

“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.

“Necessity is blind until it becomes conscious.”

Karl Marx

The defence of necessity has been debated upon for considerable amounts of time in English law, as trial judges have remained hesitant towards whether or not necessity should be permitted as a defence. If the defence was to be permitted, what would the courts consider as ‘necessary’ circumstances? This essay will explain and analyse the law’s current stance towards the defence of necessity, and how a defendant “*unlawfully killing a reasonable person under the King’s (or Queen’s) Peace with malice aforethought*”¹ should never be allowed the defence.

What is the defence of necessity?

Being in a situation of necessity occurs when a person is forced to act in an illegal manner due to his difficult circumstances; in doing so he prevents a “*worse evil from occurring*.”² The defence of necessity operates as an excuse to criminal liability as, theoretically speaking; the defendant would have committed the offence to avoid a ‘greater evil’ upon both himself and other people. It has been noted that this defence has many similarities with duress of circumstances, as it’s the situation an individual is placed in that results in an offence to occur. Early writers on English law in the 1600s understood necessity to justify one’s immoral conduct which would have otherwise been considered unlawful. In the case of Moore v Hussey (1609) Lord Hobert J. had stated that “*All laws admit certain cases of just excuse, when they are offended in the letter, and where the offender is under necessity, either of compulsion or inconvenience*”. This statement justifies the use of necessity, as Lord Hobert has taken into consideration the ability of an individual to have a just and rational reasoning to act in a certain way.

Has necessity been permitted as a defence to murder?

The leading case in relation to both necessity and murder is Dudley and Stephens (1884). In this case two defendants and a 17 year old cabin boy were

¹ Criminal Law A2 – J. Martin Page 67

² Criminal Law A2 – J. Martin Page 194

shipwrecked in a small open boat approximately 1600 miles away from land for 20 days. They had hardly any food or water during that time, and fearing they would all die if they didn't eat anything, killed the cabin boy. They claimed that he was likely to die first anyway, so consequently ate his flesh. They were rescued four days later when picked up by a passing ship and were subsequently charged for the boy's murder. Their claim of necessity to save themselves from dying was rejected by the courts, so they were sentenced to death.

Lord Coleridge one of the trial judges in the case, after referring to Sir Matthew Hale's assertion (entitled *The History of the Pleas of the Crown, 1736*) concluded that a man cannot be acquitted of theft of food even if suffering from extreme hunger, so doubted that the defence of necessity could ever be extended to a defendant who had killed another to save his own life. Lord Coleridge stated that "*Though law and morality are not the same... the absolute divorce of law from morality would be of fatal consequences; and such divorce would follow with the temptation to murder.*"³

If both Dudley and Stephens were granted the defence of necessity, would its imposition as binding precedent in today's court protect everyone existing in society, or would it harm and destroy the solidarity that the law intended to initially achieve? Most definitely the latter, as it would create a loophole that thousands would flock towards, in hope of being excused or given a mere tap on the shoulder for committing a crime due to their 'necessary' situation. What would happen if necessity was permitted in charges of murder? It would result in the unnecessary killings of innocent individuals, such as the cabin boy, as those committing the crime would think themselves as individuals of reasonable aptitude and worthiness to commit crime, to protect themselves rather than others. Dudley and Stephens regarded themselves as superior to the cabin boy, probably due to his lower status (if compared to theirs), making their crime even more atrocious and immoral.

As well as Lord Coleridge realising the analogy of hunger and the theft of food, he also took into consideration the Christian aspect of actually giving up one's life to save others, rather than taking another's life to save one's own. He said "*By what measure is the comparative value of lives to be measured? Is it to be strength, or intellect, or what?*"⁴ This means necessity should never be a defence to murder, as who is to be the judge of what is or is not necessary? This is one of the elements that make the defence of duress unavailable to charges of murder.

³ Cases and Materials on Criminal Law, 8th Edition, J Allen, Elliot, Woods (Page 333)

⁴ <http://www.lawteacher.net/criminal.php>

Should an emergency affecting life and death permit necessary yet criminal actions?

In the case of Buckoke and Others v Greater London Council (1971) Lord Denning in his obiter dicta statement asked whether the driver of a fire engine was compelled to stop at a red traffic light even if he saw 200 yards down the road a blazing house if the man's life would be lost by waiting? He accepted that the driver would have no choice but to commit an offence against the Road Traffic Regulations if he crossed the red light, as it was a necessary situation that would result in the loss of an innocent life. *"I suggested to both counsel that the driver may be excused in crossing the lights to save the man. He might have the defence of necessity. Both counsel denied it. They would not allow him any defence in law."*⁵ Although the actions of the counsel would have been looked at in a negative light, it must be remembered that the concept of *stare decisis* (stand by what has already been established) plays a crucial part in the law's foundations.

Lord Denning's analogy can be considered as logical, as no fire fighter would want to be the reason behind an innocent man's death. But logically, the very creation of Road Regulations have been put in place to protect and safeguard the rest of society. What if a young child had been crossing the street at the time, and was killed by the fire fighter's actions? What if, after seeing the green light, a car had driven past the fire engine, but due to the fire fighter disobeying the law, crashed and killed the a perfectly innocent family? There are endless 'what if' questions that justify the reasons behind why necessity should never being a defence to murder. In relation to **Source 7**, the case of Kitson (1955) (although not a murder case) involved the defendant drinking alcohol before going to sleep in his brother in law's car. When he woke up to find the car coasting down the hill, he grabbed hold of the steering wheel to prevent a crash and steered it into a grass verge at the bottom of the hill. He was charged with driving a car whilst under the influence. When looked at the meaning of the Act, it was found that he possessed the *"ingredients of the offence"*⁶ so the charge was upheld. Was it necessary for him to steer the wheel? Definitely. Was it legal for him to steer the wheel? Most definitely not. It would be an absurdity to say the defendant should have merrily sat on his seat without a care in the world, although his life was at risk. But if the defence of necessity was permitted, it would result in a high number of acquittals, and the lenience towards 'drink drive' offences would not be considered as serious as they are today.

⁵ Cases and Materials on Criminal Law, 8th Edition, J Allen, Elliot, Woods (Page 325)

⁶ <http://www.swarb.co.uk/lisc/RdTrf19301959.php>

Another point relating back to what necessity truly is can be found in the very definition of the word. Necessity has been defined by the English Oxford Dictionary as “**1** *the state or fact of being required or indispensable. 2* *an indispensable thing. 3* *a situation enforcing a particular course: created more by necessity than design.*”⁷ What can be recognised as indispensable? What is an indispensable thing? What type of situation would enforce a particular course? The ambiguity of literal definitions can result in vague understandings, but this can be prevented by Parliament defining particular words in the Acts created. The problem with the defence of duress is that an Act of Parliament stating what can and cannot be considered as duress does not exist, relying upon case law and binding judgements taking priority.

Choosing the lesser of two evils: Moral or immoral?

In the case of R v Bourne (1939) the defendant was a gynaecologist who performed an abortion on a 14 year young girl who had been raped. In his professional opinion, he knew that she could die if permitted to give birth, so the abortion was performed in a public hospital with the consent of her parents. The defendant was found not guilty of “unlawfully procuring a miscarriage” following a direction from the trial judge to the jury that a defendant did not act unlawfully for the purposes of s58 of the Offences Against the Person Act (1861). He had acted in good faith, and had exercised his clinical judgement as a medical professional. This element is now found within the Abortion Act (1967). Many people still consider abortion an act of murder, myself included, but under the law’s jurisdiction, a homicide offence cannot be charge in respect of killing a foetus as the child must have “an existence independent of the mother” before it can be considered a “creature in being”.

In reference to **Source 10**, the case of Re A (Conjoined Twins) (2000) (a civil case) the court had to consider whether it would be lawful for doctors to perform a life threatening operation to separate conjoined twins. One of the twins, Mary, was born without having a proper heart or lungs, and was only kept alive by the existence of her twin, Jodie, whose heart circulated blood for the two of them. Their parents who were devout Catholics refused consent to an operation to separate them, but the doctors had applied for a declaration. If the twins were not separated, both would inevitably die. If the twins were separated, only one twin would die: consequently being the lesser of two evils. Ward LJ stated that “*the best interests of the twins is to give the chance of life to child whose actual bodily condition is capable of accepting the chance*”⁸ Separating the twins

⁷ http://www.askoxford.com/concise_oed/necessity?view=uk

⁸ Cases and Materials on Criminal Law, 8th Edition, J Allen, Elliot, Woods (Page 337)

without the courts declaration would result in Mary's murder, as it would be an unlawful killing rather than a lawful one. But separating them with the courts declaration would be lawful, thus eliminating the need of the defence of necessity altogether.

Brooke LJ said that the defence of necessity would be available to the doctors were they to ever be charged with Mary's murder, as he approved four principles that were set out in *Sir James Stephen's Digest of Criminal Law (1883)*. These consisted of 1) the act was done only in order to avoid the consequences which could not otherwise be avoided 2) those consequences, if they had happened, would have inflicted inevitable and irreparable evil 3) no more was done than was reasonably necessary for that purpose 4) the evil inflicted by it was not disproportionate to the evil avoided.⁹ Brooke LJ concluded that "*the interests of Jodie must be preferred to the interests of Mary (as he) considered that all the requirements (were) satisfied in the case.*"¹⁰

Choosing the lesser of two evils can be an incredibly difficult decision to embark on, as seen in Re A (Conjoined Twins) (2000) where a human being lacking the vital elements of a self-sufficient human, had to be sacrificed in order to save her sister. As the purpose of the law is to protect those living in a nation, the judgement of the case was taken to the Court of Appeal to ensure it did not violate the Human Rights Act (1998) and Article 2 of the European Convention of Human Rights (*Everyone's right to life shall be protected by law. No one shall be deprived of his life intentionally save in the execution of a sentence of a court following his conviction of a crime for which this penalty is provided by law.*)¹¹ they were satisfied that it did not constitute a breach. As Article 2(1) protects individuals from being "intentionally" deprived of life, "intentionally" in this case and the context of the case had to be given its natural and ordinary meaning.

Is the defence of necessity when performing an operation applicable when an individual cannot articulate against it?

Before the case of Re A (Conjoined Twins) (2000) had occurred, the case of Re F (Mental Patient: Sterilisation) (1990) involved doctors seeking a declaration from the courts to make it lawful for them to operate on an individual. In this case, a health authority had applied for a declaration to lawfully sterilise a girl who had a very severe mental disability. She had formed a sexual relationship with another mental patient, which obviously put her at risk of becoming pregnant. The doctors who were responsible for her health and safety said that she

⁹ Criminal Law A2 – J. Martin Page 195

¹⁰ Cases and Materials on Criminal Law, 8th Edition, J Allen, Elliot, Woods (Page 339)

¹¹ <http://www.hri.org/docs/ECHR50.html#C.Art2>

wouldn't be able to understand the pregnancy properly which could be extremely dangerous for her mental health. The girl's mother supported the application for the court's declaration, but the solicitor who was acting on behalf of the girl thought that performing the operation would be illegal as she was unable to give consent herself.

Lord Goff of Chieveley stated that *"...in the case of a person of sound mind, there will ordinarily have to be an emergency before such action taken without consent can be lawful; for otherwise there would be an opportunity to communicate with the assisted person and to seek his consent."*¹² This means that performing the operation would be a violation towards the patient's rights, as using the correct methods of communication to perform such a 'necessary' operation with the patient herself is and can be possible. However the case was summed up by Lord Brandon saying that "it will also be their (doctors) common duty to do so (perform the operation)." I see no justification with his summing up, as the patient is a human being physically capable of bearing and looking after a child with support, but simply lacks some mental capabilities. There are many examples of mentally handicapped individuals taking care of and having children. If the patient, in this case, could understand and take part in sexual activity, then she should be able to take care of her child. Sterilisation is not a necessary objective, so the courts should have denied it.

Conclusion

To conclude, the defence of necessity in regards to murder is a good concept if looked at theoretically, but as seen in Dudley and Stephens (1884) it is not a concept that can work in everyday society. If the defence was granted to defendants after intentionally committing murder to save themselves was permitted, disorder and uncertainty will disturb the theory of stare decisis. Duress is not a defence to murder or attempted murder, so neither should necessity.

Bibliography

Criminal Law A2 – J. Martin

Cases and Materials on Criminal Law, 8th Edition, J Allen, Elliot, Woods

<http://www.hri.org/docs/ECHR50.html#C.Art2>

http://www.askoxford.com/concise_oed/necessity?view=uk

<http://www.swarb.co.uk/lisc/RdTrf19301959.php>

<http://www.lawteacher.net/criminal.php>

Cases

-Moore v Hussey (1609)

-Dudley and Stephens (1884)

-Buckoke v Greater London Council (1971)

-Kitson (1955)

-R v Bourne (1939)

-Re A (Conjoined Twins) (2000)

-Re F (Mental Patient: Sterilisation) (1990)

¹² Cases and Materials on Criminal Law, 8th Edition, J Allen, Elliot, Woods (Page 328)