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Duress as a Defence to Murder

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I. Introduction

It is perhaps not surprising that in an age which has witnessed an ever increasing amount of terrorist activity, an opportunity should arise for the courts to examine the present status of the defence of duress in the criminal law. Such an opportunity was afforded to the House of Lords recently in *Director of Public Prosecutions for Northern Ireland v. Lynch*.¹

II. The Facts

The scene was the troubled city of Belfast. On the afternoon of January 28, 1972, Joseph Lynch drove a stolen car containing three hooded and armed men to a garage, where an off-duty police constable, Norman Carroll, was doing work on his car. The three men ran across the road, gunned down the constable and were driven away by Lynch in the waiting car. Lynch's story was that earlier that day he had been summoned to a back room, where there were three men (Meehan, Bates and Mailey), two of them armed. There he was ordered first to 'hi-jack' a car, which with Mailey he did, and later to drive it. He drove the three men to a place near where the constable was stationed. After the killing he drove them back to their starting point. One of the men in the room and in the car, he said, was Sean Meehan, a member of the Irish Republican Army and a ruthless gunman. Lynch testified that Meehan was the kind of person whom it would be perilous to disobey and that Meehan had indicated that he would tolerate no disobedience. "You have no other option. I firmly believe that I would have been shot for defying him," he said.

Thus, Lynch's main contention was that all that he had done had been done under duress and that he was therefore entitled to be acquitted. After a trial before a judge and jury Lynch was convicted of aiding and abetting the murder, the trial judge withdrawing the issue of duress from the jury, taking the view that as a matter of law

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1. [1975] 2 W.L.R. 641; [1975] 1 All E.R. 913 (H.L.).

the defence was not available on a charge of murder. Lynch was sentenced to life imprisonment.

The Court of Criminal Appeal in Northern Ireland upheld this decision,² but certified that two points of law of general public importance were involved in their decision, and gave leave to appeal. The two certified points were:

- (1) On a charge of murder is the defence of duress open to a person who is accused as a principal in the second degree (aider and abettor)?
- (2) Where a person charged with murder as an aider and abettor is shown to have intentionally done an act which assists in the commission of the murder with knowledge that the probable result of his act, combined with the acts of those whom his act is assisting, will be the death or serious bodily injury of another, is his guilt thereby established without the necessity of proving his willingness to participate in the crime?

The House of Lords, by a majority of three (Lord Morris of Borth-y-Gest, Lord Wilberforce and Lord Edmund Davies) to two (Lord Simon of Glaisdale and Lord Kilbrandon), allowed the appeal and ordered a re-trial.

III. The Authorities Before Lynch

Duress has long been recognised in English law as a defence to most offences, not merely as mitigating punishment. The cases are few, but the defence has been accepted as applying to malicious damage,³ receiving,⁴ unlawful possession of ammunition,⁵ arson,⁶ conspiracy to steal and larceny,⁷ perjury⁸ and even certain forms of treason.⁹ In Canada the defence has been recognised,¹⁰ though, as

2. (Unreported) June 27, 1974; see note by D. R. Miers, *Duress as a Defence to Murder* (1974), 25 N.I. Leg. Q. 464; O'Donnell J. dissented to the extent that, in his opinion, the defence of duress is admissible when the charge is one of aiding and abetting murder.

3. *R. v. Crutchley* (1831), 5 C. & P. 133; 172 E.R. 909.

4. *Attorney-General v. Whelan*, [1934] I.R. 518 (C.C.A.).

5. *Subramaniam v. Public Prosecutor*, [1956] 1 W.L.R. 965 (P.C.).

6. *R. v. Shiaros* (unreported) September 29, 1961 (C.C.A.).

7. *R. v. Gill*, [1963] 1 W.L.R. 841; [1963] 2 All E.R. 688; 47 Cr. App. R. 166 (C.C.A.).

8. *R. v. Hudson*, [1971] 2 Q.B. 202; [1971] 2 W.L.R. 1047; 56 Cr. App. R. 166 (C.A.).

9. *Oldcastle's Case* (1419), 1 Hale P.C. 50; *M'Growther's Case* (1745), Fost. 13; 18 State Tr. 391; *R. v. Stratton* (1779), 1 Dougal. 239; 99 E.R. 156; *R. v. Purdy* (1946), 10 J. Cr. L. 182.

10. For a recent example see *Payne*, [1974] 2 W.W.R. 658 (B.C. Prov. Ct.) (escaping from lawful custody in a detention centre).

will be seen, the *Criminal Code* specifically excludes it in regard to several offences.¹¹

The English authorities are conflicting on whether the defence extends to murder. The writers are unanimous that it does not.¹² In several cases judges have expressed similar sentiments, but, with one exception,¹³ all were *obiter dicta*.¹⁴ They followed the writers, who in turn followed Hale. It is undeniable that the criminal law has undergone in this area a process of liberalization since Hale, and has taken perhaps a more tolerant view of human reactions. It would be surprising if the institutional writers were to be accepted today without comment.

As against these older views there is the general statement of Lord Widgery in *Hudson*,¹⁵ made after full argument, that the defence may be admissible in cases of murder other than as a principal.

It is important in this context to distinguish between the possible degrees of participation in the criminal law. In English law, prior to 1968, there were four such degrees in the case of a felony: (i) principal in the first degree, whose act was the most immediate cause of the *actus reus*; (ii) principal in the second degree, who was present, aiding and abetting the principal in the first degree at the time of the commission of the offence; (iii) accessory before the fact, who before the commission of the crime advised its commission or knowingly gave assistance to one or more of the principals; (iv) accessory after the fact, who gave to a principal felon or an accessory before or after the fact, any assistance whatever tending to and having the object of, enabling him to evade arrest, trial or punishment.¹⁶ As a result of the abolition of the distinction between felonies and misdemeanours by s. 1 of the Criminal Law Act 1967, accessories before the fact are treated as principals, and the offence of being an accessory after the fact no

11. *Infra*.

12. 1 Hale P.C. 50; 4 Bl. Comm. 27; 2 J. Stephen, *History of the Criminal Law of England* (New York: Burt Franklin, 1964) at 107.

13. *R. v. Tyler and Price* (1838), 8 C. & P. 616; 173 E.R. 643.

14. *Attorney-General v. Whelan*, [1934] I.R. 518 at 526 (*per* Murnaghan J.); *R. v. Steane*, [1947] K.B. 997 at 1005 (C.C.A.) (*per* Lord Goddard C.J.); *R. v. Bourne* (1952), 36 Cr. App. R. 125 at 128 (C.C.A.) (*per* Lord Goddard C. J.); *R. v. Smyth*, [1963] V.R. 737 at 738 (S.C.) (*per* Sholl J.).

15. [1971] 2 Q.B. 202; [1971] 2 W.L.R. 1047; 56 Cr. App. R. 166.

16. Smith and Hogan, *Criminal Law* (1st ed. London: Butterworths, 1965) at 68; Glanville Williams, *Criminal Law, The General Part* (2d ed. Toronto: Carswell Co., 1961) at 346.

longer exists.¹⁷ It is now usual to refer simply to principals and secondary parties.

In Canada the modes of participation in crime are laid down in ss. 21-23 of the *Criminal Code*. A “party” may be the actual perpetrator of the act, that is, the one who with his own hands or through an innocent agent, does the act itself; he may be one who, before the act is done, does or omits something for the purpose of aiding someone to commit it; he may be one who is present aiding and abetting another in the doing of it; or he may be one who counsels or procures the doing of it, or who does it through the medium of a guilty agent. An accessory after the fact is one who, “knowing that a person has been a party to the offence, receives, comforts or assists him for the purpose of enabling him to escape.”¹⁸

To return to the case law, the nineteenth century case of *Tyler and Price*¹⁹ is against the admission of the defence. The two accused were members of an armed gang which under the leadership of a lunatic named John Thom had gathered to resist the civil authorities. Thom shot a constable who had come to arrest him and the accused threw the victim, still alive, into a ditch where he died. The accused said that they acted under the fear of personal violence from Thom. The case has been cited as an authority against the availability of the defence in cases of murder, but it would seem to have no such effect. There is no indication in the report of any element of duress, and no attempt was made to establish that the accused could not escape from the gang. Further, as Professor Glanville Williams has suggested, “. . . the evidence seemed to show that Tyler had voluntarily joined a criminal organisation knowing of its purpose; and one who does this has no cause for complaint if he is debarred from the defence of duress in respect of threats afterwards made to him.”²⁰

In Ireland the defence has been accepted on a charge of attempted murder,²¹ and in *Sephakela v. R.*²² an appeal from the Supreme Court of Basutoland, the Privy Council by implication recognised

17. Smith and Hogan, *Criminal Law* (3d ed. London: Butterworths, 1973) at 92.

18. Section 22.

19. (1838), 8 C. & P. 616; 173 E.R. 643.

20. Glanville Williams, *supra*, note 16 at 759-60. This restriction is expressly stated in the Canadian *Criminal Code*, s. 17, *infra*.

21. *R. v. Fagan* (unreported) September 20, 1974.

22. [1954] Crim. L.R. 723 (P.C.) (Basutoland) and see R.S. O'Regan, *Duress and Murder* (1972), 35 M.L.R. 596 at 600-601.

the plea of duress on a charge of murder, although the evidence before the court was insufficient to establish the defence. The authority of *Sephakela* is, however, somewhat weakened by the fact that the Privy Council was enunciating Roman-Dutch law, not the common law.

Outside the United Kingdom, in *R. v. Brown and Morley*,²³ the prosecution case was that Brown, a lodger in one Elsie Leggett's house, had agreed to cover Morley's approach to Leggett's bedroom, which he did by coughing, thus enabling Morley to murder her there. The Supreme Court of South Australia, by a majority of two to one, held duress to be not admissible on a charge of aiding and abetting murder, but a different view has been taken in South Africa. There, in *S. v. Goliath*,²⁴ D and E were walking together when they came upon the victim, P, whom they asked for a cigarette and then for money. When P said that he had no money E stabbed him with a knife and ordered D to tie him up. Being afraid, D refused whereupon E threatened that unless D obeyed he would kill him. D then tied P's arms behind his back and E stabbed P twelve more times from which he died. At their trial for murder, E was found guilty, but D was acquitted on the ground that he had acted under E's compulsion. The Appellate Division held, by a majority of four to one, that compulsion can constitute a complete defence to a charge of murder.

Several Commonwealth Codes, while admitting a defence of compulsion by threats, exclude it in cases of murder.²⁵ The *Criminal Code* of Canada is representative of these:

17. *Compulsion by Threats.* A person who commits an offence under compulsion by threats of immediate death or grievous bodily harm from a person who is present when the offence is committed is excused for committing the offence if he believes that the threats will be carried out and if he is not a party to a conspiracy or association whereby he is subject to compulsion, but this section does not apply where the offence that is committed is treason, murder, piracy, attempted murder, assisting in rape, forcible abduction, robbery causing bodily harm or arson.

This provision follows the report of the Criminal Code Bill

23. [1968]S. A. S.R. 467 (S.C., *in banco*).

24. [1972]3 S. Afr. L.R. 1 (S.C., A.D.).

25. Canada (s.17); New Zealand (s.24); Tasmania (s.20(1)); Queensland (s.31(4)); Victoria (s.54).

Commissioners of 1879²⁶ which, under the influence of Stephen, prepared a draft code. The equivalent section of the draft code²⁷ was framed to express what was then thought to represent the existing common law.²⁸ The authority quoted as regards murder is as usual Hale. Thus, in the Canadian cases the result has been determined by the application of the *Code*. For example, in the early case of *R v. Farduto*,²⁹ which was cited before the House of Lords in *Lynch* itself, the accused, who had a razor, was threatened by one Pardillo that he would be shot unless he handed over the razor. The accused did so, and Pardillo used it to kill someone then present. The accused had no defence to a charge of murder because of the exclusionary effect of the *Code*. It did not follow, according to the court, that compulsion was never an excuse for killing, but the compulsion must be such as to make the accused person a mere inert physical instrument, for instance if A by force took the arm of B, in which was a gun, and therewith killed C. Here A would be guilty of murder, but B would not. Yet, it is submitted, this purported exception to the general rule is best put upon the ground, not of duress or compulsion, but rather on the more fundamental one that he did no act.

The most recent and authoritative Canadian case is *R v. Paquette*.³⁰ There, two co-accused, Simard and Clermont entered a store, each carrying a gun, and in the course of executing a robbery, a customer was shot and killed. Paquette, a former employee of the store, drove the other two to the premises where the homicide was effected. The accused was charged with constructive murder, under s. 213 of the *Code*, the Crown's case against him being based on the combined effect of that section and s. 21(2). The latter requires proof of an "intention in common" with the other perpetrators on the part of the accused. The defence was one of duress, the accused contending that he was not guilty of murder because he had not formed an intention in common with the others to effect the unlawful purpose of robbery and to assist each other therein, but rather his participation was by reason of fear of death or serious bodily harm to himself. On appeal, counsel for the Crown argued

26. (1879), C 2d series 2346.

27. Section 23.

28. See note A at 10 of the report.

29. (1912), 10 D.L.R. 669; 21 C.C.C. 144; 19 Rev. Leg. (N.S.) 165 (Que. Q.B., A.D.).

30. (1974), 5 O.R. (2d) 1; 19 C.C.C. (2d) 154 (C.A.).

that s. 17 of the *Criminal Code* was an exhaustive account of the circumstances in which compulsion may excuse,³¹ that the exclusion of the offences of robbery and murder from the application of the section extended not only to a person who in fact committed the offence but to everyone who became a party to the offence under the *Code*. He further contended that where an accused cannot invoke s. 17 as an excuse for the commission of an offence he cannot rely on duress or compulsion as being relevant to the issue as to whether the accused had formed a common intention to carry out an unlawful purpose.

The authority for these propositions was said to be the decision of the Supreme Court of Canada in *Dunbar v. The King*.³² In that case the facts were only slightly different and the legal issues identical. It was held that the compulsion section of the *Code*, excluding, as it did, murder and robbery, was inapplicable, and that the argument that compulsion was relevant to the question of common intention failed to recognise the distinction between intention and motive.

The Court in *Paquette*, with regret, felt impelled to follow the decision in *Dunbar*, pointing to the harsh consequence that a taxi driver, who unwittingly picked up persons whom he believed to be passengers, and then at gunpoint was forced to drive them knowingly to the scene of the robbery would, if death were to result as a consequence of that robbery, have no defence to a charge of murder.³³

In the United States the courts have generally expressed the view that duress is not available to one who intentionally kills an innocent person or who aids and abets such killing.³⁴ However, these decisions have usually been placed on other grounds as well, for instance, that there was an opportunity to escape which the accused did not take.³⁵

The only direct English authority is that of *R v. Kray*.³⁶ One of several persons charged with murder was Anthony Barry. It was

31. Relying on *R. v. Carker*, [1967] S.C.R. 114; [1967] 2 C.C.C. 190; 60 W.W.R. 365.

32. (1936), 67 C.C.C. 20; [1936] 4 D.L.R. 737 (S.C.C.), *aff'g* [1936] 3 W.W.R. 99; 51 B.C.R. 20 (C.A.).

33. (1974), 5 O.R. (2d) 1 at 8; 19 C.C.C. (2d) 154 at 161 (C.A.).

34. See *e.g.* *Leach v. State* (1897), 42 S.W. 195; *State v. Nargashian* (1904), 58 A. 953; *State v. Weston* (1923), 219 P. 180.

35. See *e.g.* *Arp v. State* (1893), 12 S. 301; *State v. Nargashian* (1904), 58 A. 953.

36. (1969), 53 Cr. App. R. 569 (C.A.).

alleged that he had carried a gun to a house, knowing that Reginald Kray intended to use it to murder one McVitie there. Barry's defence was one of duress in that he was in fear for his own safety and that of his family if he failed to carry out Kray's orders. Accordingly, the trial judge admitted evidence of the violent reputation of the Kray twins. The Court of Appeal accepted that duress can be a defence to a person charged with murder "as an accessory".

Thus, the Court in *Kray* drew a distinction between "accessories" and "principals". By the use of the term "accessory", it is possible that they were referring to the old common law modes of participation, and, in particular, the accessory before the fact. There is no evidence that Barry was present or assisting in any way when the murder was actually committed, but it is submitted that there is no ground for distinguishing between the man who is forced to carry a gun to the scene of the crime, as in *Kray*, and one forced to drive the killer there. Once the defence of duress is admitted in the case of an accessory of one kind it is difficult to resist its extension to all secondary parties. Once this development is made one is forced to look again at the rationale, if any, of excluding the defence in the case of a principal.

Kray thus opened the door to a reconsideration of the traditional distinctions. In the case of secondary parties their Lordships have ventured boldly through. In the case of the principal the door is now shut. But not locked.

IV. The Majority Judgments in Lynch

The *ratio* of *Lynch* would seem to be that duress is a defence to all crimes (except possibly treason³⁷ and murder as a principal) where the will of the defendant has been overborne by threats of death or serious personal injury to himself (or possibly another, for example, wife or child). In the opinion of the majority, there was nothing in case-law or principle to justify withholding the plea of duress in cases of murder, at least so far as secondary parties were concerned.

We are here in the domain of the common law; our task is to fit what we can see as principle and authority to the facts before us, and it is no obstacle that these facts are new.³⁸

37. But see *supra*, note 9.

38. *Per* Lord Wilberforce at [1975] 2 W.L.R. 641 at 659-60; [1975] 1 All E.R. 913 at 930.

The reason for the majority view is best expressed by Lord Morris:

The answer that I would give to these questions is that it is proper that any rational system of law should take fully into account the standards of honest and reasonable men. By those standards it is fair that actions and reactions may be tested. If then someone is really threatened with death or serious injury unless he does what he is told to do is the law to pay no heed to the miserable agonising plight of such a person? For the law to understand not only how the timid but also the stalwart may in a moment of crisis behave is not to make the law weak but to make it just. In the calm of the court-room measures of fortitude or of heroic behaviour are surely not to be demanded when they could not in moments for decision reasonably have been expected even of the resolute and the well disposed.³⁹

The majority were not impressed with the traditional arguments against allowing the defence in cases of murder. There were no reasons of public policy against doing so. It had been argued that it was very easy for the plea of duress to be raised and difficult for the prosecution to rebut. But this was also true, in Lord Edmund-Davies' view, of other well recognised pleas, drunkenness for instance.⁴⁰ Lord Coleridge may have thought the duty of a citizen in certain situations to be to sacrifice his life,⁴¹ but his Lordship preferred the view of Rumpff J. in *S. v. Goliath*,⁴² that the criminal law should be more concerned with the conduct of the average person rather than with his more heroic neighbour.

Lords Morris and Wilberforce would not extend the defence to murder as a principal,⁴³ but Lord Edmund Davies thought it illogical to restrict it to murder as a secondary party,⁴⁴ when "the contribution of the secondary party to the death may be no less significant than that of the principal"⁴⁵ an approach given support by both dissenting judgments.⁴⁶

39. *Id.* at 646D; [1975] 1 All E.R. at 930.

40. *Id.* at 685E; [1975] 1 All E.R. at 953E and see Lord Wilberforce, *id.* at 660E; [1975] 1 All E.R. at 930H.

41. *R. v. Dudley and Stephens* (1884), 14 Q.B.D. 273 at 287.

42. [1972] 3 S. Afr. L.R. 1 at 25.

43. See Lord Morris, [1975] 2 W.L.R. 641 at 647-48; [1975] 1 All E.R. 913 at 918-19; *per* Lord Wilberforce, *id.* at 656; [1975] 1 All E.R. at 926-27.

44. *Id.* at 688; [1975] 1 All E.R. at 956.

45. Smith and Hogan, *supra*, note 17 at 166.

46. See Lord Simon, [1975] 2 W.L.R. 641 at 666-67; [1975] 1 All E.R. 913 at 936; Lord Kilbrandon, *id.* at 676; [1975] 1 All E.R. at 945. It has come to the notice of the writer that the question whether the defence extends to the actual

Lord Wilberforce would seem to have gone somewhat further than the rest of their Lordships by saying that:

Nobody would dispute that the greater the degree of heinousness of the crime, the greater and less resistible must be the degree of pressure, if pressure is to excuse.⁴⁷

There may be much to be said for this view that in the case of more trivial offences a less serious threat than one of death or serious personal injury should suffice. On this view, if D were to break a window under the threat of a less serious assault, or of his watch being smashed, then there would be a defence of duress available to him on a charge of criminal damage. Yet how does this fit in with the *ratio* of *Lynch*? It is submitted that it directly conflicts with the restriction to threats of death or serious bodily harm imposed by the majority, a restriction which is also accepted in the earlier authorities.⁴⁸

The question of duress of course involves consideration of the extent to which the accused placed himself under another's domination and how far he might have withdrawn himself from the situation. Nothing in the majority judgments affects this question in any way. The same applies to the question of proof. The evidential burden is carried by the accused, the burden of proof remaining throughout on the prosecution.⁴⁹

In view of the majority holding, the second certified question did not call for direct decision. Four of their Lordships were content to hold that the crime of aiding and abetting another to commit a crime, while requiring some proof of *mens rea*, did not involve a "specific intent".⁵⁰ Lord Simon limited the latter term to an ulterior intent.⁵¹ A crime is often so defined that the *mens rea* includes an intention to produce some further consequence beyond the *actus reus* of the particular crime, for example, in burglary it is not enough that the accused intended to enter a building as a trespasser. He must also have the ulterior intent to commit one of a number of

perpetrator of the killing is at last to be considered. The Judicial Committee of the Privy Council will shortly be asked to decide the point in an appeal from Trinidad and Tobago, *sub nom. Abbott v. The Queen*.

47. *Id.* at 656D; [1975] 1 All E.R. at 927B.

48. See the discussion in Smith and Hogan, *supra*, note 17 at 167 and the cases cited therein.

49. *R. v. Gill*, [1963] 1 W.L.R. 841; [1963] 2 All E.R. 688; 47 Cr. App. R. 166; *R. v. Bone* (1968), 52 Cr. App. R. 546 (C.A.).

50. Lord Wilberforce makes no mention of the second certified question.

51. [1975] 2 W.L.R. 641 at 672; [1975] 1 All E.R. 913 at 941.

specified offences in the building.⁵²

V. *The Dissenting Judgments*

The possible criticisms of the majority position are all explored by Lord Simon of Glaisdale in a detailed and vigorous dissent. His Lordship agreed with the majority that any sane and humane system of criminal law should be able to allow for situations such as the present one, and yet disagreed as to the best way of achieving the necessary flexibility. Would it not be preferable, Lord Simon asked, to allow a general plea in mitigation in the case of duress rather than a narrowly based and arbitrarily defined defence?⁵³ In duress situations both *actus reus* and *mens rea* were present. The mind was “guilty” albeit to a lesser extent than one acting under no such constraint.⁵⁴ Was not, he continued, the rationale of duress as a criminal defence that an act prohibited by the criminal law may be *morally* innocent? The way to deal with this was by mitigation of sentence, or the use of discretion by the prosecution or the Parole Board, or by the exercise of the prerogative of mercy in appropriate cases.⁵⁵ In the case of murder where the penalty was mandatory, Lord Simon saw another way of achieving the required flexibility: the law made a “concession to human frailty” in the case of provocation by allowing it to reduce the crime of murder to that of manslaughter. In his Lordship’s view, it should make such a concession in the case of duress.⁵⁶

The difficulty that arises with this kind of reasoning is that any court needs to be aware of the extent of the blameworthiness of the defendant before it can assess the appropriate sentence. The question of duress is likely to be of the utmost importance in this connection. If this issue is to be withdrawn from the jury, then this

52. Lord Simon’s suggestion might perhaps introduce some certainty into this area of the law, although the term “specific intent” is a notoriously imprecise one in English law. It has been used most frequently in connection with the defence of drunkenness: see *e.g.* *R. v. Lipman*, [1970] 1 Q.B. 152 (C.A.); *Bolton v. Crawley*, [1972] Crim. L. R. 222 (D.C.); *R. v. Burns* (1974), 58 Cr. App. R. 364 (C.A.); *R. v. Sheehan and Moore*, [1975] 2 All E.R. 960 (C.A.); *R. v. Majewski*, [1975] 3 All E.R. 296 (C.A.). For a discussion of the various interpretations of the term, see R. Cross, *Specific Intent*, [1961] Crim. L.R. 510.

53. [1975] 2 W.L.R. 641 at 662, 670-71; [1975] 1 All E.R. 913 at 932, 939-40.

54. *Id.* at 669; [1975] 1 All E.R. at 938; and see Lord Kilbrandon, *id.* at 677; [1975] 1 All E.R. at 945.

55. *Id.* at 662; [1975] 1 All E.R. at 932.

56. *Id.* at 670-71; [1975] 1 All E.R. at 639-40; and see Lord Kilbrandon, *id.* at 667; [1975] 1 All E.R. at 945-46.

body, the arbiter on questions of fact, would be prevented from deciding what may perhaps be the most important fact in the case, from the point of view of sentence.⁵⁷ Of course, in sentencing judges frequently rely on matters of fact not before the jury, but the question of duress would seem to be of such fundamental importance as to make it essential that it be considered first by that body. Further, Lord Simon's advocacy of a general plea of mitigation might be more justified if the defence of duress were to be very broadly defined. Where, however, the threat is confined to one of death or serious personal injury, as at present in English law, then this argument loses much of its force.

Lord Simon accepted that duress had long been recognised as defence to some crimes and that it was too late for the judges to overturn this and substitute a general plea in mitigation.⁵⁸ Yet, it is this very question of authority which, in his Lordship's view, forms the basis of the most powerful argument against the majority reasoning. The writers and commentators (all under the impression that they were stating the common law) were unanimous that duress was no defence to murder. The draft code of 1879 and the Commonwealth Codes were to the same effect. Were all these authorities to be swept aside? What, he asked, was said to counter them? Merely a Roman-Dutch authority, a dissenting Australian judgment, a passing reference in a Privy Council case, an unreported case from Northern Ireland, and a case of an accessory before the fact where the issue was virtually uncontested.

There is considerable force in this criticism, but perhaps *Kray*, the one direct English authority, is treated somewhat peremptorily by Lord Simon. There, it is true that the contrary point was not argued, but the Court would only have reached the conclusion that the defence was available to an accessory if well satisfied that it was correct, since if they were wrong in their view, much highly prejudicial evidence had been wrongly admitted against the Kray twins, the principals to a charge of murder.

57. For a discussion of a similar problem in connection with offences of strict liability, see T. B. Hogan, *Criminal Liability Without Fault* (Leeds: Leeds University Press, 1969) at 8-10; see also *Lockyer v. Gibb*, [1966] Crim. L. R. 504 (Q.B.); *R. v. Warner*, [1967] Crim. L.R. 529 (C.A.) and the commentaries thereon; and see Lord Wilberforce, [1975] 2 W.L.R. 641 at 660; [1975] 1 All E.R. 913 at 930.

58. [1975] 2 W.L.R. 641 at 671-72; [1975] 1 All E.R. 913 at 940-41; and see Lord Kilbrandon, *id.* at 675; [1975] 1 All E.R. at 943.

The Criminal Justice Act (Northern Ireland), 1945, s. 37(1) (which re-enacts identically an equivalent provision in English law)⁵⁹ gives a defence to a wife who proves that she acted in the presence of and under the coercion of her husband but makes an exception of murder.⁶⁰ Lord Simon argued that if Parliament intended to exclude murder from the defence of coercion, it would be anomalous to hold that duress could excuse murder.⁶¹ Yet if, as seems likely, the defence of coercion is wider than that of duress,⁶² why should the same principles necessarily apply to both? The best approach to this notoriously obscure provision is perhaps to regard it as “merely an incomplete statement of the common law and the common law still exists to supplement its deficiency.”⁶³

VI. Lynch and the General Defence of Necessity

The final point made by the minority was that the question of duress could not be considered without examining the concept of “necessity” generally. Necessity in law, said Lord Simon, denoted a situation where circumstances faced a person, with a choice between two evils, one involving an infringement of the criminal law.⁶⁴ It had been rejected in the criminal law generally, his Lordship stated, and there was no distinction in principle between necessity and duress.

The only difference is that in duress the force constraining the choice is a human threat, whereas in necessity it can be any circumstance constituting a threat to life (or, perhaps, limb).⁶⁵

Lord Simon considered, therefore, that duress was merely a particular application of the doctrine of necessity. *Dudley and Stephens*⁶⁶ had established that necessity was no defence to a charge of murder. In order to allow the appeal, in his Lordship’s view, the House would have to overrule *Dudley and Stephens* or say that it did

59. Criminal Justice Act, 1925, 15 & 16 Geo. V, c. 86, s. 47.

60. And treason.

61. [1975] 2 W.L.R. 641 at 671-72; [1975] 1 All E.R. 913 at 940-41.

62. See Smith and Hogan, *supra*, note 17 at 169; *cf.* the discussion in Glanville Williams, *supra*, note 16 at 764-67.

63. Glanville Williams, *supra*, note 16 at 765; see Lord Edmund Davies, [1975] 2 W.L.R. 641 at 685-86; [1975] 1 All E. R. 913 at 953-54; Lord Wilberforce, *id.* at 659; [1975] 1 All E.R. at 929-30; Lord Morris, *id.* at 652; [1975] 1 All E. R. at 923.

64. *Id.* at 665; [1975] 1 All E.R. at 935.

65. *Id.* at 667; [1975] 1 All E.R. at 936.

66. (1884), 14 Q.B.D. 273 at 287.

not negative necessity. If the latter course were taken, the elements of “necessity” as a defence would have to be defined.⁶⁷

Again, whatever the force of Lord Simon’s approach in principle, the courts have in practice generally recognised a distinction between the two pleas. Thus, duress has been accepted as a defence to larceny,⁶⁸ but “economic necessity” is said not to excuse such an offence.⁶⁹

In their recent consideration of both defences⁷⁰ the Law Commission agreed that the elements of the defences were not the same and accorded separate treatment to each of them. The Law Commission could see no social purpose to be served in excluding the defence of duress in relation to murder⁷¹ and proposed that the defence should be available on any charge.⁷² Likewise, there should be a general defence of necessity, available where “the defendant himself believes that his conduct is necessary to avoid some greater harm than that which he faces.”⁷³ The harm to be avoided “must, judged objectively, be found to be out of all proportion to that actually caused by the defendant’s conduct.”⁷⁴

The defence of necessity is always popular as an academic notion, but the problems of its practical definition and application are well recognised.⁷⁵ To draw the traditional distinction between human and other threats may be intellectually unsatisfying, but precision and certainty are perhaps no lesser values in a modern system of criminal justice.

According to the majority *Dudley and Stephens* stands undisturbed as a result of *Lynch*. Lord Morris saw no reason to question the law as laid down there.⁷⁶

VII. Postscript

Unfortunately, not all stories have happy endings. Some twelve

67. [1975] 2 W.L.R. 641 at 666-67; [1975] 1 All E.R. 913 at 935-37; and see Lord Kilbrandon, *id.* at 675-76; [1975] 1 All E.R. at 944-45.

68. *R. v. Gill*, [1963] 1 W.L.R. 841; [1963] 2 All E.R. 688; 47 Cr. App. R. 166.

69. 1 Hale P.C. 54; 4 Bl. Comm. 31 and see *Southwark London Borough v. Williams*, [1971] 2 All E.R. 175 at 179 (*per* Lord Denning M.R. *obiter*).

70. The Law Commission, Working Paper No. 55, *Codification of the Criminal Law* (London: Her Majesty’s Stationery Office, 1974).

71. *Id.* at 16-17.

72. *Id.* at 17, 19.

73. *Id.* at 38; and see 29-30.

74. *Id.* at 38; and see 30-31.

75. See *e.g.* the discussion in Smith and Hogan, *supra*, note 17 at 161-64.

76. [1975] 2 W.L.R. 641 at 651; [1975] 1 All E.R. 913 at 922.

weeks after the House of Lords' judgment was delivered, Lynch was again convicted after a no-jury trial,⁷⁷ held *in camera*. Lord Justice Jones ruled that in his view the defendant was "in on the venture", maybe not as a member of the Irish Republican Army, but as a supporter who had no hesitation in assisting others. He found Lynch a very unsatisfactory witness, thoroughly unconvincing and "prepared to lie his way out of a position in which he found himself."⁷⁸

Thus, according to the *Belfast Telegraph*, Joseph Lynch has found himself the holder of a most unenviable record, the first man in Northern Ireland to be tried, convicted and sentenced to life imprisonment twice for the same murder.

77. In the interim period between the first and the second trial the Northern Ireland (Emergency Provisions) Act 1973 was passed. Section 2 of this Act provided that trials of scheduled offences (which included murder) should be by a Judge of the High Court, or a County Court Judge, sitting alone with no jury.

78. *Belfast Telegraph*, June 3, 1975 at 11.