Necessity: Duress of Circumstances or Moral Involuntariness?

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Abstract: While the Canadian Supreme Court has accepted necessity as an excuse on the basis of moral involuntariness, English and Welsh courts have adopted a different route by incorporating excusatory necessity into duress of circumstances. The objective element of this defence prevents the defendant's characteristics from being taken into account, and assumes a level of courage. In a defence where the fear emotion is the prevalent feature, this paper questions whether judges in England and Wales have taken the wrong path by implementing a necessity defence as a form of duress.

Keywords: necessity, excuse, justification, character, choice theory, capacity theory, fear emotion, courage.

I. Introduction

'[a] person should not be liable to life imprisonment for failing to be a hero'[1]

The 'necessity defence' occupies a somewhat ambivalent and nebulous position in English and Welsh law. Although it has been denied by some that such a defence exists,[2] it has nonetheless been acknowledged in diverse cases.[3] However, it has only really been successfully invoked in medical cases where doctors have been, and

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1 J.C. Smith, *Justification and Excuse in the Criminal Law* (Stevens: London, 1989) 94.

2 See, for example, C.M.V. Clarkson and H.M. Keating, *Criminal Law: Text and Materials*, 7th edn (Sweet & Maxwell: London, 2010) 353, albeit qualified by the proviso 'until fairly recently … ', because of the extending of duress of circumstances to cover the traditional conception of necessity, as seen below. See also D.W. Elliott, 'Necessity, Duress and Self-Defence' [1989] *Crim LR* 611 at 611.

3 These include, for example, *Southwark LBC* v *Williams and Anderson* [1971] 1 Ch 734; *Buckoke* v *GLC* [1971] 1 Ch 655; *R* v *Pommell* [1995] 2 Cr App R 607; *R* v *Shayler* [2001] 1 WLR 2206 (CA) (although the discussion of necessity by the Court of Appeal was subsequently criticized by the House of Lords); *R* v *Quayle* [2005] 1 WLR 3642; *R* v *Jones* [2005] QB 259; and *R* v *Altham* [2006] 1 WLR 3287.

still are, able to rely on it in order to treat incompetent patients in their best interests[4] and without their consent.[5]

Perhaps the most well known of these cases is *A (Children)*,[6] where surgeons applied for a declaration that it would be lawful to separate conjoined twins where it was known that the weaker twin would die on the operating table. The Court of Appeal, in distinguishing *Dudley and Stephens*,[7] held that the doctrine of necessity provided the doctors with a defence to a potential charge of murder. Brooke LJ, in particular, advocated the necessity defence, and set out its criteria as being that

> (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.[8]

The inclusion of a proportionality criterion is generally associated with a utilitarian-based[9] concept of justification. In simple terms, a justification focuses on the nature of the action carried out by

4 Best interests is the objective test used in England and Wales to permit treatment of incompetent patients. A common law construct, the criteria for best interests is now set out in the Mental Capacity Act 2005, s. 4.

5 See for example *In Re F (Mental Patient: Sterilisation)* [1990] 2 AC 1; *Re F (Adult Patient: Jurisdiction)* [2000] Lloyd's Law Reports 381; *R* v *Bournewood Community and Mental Health NHS Trust, ex p L* [1998] 2 WLR 764; (CA) [1999] 1 AC 458 (HL). However, see the European Court of Human Rights' decision in *HL* v *UK* (application No. 45508/99). Note the late Tony Nicklinson's attempt to invoke necessity in *R (On the Application of Tony Nicklinson)* v *Ministry of Justice* [2012] EWHC 2381 (Admin) and the continuation of the necessity debate in the Court of Appeal in *R (On the Application of Mrs Jane Nicklinson and Paul Lamb)* v *Ministry of Justice* [2013] EWCA Civ 961.

6 *Re A (Children) (Conjoined Twins: Surgical Separation)* [2000] 4 All ER 961.

7 *R* v *Dudley and Stephens* (1884) 14 QBD 273. As one of the most recognized cases in the common law world, the facts of this case barely need recounting here. Suffice it to say that, following a shipwreck, four survivors found themselves drifting in a small boat on the open seas. After twenty days—seven of those without food, and five without water—the two defendants killed and ate the cabin boy, who, having drunk sea water, was the weakest of the four, and 'was likely to have died before them'. The fourth survivor did not take part in the killing, but did eat the flesh. They were rescued four days later and, although the two defendants were successfully tried for murder and sentenced to death, their sentences were commuted to six months' imprisonment. The case has been, until recently, accepted without question as authority that necessity cannot be a defence to murder. For more on the background of the case at that time, see B. Simpson, *Cannibalism and the Common Law* (Penguin Books: Middlesex, 1984).

8 *Per* Brooke LJ in *A (Children)*, above n. 6, following Sir James Stephen, at 1052.

9 The utilitarian rationale in *A (Children)*—relying on the concept of the lesser of two evils, where it is better to kill one than allow two to die—is generally understood to be justificatory (and not excusatory). S. Gardner, 'Necessity's Newest Inventions' (1991) 11(1) *OJLS* 125 at 130.

the actor,[10] and denies that any wrong has been committed by him/her.[11] A justification is, in essence, consequentialist in nature because it favours a consequence that leads to the least harm or evil.

However, situations can arise where it is inappropriate to raise necessity as a justification because, for example, it is a one-on-one situation where the perpetrator cannot therefore claim to be avoiding a greater evil. According to Glanville Williams, necessity would never justify one person killing another to save him/herself; where the balance is one person's life as against another, necessity cannot apply, because there is nothing to differentiate between the two lives, which must be considered as legally equal.[12]

Fictitious and real examples that come to mind are: the men on the plank;[13] two men who 'share' a parachute;[14] the two mountaineers in *Touching the Void*;[15] and *Troy Carlisle* v *State of Mississippi*.[16] In this fairly recent US case, Troy Carlisle went fishing on a Mississippi lake with a family friend, Kenny Peeples, and Peeples' step-children, Dallas and Garrett Reinhardt, aged 7 and 4 respectively. The children jumped off the boat to go swimming. Both were wearing life jackets, but got into difficulties in the wind-blown swell. Peeples swam to rescue Garrett, while Carlisle did likewise to Dallas. She would probably have survived, but Carlisle, panicking from having swallowed water, removed her life jacket, claiming that he took it off her to wrap it around his arm so both of them would be saved. She drowned, and he was

10 R.F. Schopp, *Justifications, Defenses and Just Convictions. Cambridge Studies in Philosophy and Law* (Cambridge University Press: New York, 1998) 30. Or, as Wells expounds: 'An act is justified; an actor is excused' in 'Necessity and the Common Law' (1985) 5 *OJLS* 471 at 472.

11 M. Gur-Arye, 'Should the Criminal Law Distinguish between Necessity as a Justification and Necessity as an Excuse?' [1986] 102 *LQR* 71 at 71.

12 G. Williams, *Textbook of Criminal Law*, 2nd edn (Stevens: London, 1983) 607.

13 First introduced by Bacon; Bacon's Maxims. Reg. 25. (1630) and later made famous by Kant. See A. Brudner, 'A Theory of Necessity' (1987) 7(3) *OJLS* 399 at 352–5; and S. Uniacke, 'The Limits of Criminality: Kant on the Plank' in H. Tam (ed.), *Punishment, Excuses and Moral Development* (Avebury Press: Aldershot, 1996).

14 The first parachutist can kick the other off, as the second is 'designated for death' because his parachute did not open. G.J. Annas, 'Siamese Twins: Killing One to Save the Other' (April 1987) *Hastings Center Report* 27 at 27.

15 Where one cuts the rope by which he is being dragged towards a crevasse by his falling companion. J. Simpson, *Touching the Void* (Vintage: London, 1997).

16 *Troy Carlisle* v *State of Mississippi* 822 So. 2d 1022; 2002 Miss. App. LEXIS 152.

convicted of (a reduced charge of) manslaughter, receiving the maximum 20-year sentence.[17]

In this type of one-on-one situation, it would be difficult to rely on necessity as a justification. An alternative option would be to accept the more individualized notion of necessity as an excuse.[18] This is because an excuse focuses on the actor (and not the action) and denies any responsibility on his part for performing wrongfully.[19] Put another way, excuses concentrate on the predicament facing the actor, rather than on the value of the act itself.[20] Excuses are based on our compassion for the situation in which the actor has been placed,[21] because, as a society, we can see that the actor has performed in exactly the same way as any other ordinary person would have done in the same situation.[22]

Unfortunately, judges in England and Wales have not accepted necessity as an excuse.[23] What they have done instead is to develop the defence of duress by threats to include what is known as duress

17 There are several other cases where the 'numbers' involved would enable a utilitarian approach. These include, for example, L. Fuller, 'The Case of the Speluncean Explorers' [1949] 62(4) *Harvard LR* 616; the fat potholer, a hypothetical person created by P. Foot in *Virtues and Vices and other Essays in Moral Philosophy* (Clarendon Press: Oxford, 1978; 2002 reissue); 'The Trolley Problem', devised by Foot, but subsequently developed in J.J. Thomson, 'The Trolley Problem' (1984–5) 94 *Yale LJ* 1395; *US* v *Holmes* (1842) 26 *F. Cas* 360; the Zeebrugge/*Herald of Free Enterprise* disaster, for which see Smith, above n. 1 at 73–4; the *HMAS Westralia*, noted in D. Pascoe, Thesis (ANU), 'Murder and the Defence of Necessity' (2007); and *R* v *Dudley and Stephens*, above n. 7, itself.

18 Note that Germany recognizes both a justificatory *and* excusatory form of necessity; see I. Kugler, 'Necessity as a Justification in Re A (Children)' (2004) 68 *JCL* 440. The Canadian Law Reform Commission Working Paper 29 (1982) *Criminal Law The General Part: Liability and Defences* also identified a lesser evils and a humanitarian version of excuse, which was endorsed in *Perka* v *R* [1984] 2 SCR 232 at para. 25; see S. Yeo, 'Proportionality in Criminal Defences' (1988) 12 *Crim LJ* 211 at 221. The Model Penal Code also contains provisions of lesser evil (§3.02), and of 'extreme mental or emotional disturbance' in §210.3. See also n. 167 below.

19 See Gur-Arye, above n. 11 at 71.

20 A. Norrie, *Crime, Reason and History*, 2nd edn (Butterworths: London, 2001) 154.

21 G. Williams, 'The Theory of Excuses' [1982] *Crim LR* 732 at 733, and see *Perka*, above n. 18 at [88].

22 S.M.H. Yeo, 'Necessity under the Griffith Code and the Common Law' (1991) 15 *Crim LJ* 17 at 19.

23 Indeed, the judiciary in England and Wales has demonstrated an 'exceptional' reluctance to develop a necessity defence at all; see D.C. Ormerod's Case Comment on *R* v *Jones (Margaret)* [2005] *Crim LR* 122 at 125. The potential for disobedience may well be a valid reason for this; this is perhaps best put by Edmund Davies LJ in his well-known dictum that '[n]ecessity can very easily become simply a mask for anarchy' in *Southwark LBC* v *Williams* [1971] 1 Ch 734 at 746. See also J.F. Childress, 'Civil Disobedience, Conscientious Objection, and Evasive Non-compliance: A Framework for the Analysis and Assessment of Illegal Actions in Health Care' (1985) 10 *J Med and Philosophy* 63.

of circumstances[24] to cover this type of situation, albeit (i) this is currently confined to driving cases,[25] and (ii) like duress by threats, it is not a defence to murder. Significantly though, duress, unlike necessity, is understood to operate as an excuse.[26]

Essentially then, what has happened in England and Wales is that, despite the very real distinctions between necessity and duress,[27] 'duress of circumstances covers situations that are termed "necessity" in other jurisdictions [and by basing it on duress by threats] the courts have been able to develop duress of circumstances as an excusatory defence'.[28]

The test for duress of circumstances is that 'the defendant committed the offence in response to a genuine belief in an imminent threat of death or serious injury and that a sober person of reasonable firmness [sharing the] characteristics of the accused would have reacted in the same way … '[29] The availability of the defence depends, from an objective point of view, on the defendant having acted both reasonably and proportionately when avoiding that threat.[30]

The main objections to the test are that (i) it requires the defendant to reach an unattainable heroic standard, and (ii) the defendant's emotional state (in this instance fear) is ignored in making an assessment of his/her reaction to the danger he/she is placed in. Thus, while fear is the prevailing psychological condition of a person claiming duress, this is not echoed in the defence's rationale.[31] Being afraid is not a characteristic that is ascribed to the reasonable man in the objective test for duress. On the contrary, there is an assumption that individuals possess a certain level of courage, and, as will be seen below, although the perpetrator is judged as against

24 This is actually not clear-cut, the defence having also been called, for example, 'necessity of circumstances' by Mance LJ in *R* v *Quayle* [2005] EWCA Crim 1415 at [75], and claimed to be 'coterminous' with necessity; see Ormerod, *ibid*. at 122; Lord Hailsham in *R* v *Howe* [1987] 1 AC 417 at 429; Woolf LJ in *R* v *Conway* [1988] 3 All ER 1025 at 1029; and *Shayler*, above n. 3 at [61].

25 See, for example, *Conway*, *ibid*., and *R* v *Martin* [1989] 1 All ER 652.

26 Ormerod, above n. 23 at 125.

27 For the distinctions between the two, see especially Ormerod, above n. 23 at 125 and in 'Necessity of Circumstance' (case comment on *R* v *Quayle*) [2006] *Crim LR* 148. In contrast, see K.J.M. Smith, 'Duress and Steadfastness: In Pursuit of the Unintelligible' [1999] *Crim LR* 363. But for an argument that they should be combined into one defence of 'necessary action' see C.M.V. Clarkson, 'Necessary Action: A New Defence' [2004] *Crim LR* 13 (50th Anniv Edn). In response, see W. Chan and A.P. Simester, 'Duress, Necessity: How Many Defences?' (2005) 16(1) *KCLJ* 121.

28 See Clarkson and Keating, above n. 2 at 356. Yeo, in particular, criticizes this trend, above n. 22 at 23.

29 A. James, 'Divisional Court: Duress: Objective Test' (2007) 71 *JCL* 193 at 193.

30 *Per* Simon Brown J in *Martin*, above n. 25 at 653. Note that although this is an objective test, there is nonetheless a proportionality criterion.

31 E. Spain, *The Role of Emotions in Criminal Law Defences* (Cambridge University Press: Cambridge, 2011) 67, referencing S. Yeo, *Compulsion in the Criminal Law* (The Law Book Company: Sydney, 1990).

a reasonable man, '[t]he moral yardstick by which common law judges have measured the accused … is that of the hero, rather than the ordinary person …'[32] Undoubtedly, it is both unjust and morally wrong to bind people to standards that are unattainable.[33] It also breaches the fault principle.[34]

Therefore, while it will be argued here that it is a good thing to have an excusatory version of necessity that expresses compassion for persons 'caught in a maelstrom of circumstance',[35] what will be questioned is whether judges in England and Wales have taken the wrong path by implementing a necessity defence as a form of duress. This will be considered by comparing this approach to the one adopted by the Supreme Court of Canada in *Perka*,[36] where Dickson CJ in his 'landmark'[37] majority judgment[38] recognized necessity as an excuse[39] based on a rationale of moral involuntariness. This has been explained by Lebel J in the later case of *R* v *Ruzic* as being where a person, 'faced with perilous circumstances … is deprived of a realistic choice whether to break the law'[40] and by Young as a situation where '…the actor had no reasonable legal alternative to breaking the law'.[41]

Unlike duress of circumstances, this approach, as will be seen below, highlights the elements of choice and voluntariness, rather than which characteristics, if any, should be attributed to the reasonable man. Moreover, in a later Canadian case, *Latimer*,[42] the Supreme Court, in adopting the three criteria for necessity as set out in *Perka*, held that the first two criteria—the requirement of

32 See Pascoe, above n. 17 at 16, referencing Yeo in 'Necessity under the Griffith Code', above n. 22 at 36.
33 A. Noti, 'The Uplifted Knife: Morality, Justification and the Choice-of-Evils Doctrine' (2003) 78 *New York University LR* 1859 at 1886.
34 E. Colvin, 'Ordinary and Reasonable People: The Design of Objective Tests of Criminal Liability' (2001) 27 *Monash University LR* 197 at 197.
35 G.P. Fletcher, 'The Individualization of Excusing Conditions' (1973–4) *Southern California LR* 1269 at 1308.
36 *Perka*, above n. 18.
37 See Wells, above n. 10 at 472.
38 Wilson J, dissenting from the reasoning but not the result, agreed that this was necessity as an excuse, but that it should be 'characterized not by its involuntariness but by its unpunishable nature'. Compare with D. Klimchuck, 'Necessity, Deterrence and Standing' (2002) 8(3) *Legal Theory* 339 at 339.
39 Above n. 18 at [61]. As did both Young CJ and King J in *R* v *Loughnan* [1981] VR 443, where the defendant, fearing for his life, escaped from prison. (They also distinguished *Dudley and Stephens*.) Applied in *R* v *Rogers* (1996) 86 Australian Criminal Reports 542.
40 *R* v *Ruzic* [2001] 1 SCR 687 at [29]. Ruzic's mother was threatened with harm if Ruzic refused to smuggle heroin into Canada. She lost her appeal. Although this was a case on duress, the Canadian Supreme Court followed the reasoning on moral involuntariness as expounded in *Perka* and referred to *Latimer*, decided just three months previously.
41 D. Young, 'Excuses and Intelligibility in Criminal Law' (2004) 53 *University of New Brunswick Law Journal* 79 at 97.
42 *Latimer* v *The Queen* (2001) SCC 1, decided just four months after *Re A (Children)*.

imminent peril or danger, and that there was no reasonable legal alternative to the course of action taken—would be based on a modified objective test. The beauty of this test is that not only does it place an ordinary or reasonable person in the same position as the accused, it also personalizes the objective test in such a way that the defendant's 'cognitive and volitional powers' are assimilated into the criteria against which he or she is assessed.[43] This would seem to be a valid alternative to a solely objective standard that ignores the most fundamental of the defendant's characteristics. However, the third, proportionality criterion was to be measured according to a purely objective standard.

II. *Perka* and Moral Involuntariness

In *Perka* v *R,*[44] the crew of a ship carrying cannabis to Alaska were forced to land and unload their cargo on the Canadian coast because of storm damage to their ship. They were charged with importing drugs into Canada. Dickson CJ examined the history, background, conceptual foundations and limitations of the necessity defence;[45] quoted from both older and more recent authorities[46] and then, in upholding the appellant's appeal, said that:

> The key to the defence of necessity as an excuse rests with the involuntariness of the act, where the actor's 'choice' to break the law is no choice at all but remorselessly compelled by normal human instincts. To be involuntary in this moral sense, the act must be inevitable, unavoidable and afford no reasonable opportunity to the accused for an alternative course of action that does not involve a breach of the law. The definition applies only in circumstances of imminent risk where the action was taken to avoid direct and immediate peril. As well, the harm inflicted must be less than the harm sought to be avoided.[47]

There are three particularly important principles in Dickson's judgment in *Perka*. The first is his interpretation of the defendants' acts as morally involuntary. The second is that this notion of moral involuntariness is the basis for an excusatory (as opposed to a justificatory) conception of necessity, and the third is that, although excusatory, a proportionality criterion was nonetheless imposed.

43 See Colvin, above n. 34 at 223.
44 *Perka,* above n. 18.
45 Very much as Brooke LJ did in *A (Children),* above n. 6.
46 Including Aristotle, Hobbes, Kant, Blackstone, Stephen, Halsbury's Laws, Glanville Williams, and Smith and Hogan, and his own earlier judgment in *R* v *Morgentaler* (1976) 33 CRNS 244.
47 *Per* Dickson CJ summary.

i. Moral Involuntariness, Choice and Voluntarism

First—and borrowing from Fletcher's notion of 'compulsion of circumstance'[48] as his basis for moral involuntariness—Dickson explained that, although the actor does have a choice, the constraints of the situation render his or her choice involuntary. He illustrates this by reference to a lost mountaineer who, about to freeze to death, breaks into a log cabin in the mountains.[49] Such a person does have 'control over his actions to the extent of being physically capable of abstaining from the act' (so the involuntariness is neither literal nor physical), but nonetheless, realistically, his choice is not a 'voluntary' one.[50]

This then brings us to a brief look at choice theory.[51] The two main interpretations of choice theory are, first that we should only punish an offender for what he or she chooses to do;[52] this is claimed to be the most 'orthodox'[53] of theories that relate to excuses. The other version of choice theory holds that the offender should not be punished if, as a result of lack of capacity or of opportunity,[54] he '*could not have chosen* to act otherwise than [he] did'.[55]

The first interpretation relies on the offender having (voluntarily) chosen to act. As Dickson himself conceded in *Perka*, the choice clearly exists. However, it can equally clearly be seen that this was a limited choice, constrained and indeed created only as a result of the existing circumstances. It is accordingly a choice forced upon the offender.

It can just as effectively be argued, however, that no choice exists at all, because the offender was simply 'reacting', rather than *choosing* to act in response to the situation.[56] This would certainly be in line with the notion that responses to some primary emotions (which include fear and, for example, anger) are automatic and reflexive.[57] Alternatively, it can be argued that actions carried out under duress are not really 'chosen' at all, because the accused 'acts

48 G.P. Fletcher, *Rethinking Criminal Law* (Little, Brown and Co: Boston, 1978). *Perka*, above n. 18 at [34].
49 Young criticizes this because the mountaineer's will was not overcome by fear, above n. 41 at 98.
50 Compare Lebel J in *Ruzic*: 'the accused's conduct [was] not, in a realistic way, freely chosen [because] her will [was] overborne', above n. 40 at [44].
51 By way of disclaimer, I should add that I am not a theorist! The account that follows barely touches on the complexity of the topic, upon which others, significantly more competent than I, have already written.
52 J. Herring, *Criminal Law. Text, Cases and Materials*, 5th edn (Oxford University Press: Oxford, 2012) 727.
53 M.S. Moore, 'Choice, Character and Excuse' (1990) 7 *Society, Philosophy and Policy* 29 at 40.
54 Moore, *ibid*. at 29.
55 A. Duff, 'Choice, Character, and Criminal Liability' (1993) 12 *Law and Philosophy* 345 at 354. Emphasis in original.
56 Fletcher referred to in Duff, *ibid*. Emphasis added.
57 D. Evans, *Emotion: the Science of Sentiment* (Oxford University Press: Oxford, 2001) 16.

from terror, not from choice'.[58] A closer look at these two will show that they both say the same thing but in a different way, i.e. that the fear emotion plays a key part in deciding whether the offender has chosen to act. This is precisely why the impact of strong emotions such as terror and fear should be factors that are ascribed to the reasonable man in the objective test.[59]

The second interpretation of choice theory introduces a notion of capacity. Capacity theory, a 'popular variant' of choice theory, applies when a person 'did not and could not have chosen to obey the law'[60] (because his capacity was impaired). Despite two significant criticisms—from Horder, for including capacity in choice theory at all,[61] and, following on from that, from Herring, that emotion is irrelevant to capacity theory[62]—neither can stand for a number of reasons.

First, the question of capacity *is* relevant, because the reason for its absence could be ascribed to three slightly different, albeit linked, things: a person's character,[63] his or her lack of virtue[64] or his or her fear emotion.[65] These, in turn, can have a profound effect on the offender's state of mind. Using fear as an example, Duff notes:

> [s]omeone who is terrified by a threat might, indeed, suffer some impairment of … capacit[y]: he might be so frightened that he is less able … (than people of normal capacities normally are) to assess the plausibility of the threat or to work out whether and how he could protect himself against it.[66]

Despite this, Duff still argues that we should ascribe to the reasonable man 'any of this defendant's actual characteristics that affected his response to the threat, *other than characteristics which involve or*

58 What Duff calls 'an impulsive act' and not a chosen one; Duff, above n. 55 at 352 and 353.

59 Indeed, the Irish Law Commission argued 7 years ago that '[a]s an excusatory defence is allowed as a concession to human frailty it is arguable that account should be taken of *all* the defendant's characteristics'. Noted in Spain, above n. 31 at 186. Emphasis added.

60 Herring, above n. 52 at 727. Herring criticizes the theory at 731.

61 J. Horder, 'Criminal Culpability: The Possibility of a General Theory' (1993) 12(2) *Law and Philosophy* 193 at 199.

62 Herring, above n. 52 at 723.

63 'Character is the aggregate of features and traits that form the individual nature of some person or thing. 2. one such feature or trait; characteristic … 4. qualities of honesty, courage, or the like; integrity.' http://dictionary.reference.com/.

64 Virtue is '1. moral excellence; goodness; righteousness. 2. conformity of one's life and conduct to moral and ethical principles; uprightness; rectitude', available at http://dictionary.reference.com/.

65 'Emotion is an affective state of consciousness in which joy, sorrow, fear, hate, or the like, is experienced, as distinguished from cognitive and volitional states of consciousness', available at http://dictionary.reference.com/.

66 Duff, above n. 55 at 356.

reveal a lack of … proper courage'.[67] This supports the view held by many that a minimum (normative) standard of courage is expected of all individuals.[68]

While Duff's quote sees courage as a characteristic, in the normative standard, courage is seen as a virtue. This ties in nicely with Gardner's claim that the 'gist' of the duress excuse is that the person claiming it 'does not possess the virtues needed to do better'.[69]

In an interesting categorization, Duff describes a virtuous person as one who does not have to expend any effort in behaving virtuously,[70] whereas someone who 'lacks the moral strength to resist temptations that a more virtuous person would resist …' is weak-willed.[71] Interestingly, because weak will is a negative characteristic, it is not seen as a virtue; contrarily courage, as a positive characteristic, is a virtue, i.e. as the definitions of character and virtue demonstrate, a person of good character is simultaneously seen as virtuous. This does not, however, mean that not possessing courage is a vice,[72] or that there should be an expectation that all individuals are courageous.

The second reason for disputing Horder's criticism is that the capacity/choice link is exactly how the theories are traditionally described. For example, Hart said that:

> What is crucial is that those whom we punish should have had, when they acted, the normal capacities, physical and mental, for doing what the law requires and abstaining from what it forbids, and a fair opportunity to exercise those capacities. Where these capacities and opportunities are absent, as they are in different ways [including] … coercion … the moral protest is that it is morally wrong to punish, because … 'he could not have done otherwise' or 'he had no real choice'.[73]

67 Duff, above n. 55 at 359. Emphasis added. This is a really brief summary. Duff's argument is obviously more complex than this and includes problems in ascertaining when a person acts 'out of character', and whether one single event is sufficient to show what a person's character is.

68 See, for example, J. Gardner, 'The Gist of Excuses' (1997–8) 1 *Buffalo Crim LR* 575; B.L. Berger, 'Emotions and the Veil of Voluntarism: The Loss of Judgment in Canadian Criminal Defences' (2005–6) 51 *McGill LJ* 99; J. Dressler, 'Exegesis of the Law of Duress: Justifying the Excuse and Searching for its Proper Limits' in M.L. Corrado (ed.), *Justification and Excuse in the Criminal Law. A Collection of Essays* (Garland: New York, 1994) 381.

69 J. Gardner, 'Justifications and Reasons' in A.P. Simester and A.T.H. Smith (eds), *Harm and Culpability* (Clarendon Press: Oxford, 1996) 119.

70 R.A. Duff, 'Virtue, Vice, and Criminal Liability: Do we Want an Aristotlean Criminal Law?' (2002–3) 6 *Buffalo Crim LR* 147 at 164–5.

71 Weak-will has been defined as, for example, irresolute, soft, feeble or spineless: http://www.thefreedictionary.com/weak-willed (accessed 25 October 2013). Note the link with self-control here; as Duff states, you have self-control if you want to do something but resist or refrain from doing it; Duff, *ibid*. at 159.

72 Duff, above n. 70: a vicious person is one who tries to do good, but is tempted away from it.

73 H.L.A. Hart, *Punishment and Responsibility* (Oxford University Press: Oxford, 1968) 152.

Thirdly, and to counter Herring's critique, capacity is significant here in so far as it can be argued that, if the actor has done all that he/she is capable of doing in his/her fearful condition, then emotion *is* relevant to the capacity to make a choice.[74]

Exactly like choice, voluntarism maintains that defendants are ethically blameworthy, and can be penalized, provided they possessed both the capacity and the opportunity to comply with the law, i.e. they could at least have acted in a different way had they opted to do that.[75]

According to Kadish, voluntarism is the principle that underlies excuse, but, contrary to the view expressed by Lebel J in *Ruzic* that moral involuntariness did not literally mean physical involuntariness,[76] Kadish also argues that voluntarism is both literal and metaphoric. Literal because nothing prevents the person from making a choice (although he concedes that the choice is so constrained by circumstances that ordinary law-abiding persons would not have chosen otherwise), and metaphoric because literally, the actor has made a choice to do an act that is criminal. But the choice is nonetheless not blameable because of two considerations. First, the actor has acted under constraining pressures on his/her will, and second, those circumstances would have led even a reasonable, normally law-abiding person to act in the same way. These people should not be condemned because they have simply conducted themselves in exactly the same way as most of us would in such unusual circumstances.[77]

There are two points to consider here: first, that we would then potentially be excusing everyone, because we would all have done exactly the same;[78] and second, is the defendant in fact free of blame? As to the former, it is precisely this concern that justifies the existence of the objective test, but, as will be argued below, should such strict adherence to principle totally negate the concept of individualized decision-making, where the accused was placed in a situation not of his making; where his emotions affect his perceptions; where others would have acted in the same way; where sympathy to his plight is substantial; and where deterrence would have no individual or collective effect? The rarity of such cases is, in

74 See Duff, above n. 55 at 377 '… his desperate anxiety and fear … was such that … it impaired his capacity to think in any rational way about what he should do'.

75 J.T. Parry, 'The Virtue of Necessity: Reshaping Culpability and the Rule of Law' (1999) 36 *Houston LR* 397 at 421.

76 Because the accused still 'retains conscious control over her bodily movements' *per* Lebel J, above n. 40 at [44].

77 S.H. Kadish, 'Excusing Crime' (1987) 75 *California LR* 257 at 274.

78 As Brudner has said, the 'paradox' of necessity as an excusing condition, of course, is that the accused satisfies all the criteria for committing an offence (including the *mens rea*), yet still does the same as anyone else would do; Brudner, above n. 13 at 353.

any event, unlikely to have a detrimental effect on the common law system of precedent, but would have the positive effect of acknowledging the constraints placed on the accused.

As to the second point, the whole idea of an excuse is to accept the unlawfulness of the act,[79] while denying its blameworthiness.[80] This seems to be a somewhat supported principle,[81] but equally, there are many who would argue contrarily that the defendant is not blameless.[82] There can be no disputing the claim that the act is unlawful. Rather, the difficulty lies in ascertaining the defendant's blameworthiness. The rationale for ascribing blame currently rests on the notions of voluntariness and choice, both of which are compromised by the element of constraint on the defendant's will. This is precisely why considering an alternative rationale based on the defendant's emotions could provide a more satisfactory resolution.

One possible basis for such a rationale could lie in adopting Berger's proposal to forego moral involuntariness in favour of a principle based on the blameworthiness aspect itself. He argues that, while moral involuntariness claims to take emotion into account, there is no way of assessing the validity or appropriateness of the emotion in permitting the excuse to be granted; he claims that what is wrong with 'the idiom of moral involuntariness' is that the only thing it does is to say that:

> the individual was overwhelmed by emotion such that she had no real choice but to break the law … the voluntarist account … tells us that an individual has been overcome by circumstantially evoked emotions … It does not, however, pass judgement on the legitimacy of … emotional reactions or the social structures and norms that conditioned them.[83]

Key to Berger's alternative solution is that it would enable an evaluation to be made of the 'content and normative bases of emotions …'.[84] Clearly, however, there would have to be some way of judging the legitimacy of the actor's reaction to the emotion. In fact, the acceptability of the emotion itself would also need to be considered.[85]

79 Gardner, above n. 9 at 126.
80 See Fletcher, above n. 48 on blameworthiness, culpability, responsibility and attribution generally.
81 See, for example, Clarkson, above n. 27 at 14; Brudner, above n. 13 at 351; and Spain, above n. 31 at 19.
82 For example G.T. Trotter, 'Necessity and Death: Lessons from *Latimer* and the Case of the Conjoined Twins' (2002–3) 40 *Alberta LR* 817 at 835–6 and Brudner, above n. 13 at 351.
83 He calls this 'normative veiling'; see Berger, above n. 68 at 108–19.
84 *Ibid*.
85 See here, for example, D. Kahan and M. Nussbaum, 'Two Conceptions of Emotion in Criminal Law' (1996) 96(2) *Columbia LR* 269, and S. Uniacke, 'Emotional Excuses' (2007) 26 *Law and Philosophy* 95.

ii. Moral Involuntariness as an Excuse

We move on now to Dickson's second important principle—his rationale for categorizing moral involuntariness as an excusatory form of necessity. Dickson sets out and explains the distinction between justification and excuse[86] and concedes that necessity can have either of these as its theoretical basis. The former—based on the 'choice of evils/greater good'—he criticizes because the law should not acknowledge a principle which enables a person to break the law because he subjectively thought it contradicted 'some higher social value'.[87] Excusatory necessity, however, is 'less open to criticism' because:

> It rests on a realistic assessment of human weakness, recognizing that a liberal and humane criminal law cannot hold people in strict obedience of laws in emergency situations where normal human instincts, whether of self-preservation or of altruism, overwhelmingly impel disobedience … At the heart of this defence is the perceived injustice of punishing violations of the law in circumstances in which the person had no other viable or reasonable choice available; the act was wrong but it is excused because it was realistically unavoidable.[88]

This supposedly, therefore, has nothing to do with choosing a lesser evil, or achieving the greater good. Rather, it is a more individualized defence that takes into account the circumstances facing the defendant at the time. As will be seen below, the notion of individualized decision-making is itself problematic for obvious reasons,[89] but it should be accepted that such circumstances do arise and should be accommodated by the law.

iii. Moral Involuntariness and Proportionality

Third, and although recognizing an excusatory form of necessity, Dickson, seemingly contradicting the previous point, then imposed a proportionality criterion as one of the three prerequisites essential to satisfying the necessity defence because, in his view:

> [n]o rational criminal justice system … could excuse the infliction of greater harm to allow the actor to avert a lesser evil. In such circumstances we expect the individual to bear the harm and refrain from acting illegally. If he cannot control himself, we will not excuse him. [As such therefore], the harm inflicted must be *less than* the harm sought to be avoided.[90]

86 Compare Brooke LJ, who specifically rejected the *Perka* formulation in *A (Children),* simply on the basis that 'English criminal law does *not* make any clear-cut distinction between a justification and an excuse', above n. 6 at 1049. Emphasis added.
87 *Per* Dickson CJ in *Perka,* above n. 18 at [32].
88 *Ibid.* at [33] and [35].
89 See, for example, E.M. Morgan, 'The Defence of Necessity: Justification or Excuse?' (1984) 42 *University of Toronto Faculty of Law Review* 165.
90 *Per* Dickson CJ in *Perka,* above n. 18 at [43] and [44]. Emphasis added.

As Dickson himself conceded, the inclusion of a proportionality requirement in an excuse is strange, because the balancing of harms/lesser of two evils aspect of necessity is generally associated with justification and not with excuse. In fact, and as can be seen, the wording of the proportionality criterion here is justificatory,[91] because it specifically requires the balancing of two harms.[92] Indeed, it is this aspect of Dickson's judgment in *Perka* that has attracted the most specific censure, because including a proportionality requirement in an excusatory defence is incompatible with its rationale. As noted earlier, an excuse looks to an offender's culpability in situations where he/she should be exonerated on the basis that other people of ordinary resilience would have done exactly the same. An excuse is not thus concerned with balancing evils, or with achieving the greater good.[93]

Thus, while taking the novel step of introducing a necessity excuse based on moral involuntariness, Dickson CJ somewhat spoilt its effect and usefulness by requiring a proportionality condition, which specified not merely that the harm caused should be equal to the harm avoided, but that it should be less. It took another 17 years for the stringency of that test to be somewhat alleviated by the Supreme Court of Canada (again) in *Latimer*.

III. *Latimer*, Proportionality and the Modified-objective Test

In this case,[94] decided just four months after *Re A (Children)*, a father unsuccessfully invoked the necessity defence after killing his disabled 12-year-old daughter in order to prevent her suffering. The court accepted that a necessity defence existed, and adopted the criteria set out in *Perka*, but dismissed Latimer's appeal on the basis that there was insufficient evidence 'to give an air of reality' to the criteria in this particular case.[95] However, the proportionality criterion was 'diluted',[96] so that it was no longer the case that the harm inflicted had to be *less than* the harm sought to be avoided, but rather, that 'the two harms must, at a minimum, be of a comparable

91 As it is also in *Latimer*, for which see below. Trotter, above n. 82 at 829.
92 For commentaries on the case, see, for example, I.H. Dennis, 'On Necessity as a Defence to Crime: Possibilities, Problems and the Limits of Justification and Excuse' (2009) 3 *Crim Law and Philosophy* 29; B. Sneiderman and R. Deutscher, 'Dr Nancy Morrison and her Dying Patient: A Case of Medical Necessity' (2002) *Health Law Journal* 1; S. Yeo, 'Revisiting Necessity' (2010) 56(1) *Crim Law Quarterly* 13; and Wells, above n. 10 at 473 and 474.
93 See Yeo, above n. 18 at 213 and 219.
94 *Latimer*, above n. 42.
95 *Latimer*, above n. 42 at [42].
96 See Yeo, above n. 92 at 18.

gravity'. That is, '[t]he harm avoided must be either comparable to, or clearly greater than, the harm inflicted'.[97]

Perhaps there is a greater rationalization for including proportionality in the *Latimer* case than there was in *Perka*, because the former dealt with homicide while the latter did not. However, in avoiding committing itself as to whether killing another could be a proportionate response, the Supreme Court said that '[i]t is difficult … to imagine a circumstance in which the proportionality requirement could be met in a homicide situation. We leave open, if and until it arises, the question of whether the proportionality requirement could be met in a homicide situation.'[98]

It is arguable that this 'more generous'[99] interpretation of the proportionality requirement makes it easier to claim that killing a person could indeed be proportionate (in a justificatory sense).[100] Indeed, the dictum very much leaves open the possibility that the court would not reject outright the notion that necessity could be a defence to murder in the future. As has been seen already, there are a number of scenarios where one could envisage that the proportionality criterion could be satisfied; for example, the mountaineer attached to his falling companion who cuts the rope (as seen in *Touching the Void*); passengers of a capsized ferry who throw a passenger off a ladder in order to escape (the Zeebrugge disaster);[101] and shooting down a hijacked aeroplane (Bohlander and Ormerod's example).[102] In Yeo's view, 'it is likely that most members of society would be prepared to exculpate the defendants of homicide in these situations',[103] but opinion is divided on this thorny issue.[104]

97 *Latimer*, above n. 42 at [31]. See Wicks' criticism, E. Wicks, 'The Greater Good? Issues of Proportionality and Democracy in the Doctrine of Necessity as Applied in Re A' (2003) 32(1) *CLWR* 15 at 21–2 and compare *Re A (Children)*, above n. 6, that it can be a greater evil as long as it is not disproportionate. Point made by Spain, above n. 31 at 11.

98 *Latimer*, above n. 42 at [40].

99 See Trotter, above n. 82 at 821.

100 Indeed, Clarkson has argued that '… killing an aggressor to save one's own life could well satisfy the test of reasonableness and proportionality' but *not* in relation to duress (so fulfilling both the justificatory and excusatory interpretations of proportionality); above n. 27 at 22.

101 Smith's discussion of the Zeebrugge disaster, above n. 1 at 73–8 would support this view.

102 D. Ormerod, *Smith & Hogan's Criminal Law*, 13th edn (Oxford University Press: Oxford, 2011) 372; M. Bohlander, 'Of Shipwrecked Soldiers, Unborn Children, Conjoined Twins and Hijacked Airplanes—Taking Human Life and the Defence of Necessity' (2006) 70 *JCL* 147 and in M. Bohlander, 'In Extremis—Hijacked Airplanes, "Collateral Damage" and the Limits of the Criminal Law' [2006] *Crim LR* 579.

103 These examples are also listed by Yeo, above n. 92 at 32 and 33.

104 See, for example, E. Spain, 'Duress and Necessity in Ireland: Reform on the Horizon' (2008) 18(3) *Irish Criminal Law Journal* 70 at 72; S. Ost, 'Euthanasia and the Defence of Necessity: Advocating a more Appropriate Legal Response' [2005] *Crim LR* 355 at 367. Contrarily, Michalowski claims that proportionality is not satisfied in *A (Children)*, S. Michalowski, 'Sanctity of Life—Are Some Lives More Sacred than Others?' (2002) 22 *LS* 377 at 388.

IV. Duress of Circumstances

That, therefore, is the position in the Canadian courts. In contrast, and as has been noted earlier, the courts in England and Wales have opted to immerse excusatory necessity into duress of circumstances, an offshoot of duress by threats, and therefore subject to the same conditions. Indeed, other than the 'source of the constraint', the defences of duress by threats and duress of circumstances are identical.[105]

Again, although excusatory in nature, a proportionality test is nonetheless included. Simon Brown J set out the test for duress of circumstances in *R* v *Martin*:

> … first, English law does, in extreme circumstances, recognise a defence of necessity. Most commonly this defence arises as duress, that is pressure on the accused's will from the wrongful threats or violence of another. Equally, however, it can arise from other objective dangers threatening the accused or others. Arising thus it is conveniently called 'duress of circumstances'.
>
> Second, the defence is available only if, from an objective standpoint, the accused can be said to be acting reasonably and proportionately in order to avoid a threat of death or serious injury.
>
> Third, assuming the defence to be open to the accused on his account of the facts, the issue should be left to the jury, who should be directed to determine these two questions: first, was the accused, or may he have been, impelled to act as he did because as a result of what he reasonably believed to be the situation he had good cause to fear that otherwise death or serious physical injury would result; second, if so, would a sober person of reasonable firmness, sharing the characteristics of the accused, have responded to that situation by acting as the accused acted? If the answer to both those questions was Yes, then the jury would acquit; the defence of necessity would have been established.[106]

Unlike the wording used by Dickson in *Perka*, it can be seen that the wording of the proportionality criterion used here is *not* justificatory, as it does not involve the balancing of harms against each other. Accordingly, the proportionality requirement can be understood to represent a different interpretation from that which

105 See Spain, *ibid.* at 70. Duress by threats applies where a defendant 'committed an offence as a result of a genuine belief in an imminent threat of death or serious injury [from another person] and that a sober person of reasonable firmness with appropriate characteristics of the accused would have reacted in the same way to that genuine belief'. See James, above n. 29 at 193–4.

106 *Per* Simon Brown J in *Martin*, above n. 25 at 653–4. *Martin* modified the 'reasonable steadfastness test' set out in *R* v *Graham* [1982] 1 All ER 801 at 801, where Lord Lane CJ stated that '… a defendant should have the self-control and steadfastness reasonably to be expected of the ordinary citizen in the defendant's situation …' For criticism of the *Graham* test see K.J.M. Smith, 'Must Heroes Behave Heroically?' [1989] *Crim LR* 622. For criticism of the *Martin* test see C. Gearty, 'Necessity: A Necessary Defence in Criminal Law?' [1989] *Cambridge Law Journal* 357 at 358.

appears in justificatory necessity. Rather, it can be suggested that proportionality in the sense conveyed here goes to reasonableness. For example, Pascoe argues that, if proportionality is to be a part of excusatory necessity, the best way to include this would simply be to balance the harms 'as a *factor going to the reasonableness of the accused's response*'.[107] Similarly, Yeo has said that '[a]nother description of [the proportionality] requirement is that the defendant's conduct must have been a "reasonable" response to the peril'.[108] Unlike the foci in moral involuntariness, therefore, here the focus is on reasonableness[109] and on which of the defendant's characteristics, if any, are permitted to be ascribed to the reasonable man.

In *Latimer*, it will be recalled that only the first two criteria—imminent peril or danger and no reasonable legal alternative—were to be judged according to a 'modified objective' point of view. According to the court, this meant that, in evaluating the defendant's behaviour, 'personal characteristics that legitimately affect what may be expected of that person' must be taken into account.[110] However, the proportionality criterion had to be judged strictly objectively, *without* recourse to personal characteristics.

While at first glance, therefore, the tests in *Perka* and *Martin* appear to be the same, they differ as to the application of proportionality/reasonableness to their respective criteria.

> What concerns the court [in duress of circumstances] is … the question of whether this defendant's response and action were within the (fairly generous) boundaries of the 'reasonable': was his fear reasonable, was his response to it reasonable, was it reasonable to give in to that threat?[111]

The way this is measured is by virtue of the (objective) reasonable man test.

V. The Reasonable Man in Duress of Circumstances

According to Duff, the reasonable person 'is a person who has and displays those modest civic virtues that the law can properly demand of its citizens'.[112] However, we know that this reasonable man is not really a 'person' at all; rather, he is an ideal, a 'construct'

107 See Pascoe, above n. 17 at 24. Emphasis in original.
108 See Yeo, above n. 92 at 42. Likewise Young CJ and King J in *Loughnan*, above n. 39 at 448.
109 The defendant must reasonably believe (first part of condition 3); must act reasonably (condition 2); and the reasonableness of his response will be measured objectively against a person of reasonable firmness sharing the characteristics of the accused (second part of condition 3).
110 *Latimer*, above n. 42 at [33].
111 See Duff, above n. 70 at 178.
112 Duff, *ibid.* at 175–6. Compare K. Huigens, 'Virtue and Inculpation' (1994–5) *Harvard LR* 1423.

created as much as anything to avoid inquiring too much into the defendant's character, and to prevent individualization.[113] He has also been described as 'an institutional heuristic'[114] and as 'reasonableness rendered incarnate …'.[115] In explaining this, Westen goes on to say that:

> '[r]easonableness' is not an empirical or statistical measure of how average members of the public think, feel, or behave … [t]hus, despite its being sometime said … that a reasonable person for purposes of … duress is an average person, including average persons who are … cowardly, a reasonable person for purposes of duress is a person who manifests the kind of courage that society has a right to expect of persons … reasonableness is a normative measure of ways in which it is *right* for persons to think, feel or behave.[116]

In other words, behaving reasonably is a *normative* benchmark,[117] but one that nonetheless seemingly expects individuals to reach a minimum standard of fortitude. This view argues that the reasonable person is someone with a reasonable and appropriate regard for the law and the values it protects, but who also possesses a reasonable and appropriate degree of courage.[118] Certainly in duress of circumstances this is made more evident in the fact that the test is more than simply a comparison as against a reasonable man per se. This reasonable man in duress is one who possesses reasonable firmness. The problem with this is that it sets the expectation too high;[119] most people in a one-on-one life or death situation will be afraid, and in the interests of self-preservation will not sacrifice their life for another; will not be firm; will not be courageous; and will not be heroes.

According to the *Oxford Dictionary of Law*, a hero is 'a person of superhuman qualities'.[120] Alternatively, it has been said that '[a] hero

113 See Fletcher, above n. 35 at 1272 and 1290.
114 V. Nourse, 'After the Reasonable Man: Getting Over the Subjectivity/Objectivity Question' (2008) 11 *New Criminal LR* 33 at 34.
115 P. Westen, 'Individualizing the Reasonable Person in Criminal Law' (2008) 2 *Crim Law and Philosophy* 137 at 139.
116 Westen, *ibid*. text to and fn. 6 at 138. Emphasis in original.
117 See, for example, P. Westen and J. Mangiafico, 'The Criminal Defense of Duress' (2002–3) 6 *Buffalo Crim LR* 833 at 908.
118 See Duff, above n. 70, fn. 48 at 176–7. But Duff then goes on to say that on the one hand, the law 'should set only modest, rather than heroic or saintly, standards …' while conceding on the other that English law seems to 'demand heroism … in denying duress as a defense to murder'.
119 See Noti, above n. 33 at 1886.
120 *Oxford Dictionary of Law*, available at http://www.oxforddictionaries.com/definition/english/hero. Alternatively, 'a person of great moral strength', J. Horder, *Excusing Crime* (Oxford University Press: Oxford, 2004) (quoting Dressler) at 136. 'If the son of God himself is not a hero … in the sense of someone who goes to his death without fear, then where are these heroes to be found? And, if they exist, what are they: men or supermen?' F. Lubonja, 'Courage and the Terror of Death' (2004) 71(1) *Social Research. An International Quarterly of the Social Sciences* 117 at 133 (Special Issue on 'Courage').

is someone who, when forced to choose between himself and others, exceeds anything that society rightly expects of people in the way of sacrificing themselves'.[121] On the other hand, a reasonable man is simply 'an ordinary citizen; a hypothetical person in society who exercises average care, skill, and judgment in conduct'.[122] We are told that the normative standard does not demand that people be saints or heroes,[123] yet the law suggests otherwise. This is evident in, for example, Lord Coleridge's judgment in *Dudley and Stephens* where he said:

> To preserve one's life is generally speaking a duty, but it may be the plainest and the highest duty to sacrifice it. War is full of instances in which it is a man's duty not to live, but to die. … It is not correct … to say that there is any absolute or unqualified necessity to preserve one's life …[124]

This passage has been roundly criticized by many, including Glanville Williams,[125] Rupert Cross[126] and Alan Norrie, the latter commenting that, although 'Lord Coleridge expresses compassion for the accused in terms of a morality that recognises normal human standards of conduct … he nonetheless condemns them in terms of an Old Testament morality for their lack, not of normal human standards, but of heroism'.[127]

Similarly, Lord Hailsham—in 'the most controversial exposition of an idealistic standard'[128]—said in *Howe* that he did not at all

> accept in relation to the defence of murder it is either good morals, good policy or good law to suggest … that the ordinary man of reasonable fortitude is not to be supposed to be capable of heroism if he is asked to take an innocent life rather than sacrifice his own … I have known in my lifetime of too many acts of heroism by ordinary human beings of no more than ordinary fortitude to regard the law as either 'just or humane' which withdraws the protection of the criminal law from the innocent victim and casts the cloak of its protection upon the coward and the poltroon in the name of a 'concession to human frailty'.[129]

121 See Westen and Mangiafico, above n. 117 at 908, especially fn. 218.
122 http://legal-dictionary.thefreedictionary.com/Reasonable+Person (accessed 25 October 2013).
123 Westen and Mangiafico, above n. 117 at 908.
124 *Per* Lord Coleridge in *R* v *Dudley and Stephens*, above n. 7 at 287. Compare Lord Salmon in *Abbot* v *R* [1977] AC 755 at 764–7.
125 G. Williams, *Criminal Law. The General Principles* (Stevens: London, 1961) 741–4.
126 R. Cross, 'Necessity Knows No Law' (1968–70) 3 *University of Tasmania LR* 1 at 3.
127 See Norrie, above n. 20 at 157. As Reed has commented: to demand heroism is 'ludicrous'. A. Reed, 'The Need for a New Anglo-American Approach to Duress' (1997) 61 *JCL* 209 at 217.
128 See Colvin, above n. 34 at 214.
129 *Per* Lord Hailsham in *Howe*, above n. 24 at 432.

This dictum can be criticized on a number of levels. For example, it can be condemned on the basis that the judiciary have set out their stall to favour an innocent victim at the expense of the threatened perpetrator who is also just as innocent as the victim.[130] Alternatively, Lord Hailsham, a Second World War veteran, clearly writes from that perspective, and there is strong evidence to suggest that persons such as, for example, soldiers and policemen, trained to deal with fear,[131] are better able to withstand it and other similar 'stressors'.[132] Accordingly, to put such persons, or their opposites, side by side with the reasonable man is not a legitimate comparison.[133]

A problem with this, of course, is that to differentiate in this way would impose variable and subjective standards.[134] Smith, while conceding that account should be taken of a defendant's character, nonetheless objects to this in his comparison between 20-year-old Mr Manly and 80-year-old Miss Meek. Mr Manly would be presumed to demonstrate more fortitude than Miss Meek, but from a practical point of view, how does one distinguish between the amount of fortitude or forbearance that must be established as between the two?[135]

There is no doubt that having variable or individual standards would be problematic from this point of view, but as the law itself has conceded that excusatory defences are intended to accommodate natural human weakness, it is essential that the disparity of circumstances facing such individuals should be recognized, and that they should be treated differently from other criminals.[136]

Gardner, in accepting that different people are subject to different normative expectations, has no fundamental objection to making excusatory standards vary, but bases this on the different skills that individuals possess, and the different roles they play in society. However, he qualifies this by adding that being human is nonetheless the overarching minimum standard that establishes those basic levels of character expected of us.[137] This idealistic view seems contradictory and does not in fact account for people's differing levels

130 See Spain, above n. 31 at 248.
131 See, for example, J. Horder, 'Cognition, Emotion, and Criminal Culpability' (1990) *LQR* 469 at 485; and see the special ('Courage') issue *Social Research. An International Quarterly of the Social Sciences* (2004) 71(1) on soldiers.
132 H.V. Hall, 'Extreme Emotion' (1990) 12 *University of Hawaii LR* 39 at 48.
133 A. Reilly, `The Heart of the Matter: Emotion in Criminal Defences' (1997–8) 29 *Ottawa LR* 117 at 149.
134 For more on variable standards, see for example, B. Mitchell, 'Provoked Violence, Capacity and Criminal Responsibility' (1995) 1 *Psychology, Crime and Law* 291 and M. Baron, 'Excuses, Excuses' (2007) 1 *Crim Law and Philosophy* 21 at 23.
135 See Smith, above n. 106 at 626–7.
136 J. Lindsey, 'A New Defence of Necessity in Criminal Law' (2011) *UCL Jurisprudence Review* 122 at 127.
137 See Gardner, above n. 68 at 593–4.

of courage, or lack of it, in the face of fear. Being human does not automatically imbue all individuals with courage. Should courage and its opposite, cowardice, therefore be characteristics that *should* be taken into account in an excusatory defence that is, after all, a concession to human frailty?

VI. What Characteristics Should be Taken into Account?

Courage (both a characteristic and a virtue) is the overcoming of fear.[138] Because the need for courage revolves around a risk of bodily injury or death, it is easy to see its evident link with a person's emotions, particularly with his fear.[139] Fear is usually defined as 'an emotional reaction resulting from the apprehension that there is a danger about and the consequent desire to avoid or be rid of the danger'.[140] It is perceived as an acceptable or explicable emotion, unlike others such as, for example, hatred, jealousy, bitterness, malice and spite, which are never acceptable or appropriate, and so should never provide an excuse for any unacceptable behaviour that springs from them.[141]

Courage should be distinguished from fearlessness, which implies not that individuals can face their fear, but rather that they experience no fear in the first place.[142] The opposite of courage is cowardice (a vice)—a lack of courage to face danger. A not-so-literal definition has described a coward as 'someone who, when forced to choose between himself and others, fails to give the weight to the interests of others that society rightly expects of people'.[143] This again reminds us of the normative standard and the expectation of a certain level of courage, although Westen and Mangiafico rather optimistically perceive that there exists a 'middle ground', whereby a person who is neither a hero nor a coward upholds the interests of others to a minimal standard.[144]

The test in *Martin* asks whether a sober person of reasonable firmness, sharing the characteristics of the accused, would have responded to the situation by acting as the accused acted. The question must therefore be, not 'Was the defendant courageous (or a coward)?', but rather 'Would a sober person of reasonable

138 G. Kateb, 'Courage as a Virtue' (2004) 17(1) *Social Research. An International Quarterly of the Social Sciences* at 43.
139 D. Pears, 'The Anatomy of Courage' (2004) 17(1) *Social Research: An International Quarterly of the Social Sciences* at 7.
140 W. Lyons, *Emotion* (Cambridge University Press: Cambridge, 1980) 70.
141 See Uniacke, above n. 85 at 101.
142 S.J. Rachman, 'Fear and Courage: A Psychological Perspective' (2004) 71(1) *Social Research. An International Quarterly of the Social Sciences* at 157.
143 Westen and Mangiafico, above n. 117 at fn. 218.
144 *Ibid.* at 908–9: the middle ground consists of the 'minimum standards for courage and self-control we have a right to expect of each other'.

firmness have been courageous (or a coward) in those same circumstances?' Wilson has commented that 'a person of reasonable firmness, by definition, shows no undue susceptibility to danger',[145] i.e. he or she would be fearless (but not courageous). However, it is not unrealistic to suggest that, if the harms are proportionate to each other (say killing another to save one's own life), it is probable that even a person of reasonable firmness would be powerless to stand firm.[146]

What is problematic, though, is that the sober person of reasonable firmness is *assumed* to possess a certain level of courage or fortitude.[147] This is borne out not only in the passages quoted earlier, but also in, for example, *R* v *Bowen*, where it was held that '[t]he mere fact that the accused is more pliable, vulnerable, timid or susceptible to threats than a normal person are not characteristics with which it is legitimate to invest the reasonable or ordinary person for the purposes of considering the objective test'.[148] Similarly, it was said in *R* v *Horne* that 'personal mental characteristics such as inherent weakness, vulnerability, susceptibility to threats' should not be accounted for in the objective test.[149]

It seems clear that these characteristics and emotions are central to the whole concept of duress of circumstances as an excusatory defence, yet in view of the fact that they are not ascribed to the reasonable man, how can duress as an excuse be supported by that test in this instance? The answer to this might lie in character theory, although differing interpretations and debates about the theory demonstrate that it is by no means clear-cut.

Character theory claims that, although the defendant acted unlawfully, such action was not a reflection of his character.[150] In so far as it is possible, then, we first need to see what characteristics are and how they (and emotions) affect a person's behaviour/response. It will be seen that there are differing interpretations and perceptions of what characteristics are. For example, they have been described as 'fixed or stable aspects of an agent's psychological make-up that pertain to virtues and vices'.[151] These can

145 W. Wilson, *Criminal Law Doctrine and Theory*, 3rd edn (Longman: Harlow, 2008) at 251. Compare V. Tadros, 'The Characters of Excuse' (2001) 21(3) *OJLS* 495.

146 See Young, above n. 41 at 99.

147 In a perverse kind of way, this makes some sense. See, for example, Beldam LJ in *R* v *Hurst* [1995] 1 Cr App R 82, where he said that 'we find it hard to see how a person of reasonable firmness can be invested with the characters of personality which lack reasonable firmness' at 91.

148 *R* v *Bowen* [1996] 4 All ER 837 at 844.

149 *R* v *Horne* [1994] *Crim LR* 584 at 585.

150 See Tadros, above n. 145 at 495.

151 C. Finkelstein, 'Excuses and Dispositions in Criminal Law' (2002–3) 6 *Buffalo Crim LR* 317 at 324. This is contrary to Duff who sees virtues and vices—of which courage and cowardice are two—as character *traits*, rather than as characteristics; Duff, above n. 55 at 364.

be distinguished from character traits, which are distinguishing qualities (as of personal character),[152] and dispositions, which can be defined as 'entrenched patterns of behaviour'[153] or as 'a person's tendency to feel an emotion'.[154] Once again, the link between a characteristic and the underlying emotion is clear to see.

However, there are a number of problematic issues in relation to character theory. The first of these is that it presumes that people are responsible for their characters. Moore, in particular, argues that, to some extent, it is clear that 'we are responsible for being the kind of people that we are',[155] but Duff rightly disputes this[156] because, in order to be responsible for our character (traits), we must have some control over them. This means that, at a minimum, it must be within our power to alter and resolve them; 'or perhaps, more ambitiously, that it must be within our power to avoid acquiring them'.[157]

Whether or not one can 'avoid' acquiring a certain character(istic) is open to question. A person's character is developed over time, is affected by genetic influences and upbringing and, more widely, by surroundings and social and environmental factors. Despite this, most of the time, a person's character is comparatively stable.[158] Proneness to fear would be an example of this, such that someone who is highly prone to fear will undoubtedly react to threats with a substantial escalation in sensitivity to both fear and other fearful-type emotions. Thus, although perceptions and behaviour associated with fear will change as a person develops, the actual sense of fear remains fundamentally unchanged, whatever a person's age.[159]

152 http://www.merriam-webster.com/dictionary/trait (accessed 25 October 2013). A character trait refers to any socially desirable or undesirable disposition of a person. However, as can be seen from n. 63 above, a person's character traits go to make up his character.

153 Finkelstein, above n. 151 at 339. Dispositions are generally exercised without rational deliberation; an example would be that an individual would be more 'disposed' to save his own life than another. As Westen and Mangiafico note, however, '[i]t is an unworthy disposition on an actor's part to favor himself at the expense of others, albeit an unworthy disposition that many others in society share'. Westen and Mangiafico, above n. 117 at 907.

154 For example, a fearful person is more likely to become frightened. E.A. Posner, 'Law and the Emotions', John M. Olin Law and Economics Working Paper No. 103 (2000), The Law School, University of Chicago at 5–6.

155 See Moore, above n. 53 at 45.

156 As do J. Sabini and M. Silver, 'Emotions, Responsibility, and Character' in F. Schoeman (ed.), *Responsibility, Character and the Emotions* (Cambridge University Press: Cambridge, 1987) 169.

157 See Duff, above n. 70 at 159.

158 See Tadros, above n. 145 at 503. Although Parry would disagree, above n. 75 at 423–6.

159 C.E. Izard and E.A. Youngstrom, 'The Activation and Regulation of Fear and Anxiety' in D.A. Hope (ed.), *Perspectives on Anxiety, Panic and Fear*. Vol. 43 of the Nebraska Symposium on Motivation (Nebraska Press: Lincoln, 1996) at 2, 15 and 31.

The second concern with character theory, which follows on from the first, is that, in order to verify that an individual *does* possess an established characteristic or character trait, this has to manifest itself over time; clearly, one single manifestation would not prove this (and might contrarily demonstrate that the defendant acted out of character). Taking courage as an example, Duff argues that:

> it is not the kind of attribute which … has one single manifestation; … it is conceivable, though perhaps empirically very unlikely, that someone should have a particular character-trait, but never manifest it in action … someone could be courageous, for example, though he has never acted courageously—since he has never faced a situation calling for courage.[160]

In the coercive and dangerous situations envisaged here, it is pretty obvious that Lords Coleridge and Hailsham would see killing another to save oneself as demonstrating cowardice and not courage, but even decent and ethically munificent people are not unaffected by feelings of fear and dread,[161] so being fearful, or less courageous than others, is not a feature of a 'bad' character or of a 'bad' person. There are certain vices, such as callousness and evilness, that should be the subject of criminal censure, but there are others, such as cowardice, which, while reprehensible, should not.[162] Moreover, it can also be argued that it is not a reflection of character if a person is being compelled by the circumstances to act in a certain way.[163]

VII. Advocating an Excusatory Emotion-based Defence[164]

It is evident from the foregoing discussion that an excusatory form of defence is necessary for individuals who are the victims of bad timing, or bad luck, or who simply find themselves in the wrong place at the wrong time. The reasons for this are many.

First, it serves the interests of justice in the rare, one-off emergency[165] type of situation in which this defence would be invoked to recognize that difficult and unusual circumstances for which the defendant cannot be held responsible should be dealt with differently from the norm.[166] The type of emergency situation envisaged,

160 See Duff, above n. 55 at 365 and 371–2. There seems to be fairly wide agreement that a person's character cannot be judged simply from one single event: Brudner, above n. 13 at 346; Rachman, above n. 142 at 157; D. Bayles, 'Character, Purpose and Criminal Responsibility' (1982) 1(1) *Law and Philosophy* 5 at 8. However, see Tadros, above n. 145 at 495.
161 See Herring, above n. 52 at 751.
162 See Tadros, above n. 145 at 498.
163 See Huigens, above n. 112 at 1442.
164 See Spain, above n. 31 at 262.
165 See, for example, B. McSherry, 'The Doctrine of Necessity and Medical Treatment' (2002) 10 *JLM* 10 at 15.
166 Spain, above n. 31 at 38–41.

in particular, is where individuals are faced with one-on-one life and death circumstances, and one has to kill another in order to survive. Circumstances such as these do exist (as we have seen from, for example, the climbers in *Touching the Void* and in the *Troy Carlisle* case), albeit they are likely to be very rare. This does not, however, mean that they do not merit individual attention.

Second, identifying an excusatory defence that acknowledges the role of emotion in decision-making[167] goes to the character or virtue of the actor and affects the way we perceive him or her. He or she may well be an upstanding citizen faced with impossible circumstances that do *not* properly reflect good character, and to which any person in the same circumstances would understandably succumb.

Third, it would enhance 'society's psychological well-being' if we could reassure citizens that they would not be bound by 'unattainable' and 'immoral' standards.[168] The problem with the reasonable man standard here is that it punishes people for 'falling short of sainthood',[169] and it has no right to do so.[170]

This view can be no better expressed than by quoting Rumpff J's majority judgment in *S* v *Goliath*, where he said that:

> the criminal law should not be applied as if it were a blueprint for saintliness but rather in a manner in which it can be obeyed by the reasonable man … It is generally accepted … that for the ordinary person in general his life is more valuable than that of another. Only they who possess the quality of heroism will intentionally offer their lives for another. Should the criminal law then state that compulsion could never be a defence to a charge of murder, it would demand that a person who killed another under duress, whatever the circumstances, would have to comply with a higher standard than that demanded of the average person. I do not think that such an exception to the general rule which applies in criminal law, is justified.[171]

Moreover, and as noted earlier, the whole point of a defence such as duress of circumstances (and other excusatory defences in fact) is to recognize that some people simply cannot reach this idealistic standard of reasonable firmness, because they are so afraid. As long as such a person has achieved the utmost degree of courage of

167 Note the Model Penal Code Provision §210.3 on extreme mental or emotional disturbance, and the 'sudden and extraordinary emergency' provisions in Australia and New Zealand set out in McSherry, above n. 165, and see n. 18 above.

168 See Noti, above n. 33 at 1877 (albeit talking about justifications and not excuses).

169 L. Katz, *Bad Acts and Guilty Minds* (The University of Chicago Press: Chicago, 1987) 68.

170 See Dressler, above n. 68 at 407.

171 *Per* Rumpff J in *S* v *Goliath* [1972] (3) SA 1 at 25. A South African (Supreme Court) case where duress was held to be a complete defence. (Translation from *Abbot* v *R* [1976] 3 WLR 462 but slightly different translation by C.C. Turpin in his commentary on the case in (1972) 30(2) *The Cambridge LJ* 202.)

which he or she was capable, he or she should be eligible for an excuse.[172]

Finally, fair labelling, one of the basic principles that underlie criminal law, states that the description of an offence should match the wrong done. In cases of duress, these do not match, because the law hypocritically[173] demands a standard that exceeds the defence description.[174] Clearly, citizens will lose respect for the law in such cases.[175] Indeed, punishment will have no deterrent effect where avoiding the imminent danger is more pressing to the defendant than punishment sometime in the future.[176]

VIII. Conclusion

In England and Wales, an excusatory defence does exist in what has become tentatively known as duress of circumstances while, in Canada, the defence lies in an excusatory form of necessity based on moral involuntariness. As between the two:

(i) Moral involuntariness is excusatory and explicitly goes to both choice and voluntariness because of the constraints placed upon the actor. While this is made expressly evident in the definition of moral involuntariness set out earlier, the notions of choice and voluntariness are not expressly mentioned in duress of circumstances, although they are clearly relevant.
(ii) Duress of circumstances, like moral involuntariness, is also excusatory but its main focus is on the defendant's characteristics, and which of these, if any, should be ascribed to the reasonable man.
(iii) Both contain a proportionality requirement, but in moral involuntariness it is worded according to a justificatory notion of the balance of two evils, while in duress of circumstances it goes to reasonableness.
(iv) Ostensibly, following *Martin*, a defendant's characteristics will be taken into account in deciding whether he has acted proportionately.
(v) Conversely, in *Latimer*, the proportionality criterion is solely objective.

This piece does not claim that moral involuntariness is any 'better' than duress of circumstances, but what it does say is that, while

172 V. Tadros, *Criminal Responsibility* (Oxford University Press: Oxford, 2007) 315.
173 See Dressler, above n. 68 at 393 and 403.
174 See Spain, above n. 31 at 253: 'the law is exceeding its role if it aims to exact heroism from all members of society'.
175 Westen and Mangiafico, above n. 117 at fn. 218.
176 E.B. Arnolds and N.F. Garland, 'The Defense of Necessity in Criminal Law: The Right to Choose the Lesser Evil' (1974) 65(3) *Journal of Crim Law and Criminology* 289 at 290.

an objective assessment is necessary,[177] the duress of circumstances test is wrong, because it excludes fear and expects courage. Characteristics ascribed to the reasonable man under the *Martin* test for duress of circumstances should include the fear felt by the defendant in the circumstances in which he or she finds him/herself. The fact that he is more prone to fear than the sober man of reasonable firmness is not a reflection of bad character and is not a feature of a person's personality that should rightly be punished; if someone is so overwhelmed by fear or 'lacked the courage to behave more virtuously than he did [as distinct from someone who could have done otherwise] he ought to be entitled'[178] to the defence. As was noted earlier, the Irish Law Commission recognized this when it recommended that *all* a defendant's characteristics should be accounted for when considering the duress defence.

In relation to the objective test, then,[179] the solution might thus be to adopt *Latimer*'s modified-objective test, a test that settles nicely between the objective and subjective tests. Although involving an objective appraisal, it also specifically takes into account the accused's particular circumstances and characteristics.[180] To that end, therefore, 'the objective test is personalised' to the extent necessary to ensure that all accused persons are judged against standards that they have a fair opportunity to meet.[181]

To counter allegations that such a wide defence would enable liberties to be taken, an excusatory defence of this nature should be confined only to the rare situations of emergency outlined earlier. Furthermore, as an excuse, it would be personal to the defendant, and thus would not have any repercussions on cases in the future,[182] and neither would a precedent be set. In a common law system, this may seem to be a controversial suggestion, but it must be recalled that the situations envisaged are going to be rare, because of their unique facts. As such, the facts themselves will limit the same exact situation from arising again. In addition, taking decisions in the legal system on an individualized basis is not new; it already occurs in deciding whether or not to prosecute, and in sentencing. Arguably, therefore, any impact to traditional principles would be minimal.

177 For a contrary view, see Lord Simon's dictum in *DPP for NI* v *Lynch* [1975] AC 653 where he said that '[i]t is arguable that the test should be purely subjective, and that it is contrary to principle to require the fear to be a reasonable one' at 686.

178 See Tadros, above n. 145 at 515.

179 That is to say, excluding proportionality, which should not in any event be a part of excusatory necessity.

180 See Colvin, above n. 34 at 223.

181 *Ibid.* at 202 and 204.

182 Because 'the nature of the emergency sets necessary moral and political limits on the applicability of the defence'; Wilson, above n. 145 at 298.

Moreover, it would still be the case that the appropriate defence criteria would have to be satisfied.[183]

Finally, 'if duress is thought … to reflect our compassion of the ordinary unheroic victims of ill-luck, it should operate *whatever* the accused does as long as the reasonable person, with whatever characteristics it is thought appropriate to invest him with, could not be expected to act differently'.[184] As such, account should be taken of the defendant's fear or lack of courage, as these are central to the defence's rationale.

183 See Fletcher, above n. 35 at 1304–8. Herring supports the notion that exceptions should be made where following the rules would lead to unsatisfactory consequences, in his commentary on the High Court decision in *Nicklinson*, above n. 5. J. Herring, 'Escaping the Shackles of Law at the End of Life' [2013] 21 *Med LR* 487.

184 See Wilson, above n. 145 at 246. Emphasis in original.