

[Essay LA2-6 - Whether 'duress of circumstances' is called 'duress' or 'necessity' does not matter. Discuss.](#)

Introduction

Whether duress of circumstances is called duress or necessity is a contentious issue particularly among academics and lawyers. Some argue that there is a thin line between the defences of duress and necessity. However, there are distinct differences between the two as I shall make clear throughout this answer. The defence of duress can be divided into two areas; duress of circumstances and duress of threats. Both defences illustrate clear differences to that of necessity. I argue that it does matter whether or not duress of circumstances is called duress or necessity due to the number of striking differences. I will now illustrate these differences between duress of circumstances and duress of threats to discover whether either defence shares sufficient similarities to prove or disprove the statement given in the title.

Duress of circumstances

Duress of threats has been recognized as a defence for a long period of time, yet it is only in recent years that the courts have recognized that a defendant may be forced to act because of surrounding circumstances that they may find themselves in. The first case in which the defence of duress of circumstances was recognized was that of [Willer 1986](#). In this case the defendant and a passenger were driving down a narrow alley when the car was surrounded by a gang of youths who threatened them. Willer realised that the only way to get away from the gang was by driving on the pavement. Willer did this quite slowly at around ten miles per hour and having made his escape he drove to the police station to report the gang. The police charged him with reckless driving for having driven on the pavement and he was convicted. Willer appealed and the Court of Appeal made it clear that the jury should have been allowed to consider whether the defendant drove 'under that form of compulsion, that is, under duress'. This case was followed by [Conway in 1988](#). In this case 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 believed they were the two men who were after him, when in fact they were policemen. He yelled at the defendant to drive off, Conway did so very fast and was charged with reckless driving. The trial judge refused to leave duress for the jury to consider and the defendant was convicted. On appeal the Court of Appeal quashed the conviction and 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.

A third case, which also involved a driving offence was the case of [Martin 1989](#) where the defendant's wife became hysterical and threatened suicide unless he drove her so who was late and at risk of losing his job to work. The defendant was disqualified from driving but he eventually agreed to do this. He was convicted of driving whilst disqualified. 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](#) for duress by threats applied. The tests were: (i) was the defendant compelled to act as he did because of what he reasonably believed he had good cause to fear serious injury or death? And (ii) if so, would a sober person of reasonable characteristics of the accused have responded in the same way? Although these cases have established that there was a defence of duress of circumstances, all cases concern driving offences. It was not until the case of [Pommell 1995](#) that it became clear that duress of circumstances could be a defence to all crimes except murder, attempted murder and some forms of treason. In this case the defendant was found by police lying in bed with a sub-machine gun against his leg. He told police that he has taken it off another man who was going to use it to 'do some people some damage'. The defendant said he has intended getting his brother to give the gun into the police that morning. At his trial for possessing a prohibited weapon the judge ruled that his failure to go to the police straight away prevented him from having any defence. The defendant was therefore convicted and 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. The defendant's conviction was quashed and was sent for a re-trial.

Duress of threats

The defence of duress of threats arises where a defendant is threatened by another with death or serious injury if he or she does not commit a crime. For example, in the case of [Hudson and Taylor](#) where two girls committed perjury in an unlawful wounding case in which they were the principal witnesses. When the girls were charged with perjury they claimed they had been threatened that they would be 'cut up' unless they committed perjury; they had been so frightened that they had duly told the lies in court. It was held that the defence of duress should have been put to the jury. The source of the threat must be towards another person. This particular species of duress is sometimes termed 'duress by threats'. Therefore, there are significant differences in the defences of duress of circumstances where the defendant is compelled to act in an unlawful way due to certain circumstances, and duress by threats where a person is threatened to act unlawfully by another. Now that the defences of duress of circumstances

and duress of threats have been discussed and it has been discovered that they hold significant differences it is only logical that the defence of necessity will again hold unique differences which will therefore affect whether or not duress and necessity are essentially the same.

Defence of necessity

The defence of necessity potentially arises where a defendant claims they 'had to commit a crime', not because of threats towards them, but because something (in the shape of surrounding circumstances which may or may not have been caused by a human being) deprived them of any real alternative. Hence, the defendant will claim they committed a crime to prevent a 'greater evil'. If we take the example where ten people are climbing a ladder to safety from a vessel that is sinking. One of them is so petrified that he 'freezes' on the ladder and cannot be persuaded to move. Eventually he is pushed from the ladder and dies. If charged with murder the survivors would claim that their actions were necessary and that it was better for one to die so that nine could live. With this example in mind it is perhaps understandable why some academics and lawyers believe that duress of circumstances and necessity are essentially the same. However, the difference with necessity is that the defendant is not only acting in response to certain circumstances, he or she is also acting to prevent a greater evil from occurring. Although the defence of necessity has certain similarities with the defence of duress of circumstances the courts have been reluctant to recognise necessity in a defence in its own right. The leading case in the area of necessity is [Dudley and Stephens 1884](#). In this case the two defendants were shipwrecked with another man and the victim, a 17 year old cabin boy in a small boat about 1600 miles from land. After drifting for twenty days and having gone without food and water, the defendants killed and ate the cabin boy. Four days later they were picked up by a passing ship and on their return to England were convicted of murder. Their claim of necessity to save themselves from dying was rejected. In additional support of the statement given in the essay title, the charge in Dudley and Stephens was of murder, so it can be argued that the law on necessity is in line with the law on duress, as duress is not available on a charge of murder.

From looking at duress of circumstances and necessity in detail it is clear how academics could come to the conclusion that it doesn't matter whether duress of circumstances is called duress or necessity, as points of law seem to be in line with one another. However, what is also clear is the fact that both duress of circumstances and necessity have striking differences which set them apart as separate defences. I shall now develop the argument that in fact it does matter a great deal whether duress of

circumstances is called duress or necessity due to the clear distinction between them.

Distinction between necessity and duress of circumstances

From the majority of cases on duress of circumstances it is clear how they might concern situations of necessity and many recent cases use the terms duress of circumstances and necessity interchangeably as simply being different labels for essentially the same thing. There are, however, important differences between the two defences. Necessity is widely regarded in other jurisdictions as a justificatory defence, whereas, as seen, the defence of duress of circumstances has been viewed as an excuse by English law. The difference in theoretical approach has important consequences for the rules governing each defence. Firstly, duress of circumstances is a defence only when there has been a threat of death or serious injury. With an excusatory defence, the essence of which involves the defendant's will being overborne and the actions being morally involuntary, one can perhaps understand the view that this will only be so if the threat is truly awesome as in the case of a threat of death or serious injury. With a justificatory defence, however, the emphasis is on the actor making a choice between two evils and pursuing the lesser of them. So, with necessity the threat need not be of death or serious injury. The essence of the defence is that it involves a balancing of evils. The threat can take any form but the crime committed by the defendant must involve a lesser evil.

Secondly, with duress of circumstances the threat must be 'imminent' in the sense of being operative on the mind of the defendant and overbearing their will. Yet, with necessity, the principal is one of "necessity, not emergency". A rational choice is made to avert a greater evil that will necessarily occur even if it would be some time before it occurs. Thirdly, the cases on duress of circumstances have allowed certain aspects of the vulnerability of the defendant to be taken into account; the test is whether the reasonable person, sharing the same characteristics as the defendant, would have given in to the threats. This is an appropriate test for determining whether a person should be excused because his or her will was overborne. With necessity, the focus is on the balancing of evils and not on the particular defendant's condition. There should be no scope for making allowance for the defendant's condition or vulnerability. Finally, duress of circumstances is not a defence to murder, attempted murder or certain forms of treason. With necessity the focus is on the balancing of evils and judging the choices of the defendant. In principle, necessity ought to be a defence when the defendant kills one person in order to save the lives of more than one person.

The judgment of Howe 1987

In additional support of my argument that it matters a great deal whether duress of circumstances is called duress or necessity, Lord Hailsham in the judgment of [Howe 1987](#) also states there is a clear distinction between the two defences. Lord Hailsham states: "If we were to allow this appeal (against a conviction for murder on the basis of duress) we should, I think, also have to say that Dudley and Stephens was bad law. There is, of course, an obvious distinction between duress and necessity as potential defences; duress arises from the wrongful threats of violence of another human being and necessity arises from any other objective dangers threatening the accused. This, however, is in my view a distinction without a relevant difference, since on this view duress is only that species of the genus of necessity which is caused by wrongful threats. I cannot see that there is any way in which a person of ordinary fortitude can be excused from the one type of pressure on his will rather than the other". Lord Hailsham's view is that because the defences of duress and necessity are so similar, neither is available to the person who kills. This could be regarded as implicit acknowledgement of the existence of a defence of necessity to crimes other than murder, attempted murder and certain forms of treason. Perhaps it was dicta such as these that permitted the rapid development of the defence of duress of circumstances.

Conclusion

In conclusion, I still strongly hold the view that in fact it does matter whether duress of circumstances is called duress or necessity. Although the nature of some of the cases mentioned could apply to both defences there are striking differences between the two defences which I have discussed at length. Although duress of circumstances has only really developed in recent years, the fact that the defendant is only compelled to act due to the unique circumstances they find themselves in, they do not have to choose a lesser of two evils, as a defendant pleading necessity would have to prove. Despite the fact that one could understand why some academics believe the two defences are increasingly similar, the courts are still reluctant to accept necessity as a defence in its own right. Therefore, there are two defences present for a reason, if duress and necessity were given the same labels it would effectively bring the legal system into disrepute as those defendants who have to choose a lesser of two evils will not have the opportunity to use this in their favour as it is not necessary to prove it in a defence of duress of circumstances. Thus, the two defences should remain separate in order to provide a fair trial for all defendants.

Bibliography

A2 Criminal Law by Jacqueline Martin

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Class Notes

Howe judgment

Case law