

Explain the relevance of the phrase “A concession to human frailty” when it comes to the defence of duress.

Written by Sarina Worley (2009).

Introduction

The phrase “*A concession to human frailty*” can simply be described as a human being conceding or yielding in their moral weakness when faced with a threatening situation. If, when in this threatening situation, the human being commits a criminal act, it is possible that the courts may excuse the criminal conduct, resulting in a full acquittal, under the defence of duress. However when this criminal act relates to one of murder or attempted murder the relevance of the phrase; “*A concession to human frailty*” when it comes to the defence of duress has come under a controversial light. It has been shown by many judges, throughout the many cases of duress, that there are differing views on the relevance of this phrase; and although one may agree that there is a titanic amount of relevance to the phrase “*A concession to human frailty*” within the defence of duress, to all charges, it is currently held that is available to all charges except ones of murder, attempted murder and possibly some forms of treason.

Duress

There are two forms of duress known as duress of threats and duress of circumstances. Duress of threats has been in existence for around sixty to seventy years, although it has rarely been seen within the courts until the last forty years or so, where it has been able to develop and grow. 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. Duress of circumstances, which has only recently been given the recognition of a defence, is where the defendant commits a crime in order to avoid a dangerous situation. An example of this could be the defendant illegally driving through an ally in order to avoid a potentially dangerous situation.

When explaining the relevance of the phrase “*A concession to human frailty*” when it comes to the defence of duress, both forms of duress, which have been stated above, will be considered. Two judges’ statements in particular that will be used are Lord Morris and Lord Hailsham within the cases of DPP for Northern Ireland v

Lynch (1975) and Howe (1987). Both will be explain the relevance of the phrase "*A concession to human frailty*" when it comes to the defence of duress. Particularly when considering the more serious offence of murder.

Duress of circumstances

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. As a result the court excused the criminal conduct, resulting in a full acquittal. This highlights that the defendant yielded in his moral weakness and committed a crime in order to avoid a dangerous situation. The courts accepted that there is "*A concession to human frailty*" when it comes to the defence of duress by acquitting him. The same line was taken for the case of Conway (1989) in which the passenger of the defendant had been shot a few weeks earlier. Two men came towards him, thinking they were the same people, he then yelled at the defendant to drive off, so he did. However they were actually plain clothed policemen. As a result he was charged with reckless driving. Conversely the Court of Appeal quashed the conviction and ruled that a defence of duress of circumstances was available if, on a subjective standpoint, the defendant was acting in order to avoid a threat of death or serious injury. This, therefore, highlights that the relevance of the phrase "*A concession to human frailty*" when it comes to the defence of duress is titanic.

Another case that supports this is Martin (1989); in this case the defendant's wife became hysterical and threatened herself with suicide unless he 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. This, therefore, highlights that the relevance of the phrase "*A concession to human frailty*" when it comes to the defence of duress is titanic.

It was not until the case of Pommell (1995) in which 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 it to do some people some damage*'. The defendant said that he had 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 prevented 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 treason. This highlights that the relevance of the phrase "*A concession to human frailty*" when it comes to the defence of duress is titanic. However when it is considered in relation to more serious charges of murder, attempted murder and some forms of treason; it is looked down upon.

Duress of threats

For the case of DPP for Northern Ireland v Lynch (1975), Lord Morris presented in his judgement *"In my view the law has recognised that there can be situations in which duress can be put forward as a defence. Someone who acts under duress may have a moment of time, even one of the utmost brevity, within which he decides whether he will or will not submit to a threat. There may consciously or subconsciously be a hurried process of balancing the consequences of disobedience against the gravity or the wickedness of the action that is required. The result will be that what is done will be done most unwillingly but yet intentionally. Terminology may not however much matter. The authorities show that in some circumstances duress may excuse and may therefore be set up as a special defence"*. The defendant in this case was deemed not guilty because the judge realised the defendant is not the only individual that would act the way he did. This illustrates that the courts have accepted that when a defendant is in a threatening situation and commits a criminal act, they have excused the criminal conduct, and given a full acquittal.

Although the defence of duress was given in the case of Lynch (1975) in the case of Howe (1987) the judges decided the defendant would not gain the defence of duress, in this case the defendant, with others, took part in torturing and abusing a man, who was strangled by one of the other participants. On a second occasion another man was tortured, abused and then strangled by the defendant. On trial the judge ruled that the defence of duress was available to the first killing since he was only a secondary offender but that it was not available for the second killing since he was the principle offender. The court of appeal agreed with this; however the House of Lords held that duress was not available as a defence for either murder. This case, therefore, overruled the case of Lynch (1975). In Howe (1987) Lord Hailsham stated *"I do not at all accept in relation to the offence of murder it is either good moral, good policy or good law to suggest...that the ordinary man of reasonable fortitude is not to be supposed to be capable of heroism if he is asked to take an innocent life rather than sacrifice his own"*. According to Lord Hailsham the defendant should have been the hero, but should a person really be liable to convicted for murder, because he failed to be a hero? Are there not circumstances in which a person of reasonable fortitude would submit to threats? Lord Hailsham also gave two other statements, the first of which can be seen in Source 2 *"the concession to human frailty is not more than to say that in such circumstances a reasonable man of average courage is entitled to embrace as a matter of choice the alternative which a reasonable man could regard as a lesser of two evils. Other considerations necessarily arise where the choice is between the threat of death or serious injury and deliberately taking an innocent life is at least as valuable as his or that of his loved one. In such a case a man cannot claim that he is choosing the lesser of two evils. Instead he is embracing the cognate but morally disreputable principle that the end justifies the means"*. Also according to Lord Hailsham when he spoke of heroism and sanctity of life, the law is *"neither just nor humane which withdraws the protection of the criminal law from the innocent victims and places the cloak of its protection upon the coward and the platoon in the name of concession to human*

frailty". Therefore according to Lord Hailsham, the ordinary man, rather than kill another, might be expected to sacrifice his own life. Such a view imposes a fundamentally false standard of criminal conduct. There is unashamedly not 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 would be regarded as supererogatory. The relevance of the phrase "*A concession to human frailty*" when it comes to the defence of duress, in the eyes of Lord Hailsham, is not present; he refuses to accept that there is weakness within the human being. We cannot expect human beings to be heroes! Therefore, one can suggest that the relevance of the phrase "*A concession to human frailty*" when it comes to the defence of duress is titanic; but according to the rigidity of the law there is not when it comes to a charge of murder.

A key case for duress of threats and for the phrase "*A concession to human frailty*" is Graham (1982) in this case the defendant was a homosexual who lived with his wife and another homosexual man. The other man was violent and often bullied the defendant. After both the defendant and the other man had been drinking heavily, the other man 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 one minute. The wife died. The defendant claimed he had only held the flex because of his fear of the other man. The defendant's conviction was upheld. Within this case the two-stage test was created known as the subjective and objective test, they are as follows:

- ➔ Was the defendant compelled to act as he did because of what he reasonable believed he had good cause to fear serious injury or death? (subjective test)
- ➔ And if so, would a sober person of reasonable firmness, sharing the characteristics of the accused have responded in the same way? (objective test)

If the defendant fulfils the requirements, he will gain the defence of duress. This highlights that there is "*A concession to human frailty*" when it comes to the defence of duress. Since, if the defendant conceded or yielded in his moral weakness when faced with a threatening situation, it is possible for the courts to excuse the criminal conduct which would lead to a full acquittal. Therefore one can suggest that the relevance of the phrase "*A concession to human frailty*" when it comes to the defence of duress is titanic. But according to the rigidity of the law there is not when it comes to a charge of murder.

In the case of Gotts (1992), in which the father of a 16-year-old boy threatened him with violence unless he stabbed his mother. The boy did stab his mother, but this only caused her serious injury and not death. He was convicted of attempted murder. In this case Lord Jauncey 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*". This suggests two points firstly that the offence of murder is more

perilous, than that of murder since the intention is to kill; rather than the intention to kill or cause serious harm. And secondly that the relevance of the phrase "*A concession to human frailty*" when it comes to the defence of duress to a charge of attempted murder is not relevant. Lord Jauncey refuses to accept that there is a concession to human frailty, and refuses to accept that as humans we do have weaknesses. However, one agrees with the view that human's do have weaknesses and do possess fears when put into a dangerous and threatening situation. Therefore one can suggest that the relevance of the phrase "*A concession to human frailty*" when it comes to the defence of duress is tenuous. But according to the rigidity of the law there is not when it comes to a charge of attempted murder.

Conclusion

In conclusion we have looked at the relevance of the phrase "*A concession to human frailty*" when it comes to the defence of duress; and explained this through discussing duress of circumstances and duress of threats. It has been found that the relevance of the phrase "*A Concession to human frailty*" when it comes to the defence of duress is tenuous; we have proved that humans do have weakness and do concede or yield in their moral weakness, when faced with a threatening situation. However, according to the rigidity of the law there is not "*A concession to human frailty*" when it comes to charges of murder, attempted murder and possibly some forms of treason.