

## Support Materials

### Criminal Law Special Study (G144)

These materials should be read alongside the approved specimen question paper and mark schemes and specification.

Question:

- 1) Discuss the extent to which the precedent in *Re A (Conjoined Twins)* (Source 10 page 6 and Source 11 page 7 Special Study Materials) represents a development of the law on necessity.

[12]

Example Grade A Answer:

Re A (Conjoined Twins) is an interesting case because it conflicts with what the law was previously thought to be. Doctors wanted to separate conjoined twins but this would result in the death of one twin. If the operation was not carried out both twins would die but with it one could be saved. The doctors were trying to use the defence of necessity but in *Dudley & Stephens* where shipwrecked sailors killed and ate a cabin boy when they had no food the court held that necessity could not be a defence to murder.

In Re A the Court of Appeal authorised the separation and held that there were circumstances where necessity could be used as a defence to murder when the killing was in order to avoid a worse evil, in this case the certain death of the twin that could be saved. The court said that the defence could only be used if some strict requirements were met and these are identified by Brooke LJ in lines 19 to 22 of source 11. However, the court stressed that the defence could only be used very rarely and should not be taken as a precedent and would have to 'develop on a case by case basis' (line 9 source 11).

## Examiner's commentary

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This is a very good answer. While there are no marks for AO1 the candidate has introduced sufficient facts to show why the Court of Appeal considered the applicability of a defence that had not previously been accepted and showed why linking to the case of Dudley & Stephens and implicitly this shows development.

The candidate shows a clear understanding of the nature of the defence and makes three very good evaluative points:

- on the justification being avoiding a worse evil;
- on the requirements for the defence to apply; and
- the point on the case not acting as a precedent.

For the second and third of these the candidate has displayed good skill in using source based exams by making economical references to precise lines in the source.

## Example Grade E Answer:

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Re A was about the separation of conjoined twins. J was capable of independent existence, but an operation to separate them would inevitably have resulted in the death of M who was only alive because a common artery circulated blood for both of them. If the operation wasn't carried out both twins would die. The judges allowed the separation because it was in J's best interests even though it was not in M's best interests because it would bring her life to an end. A balance had to be struck. The law had to allow an escape through the choosing the lesser of two evils. The conclusion had to be that carrying out the operation was the lesser evil and no unlawful act would be committed. The case is a development because of necessity (source 11).

## Examiner's commentary

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This candidate has tried to make use of the sources, albeit in a fairly unsophisticated way. Most of the answer is extracts from Source 10 repeated almost verbatim. The reference to source 11 at the end is too generalised to gain credit. In fairness the candidate has been selective rather than taking whole passages but even then these references should have been properly cited using inverted commas.

The candidate does gain some credit because of this selectivity. The references to 'best interests', striking a 'balance', and to 'choosing the lesser of two evils' are all relevant points to come out of the case, as is the recognition of the use of the defence of necessity.

The candidate gains limited marks for recognition of these issues but could have secured much higher marks by explaining and developing the points.

Question:

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- 2) Lord Hailsham in *Howe* explains the defence of duress by saying that “*in such circumstances a reasonable man of average courage is entitled to embrace as a matter of choice the alternative which a reasonable man could regard as the lesser of two evils.*” [Source 2 page 2 lines 7-9 Special Study Materials].

Consider the extent to which the development of the restrictions on the use of duress really allow ‘a reasonable man of average courage’ to exercise such a choice.

[30]

Example Grade A Answer:

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Many defences in criminal law apply because the defendant either lacks the necessary mens rea or has not voluntarily committed the guilty act. Duress is different to these because the defendant has both the mens rea and the actus reus of the crime but the courts are prepared to accept that there is a justification for his actions. The defence works because the defendant has been threatened with either death or injury either to himself or to his family unless he carries out the crime. The law considers that in these circumstances the defendant doesn't really have any choice but carry out the crime because as Lord Hailsham says in source 2 lines 6-8 a reasonable man is entitled to choose ‘the lesser of two evils’. However, the courts have been very restrictive in when they will allow the defence and the defence is not available for all crimes. This is seen straightaway in source 3 where the House of Lords overruled *Lynch* and held that duress is not available on a charge of murder or attempted murder. So this limits the extent to which a reasonable man of average courage is able to exercise a choice.

This was later confirmed in *Gotts* and is seen in source 4 lines 10-12 and lines 15-19. The judges will not allow the defence in these crimes because they are preserving the sanctity of human life. The fact that duress is not available to attempted murder seems unfair because it is available to a charge of grievous bodily harm under s18 OAPA and it would be possible for the victim to be harmed more under that offence. For instance the defendant could have shot at the victim and missed and the defence wouldn't be available but he could beat the victim to within an inch of his life and the defence could be available. This seems unfair that the availability of the defence depends on what charge the prosecution brings against him.

Duress can only succeed if the two part test in *Graham* is satisfied. Firstly the defendant is impelled to act because of a threat of death or serious injury to himself or his family. Secondly that a sober firmness would have done exactly what the defendant did in the circumstances. This can be seen in source 1 lines 4-19.

The judges have also placed a number of other limitations on the defence which make it more difficult to use successfully. For instance the defence won't be available if the threat is not one of death or serious injury. In *Valderrama-Vega* the court said that a threat to reveal the defendant's homosexuality wasn't sufficient for the defence to apply unless there were also death threats. This seems unfair because the person might suffer as a result and still feel that he had no choice but to do what he was told to do. They might see the threat as just as serious as a threat of injury and that carrying out the crime was the lesser of two evils.

Another limitation is where the defendant has voluntarily associated with people that he knows to be violent who then make the threats to him. This was seen in *Shepherd* where the defendant was forced by threats to rob shops because of threats of violence made to him but failed in his defence. The reasoning is given by Lord Lane in *Sharp* in lines 5-8 of source 6. *Sharp* is different because he didn't know that the gang were violent. The reason for the difference is explained in lines 18-23 of source 6. *Hasan* is a more recent case where the same point was made. This seems fair because a reasonable man wouldn't join a gang of violent criminals.

Another limitation is that the defence can't be used if the defendant had a safe means of escape. This was seen in *Hudson & Taylor* where two girls could have reported the threats to the police but didn't. Again this might seem to be unfair. As it says in lines 12-18 of source 5 we might expect the girls to act in this way. *Abdul-Hussain* is slightly different. This involved hijackers who were escaping from Iraq. The court held that the threat does not have to be immediate but it does have to be imminent. The defence can also only be used if the defendant carries out a crime that he is told to by the person threatening him. As in *Cole* lines 6-11 of source 5.

There are many criticisms of the defence. It is supposed to be a concession to human frailty but the fact that it isn't available to certain crimes means that we are expecting the defendant to be a hero but not many people are heroes. In any case the defendant might be prepared to be a hero if it is him that is threatened but if for example it was his children that were being threatened then there are not many people who would put their children at risk and they are likely to act in the same way as the defendant in that case and would consider it to be the lesser of two evils to carry out the crime. The Law Commission has also reported on the defence and said that it should be reformed and made available to all crimes.

### Examiner's commentary

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The candidate has produced a very good answer which has both breadth and some depth as well as some good critical comment. The candidate has also shown good exam technique for a source based exam paper and made extensive and effective use of the sources.

The candidate has shown a clear understanding of the nature of the defence in the opening paragraph and has interestingly contrasted it with incapacitating defences to explain that, while the defendant has appropriate actus reus and mens rea there is an excuse for committing the defence based on the threats that he has been subjected to.

For AO1 the candidate knows what is in the sources and has made use of all the cases provided with explanations for most of the points. The candidate has also explained crimes for which the defence is unavailable and situations where the defence cannot apply and expressed these as limitations.

While the candidate could have commented more extensively, there is also some good comment and the candidate has tried to comment at each point in the essay and reach conclusions at the end.



## RECOGNISING ACHIEVEMENT

The way in which the candidate has used the sources, citing relevant lines of specific sources accurately, is also a very economical and effective way of answering.



RECOGNISING ACHIEVEMENT

### Example Grade E Answer:

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Howe was part of a gang who tortured and strangled two men. Howe claimed that he only took part in the killings because he was threatened by other members of the gang that they would kill him if he didn't. The House of Lords overruled DPP v Lynch and said that duress was not available for murder or attempted murder. In Howe Lord Hailsham said that some degree of proportionality between the threat and the offence must be a prerequisite of the defence. He said that the concession to human frailty is no more than to say that in such circumstances a reasonable man of average courage is entitled to choose the alternative which is the lesser of two evils.

In Gotts the defendant was a boy of 16 who stabbed his mother because his father threatened him with violence unless he did kill his mother. The court followed Howe and said that duress was not available as a defence to attempted murder either. Lord Jauncey said that it would have been better if the development of the defence of duress had not taken place and that duress had been regarded as a factor to be taken into account in mitigation.

There are other restrictions on the defence of duress. In Valderrama-Vega the defendant imported drugs and said that he had only done so because he was threatened by a gang involved in drug smuggling that if he didn't do so they would reveal that he was a homosexual. The court said that only a threat of violence was enough to use duress as a defence. In Graham on the other hand the defendant, who was also a homosexual was threatened with violence when he killed his wife. In Hudson and Taylor two young girls perjured themselves in court and said that they only did it because a man called Farrell had threatened that he would cut them up and he was in the court. They could have reported the threat to the police and had protection so they couldn't use duress. In Shepherd the defendant couldn't use duress because he had volunteered to join the gang who threatened him whereas in Sharp the defendant didn't know that the gang was violent so he could use the defence and the court distinguished the two cases. The reasons for this are given in source 6.

Duress is unfair because it doesn't apply to all crimes and there are so many restrictions on using it.

## Examiner's commentary

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The candidate has some understanding of the defence of duress of threats but the answer is fairly narrative in style, concentrating mainly on the facts of cases and would have benefited from more explanation and development. There is also little critical comment which is typical of a grade E answer, and which obviously limits marks for AO2.

The candidate does identify a number of cases and makes valid points from them for reasonable AO1 marks. However, this could have been improved with the inclusion of the Graham criteria and more explanation of the basis of using the defence.

There is very little in the way of AO2 and critical comment is generally confined to the final rather brief paragraph. Besides this the candidate does gain some credit for recognising the case law used as imposing limitations on the defence.

The candidate has extracted some information from source 2 in the first paragraph and source 3 in the second paragraph but has more or less copied and not used inverted commas as would be appropriate. The candidate also gets no credit for the reference to source 6 because there is no reference to specific lines.



Question:

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- 3) Mara, Ian and Claire are all students of Christine's in the law school where Christine works as a lecturer.

Consider whether or not Christine would have a defence of duress available in each of the following situations.

- a) Mara, who has failed EU law, comes to Christine's room with a gun and threatens to kill Christine unless Christine goes directly to the EU lecturer's room and kills her with the knife that Mara gives him. Christine goes to the room enters and attempts to kill the lecturer but she quickly holds a large book up in front of her preventing the knife from touching her. [10]
- b) Ian comes to Christine's room and threatens that unless Christine immediately steals volumes of law reports for Ian from the research library that he will reveal to the Dean of School that Christine is having an affair with one of the third year students. Christine steals the law reports for Ian. [10]
- c) Claire, who has failed all her first year modules, phones Christine from Spain during the vacation after hearing her results and threatens Christine that unless Christine burns down the law school she will kill him when she returns from Spain. Christine does set fire to the law school. [10]  
[30]

Example Grade A Answer:

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(a)

Christine has been threatened with death by Mara unless he kills the EU lecturer

A reasonable person in Christine's position would do the same as Christine

However, after Howe duress is not available as a defence to a charge of murder or attempted murder so the defence would fail

(b)

This is like Valderrama-Vega

The threat is not one of violence to Christine or Christine's family

A reasonable person would not act in the same way as Christine

Therefore his defence will fail

(c)

Christine has been threatened with death by Claire unless he burns down the law school

The threat would have the same effect on a reasonable person as it had on Christine

However the situation is like Hudson v Taylor Christine had plenty of time to report Claire and seek protection because Claire phones Christine from Spain

Therefore Christine will not be able to use the defence of duress

## Examiner's commentary

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The candidate has used a note style to answer and this is perfectly acceptable for question 3. The important thing is that the candidate correctly applies the principles of law.

The candidate secures sufficient marks for grade A because appropriate principles are applied to all three scenarios and because most marks for question 3 are given for AO2. In each answer for instance there is a reasoned explanation of why the defence would fail.

The candidate has applied the Graham test and might have identified Graham in all three situations. The candidate could have used Gotts for part (a) although the point was made on attempted murder in obiter in Howe. The candidate might have given more detailed explanation for (b). For (c) the candidate could have also referred to Abdul Hussain. In general though the candidate has applied the law effectively with some appropriate citation.

### Example Grade E Answer:

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- (a)  
Christine can't use duress here because the defence isn't available for a charge of attempted murder or murder.
- (b)  
This is like Valderrama-Vega where the threat was that people would be told that the defendant was a homosexual unless he committed the crime. This wasn't a threat of violence so he couldn't use the defence and neither could Christine.
- (c)  
This is like the case with the two girls. Christine can't use the defence because he has time to get away.

### Examiner's commentary

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The candidate's answers are a bit simplistic and lacking in depth or detail although they also show some understanding.

For (a) the candidate has not applied the Graham test or used appropriate case law but has the basic understanding that the defence is unavailable for the particular offence.

For (b) the candidate again has not applied the Graham test but spots the possible link with Valderrama-Vega although the application is quite limited.

For (c) again the candidate has not applied the Graham test and has not referred to either the imminence or immediacy of the threat. However the candidate has made an oblique reference to Hudson & Taylor and shows understanding of the basic point.

The reasoning is also correct as far as it goes in part (c). However, the conclusion is wrong because of the lack of a recognised psychiatric injury. The candidate has omitted to mention the injury in all three and clearly could have got much higher marks for doing so.

The candidate could have secured much higher marks even just by developing all of the points made.