

Whether Duress of circumstances is called ‘duress’ or ‘necessity’ does not matter. Discuss

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Essay Plan

*Introduction

*Define what duress of circumstances is and then talk about its development, with the cases of Kitson, Willer, Conway (mention ruling in Conway) and Martin

*Mention the case of Pommell and how this case brought the defence in line with duress of threats case of Howe

*Mention how necessity in its own right has never been allowed as a defence to murder in criminal law- Dudley and Stephens, yet has been allowed in a few civil cases e.g. Bourne, Mental Patient, RE A Children.

*Mention how the later case of Shayler has seemed to contradict the ruling in Conway by saying duress of circumstances and necessity are different.

*Mention the ruling given by Lord Woolf in that case, and the different tests used for duress of circumstances and necessity.

*Say therefore that if the logic of Shayler is followed then whether duress of circumstances is called necessity or duress does matter- particularly in terms of one being a possible defence to murder, and if the facts of the case so justify, extending this defence to murder even in criminal law, distinguishing from Dudley and Stephens.

*Conclusion

Introduction

The law on duress as a defence, and its related form of necessity, has long been a source of great controversy as to where its boundaries as a defence should extend and where they should be limited. In particular, in more recent years the similarly linked defence of duress of circumstances has caused some argument as to its limits and conditions, and one of the important points connected with this is whether or not it is one in the same thing as either duress or necessity. The case law on this issue remains uncertain, and so it is worth looking at the defence thoroughly so as to determine if it matters or not whether duress of circumstances is called 'duress' or 'necessity'.

The development of the defence

Although duress in its primary form of threats has long been accepted as a defence, it is only more recently that it has been accepted that a defendant may be forced to commit a crime due to surrounding circumstances in order to prevent a greater evil from occurring, known as duress of circumstances. Whilst the defence was not officially formed until the late 1980's, often considered one of the starting points of the defence was the case of Kitson (1955). In this case, the defendant, having drunk a lot, fell asleep in the passenger seat of a car, and awoke to find it coasting downhill. Not having a drivers' license himself, but in order to prevent a crash, took control of the car and brought it to a halt. He was charged and convicted with reckless driving and for driving without a license, and with the defence of necessity being discussed yet refused, which will be looked at more later, the defence of duress of circumstances was not yet allowed. The case of Willer (1986) was the first case which made more of an emphasis on the existence of the defence of duress of circumstances. In this case, the defendant, driving his car which held a number of other passengers, drove down a narrow alley and was then surrounded by a group of youths who made violent threats towards them. Willer, as the only way to escape, drove along the pavement and then went straight to the police station to report the incident. He was charged and convicted for reckless driving, with his defence of necessity being refused, but on appeal, the Court of Appeal quashed the conviction, holding that the jury should have been allowed to consider whether or not the defendant had, in those circumstances, been forced to drive under compulsion, i.e. under 'duress'. The defence of duress of circumstances was not given this full title in this case though, and was only done so in the later case of Conway (1988). In this case, the defendant, driving a car and with a passenger with him, drove recklessly away after being told by the passenger that he thought the two men running towards the car were two men who had tried to kill the passenger a few weeks earlier, and in fact the men were only plain-clothes policemen. The Court of Appeal again quashed the conviction for reckless driving, ruling that where the facts established 'duress of circumstances' as in Willer, and as a result, the defendant was forced to act as he did 'to avoid death or serious bodily harm to himself or some other person'. Conway was the first case therefore to use the formal title of duress of circumstances as it is now known. Equally important to mention is what the judges in Conway later went on to say, ruling that the defence of duress of circumstances 'is a logical consequence of the existence of duress...' as it was commonly known i.e. 'do this or else' duress (duress of threats), going on to say that duress of circumstances was thus 'an example of necessity', and that whether it was called 'duress' or 'necessity' does not matter, only that whatever it was called, it had to be subject to the same limitations as duress of threats i.e. there had to be a fear of death or serious injury. This judgement in Conway has thus gone a fair way to

developing the defence of duress of circumstances, and particularly important in response to this essay question is that it indeed held that whether the defence was called 'duress' or 'necessity' did not matter, which will be analysed in more detail later. The case of Martin (1989) continued to develop the defence further. In this case, the defendant who had been disqualified from driving, claimed that he had been forced to drive his stepson to work (who was late and at risk of losing his job), because his wife had threatened to commit suicide unless D drove the son to work. The Court of Appeal once again held the defence of duress of circumstances was available, confirming once more its existence in its own right, ruling that the defence 'can arise from other objective dangers threatening the accused or others'. In this case, the Court of Appeal applied the two-stage test for duress of threats from the case of Graham (1982) so as for the defence to succeed, a partly objective and subjective test. Firstly, whether D was compelled to act as he did because of what he reasonably believed he had good cause to fear serious injury or death, and secondly, if so, whether a sober person of reasonable firmness, sharing the characteristics of the accused, would have responded in the same way. The case of Martin thus also added to the development of duress of circumstances.

The extension of the defence through Pommell (1995)

The defence of duress of circumstances continued to develop further in the vital case of Pommell (1995), which widened the defence considerably by holding that the defence of duress of circumstances was of general application. In this case, D was found at 8:00 A.M. lying in bed with a loaded sub-machine gun against his leg. He claimed at his trial for possessing a prohibited weapon that he had taken it off another man who said he was going to use it 'to do some people some damage', and that he planned on getting his brother to give the gun in the next morning. The trial judge held his failure to take the gun to the police straight away prevented him having any defence. However, the Court of Appeal quashed the conviction and held that the defence of duress of circumstances was available for all offences except murder, attempted murder and treason, drawing the defence in line with the other limitations on duress of threats in the case of Howe (1987). In this sense in particular, one can argue that duress of circumstances seems more credible to consider as 'duress', since it has been drawn in line with its fellow duress counterpart defence of threats. It is now important to look into the defence of necessity however in order to establish whether or not that defence is indeed the same as or different to the defence of duress of circumstances.

The defence of necessity

The defence of necessity has also long been a source of controversy, particularly as to whether it should be a defence in its own right, notably in criminal law. This has remained almost set in stone for more than a century since the case of Dudley and Stephens (1884). In this case, the two defendants, another man and a cabin boy, were shipwrecked from sea in a small lifeboat. After going nine days without food and seven days without water, the two defendants killed and ate the cabin boy. Four days later they were picked up by a passing boat and on returning to England, were tried and convicted of murder. The Divisional Court upheld the conviction, with Lord Coleridge ruling that where necessity allowed as a defence, 'it would be made the legal cloak for unbridled passion and atrocious crime'. This case has been the principal foundation of why the law had for so long been unwilling to allow a defence of

necessity or duress of circumstances to a criminal charge. Since this case, there have been almost no cases binding on the English legal system which have allowed necessity as a defence in its own right, which could be argued to reflect the view that duress of circumstances and necessity are in fact different, since the latter has been seen to extend to areas of criminal law where the former has not.

The exception of these was the later case of *Bourne* (1938). In this case, a 14-year-old girl who had been raped went to a doctor in order to receive an abortion. At the time, abortion was illegal, but because the doctor feared that the girl would die in childbirth if she did not have the abortion, he went ahead with the treatment. His defence of necessity was accepted and he was acquitted of the charge.

Nonetheless, although necessity has never since *Dudley and Stephens* and *Bourne* been allowed as a defence in criminal cases, there have been a number of civil cases in which the defence has been allowed. The first civil case in which the defence was accepted was in the case of *Re F Mental Patient* (1990). In this case, a girl with a severe mental disability had formed a sexual relationship with another mental patient, and the health authority applied to the courts for a declaration that it would be lawful to sterilise her as doctors felt she would not be able to understand pregnancy and that it would be disastrous for her precarious mental health. The girl's mother supported the application, but the Official Solicitor, who acted on behalf of the girl as she could not consent to the treatment herself, thought that performing such an operation would be illegal. The House of Lords granted the application, with Lord Brandon saying that in many cases it would be 'the common duty' of doctors to operate on patients disabled from giving their consent. In the recent case of *RE a Children* (2000), necessity was allowed as a defence following the events leading to an application to the courts to terminate an innocent life. In this case, conjoined twins were born, with the weaker twin relying on the stronger one for her life, and with doctors convinced that both of them would die unless an operation to separate them was carried out, even though that would bring about the death of the weaker one in order to give the stronger twin a life. The parents were against the operation for religious reasons, but the Court of Appeal granted the permission to carry out the operation, with Brooke LJ, giving the leading judgement, affirming that all four of LJ Stephens' criteria of necessity as a defence had been satisfied. Firstly, that the act was done only in order to avoid consequences which could not otherwise be avoided, secondly that those consequences, if they had happened, would have inflicted inevitable and irreparable evil, thirdly, that no more was done than was reasonably necessary for that purpose, and finally, that the evil inflicted by it was not disproportionate to the evil avoided. This seems to indicate another possible difference between necessity and duress of circumstances, for whilst the former can be seen to have been a defence to murder, following the case of *Pommell* (1995), it was held that duress of circumstances, like duress of threats, is never a defence to murder. As such, the logic in *Conway* saying that it does not matter whether duress of circumstances is called duress or necessity can certainly be questioned.

The case of Shayler (2002)

However, whilst necessity has long been denied as a defence in criminal law, the case of *Shayler* (2002) is an example of where the defence has been put forward again in a criminal case, and the judgement in this case has had an important influence on the way in which necessity and duress of circumstances are viewed, and whether in fact they are one and the same and whether thus it is unimportant as to whether duress of circumstances is called duress or necessity. In this case, the defendant was a former

member of MI5, and was charged with treason, but claimed the defence of necessity. Both the Court of Appeal and the House of Lords upheld his conviction, with Lord Woolf's judgement of the case being particularly relevant to look at. For in his judgement, he said that the distinction between duress of circumstances and necessity had been 'ignored or blurred by the courts', and that in fact the law was wrong for having 'tended to treat duress of circumstances and necessity as one and the same'. More importantly, the Court of Appeal went further still by actually stipulating the correct test for duress of circumstances, different from that of necessity. Firstly, that the act must be done only to prevent an act of greater evil, secondly, that the evil must be directed towards the defendant or a person or persons for whom he was responsible, and thirdly, that the act must be reasonable and proportionate to the evil avoided. The essential point to recognise here that in setting out this test for duress of circumstances, the case of Shayler seems to be completely contradictory to the logic reached in Conway as regards the insignificance of whether to call duress of circumstances duress or necessity. For whilst there are certainly similarities between the two tests for duress of circumstances and necessity, it can clearly be seen that there is a meaningful difference. Although in cases of duress of circumstances the evil must be directed towards the defendant or a person or persons for whom he was responsible, this is not the same in cases of necessity. For example, in *RE a Children*, the evil was not directed at the doctors, nor were they responsible for the twins. It was in fact the parents who were responsible for them. As a result, the logic of Conway can certainly be questioned further, for the rationale in Shayler appears solely conflicting with that of Conway, with the former clearly supporting that the two defences have in fact important differences between them and as such the relevance of what to call duress of circumstances should not be dismissed. Admittedly, neither Conway nor Shayler have set firm precedent as to whether duress of circumstances and necessity are different, but if the logic of Conway was no longer followed and the courts in future cases decided to follow that of Shayler instead, then this would have great implications as to the future nature of these defences. This is particularly in the sense that necessity could in theory be extended to offer more frequently a defence even to a charge of murder, and though unlikely given the firmly established and respected case-law of *Dudley and Stephens*, even perhaps in criminal law, if the facts of the case so justify distinguishing the two cases i.e. a selfless act which saved more lives than were lost and in which the defendant's life was not out of selfishness he chose to save, significantly different from the facts of *Dudley and Stephens*.

Conclusion

In conclusion, after having analysed the relevant case-law and considerations on duress of circumstances and necessity, it is firstly worth noting that whether duress of circumstances and necessity are in fact different has remained a very uncertain area, with no firm case-law having established a precedent on this point, it remains to be seen in future cases whether or not the two will in fact be considered the same or not. However, given the powerful logic of the arguments set out in Shayler which support the idea of the two defences being different, particularly in terms of to whom the evil must be directed, one could well argue that the two defences are in fact not the same and must be recognised as such. In addition, particularly since the defence of duress of circumstances continues to be accepted and developed by the courts in recent cases, whereas its counterpart of necessity seems very limited in its own respective reform and the scarce number of cases in which it is put forward, this gives further credence to the importance behind acknowledging the two defences as different.

Bibliography

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