King's Law Journal

ISSN: 0961-5768 (Print) 1757-8442 (Online) Journal homepage: www.tandfonline.com/journals/rklj20

Duress, Necessity: How Many Defences?

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To cite this article: Winnie Chan & A.P. Simester (2005) Duress, Necessity: How Many Defences?, King's Law Journal, 16:1, 121-132, DOI: 10.1080/09615768.2005.11427597

To link to this article: https://doi.org/10.1080/09615768.2005.11427597

ANALYSIS

DURESS, NECESSITY: HOW MANY DEFENCES?

THE COMMON LAW of crimes has long recognised a supervening[1] defence of duress by threats,[2] available in situations where D commits a *prima facie* crime in response to threats from another person, T, to cause death or serious injury should D not act as instructed. More recently, English courts have also begun to grant exculpation in situations where D commits a *prima facie* crime in response to *circumstances* that pose a serious risk of harm should D not act as he does. The most straightforward variety of these cases involves what has come to be known as 'duress of circumstances', a defence that is now uncontroversial. Its criteria have been developed by analogy to duress by threats, and they are in essence the same. Indeed, one may fairly describe the two as complementary versions of a generic defence of duress, which is available (subject to various restrictions) when D commits an offence in order to avoid death or serious injury.

So much is largely unproblematic. The main, though not always the only, rationale behind the exculpatory force of duress by threats is that, depending on the circumstances, it can be unfair to expect D to refrain from criminality when faced with grave threats to life or limb. In such cases D's action may be a wrong, in that it violates the rights of an innocent victim, but we do not fault D for doing it. Complying with T's threat, and allowing the scale of that threat to outweigh the interests of the victim, is not merely understandable but reasonable. The same rationale extends to duress of circumstances. Hence, the law has good reason to afford a defence of duress independent of the source of the threat, whether it be a third party or extraneous events. It is the risk, not its source, that does the exculpatory work.

當面臨生命或肢體的嚴重威脅時，期望D避免犯罪可能是不公平的

As such, it may be no surprise that the availability of duress has been restricted to risks of serious injury or death. Very recently, however, it has become apparent that circumstantial risks can sometimes ground a supervening defence even when life and limb are not at stake. This is not entirely new. As far back as the sixteenth century it was thought that a *prima facie* offence may sometimes be committed "to avoid greater inconveniences, or through necessity, or by compulsion . . .",[3] and the common law seems to have accepted the possibility of necessary action in specific contexts, such

1. By 'supervening', we mean a defence that does not deny proof of *actus reus* or *mens rea*, but arises once those elements are established (e.g. self-defence).
2. See e.g. *Oldcastle*'s case (1491) 1 Hale PC 50, 1 East PC 70; *Crutchley* (1831) 5 C&P 133; *A-G* v *Whelan* [1934] IR 518; *Purdy* (1946) 10 JCL 182.
3. *Reniger* v *Fossoga* (1552) 1 Plowd 1, 18.

as the demolition of a house in order to prevent the spread of fire.[4] At the same time, whether these instances could be generalised was doubtful, and the existence of a defence of necessity had been denied in a number of Court of Appeal decisions.[5] Yet the English courts have now begun to recognise a defence of necessity in a wide variety of contexts. In decisions such as *Re F*[6] and *R* v *Bournewood Community and Mental Health NHS Trust*,[7] the House of Lords has been willing to countenance the compulsory sterilisation of a woman with low mental capacity, and the detention of a person with a mental disorder, on grounds of necessity. In *Re A (Children)*,[8] it was ruled lawful for surgeons to operate in order to separate conjoined twins, notwithstanding that the operation was certain to cause the death of one twin and, being *prima facie* a murder, would be ineligible for the duress of circumstances defence. In these and other cases, the courts have used the term "necessity" candidly and, frequently, interchangeably with "duress".[9] Taken as a whole, the cases suggest a more general defence of necessity, one that goes beyond its occasional and somewhat *ad hoc* recognition in the old cases. Indeed, a number of decisions have suggested that the two duress defences are no more than categories of necessity—and it is necessity that is the generic defence, perhaps even to the extent of absorbing self-defence within its ambit.[10]

In an anniversary article for the *Criminal Law Review*, Chris Clarkson picks up on this suggestion. Clarkson argues that it may now be possible, indeed desirable, to collapse traditional distinctions and absorb the various defences of duress, together with self-defence and private defence, within a single defence of *necessary action*:[11]

> A new defence of necessary action would have the advantage of simplicity and, most importantly, would enable the focus to be on the true issue that unites the present defences: whether, given the pressure/crisis, etc., facing the defendant, the response, taking into account the context and all the circumstances, was a reasonable and proportionate reaction to that danger.

There are certainly elements that are common to the defences of self-defence, duress (both forms) and necessity. Each requires that the defendant's response be, in some sense, proportionate. Thus it will not do for me to shoot the person who threatens to spit on me. My pre-emptive action is unreasonable in virtue of being disproportionate, and the same would be true were I to shoot an innocent third party because T otherwise threatened to spit on me. But what of the *differences* between the traditional

4. See G. Williams, "The Defence of Necessity" (1953) 6 *Current Legal Problems* 216. Admittedly, many of these cases involve risks to life, and would fall within the ambit of duress of circumstance. But the cases also embrace necessary action to avert property damage. See e.g. *Tolson* (1889) 23 QBD 168, 172 (Wills J); *Cope* v *Sharpe* [1912] 1 KB 496; *Johnson* v *Phillips* [1975] 3 All ER 682; *Wood* v *Richards* [1977] RTR 201, [1977] Crim LR 295.
5. See e.g. *Kitson* (1955) 39 Cr App R 66 (CCA); *Buckoke* v *GLC* [1971] 1 Ch 655 (CA); *Southwark LBC* v *Williams* [1971] 1 Ch 734 (CA).
6. *Re F (Mental Patient: Sterilisation)* [1990] 2 AC 1 (HL).
7. [1998] 3 All ER 289 (HL).
8. [2001] Fam 147.
9. E.g. *Pommell* [1995] 2 Cr App R 607; *Martin* [1989] 1 All ER 652, 653 (Simon Brown J); *Shayler* [2001] 1 WLR 2206, 2225–7.
10. See e.g. *Safi* [2003] EWCA Crim 1809, [2004] 1 Cr App R 14 [24]; *Re A (Children)* [2001] Fam 147, 253 (Robert Walker LJ); *S (DM)* [2001] Crim LR 986.
11. "Necessary Action: A New Defence" [2004] *Criminal Law Review* 81, 95.

defences? What of the rule that duress is not available to murder, by contrast with self-defence and some cases of necessity? What of the requirement that the interventions in *F*, and in *Bournewood*, be in the best interests of the patient? That an element is common does not mean it is unifying. Clarkson thinks that the doctrinal distinctions are an accident of history and that they lack a normative rationale.[12] If he is right about this, there is really only one defence, notwithstanding the diversity of its doctrinal manifestations. But is Clarkson right? Normatively speaking, how many defences are there here?

To answer these questions, one must look at the rationale(s) behind the various defences. If the differences in their criteria and scope are justified, this must be because their rationales differ. Conversely, if their rationales differ, we may expect that the scope of their application will also differ, because it is the rationale underpinning a defence that determines its legitimate scope.

JUSTIFICATIONS AND EXCUSES

Clarkson sees this point, but opaquely. He recognises that if some defences (e.g. duress) are excusatory and others (necessity, self-defence) are justificatory, they cannot share a common rationale and therefore cannot be assimilated. Consequently, Clarkson attacks the application of the justification/excuse distinction to these defences. The distinction is a blurred one, he points out, since both justification and excuse require an assessment of the reasons for which the defendant acted as she did. Sometimes those reasons are sufficient to make the action permissible (justified); sometimes they leave it merely understandable and insufficiently culpable (excused). But "in reality there is a continuum of pressurised conduct with it being impossible to distinguish clearly. . . . It becomes a question of judgment as to when understandable reasons become sufficient ones."[13]

It is true that both justifications and excuses require an assessment of the defendant's reasons for acting, and it should be no surprise that the justification/excuse distinction cuts across, rather than tracks, such criminal law defences as duress. Duress requires only that the defendant's action be *at least* excused. It does not follow, however, that the distinction does not exist. People who act in legitimate self-defence are justified, not excused. And a person who breaks into a log cabin on the mountainside in order to stay alive during a blizzard may be justified, whereas one who, in an act of self-preservation (say, to escape a homicidal attacker), attacks and injures an innocent person may only be excused. Medically necessary treatment, on the other hand, generally involves justified rather than excused intervention.

The distinction is not merely a matter of degrees along a continuum. At least sometimes, it is structural. A key difference between self-defence and duress is that D's response is addressed to her attacker; she acts to neutralise the threat itself, not to pass it on to a third party. Provided that her response is proportionate, D does not

12. *Ibid.* "The present separate classification of these defences has meant that they have developed differently-but the differences in the rules are not necessarily rational or sustainable."
13. *Ibid.* 85.

wrong V; in duress, D always wrongs V. This is not because the conduct is more "pressurised" in self-defence cases than in duress. (Indeed, D need not even be under threat of serious injury before some actions may be taken in self-defence.) Neither is it because the gap between magnitudes of pressure and response is greater in self-defence cases. (Indeed, she may sometimes use lethal force in self-defence where, if it were duress, that response would not be allowable.) Rather, it is because the reasons for and against D's action stand in a different relationship to each other. This possibility has real implications for the law of defences because, as we shall see, some reasons for action may be admissible only when they stand in a particular relationship to the harm and not otherwise. It will not do, therefore, to specify a single defence with a unifying proportionality criterion that is expected to do all the work.

This gives us two ways of responding to Clarkson's attack on the justification/excuse distinction. The first is by reasserting the distinction itself: only some cases of what Clarkson calls "necessary action" are justified. Others, especially some cases of duress, are merely excused. But an alternative response is that the attack is, in any event, irrelevant. We can simply disregard the categorisation exercise and go directly to consider the rationale(s) underpinning the various incarnations of necessary action. Even if duress and other cases of necessary action always involve justification (which we deny),[14] they do not always involve the same *type* of justification, with the same parameters and scope. As such, the case for collapsing them into a single broad defence is not made out. Clarkson's argument assumes that, once the value of the justification/excuse distinction is undermined, the unified defence follows: a *non sequitur*.

FOUR DEFENCES

And so it proves, on a perusal of the case law. What count as instances of necessary action can and should be divided into at least four categories of exculpation: for convenience, we shall call them self-defence, duress, lesser-evils necessity, and best-interests intervention.[15]

Self-defence, unequivocally a justification, is available where D acts against V in order to ward off a threat that V himself poses. In such cases the driving normative force behind the defence is D's right to protect herself against unlawful attacks, a right grounded, in turn, in the interests D has in personal autonomy and physical integrity. That right, which allows for limited self-preference, trumps V's interests and carves a partial liberty out of D's general duty not to cause harm to others (including V). The extent of the liberty is dependent on norms of proportionality,[16] and its recognition by the legal system is constrained by rule of law considerations—if the situation is not urgent, so that recourse to protection by the state is readily available, D may not

14. For a view contrary to ours, see P. Westen and J. Mangiafico, "The Criminal Defense of Duress: A Justification, Not an Excuse—And Why It Matters" (2003) 6 *Buffalo Criminal Law Review* 833.
15. It is not possible, in an essay of this brevity, fully to explore the distinctions between the defences we have identified, or to examine all their criteria and boundaries. Our aim here is to sketch rather than to give a detailed account. We will also neglect other defences that may fall within Clarkson's general category, such as lawful arrest, and derivative issues such as mistake.
16. Cf *McInnes* [1971] 3 All ER 295.

be permitted to take the situation entirely into her own hands.[17] But the moral and legal character of D's conduct here is righteous. D acts to preserve a moral, and legal, entitlement. Indeed, the same is true even when D acts on behalf of a stranger who is the subject of an unwarranted attack.[18] It is no accident that self-defence overlaps with the prevention of crime defence.[19] D has a right not to be attacked. In situations where it is impracticable for the state to assert that right on her behalf, she upholds that right by acting in self-defence. 與法律制度不一致

In duress, by contrast, D's conduct is not consonant with the legal regime. As we said earlier, he wrongs V. Sometimes, the wrong may be morally and legally permitted, as when D enters V's house in order to call an ambulance on behalf of someone urgently in need of medical treatment. Here, D can cite the life-saving reason in order to defeat the duty he owes not to violate V's property rights. A reason of this sort is not *excluded*, as Raz would put it, by V's proprietary rights.[20] It can be stacked up against the reasons not to damage V's property when determining whether, all things considered, it is permissible (justified) for one to act as does D. This does not mean the wrong goes away: there may, for example, be a duty to pay tortious damages for any loss that V suffers.[21] But it is a permitted wrong, and we can conclude that D does not act badly, all things considered—he does not act badly overall—when he does that wrong.[22] In cases where such a conclusion is open, duress overlaps with necessity.

Yet that conclusion is not always open. The reasons not to violate V's person are not like those concerning V's property, and exclude a much wider range of counter-considerations. Thus, in the absence of V's consent, it is *not a reason at all* in favour of removing one of V's kidneys that transplanting the kidney into T's body will save T's life. The "reason" is excluded from consideration; indeed, its exclusion is part and parcel of the very significance of our rights to personal autonomy and integrity—that they are not amenable to this kind of calculus. T's need for the kidney cannot be stacked up against the reasons not to harm V when deciding, all things considered, what to do. Absent some further non-excluded reason, we can conclude that, all things considered, D should not remove V's kidney. Were D to proceed with the operation, she would both wrong V and, in so doing, act badly overall.

17. This is part of the objection to *Kelly* [1989] NI 341, in which D, a soldier, shot and killed V thinking that V was a terrorist who, if allowed to escape, would commit non-specific terrorist offences in the future. It was held that these facts justified the use of force. But in the absence of urgency, it should not be open to D to bypass normal state mechanisms for regulating (potential) wrongdoing by others. For criticism of the decision, see A. P. Simester and G. R. Sullivan, *Criminal Law: Theory and Doctrine* (2nd ed., Oxford: Hart Publishing, 2003) s 20.2(v).
18. Cf *Duffy* [1967] 1 QB 63.
19. Criminal Law Act 1967, s 3 (which also prescribes that the force used must be "reasonable in the circumstances").
20. See generally J. Raz, *Practical Reason and Norms* (Oxford University Press, 1990), s 1.2. In this case, the fact that V has a property right supplies what Raz would call a *protected* reason: a first-order reason to respect V's property coupled with a second order, *exclusionary* reason to disregard certain sorts of reasons for overriding that first-order reason. Thus self-aggrandisement is excluded as a reason for overriding V's property right, but preservation of life is not. For a summary discussion of protected reasons, see Raz's discussion in *The Authority of Law* (Oxford University Press, 1979) 16–18.
21. Cf *Vincent* v *Lake Erie Transportation Co* 124 NW 221 (1910); Simester and Sullivan, above n17, s 20.3(ii)(d).
22. For more on the distinction between doing a wrong (acting "wrongfully") and acting badly ("wrongly"), see J. Gardner, "Wrongs and Faults" in A. P. Simester (ed.), *Appraising Strict Liability* (Oxford University Press, 2005) 51, esp s 2.

It is in cases where D both commits a *prima facie* wrong and, all things considered, acts badly that duress comes into its own. Suppose, for example, that D attacks and seriously injures V because T threatens otherwise to kill her. Notwithstanding that it was impermissible for D to act as she did, in the sense that there were insufficient valid reasons for her conduct, we may be reluctant to fault D. Our reluctance is because, although D's reason for acting was (objectively speaking) inadequate, we can quite understand that it was good enough *for D*. She feared for her life. Any reasonable person might have been impelled by such a fear;[23] where this is so, we cannot make the inference of fault that would normally entitle us to blame D for her actions. Clarkson assimilates self-defence, duress and necessity on the basis that the defendants in each case act "under extreme pressure", but we can see here that the importance of the pressure differs in duress from, say, in self-defence. In self-defence, the emergency is important for rule-of-law reasons. It explains why D is not usurping the proper role of the state.[24] In duress, by contrast, the pressure directly explains D's motivation. D is right to fear for her life: her only mistake is to treat that as a reason for injuring V. But that mistake merely discloses an imperfect virtue—a limitation—not a fault. We do not count, among the qualities reasonably expected of D, the levels of self-control and altruism that would be needed for D to refrain from acting.[25]

The role of "pressure" in necessity, understood as a lesser-evils defence, is not like this. Again, it is a rule-of-law constraint.[26] One cannot raze V's house in order to create a fire break, and thereby preserve the village, without official authority unless the fire is at hand.[27] Necessity is the general case of a permitted wrong. This does not mean that it absorbs self-defence, for the latter involves no wrong at all. But it is like self-defence rather than duress, in that D's motivation constitutes, objectively speaking, a legitimate and not excluded reason for acting. Correspondingly, the scope of necessity is wider than that of duress. What makes duress exculpatory is the understandable difficulty of resisting the threat to D, so it is no surprise that qualifying threats must be severe; and there may be institutional reasons for formalising this, in our legal rule that the threat must be of death or serious injury.[28] Necessity, however, exculpates

23. Cf *Graham* [1982] 1 All ER 801, 806 (CA), requiring that the threat be such as to overcome the resistance of a "sober person of reasonable firmness".
24. Although the urgency of the occasion may sometimes also affect the precision with which questions of proportionality are determined, as in *Reed* v *Wastie* [1972] Crim LR 221 (DC) (Geoffrey Lane J): "[i]n the circumstances one did not use jewellers' scales to measure reasonable force . . . ."
25. It is, in this sense, apt to describe the defence as a "concession to human frailty" (e.g. *Howe* [1987] 1 AC 417, 432–5), i.e., in the sense that it is an imperfection characteristic of humans in general, and not particular to D.
26. See e.g. *Southwark London Borough* v *Williams* [1971] Ch 734, 740 (Edmund Davies LJ): "[t]he law regards with the deepest suspicion any remedies of self-help, and permits these remedies to be resorted to only in very special circumstances. The reason for such circumspection is clear—necessity can very easily become simply a mask for anarchy." His Lordship's point is that the legal system cannot operate if its authority is optional. Thus the use of vacant council properties, as in *Southwark*, is best resolved by political decision-making processes, implemented by consistent administration, rather than by *ad hoc* self-help such as squatting.
27. Cf *Shayler* [2001] 1 WLR 2206. D, a civil servant employed in MI5, was held to be in breach of the Official Secrets Act 1989 after he shared secret information with a newspaper, notwithstanding that he believed the actions of MI5 threatened rather than enhanced public security. D was not attempting to avert some crystallised, imminent catastrophe—there was no forthcoming incident his actions were intended to avert, merely a fear that the covert operations of MI5 threatened public security generally.
28. *Hudson* [1971] 2 QB 202 (CA); *Graham* [1982] 1 All ER 801 (CA); *Conway* [1989] QB 290 (CA). Significant restrictions on the availability of duress have also been imposed in *Hasan* [2005] UKHL 22.

because D has, all things considered, sufficient reasons to act as she does—she does not act badly overall. Thus there is no structural reason for restricting the varieties of factors that may be considered when deciding whether D's action was permitted. Of course, depending on the wrong committed, some reasons may be excluded. Others may be inadequate to defeat the reasons militating against D's conduct, so that the response is disproportionate. But that is a case-by-case matter. The preservation of property may warrant a fire engine's driving through a red light,[29] but not its plowing through a crowd to get to the blaze.

Finally, lesser-evils necessity of the type described here should also be distinguished from a different type of necessity, which we shall call "best-interests intervention". The latter defence is exemplified by *Re F.*[30] F was a sexually active woman, aged 36 but with the mental age of a young child. It was judged that a pregnancy would be extremely detrimental to her well-being, but ordinary contraception techniques were apparently either ineffective or impracticable. The House of Lords ruled that it would be permissible, on grounds of necessity, to conduct a sterilization operation. Unlike duress, the principle "is one of necessity, not of emergency".[31] Pressure is not the point. But neither is this a principle of lesser evils. It is a principle of acting on behalf of another, in circumstances where there is no opportunity to consult with the beneficiary.[32] Thus the rationale involves a form of paternalism. As such, it is quite unlike the other varieties of circumstantial exigency we have considered so far and, structurally speaking, the defence contains two key ingredients that distinguish it from those others. First, D's action must be in the *best interests* of V; secondly, V's right to refuse consent must not be overridden, a condition that is usually satisfied where V cannot be communicated with and the action is not contrary to V's known wishes.[33] In no other variety of duress or necessity does D act in V's best interests.

DISTINCTIONS IN PRACTICE? LETHAL RESPONSES AND *RE A (CHILDREN)*

We have, then, not one defence here but four. Each has a different rationale and, correspondingly, a different structure. The reasons for admitting a defence operate, and interrelate, differently in each case. But we should still ask, how much difference does this make? How far apart are the criteria of the defences, and do they have significantly different scopes?

29. As Lord Denning thought it should in *Buckoke* v *GLC* [1971] 1 Ch 655, 668.
30. [1990] 2 AC 1.
31. *Ibid.* 75 (Lord Goff): "[e]mergency is however not the criterion or even a pre-requisite; it is simply a frequent origin of the necessity which impels intervention". In particular, it may be the reason there is no opportunity to consult with V before intervening.
32. Note that, as such, it is not a principle specifically of *medical* intervention, but of intervention more generally: "[t]o give a simple example, a man who seizes another and forcibly drags him from the path of an oncoming vehicle, thereby saving him from injury or even death, commits no wrong" (*ibid.* 74).
33. Cf the criteria laid down by Lord Goff, *ibid.* 75–6: "to fall within the principle, not only (1) must there be a necessity to act when it is not practicable to communicate with the assisted person, but also (2) the action taken must be such as a reasonable person would in all the circumstances take, acting in the best interests of the assisted person. On this statement of principle, I wish to observe that officious intervention cannot be justified by the principle of necessity. So intervention cannot be justified when another more appropriate person is available and willing to act; nor can it be justified when it is contrary to the known wishes of the assisted person, to the extent that he is capable of rationally forming such a wish."

One test case is where D's actions cause death. Consider the well-known case of *Re A (Children)*,[34] in which the Court of Appeal permitted a surgical operation to separate conjoined twins, where the implications of separation were that one twin, Mary, would certainly die within minutes and that the other, Jodie, would most probably live. If the operation had not been performed, both twins were expected to die within a matter of months. The difficulty was that M's own heart and lungs were inadequate to sustain M's life, so that her survival depended on J; in particular, on J's heart continuing to pump the blood oxygenated by J through both twins' bodies. Unfortunately, sustaining both lives was imposing an excessive strain on J's heart. It was common ground that J's heart would fail within a few months, and that M's death would inevitably follow J's.

Under these circumstances, was the Court right to hold that killing J was defensible? In the rest of this article, we will discuss *Re A* in order to illustrate some of the implications of the distinctions we have drawn.[35] As we shall see, the categorisation of the case is crucial. Part of the problem was the rule laid down in *Dudley and Stephens*[36] that, like duress,[37] necessity is not available as a defence to murder. *Prima facie*, the surgery would be murder of M, since both the *actus reus* and *mens rea* elements of murder would be present. Thus the challenge for the Court of Appeal was to circumnavigate, without undermining, the rule in *Dudley and Stephens*.

SELF-DEFENCE

One way to negotiate the shoals of *Dudley and Stephens* would be to analyse the situation as a case of self-defence (or its third-party equivalent, defence of another). Rightly, self-defence is available as a defence to murder. It is rightly available because the rationale underpinning the exculpatory force of self-defence is capable of extending to lethal responses by D. If V puts D's life in danger without justification, D is entitled to assert her right to life. The hard case is, of course, where that right can be asserted only at the price of V's life. There, it is only because V has initiated the violation of D's right to life that D has priority. Notwithstanding that D and V have rights to life of equal standing, it is V, albeit blamelessly, who has violated D's right to autonomy. Where it is V who has generated the conflict, D is under no obligation to surrender her life for the benefit of V.

Consequently, an important structural reason for distinguishing self-defence from necessity is that one may, morally and legally, directly intend to kill in self-defence but not as a matter of necessity. But does the rationale underpinning self-defence actually apply to *Re A*? Ward LJ thought so. In his Lordship's analysis, the key point of

34. [2001] Fam 147.
35. We emphasise that the remarks made here are not intended to be an exhaustive analysis of either the facts or decision in *Re A* itself. It is discussed here as an illustrative case study.
36. (1884) 14 QBD 273. The defendants, survivors of a shipwreck, were adrift in an open boat in the South Atlantic. They killed and consumed without his consent the cabin-boy, Parker, who was the youngest and weakest member of their party. But for this act, D and his companions would probably have died prior to rescue. Nonetheless, they were convicted of murder and their defence of necessity was refused.
37. *Howe* [1987] AC 417.

the case is that, albeit through no fault of her own, M was killing J. Therefore, J (or someone intervening on her behalf) would be justified when acting in order to negate that threat, even though a consequence of so doing was that the person *who was the source of that threat* would die.

The difficulty with this analysis is that M cannot be described as an unlawful aggressor. Admittedly, as Ward LJ points out, there is no requirement in self-defence that the attack be a criminal offence:[38]

> The six year old boy indiscriminately shooting all and sundry in the school playground is not acting unlawfully for he is too young for his acts to be so classified. . . . [H]owever, . . . *in law* killing that six-year old in self-defence of others would be fully justified and the killing would not be unlawful. I see no difference in essence between that resort to legitimate self-defence and the doctors coming to Jodie's defence and removing the threat of fatal harm to her presented by Mary's draining her life blood.

Killing the six-year-old boy would be justified, both morally and legally, on the grounds we identified above. But the analogy does not carry over to M. There is no violation of J's right to life by M because there is no *act*, lawful or otherwise. It is not that M wrongs J innocently, like the six-year-old. M does not wrong J at all. The threat to M's life, like the threat to J's, is a *state of affairs*; M has not generated the conflict but, like J, is a victim of circumstance.

It is worth observing that in *Re A* itself Ward LJ sought to buttress his self-defence analysis by noting that, if one weighed up the respective best interests of J and M, the scales were tipped heavily in J's favour because she was the only child with any prospect of life extending beyond the following few months. Yet this consideration merely illustrates the importance of defence categorisation. It matters, if at all, only when the case is viewed as one of necessity. In the context of self-defence, it is an excluded consideration. Consider, for example, a case where P attacks D when D has only one hour to live and P is healthy. D is still entitled, if necessary, to kill P in self-defence.

Lesser-Evils Necessity

☆ An alternative analysis is to characterise the scenario in *Re A* as a case of lesser-evils necessity, a move made by Brooke LJ:[39]

> The claim is that [D's] conduct was not harmful because on a choice of two evils the choice of avoiding the greater harm was justified.

38. [2001] Fam 147, 203–4
39. *Ibid.* 236. By contrast with Ward LJ, Brooke LJ explicitly eschewed reliance on the proposition that M was an "unjust aggressor": "[n]one of the formulations of the doctrine of necessity which I have noted in this judgment make any such requirement: in this respect it is different from the doctrine of private defence." (*Ibid.* 240).

His Lordship sets out three criteria for the defence, according to which the intervention in *Re A* would be permissible:[40]

> (i) The act is needed to avoid inevitable and irreparable evil;
> (ii) No more should be done than is reasonably necessary for the purpose to be achieved; and
> (iii) The evil inflicted must not be disproportionate to the evil avoided.

The limitation of these criteria is that, without more, they would also exculpate the defendants in *Dudley and Stephens*. Moreover, it will not do the trick to point out that "Mary is, sadly, self-designated for a very early death".[41] So was the cabin-boy in *Dudley and Stephens*, whose condition was far more acute than that of the others. Similarly, the same doctors who operated in *Re A* would not have been free to accelerate M's death in order, say, to facilitate the early transplant of one of her working organs into P, some otherwise healthy patient.[42] This is, once again, an excluded reason for violating M's autonomy and personal integrity.

What is not excluded, however, is the need to protect J. Although Brooke LJ did not rely on this point, it matters that M was the source of the threat to J's life, a feature absent in *Dudley and Stephens*. That did not, as we said, entitle the doctors to kill M *in order to* save J. But the doctors were entitled to act in order to save J's life,[43] by protecting her from the threat to her life, even though their doing so would have the effect of accelerating M's death.[44] That gives us another significant distinction between the doctrines of self-defence and lesser-evils necessity. One may directly intend to kill in self-defence. One may only *obliquely* intend death in necessity.[45] In *Dudley and Stephens*, the cabin boy's death was directly intended: the defendants aimed to kill him, in order then to eat him. In *Re A*, M's death was no part of the doctors' aim or purpose, although it was an inevitable consequence of what they sought to achieve. It is only by supplementing Brooke LJ's analysis with these considerations that the rule in *Dudley and Stephens* can safely be evaded.

40. *Ibid.* citing Sir James Stephen.
41. *Ibid.* 239.
42. For that matter, neither would it be relevant in the context of duress (e.g. when D complies with a threat from gangsters by shooting a policeman known to be dying from cancer).
43. Subject, of course, to their satisfying the other criteria of necessity, in particular those identified by Brooke LJ.
44. It is here (and, more generally, in decisions about which life to save) that the matter of M's life expectancy may be a consideration, going to assessment of the proportionality criterion.
45. See Simester and Sullivan, above n17, s 5.1(i)–(iv). Broadly speaking, D *directly intends* something when he does it with the ordinary, paradigm sense of "intention"—i.e. if he acts with the aim, object, or purpose of bringing the *actus reus* about. D intends something *obliquely* when he does not intend it directly but recognises that it will be a virtually certain consequence of his actions. In the case at hand, it seems clear that the doctors do not directly intend to kill. M's death was neither sought for its own sake, nor sought as a means to an end. Her death supplied no part of the reasons why the doctors were operating; it was not an aim, object, or purpose of the operation; the doctors would not have regarded themselves as having "failed" in any sense if, by a miracle, M had survived.

Best-Interests Intervention

Rather surprisingly, the third judge in *Re A*, Robert Walker LJ, suggested that the contemplated surgery would be in the best interests of M as well as J.[46] Hence, the operation:[47]

> would not be unlawful. It would involve the positive act of invasive surgery and M's death would be foreseen as an inevitable consequence of an operation which was intended, and was necessary, to save J's life. But M's death would not be the purpose or intention of the surgery, and she would die because tragically her body, on its own, was not and never had been viable.

As it happens, Ward and Brooke LJJ both rejected the conclusion that the operation was in M's best interests, and their demurral seems right. Since this is a central criterion of the best-interests defence, the defence fails. The operation was not carried out for the benefit of M. Nonetheless, Robert Walker LJ's analysis usefully highlights the point that the direct/oblique intention distinction is important, too, in cases of best-interests intervention. Consider the familiar problem of a doctor (D) treating a terminally ill cancer patient (P) who, in the final stages of his illness, is in great pain. D may be justified in administering painkilling drugs to P notwithstanding that, as D knows, the drugs will accelerate P's death. What D may *not* do is administer those same drugs in order to free P from pain *by* accelerating his death. The former case involves best-interests intervention: the latter is euthanasia and, by extension, murder.

CONCLUDING REMARKS

No-one, least of all the Court of Appeal, would suggest that *Re A* is a case of duress.[48] Few, *pace* Robert Walker LJ, would suggest that it is one of best-interests intervention. The case is tremendously difficult and not one that admits easily of generalisation. But what emerges from discussion of the case is the importance of distinguishing, and not conflating, the different rationales at work when one claims any version of what Clarkson has called "necessary action". Had the doctors sought to save J *by* killing M (a case of direct intention), it seems most unlikely that their intervention would have been regarded as permissible—because the case is not truly one of self-defence. Nonetheless, it appears that conduct undertaken in the awareness that death will be accelerated may be permissible in certain cases of lesser-evils necessity and best-interests intervention.

Re A illustrates our more general point. All four defences we have sketched out in this article have common requirements of proportionality. But they are not unified. It seems clear enough, for example, that the criteria of best-interests and of no-opportunity-to-consent distinguish the category of best-interests intervention, and so we can make this argument straightforwardly at a doctrinal level. More importantly,

46. [2001] Fam 147, 258–9.
47. *Ibid.* 259.
48. See e.g. *ibid.* 235–6 (Brooke LJ).

we have suggested that those doctrinal distinctions track fundamental differences in the rationales underpinning each defence. Those rationales embody profound differences about the reasons why D should be exculpated when he does a *prima facie* offence: about how they operate, about the range of reasons for action that are admissible, and about how those how reasons stand in relation to each other.

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SAME-SEX MARRIAGE IN CANADA: CONTRIBUTIONS FROM THE COURTS, THE EXECUTIVE AND PARLIAMENT

FOR ANGLO-AMERICAN lawyers, the pattern of incremental social change is a familiar one, especially in the gradual extension of civil rights to minorities. However, the apparent inexorability of progressive change can obscure the institutional manoeuvrings which presage significant social reform. The current debate in North America on same-sex relationships is aptly illustrative. Although most now accept (or acquiesce in) the extension of civil and political rights to *individual* homosexuals, the question whether, and if so how, to confer legal recognition on same-sex *couples* is politically and socially divisive. This is unsurprising. After all, to recognise same-sex marriage often implicates not only enduring constitutional debates on the appropriate institutional roles of the branches of government, but also less arcane problems such as the place of marriage—heterosexual or otherwise—within contemporary liberal society.

In this note, we explain how the Canadian polity has approached the recognition of same-sex marriage, and point to the interaction of the governmental branches that is likely to result in Canada becoming the first common law jurisdiction to enact legislation re-defining marriage to embrace same-sex relationships. We begin by sketching the constitutional background in which the Canadian debate on same-sex marriage has been conducted, noting in particular the intricate manoeuvrings of the judicial and political branches. Against this backdrop, we assess the Supreme Court's recent advisory opinion on the federal executive's proposal to recast the legal capacity for marriage so as to permit same-sex couples to marry.[1] We argue that, although premised on a dubious understanding of its advisory jurisdiction, the Supreme Court's decision nevertheless represents an appropriate instance of institutional dialogue for a contentious social question that is currently receiving sustained attention in the principal democratic forum, the federal Parliament.

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1. *Reference re Same-Sex Marriage* [2004] 3 SCR 698 ("*Reference*").