations would make the law far more fair and moral.

Source 7 found in the Special Study materials includes the case of Kitson (1955) and although not a murder case, it involved the defence of duress. Within this case, the defendant had been drinking alcohol before drifting off to sleep in his brother in law's car. When the defendant awoke he found the car rolling down the hill it was 'parked' on. In order to prevent a crash, the defendant took hold of the wheel and steered it into a grass verge at the bottom of the hill. The defendant was later charged with drink under the influence of alcohol. I agree completely with the statement raised in Source 7 naming the decision in Kitson as 'one of the more ludicrous cases in post-war English law'. Although it may not have been legal for him under the law to steer the wheel, it was most definitely necessary for him to do so in order to prevent danger to his life or others around him. It would be absurd for the courts to say that the correct decision would have been for him to calmly sit in the seat of the car while it rolled down the hill likely to crash. Surely the defendant should have been congratulated, not prosecuted and when prosecuted he should have been allowed the defence.

The lesser of two evils

The dated case of R v Bourne (1939) involved a fourteen-year-old girl who had fallen pregnant as a result of rape. The defendant in the case was a gynaecologist who performed an abortion on the young girl. Due to his profession he knew that she would probably die if left to give birth, so the operation was performed in hospital with the consent of her parents. The defendant was charged under s58 of the Offence Against the Person Act (1861) for 'unlawfully procuring a miscarriage'. Although the defence of necessity was allowed in this instance it is no longer good law as the act is now governed under the Abortion Act (1967).

RE F (Mental patient: sterilisation) (1990)

Although not a criminal case, purely a civil application to the courts, the case of RE F (1990) also concerned the defence of necessity along with consent held from parents. This case involved doctors seeking a declaration from the courts in order to be able to lawfully sterilise an individual. In this instance they wished to sterilise a girl who had a very severe mental disability and who had formed a sexual relationship with another mental patient, obviously placing her at risk of becoming pregnant. The doctors responsible for the girls decided that she would not be able to understand pregnancy, which could be extremely dangerous for her mental health. The girl's mother supported the application but the solicitor acting on behalf of the girl would not give consent to the operation, as she believed that such an operation would be illegal. The House of Lords granted the application and in his summing up Lord Brandon stated "in many cases... it will not only be lawful for doctors, on the ground of necessity, to operate on or give other medical treatment to adult patients disabled from giving their consent, it will also be their common

duty to do so'. I do personally agree with this statement and would see it as safer for the girl to be sterilised in order to prevent her from difficulties in the future. How can a person who is unaware of pregnancy and is not capable of looking after herself, look after another human being?

Re A (Conjoined twins) (2000)

With reference to Source 10 of the Special Study materials the case of RE A (Conjoined twins) (2000) also a civil application to the courts involved the legal separation of two conjoined twins Mary and Jodie. One of the twins, Mary was born without a fully functioning heart or lungs and so was solely kept alive by the existence of her twin Jodie, whose heart circulated blood for them both. The twin's parents who were devout Roman Catholics refused to give consent to the operation believing that it should be God's choice. However, the doctors applied for declaration from the courts to make the operation lawful, to separate the twins, even though Mary would die as a result. If the twins were not separated both would inevitably die; consequently leaving it down to the doctors to decide the lesser of two evils. The doctors pleaded to the court that it was a necessary operation and the Court of Appeal granted the declaration. Separating the twins without the courts declaration would result in the murder of Mary, as it would be an unlawful killing. However, separating the two with the courts permission would be lawful therefore eliminating murder and the need for the defence. Ward LJ stated that 'the best interest of the twins is to give the chance of life to the twin whose actual bodily condition was capable of accepting the chance'. This statement clearly illustrates the moral and most sensible opinion of the lesser of two evils. The operation was obviously a necessity to allow the stronger twin to live, how would the doctors feel if they did not apply to the courts and both twins lost their lives as a result?

Brooke LJ said that the defence of necessity would be available to the doctors were they to be charged with the murder of the weaker twin Mary. He approved four principles of the defence of necessity as set out in *Stephen's Digest of Criminal Law (1883)*. The first point was that the act was done only in order to avoid consequences, which could not otherwise be avoided. The second was that the consequences, if had happened, would have inflicted inevitable and irreparable evil. Thirdly, that no more was one than was reasonably necessary for that purpose and finally, that the evil inflicted by it was not disproportionate to the evil avoided.³ Brooke LJ concluded that 'the interests of Jodie must be preferred to the interests of Mary considering that all of the requirements were satisfied in the case'.⁴ Although choosing the lesser of two evils in the case of RE A (Conjoined twins) (2000) must have been an extremely difficult decision, it would be seen by most as the more moral and sensible decision. All four of the principles set out by Brooke LJ were clearly met and if the doctors had left the decision down to the parents, both of the twin's lives would have been lost.

Looking at the case on surface value it appears that if this were a criminal case then the defence of necessity would have been allowed, contradicting the statement made that 'Necessity is never a defence to murder'. However, it must not be overlooked that the case of RE A (Conjoined Twins) (2000) is a civil case and

³ Criminal Law for A2 by Jacqueline Martin

⁴ Cases and Materials on Criminal Law, 8th edition. (Page 339)

purely an application to the courts with no charge of murder. Therefore, it is not binding precedent; it is simply a form of persuasive precedent that can be looked at again in the future.

Shayler (2002)

The defence of necessity was also considered in the case of Shayler (2002). In this case the defendant was a former member of the British Security Service (MI5). He was charged with disclosing confidential documents in breach of the Official Secrets Act (1989). He claimed the defence of necessity. Both the Court of Appeal and the House of Lords upheld his conviction. The Court of Appeal discussed the defences of necessity and duress of circumstances and believed that they were similar. The Court of Appeal also held that the tests for the defences were that the act must be done only to prevent an act of greater evil, that the evil must be directed towards the defendant or a person or persons for whom he was responsible. Finally, the act must be reasonable and proportionate to the evil avoided. These tests are very similar to the ones set out in RE A (Conjoined Twins) (2000). However, the difference is that for the defence of necessity there is no requirement for the evil to be directed towards the defendant or a person or persons for whom he was responsible. This illustrates that it is wrong to treat necessity as the same as duress of circumstances and should not be looked at in the same way with regards to the crime of murder.

Conclusion

To conclude, I personally completely disagree with the statement made that 'necessity is never a defence to murder'. The word never should not be used within legal terms as it is ludicrous to think that that law should be able to assume that a future case would not obviously need the defence of necessity in order for correct justice for the defendant. The defence should therefore not be ruled out completely but should be open to distinguishing and assessment on individual case circumstances.

Bibliography

- Criminal Law for A2 by Jacqueline Martin.
- Cases and Materials on Criminal Law, 8th edition.