

# A defence of duress in the law of torts?

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Chief Justice, My Lords, distinguished guests and presenters, can I commence with a few words of thanks. First, I am very grateful to Andy, Fred and James for their kind invitation to return to Oxford to spend the last two days of the Western Australian judicial recess discussing the limits of tortious liability. It is clear from the presentations over the last two days that, like the other presenters, I owe a considerable debt to James' extraordinary monograph on defences in the law of torts.

For me, this city is replete with joyful memories of scintillating debate and engaged discussion with colleagues and students, particularly doctoral

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students including two of the most brilliant who are here today. They will appreciate a small irony in my presentation today. In the course of supervisions two of my constant refrains were to insist that (1) they explain why the issue being discussed *matters*, and (2) that they take a stand on the issue and reach a firm conclusion. The paper I present today focuses upon an issue which has been decided once in the last 500 years in English law, and in which my conclusions are expressed very tentatively in the absence of argument. The issue is whether there should be a defence of duress in the law of torts.

I commence, therefore, with an explanation for why this issue matters. Although there has been only one reported decision, it is unlikely that the reason for this is that the issue never arises. As I will explain, in the related criminal law context the issue has arisen in many written decisions and arises every year in hundreds of jury trials. It may be that the reason why it never arises in the law of torts is because there is an almost unanimous view in every torts textbook, deriving from the leading case, that the defence does not exist.

As for my tentative views, those of you who know me will know that in a previous life the conclusions in this paper might have been more forcefully expressed. They might also have been expressed more firmly by my former associate, and co-author, who spent many days assisting with the research for this paper, and with whom I spent much time discussing these ideas. But the tentative possibility raised by this paper is too radical to be expressed conclusively in the absence of any argument and (at least until I finish speaking) any contradictor.

### **Introduction: the dominant view in English law**

A victim of extreme criminal menaces is told that unless she steals goods then she, and her family, will be killed. She complies, steals the goods and provides them to the menacing person. The circumstances provide her with a defence to the crime of theft. But the entrenched view is that she is liable for the

tort of conversion because duress is not a defence to the commission of a tort. The short point of this paper is to express doubt about the view that duress is not a defence to a tort. Our position is a preliminary one. It has yet to be tested against the concrete reality of a detailed factual scenario. But the following steps cast doubt on the dominant view:

(1) The authority against recognition of a defence of duress is not conclusive and is based upon a false premise.

(2) The operation of pressure in the criminal law has developed in tandem with the law of torts in relation to the formulation of liability rules. The same process, if applied to defences, would see the well-recognised defence of duress in criminal law extended to torts.

(3) There is a very fine, almost paper-thin distinction between a defence of necessity in criminal law and the law of torts (both of which have been recognised) and a defence of duress (which has not been recognised in the law of torts).

(4) A defence of duress can be supported as a matter of principle. The most common arguments of principle against the recognition of a defence of duress are not compelling. The argument that the central goal of the law of torts is compensation is, at best, questionable. The argument that a tortfeasor who had a choice whether to act should not be excused from violating the rights of a victim of a tort who had no choice is, at best, question-begging. In contrast, the rationale for the defence, like a tortious defence of necessity, might be that a defendant has a liberty to act possibly qualified by a liability to pay compensation for any loss caused.

We conclude the paper with a section that considers matters of nomenclature which have important effects. Is duress properly labelled as a 'defence'? How could it be a defence if it turns out to be a matter which a claimant must disprove? Is it a justification or an excuse? Or is it some other

type of defence? The recent monograph by James Goudkamp provides invaluable assistance through this minefield of terminology.

### **(1) The limited authority against a tortious defence of duress**

The dominant common law view for nearly four centuries has been that duress does not provide a defence to tortious conduct.<sup>1</sup> Our first point in this paper is to observe that the judicial authority which supports this view is extremely limited and was based upon what is now a false premise.

The decision usually cited is *Gilbert v Stone*.<sup>2</sup> In that case, Gilbert brought a claim against Stone for trespass and the taking of his horse. Stone pleaded that he had so acted because of twelve armed men who were threatening to kill him unless he stole the horse. Gilbert demurred. Roll J was held that Stone's plea could not justify his actions, 'for I may not do a trespassed to one for fear of threatnings of another, for by this means the part injured shall have no satisfaction, for he cannot have it of the party that threatned'.

As we explain below, the premise of this decision is now incorrect. Since the recognition in the 20<sup>th</sup> century of the tort of three-party intimidation (described in England as part of a tort of causing loss by unlawful means), a claim could probably be brought by a person in Gilbert's position against the twelve armed men. The armed men committed an unlawful act against Stone, interfering with his freedom to act, and intending to cause loss to Gilbert.

However, *Gilbert v Stone* was famously referred to with approval in an obiter dictum in the dissenting judgment of Blackstone J in *Scott v Shepherd*.<sup>3</sup> Blackstone J observed that following *Gilbert v Stone*, '[n]ot even menaces from

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<sup>1</sup> See eg T M Cooley, *A Treatise on the Law of Torts, or, The Wrongs which arise Independent of Contract* (1880) 115; W V H Rogers, *Winfield & Jolowicz on Tort; Fleming's The Law of Torts*.

<sup>2</sup> *Gilbert v Stone* (1647) Style 72; 82 ER 539.

<sup>3</sup> *Scott v Shepherd* (1773) 2 Black W 892, 896; 96 ER 525, 527.

others are sufficient to justify a trespass against a third person; much less a fear of danger to either his goods or his person;— nothing but inevitable necessity'.<sup>4</sup>

Subsequent endorsement of *Gilbert v Stone* is very difficult to find. There is also contrary authority, although the contrary authority is also very limited.

A United States authority which, however, does explicitly support a defence of duress is the decision of the Supreme Court of Tennessee in *Waller v Parker*.<sup>5</sup> In that case, Parker brought an action for trover against Waller for actions by Waller in scattering Parker's cotton which led to its destruction. Waller alleged that he had done so under the orders of a company of Confederate soldiers. The jury verdict against Waller was quashed, with Henry Smith J, for the Supreme Court of Tennessee, explaining as follows:

And these threats may be as effective to work up fears to the extent of the duress, which excuses acts done under its power, as well when the threatening or compelling force is not immediately present at the doing of the acts, as where the acts are done in the actual presence of the compelling force

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If the removal and loss were done and suffered by Walker, under the stress of fears, well grounded, real, sincere, that the armed force could and would return in a short time, and execute their threats if he did not remove and scatter the cotton; and, if, during this time, Waller was without the power or ability to procure power to resist, and to protect himself and property against the execution of the threats, then Waller is not liable to the plaintiff's action.

A second authority which is sometimes cited as involving recognition of a tortious defence of duress turns out, on closer examination, not to involve such recognition. The case is *Cordas v Peerless Transportation Co*.<sup>6</sup> In *Cordas*, a chauffeur jumped from his moving car in order to escape from a gunman. The driverless car mounted the sidewalk and injured a mother and her two children.

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<sup>4</sup> *Scott v Shepherd* (1773) 2 Black W 892, 896; 96 ER 525, 527.

<sup>5</sup> 45 Tenn 476, 1868 WL 2141 (Tenn)

<sup>6</sup> *Cordas v Peerless Transportation Co* 27 NYS 2d 198 (1941).

Carlin J, in the City Court of New York, held that the chauffeur was not liable to the victims of the accident.

George Fletcher argued that the result in *Cordas* requires recognition of duress as an excuse to liability in the law of torts: although the risk taken by the cab driver in jumping from the vehicle was unreasonable and excessive, the overwhelmingly coercive circumstances excused him from liability.<sup>7</sup> The problem with this argument is that the risk was only unreasonable and excessive if the extraordinary exigencies are ignored. Once the consequences to the chauffeur are taken into account the risk is no longer unreasonable. As Fletcher acknowledged, this was the reasoning of Carlin J. Carlin J explained that the chauffeur was not liable because the question of whether he was negligent needed to be assessed in all the circumstances. It could not be said that he was negligent in acting as he did confronted by a gunman: 'who can be wise, amazed, temperate and furious, loyal and neutral, in a moment'?'<sup>8</sup>

## **(2) A defence of duress in the law of torts by analogy with the criminal law**

Moving from the limited state of direct authority in relation to a defence of duress in the law of torts, authority for the recognition of a defence of duress can be found by extension of the defence as recognised in the criminal law. There are several steps to this second argument.

(i) The identical ground of *liability* based on duress was developed in the law of torts by extension from criminal law.

(ii) The criminal law has developed a sophisticated and concurrent defence of duress and the law of torts could develop coherently by recognition of the same defence.

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<sup>7</sup> G Fletcher 'Fairness and Utility in Tort Theory' (1972) 85 Harv Law Rev 537, 552-553.

<sup>8</sup> Macbeth, Act 2, scene 3.

**(i) Tortious *liability* based on duress was developed by analogy with the criminal law**

The modern law in relation to the crime of menaces is contained in various criminal statutes which have a lineage at least as far as Statute 18 Eliz c 5 which created the crime of compounding of penal actions.<sup>9</sup> But the earliest criminal law in relation to menaces was common law. It is in the early common law where we see the requirements which influenced the recognition of the tort of intimidation and became part of the early law of intimidation in the law of torts.

One of the early cases on the common law of menaces was *R v Southerton*.<sup>10</sup> In that case the accused threatened the victim with prosecution for selling an antiseptic called Fryar's Balsam without a stamped label. Money was paid by the victim and a prosecution ensued. The Court held that the defendant had not committed the crime. Lord Ellenborough CJ held that<sup>11</sup>

To obtain money under a threat of any kind, or to attempt to do it is no doubt an immoral action; but to make it indictable the threat must be of such a nature as is calculated to overcome a firm and prudent man.

The accused was acquitted because his threat was one that the victim ought prudently to have resisted. This restriction did not last long. In *R v Thomas Smith*,<sup>12</sup> Wilde CJ referred to, and explained, Lord Ellenborough's rule that the threat must be such that it was calculated to overcome a firm and prudent man:

That rule must be understood to refer rather to the nature of the threat, than to its probable consequences in any particular case. Whether a threat be criminal or no, cannot be taken to depend on the nerves of the individual threatened, but on the general nature of the evil with which he is threatened. Threats attended with duress, or threats of duress, or of other personal violence, or of great injury, such as is imported by this letter will come within the rule.

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<sup>9</sup> See Blackstone, Bk IV, chapter 10 part 14.

<sup>10</sup> (1805) 6 East 126; 102 ER 1235.

<sup>11</sup> (1805) 6 East 126 at 140; 102 ER 1235 at 1241.

<sup>12</sup> (1849) 1 Denison 510 at 514; 169 ER 350 at 353.

In other words, there is no requirement that the person threatened have the nerves of a firm and prudent person. The focus is upon whether the threat is of such a serious nature that it would overcome a firm and prudent person.

As the crime of menaces developed, there was no requirement that the threat concern unlawful action. One of the most common examples of menaces was a threat to report an act to the authorities, an entirely lawful action (such as the threat in *Southerton* of reporting the vendor to the prosecuting authorities). A view began to develop in the early twentieth century that a person could not be guilty of the crime of menaces unless the threat was one of unlawful conduct.<sup>13</sup> This new restriction was short lived. In *Thorne v Motor Trade Association*,<sup>14</sup> Lord Atkin pointed out with impeccable logic:

The ordinary blackmailer normally threatens to do what he has a perfect right to do - namely, communicate some compromising conduct to a person whose knowledge is likely to affect the person threatened. Often indeed he has not only the right but also the duty to make the disclosure, as of a felony, to the competent authorities. What he has to justify is not the threat, but the demand of money. The gravamen of the charge is the demand without reasonable or probable cause.

In contrast with the criminal action for menaces, the tort of intimidation was not truly recognised before the 20<sup>th</sup> century. Recognition came as a result of comments made in the great case of *Allen v Flood*.<sup>15</sup> Prior to its emergence after *Allen v Flood*, cases of tortious intimidation had been dealt with under the forms of action as actions on the case for 'threatening to mayhem'.<sup>16</sup> *Allen v Flood*, and particularly the opinion of Hawkins J, laid the foundation for the recognition of an independent tort of intimidation. It did so by reference to the crime of menaces.

In *Allen v Flood*, the respondents, Flood and Taylor, were woodworkers who were engaged by a company on a day-to-day basis to perform woodwork

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<sup>13</sup> *Ware & De Freville v Motor Trade Association* [1921] 3 KB 40 (CA); *Hardie & Lane v Chilton* [1928] 2 KB 306 (CA).

<sup>14</sup> [1937] AC 797 at 806-807.

<sup>15</sup> [1898] AC 1.

<sup>16</sup> *Garrett v Taylor* (1619) Cro 567; 79 ER 485 at 487.

on a ship. The appellant, Allen, was the union representative for the ironworkers on the ship. The ironworkers, whom Allen represented, discovered that the woodworkers, Flood and Taylor, had previously been ironworkers on another ship. The ironworkers demanded that Allen procure the dismissal of Flood and Taylor. Allen met with the foreman and general manager of the company. Allen told them that unless the woodworkers were dismissed Allen's ironworkers would leave. The woodworkers got the chop. Flood and Taylor sued Allen, alleging that he had maliciously procured their dismissal. The problem faced by Flood and Taylor was that they had no right to be employed by the company. They were engaged on a day to day basis and could be dismissed at will. At the heart of the appeal, therefore, was the question of whether Allen's bad motive could render unlawful an otherwise lawful action.

The trial judge, and the Court of Appeal, unanimously held that bad motive could have the effect that an otherwise lawful action became an unlawful one. Nine judges heard the case in the House of Lords. After the hearing began, the Lord Chancellor, seeking to persuade his brethren of the correctness of the view below, summoned another eight leading judges to attend and to deliver decisions to assist their Lordships. The case was then heard before 17 judges in England's final appellate court.

Flood and Taylor's counsel pointed out that a claimant could recover if another maliciously made statements about him with the intention of causing him financial loss; or if another maliciously made statements about him causing him loss of reputation. Counsel asked why should the law treat malicious statements to third parties differently where they cause loss of his liberty to work?

But despite the force of this argument, despite unanimity in the lower courts, and despite majority support from the additional judges called to advise the House of Lords, Flood and Taylor lost in the House, by six judges to three.

The effect of the decision of those six judges is still felt a century later as deep suspicion meets any argument that a defendant's motive alone can suffice for a cause of action to recover losses in the law of torts.

One of the judges advising the House of Lords was Mr Justice Hawkins. Hawkins was firmly of the opinion that Flood and Taylor should have recovered. In a powerful opinion, Hawkins J argued in favour of a tort of intimidation. Importantly, Hawkins J borrowed from the criminal law of menaces and what is now recognised to be an action based on duress in unjust enrichment.<sup>17</sup>

any menacing action or language, the influence of which no man of ordinary firmness or strength of mind can reasonably be expected to resist if used or employed with the intent to destroy the freedom of will in another, and to compel him through fear of such menaces to do that which it is not his will to do, and which being done is calculated to cause injury to him or some other person, amounts to an attempt to intimidate and coerce; and if such attempt is successful, the object attained under such influence is attained by coercion, and the person wrongfully injured by it, whether in his person, property, or rights, may sue the coercer for reparation in damages.

The advice of Hawkins J in *Allen v Flood* was the basis for the recognition of a tort of intimidation by John Salmond in one of the earliest, and leading, English texts on torts in 1907. In the first edition of his book, Salmond relied upon the advice of Hawkins J and suggested that there existed a tort of intimidation. Salmond argued that such a tort could arise where the claimant intimidates the defendant into acting in some way which causes the defendant harm (two party intimidation), alternatively where a defendant intimidates a third party into acting in some way which causes the claimant harm (three party intimidation). Salmond's approach which insisted on illegal action followed the conclusion of the majority of the House of Lords in *Allen v Flood*: 'it is clear that the threat complained of must be a threat to do an act which is itself illegal. No threat to exercise one's legal rights can amount to a cause of action, even if the

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<sup>17</sup> [1898] AC 1 at 17-18. Relying on *Williams v Bayley* (1866) LR 1 HL 200.

threat made for the purpose of intimidation or coercion, and even if inspired by malicious motives.<sup>18</sup> Most noticeably, however, Salmond borrowed from Hawkins J in recognising the tort of intimidation. Following *Allen v Flood*, Salmond imposed a restriction that the threat concern unlawful conduct. In *OBG Ltd v Allan*,<sup>19</sup> Lord Hoffmann in the leading speech then subsumed three party intimidation within the tort of causing loss by unlawful means and insisted that the requirement of unlawfulness meant civil wrongdoing.

In summary, although differences emerged between intimidation and menaces the criminal law of menaces was one of the foundational bases upon which the tort of intimidation was recognised by Hawkins J, then Salmond, then later cases. Tortious *liability* for exerting unlawful pressure upon another (intimidation) thus developed by reference to the criminal liability for such pressure (menaces). The same could be true of a tort *defence* of unlawful pressure, by reference to the criminal defence.

Initially, the defence of duress to a crime was very limited. As Wigmore observed, since the 13<sup>th</sup> century duress was a defence to the penal action of homicide. The 'slayer by misadventure' would have his life spared. Otherwise all liability was otherwise absolute, irrespective of any personal blameworthiness for the harm caused.<sup>20</sup>

By the 14<sup>th</sup> century duress as a defence to criminal conduct had been recognised by English law, although there are very few known cases. Sir James Fitzjames Stephen,<sup>21</sup> who knew of only two cases in which the defence had been applied, said that '[c]ompulsion by threats of injury to person or property'<sup>22</sup> was recognised as a defence to a crime in cases where the compulsion was applied by a body of rebels or riots and in which the offender took a subordinate part in

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<sup>18</sup> J Salmond *The Law of Torts* (1907 Stevens and Haynes London) at 440.

<sup>19</sup> See *OBG Ltd v Allan* [2008] 1 AC 1.

<sup>20</sup> J H Wigmore, 'Responsibility for Tortious Acts: Its History - III' (1894) 7(8) *Harvard Law Review* 59, 60.

<sup>21</sup> J Stephen, *A History of the Criminal Law in England* (London: Macmillan, 1883), Vol 2, 95 - 108.

<sup>22</sup> J Stephen, *A History of the Criminal Law in England* (London: Macmillan, 1883), Vol 2, 105.

the offence. Stephen was critical of the defence, arguing that compulsion by threats ought in no case whatever to be admitted as an excuse for crime, though it may, and ought, to operate in mitigation of punishment in most cases.<sup>23</sup>

The availability of the defence was historically confined to circumstances in which the accused was facing death for non-compliance with the demands of a third party. Thus Sir Matthew Hale said that<sup>24</sup>

if a man be desperately assaulted, and in peril of death, and cannot otherwise escape, unless to satisfy his assailant's fury he will kill an innocent person then present, the fear and actual force will not acquit him of the crime and punishment of murder, if he commit the fact; for he ought rather to die himself, than kill an innocent.

Duress was confined to a person faced with 'actual and inevitable danger to his own life'; fear alone would not be enough.<sup>25</sup>

In these early formulations of the defence, the only force that would excuse the criminal act was 'force upon the person, and present fear of death'<sup>26</sup> so that 'an apprehension, though ever so well founded, of having property wasted or destroyed, or of suffering any other mischief not endangering the person of the party, will be no excuse'.<sup>27</sup> In *McGrowther's Case*, Lee CJ directed the jury that 'the fear of having houses burnt, or goods spilled, supposing that to have been the case of the prisoner, is no excuse in the eyes of the law joining and marching with rebels'.<sup>28</sup> To permit one to break the law in order to protect property would mean that it 'would be in the power of any leader of a rebellion to indemnify all his followers'.<sup>29</sup>

Sir William Blackstone took a more expansive view of the defence, describing it as open where one committed a crime due to 'threats or menaces which induce a fear of death or other bodily harm'. The inclusion of *threats*

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<sup>23</sup> J Stephen, *A History of the Criminal Law in England* (London: Macmillan, 1883), Vol 2, 108.

<sup>24</sup> Matthew Hale, *The History of the Pleas of the Crown* 51.

<sup>25</sup> Matthew Hale, *The History of the Pleas of the Crown* 51. See also M Foster, *Crown Cases*, 217.

<sup>26</sup> *McGrowther's Case* (1746) ER 782 (Lee CJ).

<sup>27</sup> E H East, *A Treatise of the Pleas of the Crown* 1 East PC 70-1; Fost 217.

<sup>28</sup> *McGrowther's Case* (1746) 18 St Tr 391, 393.

<sup>29</sup> *McGrowther's Case* (1746) 18 St Tr 391, 393.

meant that it was not necessary to show that actual force was exerted: evidence that the defendant was subjected to threats was sufficient.

From these roots emerged the modern defence of duress to a crime in English law. The modern defence involves a two-limb test which comprises both subjective and objective elements. This test was enunciated by Lord Lane CJ in *R v Graham*<sup>30</sup> and subsequently affirmed by the House of Lords in *R v Howe*.<sup>31</sup>

1. Was the defendant, or may he have been, impelled to act as he did because, as a result of what he reasonably believe [the person making the threats] had said or done, he had good cause to fear that if he did not so act King [the person] would kill him or (if this is to be added) cause him serious physical injury?

2. If so, have the prosecution made the jury sure that a sober person of reasonable firmness, sharing the characteristics of the defendant, would not have responded to whatever he reasonably believed [the person] said or did by [acting as he did]?

The proper scope of, and restrictions upon, the plea of duress as a defence to a crime in English law were considered in the more recent case of *R v Z*.<sup>32</sup> In that case, the defendant had been convicted of aggravated burglary. At trial, the defendant admitted the burglary but pleaded that he had been coerced into acting as he did by threats of harm directed against him and his family. According to the defendant, the person who had threatened him was a drug dealer with a reputation for being violent. The Court of Appeal allowed the defendant's appeal against conviction finding that the trial judge had misdirected the jury in relation to the defence of duress. However, the House of Lords reinstated the defendant's conviction on the basis that the defendant could not rely on the defence of duress where, as a result of his voluntary association with

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<sup>30</sup> *R v Graham* [1982] 1 WLR 294, 300.

<sup>31</sup> *R v Howe* [1987] AC 417 (Lord Hailsham).

<sup>32</sup> *R v Z* [2005] 2 AC 467.

known criminals, he had foreseen or ought reasonably to have foreseen the risk of being subjected to any compulsion by threats of violence.

Lord Bingham (with whose reasons Lords Rodger and Brown agreed) explained that there are features of the defence which require it to be narrowly confined, in particular the difficulty for the prosecution in disproving the defence where little detail of it is generally vouchsafed by the defence until the trial is well underway. Lord Bingham also referred to the observations of Lord Simon in *Lynch*<sup>33</sup> (dissenting on the main ruling, which was reversed in *R v Howe*<sup>34</sup>): ‘[Y]our Lordships should hesitate long lest you may be inscribing a charter for terrorists, gang-leaders and kidnappers... A sane system of criminal justice does not permit a subject to set up a countervailing system of sanctions or by terrorism to confer criminal immunity on his gang’. Lord Bingham then enumerated the following limits on the operation and scope of the defence of duress in criminal law:<sup>35</sup>

1. Duress does not afford a defence to charges of murder, attempted murder and perhaps some forms of treason.
2. To found a plea of duress the threat relied on must be to cause death or serious injury.
3. The threat must be directed against the defendant or his immediate family or someone close to him.
4. The relevant tests pertaining to duress have been largely stated objectively, with reference to the reasonableness of the defendant’s perceptions and conduct and not with primary reference to his subjective perceptions.
5. The defence of duress is available only where the criminal conduct which is sought to be excused has been directly caused by the threats upon which reliance is placed.
6. The defendant may excuse his criminal conduct on grounds of duress only if there was no evasive action that the defendant could reasonably have been expected to take.

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<sup>33</sup> *R v Lynch* [1975] AC 653, 688.

<sup>34</sup> *R v Howe* [1987] AC 417.

<sup>35</sup> *R v Z* [2005] 2 AC 467, 490 - 491.

7. The defendant may not rely on duress to which he has voluntarily laid himself open.<sup>36</sup>

It is open for the law of torts to develop the same defence just as the law of torts borrowed from the criminal law in developing an *action* based upon unlawful pressure.

### **(3) Overlap between a defence of necessity and a defence of duress**

A third aspect of our argument that a tortious defence of duress might be recognised is that the boundary between the recognised defence of necessity and a defence of duress can be paper thin whether in criminal law or the law of torts.

#### **(i) Necessity in criminal law**

The history of English judicial recognition of the defence of necessity to a crime dates back to the 16<sup>th</sup> Century decision of *Reniger v Fogossa*.<sup>37</sup> In that case the Court appeared to accept the argument of Sergeant Pollard in which necessity was recognised as a defence alongside compulsion or duress:<sup>38</sup>

In every law there are some things which when they happen a man may break the words of the law, and yet no break the law itself; and such things are exempted out of the penalty of the law... where the words of them are broken to avoid greater inconveniences, or through necessity, or by compulsion...

Three years after the decision in the famous case of *R v Dudley and Stephens*,<sup>39</sup> Stephen described the doctrine in the following terms:<sup>40</sup>

An act which would otherwise be a crime may in some cases be excused if the person accused can show that it was done only in order to avoid consequences which could not otherwise be avoided, and which, if they had followed, would have inflicted upon him or upon others whom he was bound to protect inevitable and irreparable evil, that no more was done than was reasonably necessary for that purpose, and that the evil inflicted by it was not disproportionate to the evil avoided. The extent of this principle is unascertained. It does not extend to the case of shipwrecked sailors who kill a boy, one of their number, in order to eat his body.

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<sup>36</sup> *R v Hurley & Murray* [1967] VR 526, 543 (Smith J).

<sup>37</sup> (1552) 1 Plowd 1.

<sup>38</sup> (1552) 1 Plowd 1, 18.

<sup>39</sup> *R v Dudley and Stephens* (1884) 13 QBD 273.

<sup>40</sup> J Stephen, *A History of the Criminal Law in England* (London: Macmillan, 1883), Vol 2.

The defence of necessity to a crime was considered in detail by the Supreme Court of Canada in *Perka v The Queen*.<sup>41</sup> In that case, the appellants were charged with importing cannabis into Canada. One of their defences was that they were bound for Alaska but that their ship suffered mechanical problems which required them to dock in Canada and offload the cannabis to avoid capsizing. The appellants were acquitted. A Crown appeal was allowed by the Court of Appeal. The Supreme Court of Canada dismissed a further appeal. In the course of ordering a retrial the Supreme Court affirmed the existence of a defence of necessity as an excuse to criminal liability, based on ‘a realistic assessment of human weakness ... in emergency situations where normal human instincts ... overwhelmingly impel disobedience’.<sup>42</sup> The defence applied only where the circumstances were such that the person who committed the crime had ‘no other viable or reasonable choice available’ the act was wrong but it was excused because it was realistically unavoidable.

## **(ii) Necessity in the law of torts**

A defence of necessity was established as a tortious defence by the time of *Mouse’s Case*.<sup>43</sup> A barge was in danger of foundering while being used as a ferry across the Thames. A passenger threw the claimant’s personal property overboard to lighten the barge. The claimant sued the passenger for trespass. The plea of trespass was refused. The Court held that ‘for [the] safety of the lives of passengers... it is lawful for any passenger to cast the things out of the barge’. The owners could maintain an action against the ferryman for overloading the barge, ‘but if no surcharge was, but the danger accrued only by the act of God, as by tempest, no default being in the ferryman, everyone ought to bear his loss for the safeguard and life of a man’.

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<sup>41</sup> [1982] 2 SCR 232.

<sup>42</sup> [1982] 2 SCR 232, 248.

<sup>43</sup> (1609) 12 Co Rep 63; 77 ER 1341.

The decision in *Mouse's* case is usually regarded as an example of 'public' necessity. A more recent example of the defence is *Southport Corporation v Esso Petroleum*.<sup>44</sup> That case concerned a ship which had run aground. The defendant shipowners dumped some oil from their ship into the sea because they feared the ship would break its back and the crew would be endangered if they did not. The oil washed up onto the shore of land belonging to the claimants, who brought an action against the defendants claiming they had committed trespass in dumping the oil. Devlin J held that the defendants could rely on the defence of necessity to justify their actions since, 'the necessity for saving life has at all times been considered a proper ground for inflicting such damage as may be necessary upon another's property'.<sup>45</sup>

In contrast with these examples of public necessity, an example of 'private necessity' is the decision in *Cope v Sharpe*.<sup>46</sup> In that case, Mr Chase had shooting rights on the claimant's property. A fire broke out on the property. Mr Chase's keeper took various actions which would otherwise have amounted to trespass to prevent the fire from killing pheasants on the property. The Court of Appeal upheld a decision that the gamekeeper was held not liable on the basis of the defence of necessity. There was real and imminent danger to the pheasants at the moment at which he acted, and what he did was reasonably necessary.

A third category of necessity was recognized in *In re F (Mental Patient: Sterilisation)*.<sup>47</sup> That case concerned the lawfulness of a proposed operation of sterilisation upon F, the claimant. F was a 36 year old woman whose mental incapacity disabled her from giving her consent to a sterilisation operation. Unless a defence applied, the performance of the medical operation would be unlawful, constituting both the crime of battery and tort of trespass to the

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<sup>44</sup> *Southport Corporation v Esso Petroleum* [1953] 2 All ER 1204. The judgment was reversed by the Court of Appeal but restored by the House of Lords [1956] AC 218.

<sup>45</sup> See also *Cope v Sharpe (No 2)* [1912] 1 KB 496.

<sup>46</sup> [1912] 1 KB 496

<sup>47</sup> [1990] 2 AC 1.

person. F's mother sought a declaration that the performance of the operation would be lawful. After referring to examples of public necessity and private necessity, Lord Goff explained that there is a third group of cases in which a necessity defence is recognised:

There is, however, a third group of cases, which is also properly described as founded upon the principle of necessity and which is more pertinent to the resolution of the problem in the present case. These cases are concerned with action taken as a matter of necessity to assist another person without his consent. To give a simple example, a man who seizes another and forcibly drags him from the path of an oncoming vehicle, thereby saving him from injury or even death, commits no wrong. But there are many emanations of this principle, to be found scattered through the books. These are concerned not only with the preservation of the life or health of the assisted person, but also with the preservation of his property (sometimes an animal, sometimes an ordinary chattel) and even to certain conduct on his behalf in the administration of his affairs. Where there is a pre-existing relationship between the parties, the intervenor is usually said to act as an agent of necessity on behalf of the principal in whose interests he acts, and his action can often, with not too much artificiality, be referred to the pre-existing relationship between them. Whether the intervenor may be entitled either to reimbursement or to remuneration raises separate questions which are not relevant in the present case.

Although these three categories of necessity as a defence to a tort appear to have the potential for broad application, courts have insisted that they be applied with circumspection. For example, in *London Borough of Southwark v Williams*,<sup>48</sup> the English Court of Appeal denied that extreme hunger could excuse a theft or that homelessness could excuse a trespass. The reason according to Lord Denning MR was that 'if hunger were once allowed to be an excuse for stealing, it would open a door through which all kinds of disorder and lawlessness would pass'.<sup>49</sup> Similarly, Edmund Davies LJ said:<sup>50</sup>

But when and how far is the plea of necessity made available to one who is prima facie guilty of tort? Well, one thing emerges with clarity from the decisions, and that is that the law regards with the deepest suspicion any

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<sup>48</sup> *Southwark London Borough Council v Williams* [1971] 1 Ch 734.

<sup>49</sup> *Southwark London Borough Council v Williams* [1971] 1 Ch 734, 744.

<sup>50</sup> *Southwark London Borough Council v Williams* [1971] 1 Ch 734, 745-746.

remedies of self-help, and permits those remedies to be resorted to only in very special circumstances. The reason for such circumspection is clear – necessity can very easily become simply a mask for anarchy. As far as my reading goes, it appears that all the cases where a plea of necessity has succeeded are cases which deal with an urgent situation of imminent peril.

### **(iii) The lack of a clear distinction between necessity and duress**

The following three observations illustrate that there is, at least, a conceptual oddity in recognising a tortious defence of necessity but not a tortious defence of duress.

**First**, as we have already explained, in the earliest cases where the defences were first recognised in criminal law, the judges spoke interchangeably of the defence of necessity and compulsion.

**Secondly**, in criminal law the defence of duress has been developed by reference, in part, to the defence of necessity. In the leading English decision on the criminal defence of duress, *R v Z*, Lord Bingham supported in part the restrictions on the defence of duress by relying on the 'analogous defence of necessity' in *Perka*, in 'urgent situations of clear and imminent peril' in which 'compliance with the law [would be] demonstrably impossible'. In *R v Ruzic*,<sup>51</sup> the Supreme Court of Canada recognised that the defences 'share the same juristic principles'; their differences were sought to be explained by their different contexts. In *Taiapa v The Queen*,<sup>52</sup> the High Court of Australia considered that the common law criminal defence of necessity shares features in common with the defence of duress.

**Thirdly**, it is extremely difficult to maintain a conceptual separation of the defences of duress and necessity. Indeed, the defence of necessity is sometimes expanded to include, or analogise with, cases of duress described as 'duress of circumstances'.<sup>53</sup> And the defence of duress is sometimes described as

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<sup>51</sup> [2001] SCC 24; [2001] 1 SCR 687 [64].

<sup>52</sup> [2009] HCA 53; (2009) 240 CLR 95 [36].

<sup>53</sup> *R v Conway* [1989] QB 290; *R v Martin* [1989] 1 All ER 652; *R v Graham* [1982] 1 WLR 294; *State of Queensland v Nolan* (2002) 1 Qd R 454, 458 [19].

'force of circumstance'<sup>54</sup> and commonly treated as a species of necessity.<sup>55</sup> As Bacon explained in his commentary on *necessitas inducit privilegium quoad jura privata*, '[n]ecessity carrieth a privilege in itself. Necessity is of three sorts—necessity of conservation of life, necessity of obedience, and necessity of the act of God or of a stranger.'<sup>56</sup> As Lord Simon said in his dissenting speech in *Lynch*,<sup>57</sup> 'duress is, thus considered, merely a particular application of the doctrine of "necessity".'

A good illustration of a case which has treated duress and necessity as part of the same principle is the Scottish decision of *Moss v Howdle*,<sup>58</sup> Mr Moss was driving his car when his passenger suddenly cried out in great pain. Believing his passenger to be seriously ill, Mr Moss drove to the nearest service station at more than 100 miles per hour. Mr Moss was charged with speeding. He relied upon a statutory defence of necessity. He was convicted. He appealed to the High Court of Justiciary. The appeal was dismissed although the court considered the defence of necessity in careful detail. The Court's decision was delivered by Lord Justice-General Rodger who, as Lord Rodger, made an extraordinary contribution to English law on the House of Lords and Supreme Court of the United Kingdom. The Court explained that the defence was one of 'necessity or duress'.

In *Moss*, the Court also quoted from a famous passage of the Lord Chief Justice, delivering the decision of five judges of Queen's Bench in *R v Dudley and Stephens*,<sup>59</sup> to whom a question of law had been referred after a special verdict from the jury. The court in that case recognised the defence of necessity, although held that it did not afford the prisoners a defence to their murder of the

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<sup>54</sup> *R v Willer* (1986) 83 Cr App Rep 225.

<sup>55</sup> See *R v Howe* [1987] AC 417, 429; *R v Goldman (No 4)* [2004] VSC 2; *Southwark London Borough Council v Williams* [1971] 1 Ch 734.

<sup>56</sup> F Bacon *Works of Francis Bacon* (1824, vol IV) 34.

<sup>57</sup> *R v Lynch* [1975] AC 653, 692.

<sup>58</sup> *Moss v Howdle* [1997] SLT 782.

<sup>59</sup> *R v Dudley and Stephens* (1884) 14 QBD 273.

cabin boy. In the course of discussing the defence of necessity the Lord Chief Justice said that there was no difference in principle between necessity and duress:<sup>60</sup>

[An] accused may drive dangerously in order to avoid an immediate threat of death from an incipient heart attack, or to avoid an immediate threat of death by drowning in a flood or to avoid an immediate threat of death by drowning due to the deliberate actings of a third party. For the purposes of deciding whether they afford a defence to a charge of dangerous driving, the law should regard all of these threats in the same way.

The treatment of the defences of necessity and duress as part of the same principle is also well established in English law. As Lord Hailsham said in *R v Howe*<sup>61</sup>:

There is, of course, an obvious distinction between duress and necessity as potential defences; duress arises from the wrongful threats or violence of another human being and necessity arises from any other objective dangers threatening the accused. This, however, is, in my view a distinction without a relevant difference, since on this view duress is only that species of the genus of necessity which is caused by wrongful threats. I cannot see that there is any way in which a person of ordinary fortitude can be excused from the one type of pressure on his will rather than the other.

Rupert Cross argued that it would be 'the apotheosis of absurdity' to allow a defence of duress by threats while disallowing it for duress of circumstances where the compulsion on the defendant is exactly the same.<sup>62</sup> A strong argument can be made that the reverse should also apply in the law of torts. That is, it can be argued that there is no principled reason to recognise a defence of necessity in the law of torts but to refuse a defence of duress.

#### **(4) The theoretical basis for recognition of a defence of duress**

##### **(i) The objection that a defence of duress is inconsistent with the goal of the law of torts**

The first objection to the availability of a defence of duress in the law of torts is premised upon a perceived inconsistency between the recognition of

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<sup>60</sup> *R v Dudley and Stephens* (1884) 14 QBD 273.

<sup>61</sup> *R v Howe* [1987] AC 417, 429.

<sup>62</sup> R Cross 'Murder Under Duress' (1978) 28 *University of Toronto Law Journal* 369, 377.

such a defence and what is said to be the fundamental goal of the law of torts. This objection argues that to recognise the defence represents an attempt by the defendant to shift the costs of his or her own problems on to the claimant. As we have seen, this was essentially the objection which led to the rejection of the defence 350 years ago in *Gilbert v Stone*.

This argument is perhaps put most eloquently in Richard Epstein's words, '[t]he only proper question for tort law is whether the plaintiff or the defendant will be required to bear the loss... it is fairer to require the defendant to bear the loss because he had the hard choice of harming or being harmed when, given what is alleged, the plaintiff had no choice at all'.<sup>63</sup> According to Epstein, the defence of compulsion imposed upon the defendant by the acts or threats of a third party should not be recognised because it constitutes an attempt by the defendant to shift the costs of his own problems to the plaintiff.<sup>64</sup> '[o]ne man should not be able to solve his own problems at the expense of physical harm to another because the defendant had the choice of harming or being harmed when the plaintiff had no choice at all'.<sup>65</sup>

The notion that compensation is the fundamental goal of the law of torts also casts doubt upon all of the arguments above concerning extensions and analogies with the criminal law. As J C Smith, explained, in his consideration of the interaction between criminal law defences and civil liability:<sup>66</sup>

The object of the civil law is to provide compensation for some injury which has occurred and to decide on which of two persons the loss should properly fall. The damage has been done, it has been done by the defendant and - we will assume - to a perfectly innocent person; and, as between that person and the defendant, certainly if he has been negligent, the defendant ought to bear the loss. But in the criminal court we are

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<sup>63</sup> Richard A Epstein, 'Defenses and Subsequent Pleas in a System of Strict Liability' (1974) 3(1) *Journal of Legal Studies* 165, 169.

<sup>64</sup> Richard A Epstein, 'Defenses and Subsequent Pleas in a System of Strict Liability' (1974) 3(1) *Journal of Legal Studies* 165, 169.

<sup>65</sup> Richard A Epstein, 'Defenses and Subsequent Pleas in a System of Strict Liability' (1974) 3(1) *Journal of Legal Studies* 165, 169.

<sup>66</sup> J C Smith, *Justification and Excuse in the Criminal Law* (1989, The Hamlyn Lectures Fortieth Series) 10.

concerned not with compensation (except incidentally), but with punishment. The question is not how to allocate the burden of some existing loss but whether a new loss should be inflicted on the defendant - loss of his liberty or loss of his money by the imposition of a fine which goes to the state, not the victim. The question is whether the defendant deserves to be punished.

There are three answers to this objection concerning compensation as the fundamental goal of the law of torts: one partial answer and two complete answers.

The partial answer is that, unlike at the time of *Gilbert v Stone*, the common law now recognises a tort of intimidation. A third party who, with the requisite intention to cause loss to the claimant, induces the defendant by unlawful threats to commit a tort which causes loss to the claimant will be liable to the claimant for the tort of intimidation. The claimant will potentially have a source to recover compensation even if the third party might not have the means to pay. The answer is only partial because the third party might not be a source of complete compensation.

The second answer is that even if compensation were thought to be a fundamental goal and compensation from the defendant were thought to be essential even when the defendant is subjected to extreme duress then duress could still be a defence (as a privilege) but it could be made subject to a liability to pay compensation for any loss caused. In other words, the defendant could lawfully act in the manner in which he or she did as a result of the duress, and could not be enjoined from doing so, but would remain liable to pay compensation.

The third answer is much more controversial. This complete answer is that the basic goal of the law of torts is not to compensate for loss but is instead a concern with a person's rights. This is the basic thesis of Robert Stevens' influential and powerful monograph *Torts and Rights*.<sup>67</sup> Many arguments could

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<sup>67</sup> R Stevens *Torts and Rights* (2007).

be made in favour of the thesis concerning rights over the thesis that the fundamental goal of the law of torts is compensation. If the latter were correct why are many torts actionable without any loss being suffered? Why are injunctions awarded to prevent tortious conduct? Why do gain-based damages, or exemplary damages, exist for torts? Indeed, if the fundamental goal of the law of torts is compensation then the entire system of torts becomes hard to justify if empirical evidence is accepted that compensation might be delivered far more cheaply, and considerably more effectively, by state systems of compensation.

Nevertheless, this complete answer is controversial because of the dogma, insisted upon by many commentators and courts, that, in the famous words of one of Australia's greatest judges, compensation is the 'one principle that is absolutely firm, and which must control all else'.<sup>68</sup>

**(ii) The objection that duress involves unwarranted erosion of the claimant's right**

***(a) The argument: duress as a defence operates to negate intention and this is unjustifiable***

A second objection to the recognition of duress as a defence to a tort focuses upon the nature of the claimant's rights rather than a perceived goal of providing compensation to the victim of an injury. The objection is that the recognition of duress is an unwarranted erosion of the scope of the claimant's right. The argument is that a violation of that right should occur even if voluntary conduct by the defendant involves some mental impairment. The answer to the objection, and the reason why the argument should be rejected, is that duress does not operate as a denial of the voluntariness element of an intentional tort. The basis for the objection is misconceived.

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<sup>68</sup> *Skelton v Collins* [1966] HCA 14; (1966) 115 CLR 94, 128 (Windeyer J).

In criminal law, the defence of duress has sometimes erroneously been said to be based upon the will of the accused having been overborne by the wrongful threats imposed by another to inflict harm on the accused or the accused's family.<sup>69</sup> Hence, Lord Parker in *R v Hudson*<sup>70</sup> spoke of the commission of the alleged offence no longer being the voluntary act of the accused.

The same erroneous assumption concerning the operation of the defence of duress, has led the rationale for the defence to be asserted to be, in the words of Murnaghan J, that '[a]ll the elements producing culpability concur in this conviction except the free exercise of will, and the point is accordingly narrowed down to the consideration whether there was such an absence of will as to absolve from guilt'.<sup>71</sup> Even Blackstone apparently placed the defence of duress on the footing that it negated the voluntariness required by the intention element of the offence. Blackstone said that '[a]s punishments are ... only inflicted for the abuse of ... free will ... it is highly just and equitable that a man should be excused for those acts which are done through unavoidable force and compulsion'.<sup>72</sup> In Australia, duress has also been differentiated from necessity on the basis that duress, unlike necessity, is said to involve a situation in which 'the person's mind is not irresistibly overcome by external pressures'.<sup>73</sup>

The notion that duress operates to negate the voluntariness element of an offence or tort should be rejected both as a matter of principle and as a matter of authority.

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<sup>69</sup> *R v Ortiz* (1986) 83 Cr App R 173; *R v Hurley and Murray* [1967] VR 526; *R v Conway* [1988] 3 All ER 1025; *R v Martin* [1989] 1 All ER 652.

<sup>70</sup> *R v Hudson* (1971) 2 QB 202, 206.

<sup>71</sup> *A-G v Whelan* [1934] IR 518 (Murnaghan J).

<sup>72</sup> Blackstone's Commentaries on the Laws of England volume IV 107-8 cited in Peter Rosenthal, 'Duress in the Criminal Law' (1989) 23 *Criminal Law Quarterly* 199.

<sup>73</sup> *State of Queensland v Nolan* (2002) 1 Qd R 454, 458 [19] (Chesterman J).

***(b) Rejecting the argument as a matter of principle***

As a matter of principle, the argument should be rejected for the following reasons.

In intentional torts the violation of a claimant's right requires voluntary conduct by the defendant. A defendant commits conversion, or false imprisonment, or defamation, or battery if he or she chooses to assert control over the claimant's chattels, chooses to assert control over the claimant's liberty, chooses to make a statement which impairs the claimant's reputation or chooses to assert force, however minimal, over the plaintiff's body. In each case, it is the voluntary choice of the defendant that is an essential ingredient of the tort. This is the reason why the claim failed in *Smith v Stone*.<sup>74</sup> Stone pleaded justification to Smith's claim of trespass. Stone said that he had been carried across the boundary onto Smith's land by the force and violence of others. Smith demurred. Roll J accepted the plea of justification. Stone's conduct was not voluntary. Voluntary choice is now well established as a requirement of trespass.<sup>75</sup> But in contrast with the requirement of voluntary conduct in each case, it does not matter if the defendant's voluntary conduct is a result of some impairment in his or her decision such as a mistake. Mistake is not a defence. It is hard to see why other factors which vitiate intention, such as duress or undue influence, should have the effect that the requirement of voluntary conduct is not satisfied. As Denning LJ explained in *Cassidy v Ministry of Health*<sup>76</sup> the law of torts is not concerned with the quality or extent of a voluntary act:

[w]hen we move to the civil law paradigm of liability, the inadequacies of the choice theory of responsibility [become] obvious. In the civil law paradigm, the interests [rights] of victims are given at least as much weight as those of agents. This is reflected in the fact that the basic measure of civil law remedies is the impact of the proscribed conduct on the victim, not the nature of the agent's conduct or the quality of the agent's will.

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<sup>74</sup> *Smith v Stone* (1658) Sty 65; 82 ER 533.

<sup>75</sup> *Network Rail Infrastructure Ltd v Conarken Ltd* [2010] EWHC 1852 (TCC); *Public Transport Commission (NSW) v Perry* [1977] HCA 32; (1977) 137 CLR 107, 126 (Barwick CJ) 133 (Gibbs J).

<sup>76</sup> *Cassidy v Ministry of Health* [1951] KB 343.

The reason why duress does not 'destroy' or 'overcome' the will was explained by James Fitzjames Stephen:

A criminal walking to execution is under compulsion if any man can be said to be so, but his motions are just as much voluntary actions as if he was going to leave his place of confinement and regain his liberty. He walks to his death because he prefers it to being carried. This is choice, though it is a choice between extreme evils.

The notion of choice is also central to Holmes' conception of liability in the law of torts: 'the philosophical analysis of every wrong begins by determining what the defendant has actually chosen, that is to say, what his voluntary act or conduct has been ... and then goes on to determine what dangers attended ... the conduct under the known circumstances'.<sup>77</sup>

A further reason of principle why duress cannot be understood as negating an intention element of an offence or tort is because if it were then it is hard to see why a recognised situation of duress would not apply to all intentional torts and all crimes where intention is a necessary element of the offence. In contrast, as a privilege, duress applies in the limited circumstances in which the privilege is recognised. It derives its force from the scope of the privilege which is a separate question of principle from the scope of the elements of the offence. So, in *R v Howe*<sup>78</sup> Lord Griffiths held that duress is not a defence to charges of murder 'based on the special sanctity that the law attaches to human life and which denies to a man the right to take an innocent life even at the price of his own or another's life'. Article 8 of the Nuremberg Statute was based on the same idea.

### ***(c) Rejecting the argument as a matter of authority***

As a matter of authority, the view that the effect of duress is to negate the element of voluntariness was rejected by Lord Wilberforce in *R v Lynch*.<sup>79</sup> Lord Wilberforce explained that

whatever the ultimate analysis in jurisprudence may be, the best opinion, as reflected in decisions of judges and in writers, seems to be that duress

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<sup>77</sup> Holmes, *The Common Law* (1881) 161.

<sup>78</sup> [1987] AC 417, 439.

<sup>79</sup> *R v Lynch* [1975] AC 653, 679-680.

per minas is something which is superimposed upon the other ingredients which by themselves would make up: an offence, i.e., upon act and intention ... One may note—and the comparison is satisfactory—that an analogous result is achieved in a civil law context: duress does not destroy the will, for example, to enter into a contract, but prevents the law from accepting what has happened as a contract valid in law

Lord Wilberforce's view is also consistent with the foundation upon which the criminal defence was initially recognised. The focus was upon the boundaries of the wrong once the elements were proved. It was not a focus on the boundaries of voluntariness or intention required for proof of the offence. By the mid-17<sup>th</sup> century Hobbes said that<sup>80</sup>

If a man by the terror of present death, be compelled to do a fact against the law, he is totally excused, because no law can oblige a man to abandon his own preservation. And supposing such a law were obligatory yet a man would reason thus, If I do it not, I die presently; if I do it, I die afterwards; therefore by doing it, there is time of life gained; nature therefore compels him to the fact.

More recently, the suggestion that duress operates to negative the element of intention was rejected by the Supreme Court of Canada.<sup>81</sup>

***(d) A different basis for recognition of a defence of duress: a privilege***

The answer to this second objection is therefore as follows: if duress is to be recognised as a defence in the law of torts, as a matter of principle and authority it should not be based on a notion that it negates the intention required for an intentional tort. It must be based upon some privilege which is external to the elements of the offence. Although duress shares with every privilege the difficulty of principle involved in determining the boundaries of the privilege, Lord Bridge was correct in his speech in *Howe*<sup>82</sup> to reject the conception of the defence of duress as negating voluntariness:

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<sup>80</sup> Thomas Hobbes, *Leviathon: with selected variants from the Latin edition of 1668*, edited by Edwin Curley (Hackett Pub Co 1994).

<sup>81</sup> *R v Ruzic* [2001] SCC 24, [2001] 1 SCR 687.

<sup>82</sup> *R v Howe* [1987] AC 417.

The defence of duress, as a general defence available at common law which is sufficient to negative the criminal liability of a defendant against whom every ingredient of an offence has otherwise been proved, is difficult to rationalise or explain by reference to any coherent principle of jurisprudence. The theory that the party acting under duress is so far deprived of volition as to lack the necessary criminal intent has been clearly shown to be fallacious.

On the other hand, Lord Bridge's suggestion that the defence is otherwise difficult to explain or rationalise by reference to coherent principle need not be accepted. The answer is that the defence of duress operates as a privilege. It does not negate intention but it involves recognition that when certain criteria are satisfied no duty will exist.

This conception of duress as a privilege is also consistent with the approach taken to necessity which, on any view, is at least a closely related defence. In relation to necessity this can be seen from the various decision in *In re F (Mental Patient: Sterilisation)*. In the Court of Appeal, Neill LJ held that the performance of the operation would be lawful because it was in the public interest. In the House of Lords it was held that the operation was lawful because of the defence of necessity. But Lord Griffiths suggested that there was no difference between these two formulations:

Whether one arrives at this conclusion by applying a principle of 'necessity' as do Lord Goff of Chieveley and Lord Brandon of Oakbrook or by saying that it is in the public interest as did Neill L.J. in the Court of Appeal, appear to me to be inextricably interrelated conceptual justifications for the humane development of the common law. Why is it necessary that the mentally incompetent should be given treatment to which they lack the capacity to consent? The answer must surely be because it is in the public interest that it should be so.

### **Labelling of duress: a 'defence', an 'excuse', a 'justification' or a 'privilege'?**

In criminal law, it is unclear how the defence of duress should properly be labelled. In *Lynch*, Lord Simon observed that a 'principal difficulty in this branch of the law is the chaotic terminology, whether in judgments, academic

writings or statutes.<sup>83</sup> This uncertainty would undoubtedly flow into the law of torts if duress were recognised as a tortious defence.

The uncertainties can be illustrated by Lord Bingham's remarks in *R v Z* that where the defence of duress is made out it does not ordinarily operate to negate any legal ingredient of the crime which the defendant has committed nor to justify the accused's conduct.<sup>84</sup> Rather, duress is properly regarded as a defence which, if raised and not disproved, excuses what would otherwise be criminal conduct.<sup>85</sup> Several issues flow from this.

**First**, in what sense is duress a 'defence' if the onus of negating the 'defence' lies on the claimant? In particular, as James Goudkamp has observed, it is well recognised that the onus of proof is on a defendant to establish the facts which enliven a defence.<sup>86</sup>

There are two answers to this apparent conundrum. The first, in criminal law, lies in the difference between what is sometimes described as an 'evidentiary onus' and a 'substantive onus'. An evidentiary onus requires a defendant to show that, on the evidence in the case, there is an issue as to the matter in question fit for consideration by the tribunal of fact.<sup>87</sup> Once this is done, the substantive onus is sometimes placed upon the claimant to disprove the defence. In this sense, duress can understandably be described as a defence, in precisely the terms in which Goudkamp, with some precision, identifies a 'defence'. It is a 'liability defeating rule that is external to the elements of the claimant's cause of action'.<sup>88</sup> Of course, the concept of a 'defence' was never limited to this sense of 'confession and avoidance'. A defence has always included a plea by way of denial which, in most pleadings today, involves denial

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<sup>83</sup> *Director of Public Prosecutions for Northern Ireland v Lynch* [1975] AC 653, 688.

<sup>84</sup> *R v Z* [2005] 2 AC 467, 489.

<sup>85</sup> *R v Z* [2005] 2 AC 467, 489 (Lord Bingham); *Director of Public Prosecutions for Northern Ireland v Lynch* [1975] AC 653, 671, 680, 710 – 711.

<sup>86</sup> J Goudkamp *Tort Law Defences* (2013) 12, text accompanying fn 66.

<sup>87</sup> *Sheldrake v. Director of Public Prosecutions* [2004] UKHL 43; [2005] 1 AC 264 [1] (Lord Bingham).

<sup>88</sup> J Goudkamp *Tort Law Defences* (2013) 2.

of some or all factual elements necessary for proof of a claim. Goudkamp would prefer to use the word 'denial' to describe this manner of responding to a claim in a defence plea.

The second answer is that a defence of duress in the civil law of torts need not involve the same onus as the defence in the criminal law. For instance, the defence of self-defence in criminal law imposes an onus upon the prosecution but the onus in civil law lies upon the defendant.<sup>89</sup>

**Second**, is it accurate to describe duress as an 'excuse' rather than as a 'justification'? There are three difficulties with answering this question.

One difficulty with attempting to answer this question is that as a matter of authority, cases use the terms in different senses. As we explained above, in *R v Z* the language of excuse was also used by Lord Bingham to describe the defence of duress. But on other occasions duress is described as a justification. For instance, Stephen considered that '[i]t is just possible to imagine cases in which the expediency of breaking the law is so overwhelmingly great that people may be justified in breaking it'.<sup>90</sup> In the closely analogous cases of the necessity defence, the language of justification has also commonly been employed. In *re L*,<sup>91</sup> Lord Goff held that the detention and treatment of a mentally disabled patient who posed a danger to himself was not a false imprisonment because it was justified by necessity. Lord Goff said that 'insofar as they might otherwise have constituted an invasion of his civil rights, [the actions] were justified on the basis of the common law doctrine of necessity'.

It may be that the confusion in authority can be resolved by the approach taken in *Perka v The Queen*,<sup>92</sup> by Dickson J who provided definitions of excuse and justification. There remains considerable controversy about the definition

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<sup>89</sup> *Ashley v Chief Constable of Sussex* [2008] UKHL 25; [2008] 1 AC 962.

<sup>90</sup> J F Stephen, *A History of the Criminal Law in England* (London: Macmillan, 1883), Vol 2, 109.

<sup>91</sup> [1998] UKHL 24; [1999] AC 458. Compare the case in the European Court of Human Rights: *HL v UK* (2005) 40 EHRR 32.

<sup>92</sup> [1982] 2 SCR 232, 246-247

but his Honour's approach probably represents the dominant usage in criminal law:

Criminal theory recognizes a distinction between 'justifications' and 'excuses'. A 'justification' challenges the wrongfulness of an action which technically constitutes a crime. The police officer who shoots the hostage-taker, the innocent object of an assault who uses force to defend himself against his assailant, the Good Samaritan who commandeers a car and breaks the speed laws to rush an accident victim to the hospital, these are all actors whose actions we consider rightful, not wrongful. For such actions people are often praised, as motivated by some great or noble object. The concept of punishment often seems incompatible with the social approval bestowed on the doer. In contrast, an 'excuse' concedes the wrongfulness of the action but asserts that the circumstances under which it was done are such that it ought not to be attributed to the actor. The perpetrator who is incapable, owing to a disease of the mind, of appreciating the nature and consequences of his acts, the person who labours under a mistake of fact, the drunkard, the sleepwalker ...

In that case, Dickson J (with whom Ritchie, Chouinard and Lamer concurred) concluded that the defence of necessity was an excuse, not a justification. Necessity was said to involve a utilitarian choice of one evil ahead of the greater evil that would result in complying with the law. In the words of Blackstone it involves a 'choice of two evils'. Dickson J explained that the reason why the defence did not involve a justification is because to do so would invite a court, contrary to the judicial function, to second-guess the legislature and to assess the relative merits of social policies underlying criminal prohibitions. On the other hand, with an excuse praise is not bestowed, only pardon.

However, if Dickson J's definition is adopted it is strongly arguable that by defining necessity as an excuse on that definition still involves trespassing beyond the limits of judicial power. In the context of a criminal law sentencing regime which generally permits a wide range of possible sentences, from spent convictions with no punishment to lengthy terms of imprisonment, how is it legitimate for a judge, without statutory authority, to confer a 'judicial pardon'

and conclude that although the offence has been committed the offender is not liable to be sentenced and will be deemed to be not guilty.

A further difficulty with the approach of Dickson J is how it is possible to differentiate between justification and excuse on the basis of justified actions being those which the judge considers to be 'rightful' or subject to 'social approval'. In jurisdictions in which the relevant offence is a common law offence, there is an incongruity between, on the one hand, saying that the conduct amounts to an offence but, on the other hand, concluding that the offender is not guilty because the conduct would be approved socially? This difficulty is even greater in circumstances in which the offence is statutory. Further, how is 'social approval' to be assessed? One suggestion made by Goudkamp directs focus to the concept of 'reasonableness'.<sup>93</sup> But, as the High Court of Australia explained in *Taiapa v The Queen*,<sup>94</sup> quoting from Gleeson CJ,<sup>95</sup> '[r]easonableness is not designed to allow people to choose for themselves whether to obey the law'.

Finally, even if a consistent and coherent scheme for definition of excuse and justification could be established, it is likely that, as Goudkamp recognises, these concepts would not exhaust all defences in the law of torts.

In the case of duress, there is a coherent alternative approach, independent of the terminology of excuse and justification, which is to understand the defence by reference to the jural relations recognised almost a century ago by Wesley Hohfeld. In Hohfeld's well accepted and understood terminology we could comprehend duress as a privilege or liberty. The defence of duress would involve releasing a defendant from a duty which would otherwise exist by reference to the same considerations of principle employed by the common law in determining the scope or extent of any duty.

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<sup>93</sup> J Goudkamp *Tort Law Defences* (2013).

<sup>94</sup> *Taiapa v The Queen* [2009] HCA 53; (2009) 240 CLR 95 [37].

<sup>95</sup> *Rogers* (1996) 86 A Crim R 542 at 547.

The recognition of a privilege means that the conduct of the accused or defendant was not criminal or tortious. The privilege is still a defence in the coherent sense in which Goudkamp defines a defence: it is external to the elements of the duty even if (as in the criminal law) the onus is upon the defendant to show that there is evidence to support the raising of the defence before the substantive onus is imposed.

We consider that if the defence of duress were to be recognised as a tortious defence then it ought to be regarded as a privilege; the language of justification and excuse, even if it is to be preserved in the criminal law, should be eschewed in the law of torts.

### **Conclusion**

In *In re L*,<sup>96</sup> Lord Goff observed that it 'is perhaps surprising ... that the significant role [that the defence of necessity] has to play in the law of torts has come to be recognised at so late a stage in the development of our law'. This applies a fortiori to duress in the law of torts.

The purpose of this paper has been to challenge the nearly unanimous approach in commentary over nearly four centuries which has denied the existence of duress as a defence to a tort. There were four strands to our argument: (1) the limited and questionable authority upon which the denial is based; (2) analogy with the criminal law; (3) analogy and overlap with the recognised defence of necessity; and (4) a coherent theoretical foundation. Although we have sketched a possible theoretical foundation for the defence of duress, if it were to be recognised there would remain significant questions. Two large questions are as follows: (i) should the conditions of the privilege be the same as the defence of duress in criminal law? (ii) should the defence of duress be a privilege which is qualified upon payment of compensation by the

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<sup>96</sup> [1998] UKHL 24; [1999] AC 458. Compare the case when it reached the European Court of Human Rights: *HL v UK* (2005) 40 EHRR 32.

defendant to the party against whom the tort is committed? If so, in what circumstances? This paper has focused only on the larger question of recognition. The first step which would need to be taken would be to assess whether the arguments in favour of recognising the defence are sufficient for judges to change the direction of the course of the limited law and near unanimous commentary in this area over the last four centuries.