

# SMITH & HOGAN CRIMINAL LAW

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# Defences

## 1. Introduction

There is no accepted hierarchy of defences in English law and none is adopted here.<sup>1</sup> Equally, it should be noted, there is considerable debate about the precise theoretical lines between elements which ought properly to be regarded as part of the offence and those comprising defences.<sup>2</sup> For ease of exposition and convenience, the chapter is divided into two parts.

Part A deals with 'defences' or pleas based on a denial of capacity or status deserving of criminal sanction. It would be misleading to treat all of these as 'defences' in the true sense of the word since some involve a plea which simply puts the Crown to proof of the relevant issue. At the core of the topics considered in Part A – insanity, intoxication, mistake and infancy – is the basic principle of English criminal law that the defendant should be held liable only where he is of sufficient capacity. As Professor Hart famously explained, a person is only to be blamed if he has the 'capacity and fair opportunity to change or adjust his behaviour to the law.'<sup>3</sup>

DEFENCE  
BASED ON  
MENTAL  
STATE OF  
MIND.

Part B, deals with defences in the true sense – where D has caused an *actus reus* with the appropriate *mens rea*, but despite both these elements of the offence being proved by the Crown, D is entitled to an acquittal owing to some justifying or excusing circumstance or condition. There are special defences which apply to particular crimes (for example, provocation and diminished responsibility in murder), there are also defences applicable to crimes generally. They are dealt with separately although where appropriate their interrelationship is considered.

DEFENCE  
BASED ON  
FULL PRESENCE  
OF MIND.  
IE, DURESS  
NECESSITY

### (a) Theories of justification and excuse

The common law of homicide distinguished between justification and excuse. Some homicides, like that done by the public hangman in carrying out the sentence of the court, were justifiable. Others, like killing by misadventure and without culpable negligence, were merely excusable. In both cases the accused who successfully raised the

<sup>1</sup> See however the theoretical approach in P. Robinson, 'Criminal Law Defences: A Systematic Analysis' (1982) 82 Col LR 199; and for a ladder of defences see Horder, *Excusing Crime* (2003), 103.

<sup>2</sup> See generally G. Williams, 'Offences and Defences' (1982) 2 LS 233; K. Cambell, 'Offence and Defence' in I. Dennis (ed), *Criminal Law and Criminal Justice* (1987).

<sup>3</sup> *Punishment and Responsibility* (1968), p 181.

**(b) Children aged 10 and above**

At common law there was a *rebuttable* presumption that a child aged not less than 10 but under 14 years ('a young person') was *doli incapax*, incapable of committing crime. The presumption was rebutted only if the prosecution proved beyond reasonable doubt, not only that the child caused an *actus reus* with *mens rea*, but also that he knew that the particular act was not merely naughty or mischievous, but 'seriously wrong'. If there was no evidence of such knowledge, other than that implicit in the act itself, the child had no case to answer. In *C v DPP*<sup>291</sup> the Divisional Court held that this ancient rule of the common law was outdated and no longer law; but the House of Lords reversed this, ruling that it was not open to the courts so to hold. That decision was followed by a series of acquittals which caused disquiet.

In the Crime and Disorder Act 1998, Parliament responded by abolishing the rebuttable presumption.<sup>292</sup> This was intended to put children aged 10 and above on an equal footing with adults, so far as liability (but not sentencing or mode of trial and procedure) is concerned. The Act is not well drafted and it has been cogently argued by Professor Walker that the section does not affect the substantive law,<sup>293</sup> leaving it open to a child under 14 to introduce evidence that he did not know that what he did was seriously wrong, whereupon it will be for the prosecution to prove, not only the usual *mens rea*, but also that the child did know that.<sup>294</sup> Even this less far-reaching construction would probably remove most of the difficulties which previously arose. A 13-year-old might be expected to find great difficulty in inducing a jury to doubt that he did not know it was seriously wrong to rape someone – a fact formerly presumed in his favour.

The presumption still poses problems in prosecutions for historic sexual abuse alleged against defendants who were between the ages of 10–14 at the time of their commission.<sup>295</sup>

**SECTION B GENERAL DEFENCES****1. Duress****(a) Duress by threats and circumstances<sup>296</sup>**

For centuries the law has recognized a defence of duress by threats. The typical case is where D is told, 'Do this [an act which would be a crime if there were no defence of

Example  
DEFENCES  
of  
Justification

<sup>291</sup> [1996] AC 1, [1995] 2 All ER 43, HL. See the 8th edition of this book for detail, at 195.

<sup>292</sup> Crime and Disorder Act 1998, s 34. See L. Gelsthorpe, 'Much Ado About Nothing' (1999) CFLQ 209; J. Fonda, 'New Labour, Old Hat: Youth Justice and the Crime and Disorder Act 1998' [1999] Crim LR 36.

<sup>293</sup> See Nigel Walker, 'The end of an old story' (1999) 149 NLJ 64.

<sup>294</sup> This is supported by the Solicitor General's statements in Parliament, as cited by Walker.

<sup>295</sup> *R v Andrew N [2004] EWCA Crim 1235*, CA.

<sup>296</sup> See generally the discussion of the defences in the Law Com Consultation Paper No 122, *Legislating the Criminal Code: Offences Against the Person and General Principles* (1992) and Law Com No 218, *Legislating the Criminal Code: Offences Against the Person and General Principles* (1993).

duress] – or you will be killed’, and, fearing for his life, he does the required act. Quite recently, the law has recognized another form of duress – duress of circumstances. Again, D does the act alleged to constitute the crime out of fear, but this time no human being is demanding that he do it.<sup>297</sup> D does it because his life is threatened and his only way of escape is to do the act, which, but for the duress, would be a crime. The compulsion on D to do the act is exactly the same whether the threat comes from someone demanding that he do it, or from an aggressor, or other circumstances. His moral culpability, or lack of it, seems exactly the same.<sup>298</sup> The relationship of duress, duress of circumstances and necessity is postponed until each has been examined in detail (p 324 below).

The law relating to duress by threats is now well-developed. Duress of circumstances is still relatively new, but it has developed by analogy to duress by threats so that there is a ready-made set of principles to govern it. By a strange coincidence, all the early cases on duress of circumstances concerned road traffic offences but there was no reason why it should be limited to such offences. *Pommell*<sup>299</sup> (possession of a prohibited weapon without a certificate) now decides that it has the same range and is governed by the same principles as duress by threats. The result is that either form of duress is a general defence, except that neither applies to some forms of treason, or to murder or attempted murder, whether as a principal or a secondary party.

#### (i) Duress and voluntariness<sup>300</sup>

It has often been said that the duress must be such that D’s act is not ‘voluntary’. We are not, however, concerned here with the case where a person is compelled by physical force to go through the motions of an *actus reus* without any choice on his part. In such cases he will almost invariably<sup>301</sup> be guilty of no offence on the fundamental ground that he did no act.

If there be an actual forcing of a man, as if A by force takes the arm of B and the weapon in his hand and therewith stabs C whereof he dies, this is murder in A but B is not guilty.<sup>302</sup>

Nor are we concerned with the kind of involuntariness which arises from automatism where D is unable to control the movement of his body. When D pleads duress (or necessity) he admits that he was able to control his actions and chose to do the act with which he is charged, but denies responsibility for doing so. He may say, ‘I had no choice’ but that is not strictly true.<sup>303</sup> The alternative to committing the crime may have been so exceedingly unattractive that no reasonable person would have chosen it; but there was a choice. The courts recognize this. Where D is required to kill an innocent person, they insist that he must choose to defy the threat or threatening circumstance – and ‘threaten’ him with conviction for murder and life imprisonment if he does not. In Canada, the Supreme Court (holding that necessity may be an excuse, but not a justification)

<sup>297</sup> *Cole* [1994] Crim LR 582; *Ali* [1995] Crim LR 303.

<sup>298</sup> See the judicial affirmation that the defences are this closely linked: *Safi* [2003] Crim LR 721; *Shayler* [2001] 1 WLR 2206, citing the 6th edition of this work, but note p 324 below.

<sup>299</sup> [1995] 2 Cr App R 607.

<sup>300</sup> See M. Wasik, ‘Duress and Criminal Responsibility’ [1977] Crim LR 453; A. Norrie, *Crime Reason and History* (2nd edn, 2000), 165–170; A. T. H. Smith, ‘On *Actus Reus* and *Mens Rea*’ in P. Glazebrook (ed), *Reshaping the Criminal Law* (1978), at 104–106.

<sup>301</sup> Cf *Larsonneur*, above, p 73.

<sup>302</sup> *Hale*, 11 PC 534.

<sup>303</sup> *Hasan* [2005] UKHL 22, per Baroness Hale [73].