In *London Borough of Southwark* v *Williams* ([1971] 2 All ER 175) Lord Denning went further, remarking on the danger of recognizing a general defence of necessity (at 179):

> Necessity would open a door which no man could shut ... the plea would be an excuse for all sorts of wrongdoings. So the courts must, for the sake of law and order, take a firm stand.

Statutes may expressly provide for a defence of necessity. Section 77 of the Road Traffic Ordinance (cap. 374), for example, provides that various emergency vehicles (including fire, ambulance and police vehicles) in emergencies, may exceed speed limits 'if compliance with those provisions would be likely to hinder the use of the vehicles on that occasion for that purpose'.[15] Similarly, regulation 60 of the Road Traffic (Traffic Control) Regulations provides that various traffic signs and road markings shall not apply in a variety of circumstances, including, for example, 'the avoidance or prevention of an accident or obtaining or giving help required as a result of an accident or emergency' (Regulation 60(d) of the Road Traffic (Traffic Control) Regulations).

### *'Duress of circumstances'*

The reluctance of the courts to develop a general defence of necessity at common law lies partly in the perception that whereas duress operates as an 'excuse', individual to a particular case, leaving intact the essential criminality of D's conduct, necessity operates as a 'justification' for and thus condones D's conduct (as with self-defence, a particular instance of necessity). While it may be acceptable to promote this notion of 'necessity' in the case of a doctor who operates in an emergency without consent (which, were it not for necessity, would amount to a criminal battery), the courts have been understandably reluctant to say that persons such as Dudley and Stephens were 'justified' in killing an innocent victim, in the same way that they have been unwilling to say that a starving man is 'justified' by his circumstances in 'stealing' food.

As already mentioned, in recent years, the courts in a number of common law jurisdictions have found several methods of overcoming this 'justification' hurdle.

[15] Section 77 does not exempt such vehicles from civil liability; see section 77(3) of the Road Traffic Ordinance.



#### Necessity and 'moral involuntariness'

In Canada, for example, the Supreme Court in *Perka* ((1984) 13 DLR (4th) 1) repackaged 'necessity' as an 'excuse', rather than as a justification, in order to give recognition to a general defence of necessity. Dickson J, for example, stated (at 14):

> Conceptualised as an "excuse", however, the residual defence of necessity is, in my view, much less open to criticism. It rests on a realistic assessment of human weakness, recognising that a liberal and humane criminal law cannot hold people to the strict obedience of laws in emergency situations when normal human instincts, whether of self-preservation or of altruism, overwhelmingly impel disobedience. The objectivity of the criminal law is preserved; such acts are still wrongful, but in the circumstances they are excusable.

Necessity, according to this approach, makes a defendant's act 'morally involuntary', but it is subject to a number of restrictions, including (at 22):

> (8) The existence of a reasonable legal alternative [disentitles the actor to the excuse of necessity]; to be involuntary the act must be inevitable, unavoidable and afford no reasonable opportunity for an alternative course of action that does not involve a breach of the law;
> (9) The defence only applies in circumstances of imminent risk where the action was taken to avoid a direct and immediate peril.

The defendants in *Perka* alleged they had been 'forced' to unload a cargo of marijuana, destined for Alaska, in Canada, contrary to prohibitions on the import of dangerous drugs, when their ship ran aground in deteriorating weather. It was alleged that the captain of the ship ordered the men to offload the cargo to prevent the ship from capsizing and putting their lives at risk. At trial, they successfully argued necessity and were acquitted, but the Supreme Court of Canada on appeal ordered a retrial, holding that the defence of necessity, while available, had not been correctly left to the jury, particularly because of the judge's failure to refer to restrictions such as those outlined above.

#### The English response

The English courts have taken a different approach, avoiding the recognition of necessity as such and developing instead a defence of threatening

circumstances analogous to duress, called 'duress of circumstances' to distinguish it from 'duress' (or 'duress by threats' as duress is now commonly known). It differs from 'duress by threats' in that D is not threatened to 'commit offence X or else'; rather D acts as he or she did (amounting to an offence) because there seemed to D to be no other way of avoiding or escaping from a threat of serious harm created by the situation or circumstances surrounding D, possibly including the threatening behaviour of others. This requires the factors causing D to commit an offence to be extraneous to D; it is insufficient if D's compulsion to act in a manner involving the commission of an offence is merely the result of D's own subjective thought processes and emotions (*Rodger and Rose* [1998] 1 Cr App 143).

'Duress of circumstances', like duress by threats, is treated as an 'excuse', thereby avoiding the 'justification' problems associated with 'necessity'.

This development occurred in England in the 1980s initially in a series of traffic cases, including *Willer*, *Denton* and *Conway*, concerning reckless driving (the defence has been applied subsequently to dangerous driving which replaced reckless driving: *Backshall* [1999] Crim LR 662), *Martin*, concerning driving while disqualified, and *Bell*, a case of driving with an excessive breath alcohol level. In the first three cases, the defendant argued that he had driven in the manner alleged to be reckless to escape from a situation of danger to himself or to passengers in his vehicle. From these beginnings, the defence expanded to the point where it now seems to be recognized as a general defence, grounded on the same principles as those previously developed for duress by threats (*Pommell* [1995] 2 Cr App R 607, discussed below).

In *Willer* ((1986) 83 Cr App R 225), W drove his vehicle along a pavement and then through a shopping mall, allegedly to escape threats of violence made to him. The Recorder rejected W's attempt to raise necessity, whereupon W pleaded guilty. W's conviction was quashed by the English Court of Appeal. Watkins LJ explained (at 227) that even if W could not raise 'necessity', which was left undecided, W was nonetheless entitled to raise a defence of 'duress':

> What we deem to have been appropriate in these circumstances to raise as a defence by the appellant was duress. The appellant in effect said: "I could do no other in the face of this hostility than to take the right turn as I did, to mount the pavement and to drive through the gap out of further harm's way, harm to person and harm to property." Thus [the defence] of duress, it seems to us, arose but was not pursued. What ought to have happened therefore was that the assistant recorder upon those facts should have directed that he would



> leave to the jury the question as to whether or not upon the outward or the return journey, or both, the appellant was wholly driven *by force of circumstance* into doing what he did and did not drive the car otherwise than under that form of compulsion, i.e. under duress [emphasis added].

In *Denton* ((1987) 85 Cr App R 246), the Court of Appeal declined a further invitation to recognize a defence of necessity, on the basis that D's defence was that he had driven carefully and not recklessly to avoid danger; this, the Court concluded (at 248), 'exclude[d] any possible defence of necessity, even assuming there is such a defence. The necessity, if any, was to drive, not to drive recklessly'.

In *Conway* ([1988] 3 WLR 1238), C argued that he drove in what was alleged to be a 'reckless' manner to help his passenger escape from what C believed to be a situation of danger. In fact, there was no 'danger', since the persons supposedly 'threatening' C's passenger were police officers, but C said he had not realized this and panicked. On appeal, C argued that a defence of necessity should have been left to the jury. The Court of Appeal concluded that C was entitled to raise not 'necessity' but a 'defence of duress of circumstances', explained by Woolf LJ (at 1244) as follows:

> ... It appears that it is still not clear whether there is a general defence of necessity or, if there is, what are the circumstances in which it is available. We conclude that necessity can only be a defence to a charge of reckless driving where the facts establish "duress of circumstances", as in *Willer*, i.e. where the defendant was constrained by circumstances to drive as he did to avoid death or serious bodily harm to himself or some other person. As the learned editors point out in Smith & Hogan, *Criminal Law* (6th edition 1988, page 225), to admit a defence of "duress of circumstances" is a logical consequence of the existence of the defence of duress as that term is ordinarily understood, i.e. "do this or else". This approach does no more than recognise that duress is an example of necessity. Whether "duress of circumstances" is called "duress" or "necessity" does not matter. What is important is that, whatever it is called, it is subject to the same limitations as the "do this or else" species of duress.

'Duress of circumstances' was then raised, and judicially confirmed, in *Martin* ([1989] 1 All ER 652), involving driving while disqualified. M asserted that he drove his stepson to work despite having been disqualified, allegedly to prevent his suicidal wife from carrying out a suicide threat. The Court of Appeal concluded that duress by circumstances, a form of

necessity, ought to have been left to the jury, even though, in the words of Simon Brown J (at 654), it was 'difficult to believe that any jury would have swallowed the improbable story which this appellant desired to advance'. Simon Brown J also attempted to summarize the effect of the recent case law (at 653–4):

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

The third proposition is based on *Graham*'s test for duress by threats, modified by a reference to 'the situation' instead of 'what was said or done by the alleged duressor'.

In *Bell* ([1992] RTR 335), where B was charged with driving with an excessive breath alcohol level, B alleged that he drove in an intoxicated condition to escape what he believed were threats of serious injury directed at himself and others in the car-park of a bar as they were leaving. On appeal, the Divisional Court quashed his conviction, holding that B was entitled to raise duress of circumstances, even though when he left the bar, before the alleged threats were made, he may have intended to drive the vehicle in that same intoxicated condition. Mann LJ concluded that there was evidence that B drove in his intoxicated state in terror to escape from what he believed to be threats of serious personal injury; it was for the prosecution to disprove this by showing that B had driven further than was necessary to escape the threats, i.e. that B was no longer driving 'under



duress', and 'this it had failed to do, especially in light of the fact B did not drive all the way home'.

This defence was judicially extended beyond driving cases by the English Court of Appeal in 1995 in *Pommell* ([1995] 2 Cr App R 607; see also *Baker and Wilkins* [1997] Crim LR 497). In this case, the court agreed with the view of Professor JC Smith in his commentary on *Bell* (see [1992] Crim LR 176) that the defence, like duress by threats, should apply to all offences except murder, attempted murder and some forms of treason. Pommell was charged with the illegal possession of a weapon (a submachine gun) and ammunition after police searched his home one morning and found him lying in bed with the loaded submachine gun. P gave evidence that the previous night he had persuaded an acquaintance who was intent on using the gun in a revenge attack to hand it over to P who 'intended to arrange for the gun to be handed in to the police that morning'. P said he had initially unloaded the gun, but then reloaded it and put it in his bed to hide it from his girlfriend. P pleaded guilty after the trial judge ruled that even if P was originally driven by 'necessity' to take possession of the gun, his failure to go immediately to the police deprived him of any defence at law; applying *Martin*, he ruled there was no threat of 'immediate harm' as required by the second of Simon Brown J's proposition. The Court of Appeal concluded that P was entitled to have his defence considered by a jury both as regards his initial possession of the gun and ammunition and also as to whether his failure to report immediately to the police thereby deprived him of the defence. Kennedy LJ for the court noted the longstanding reluctance of the courts about recognizing a general defence of necessity, but observed (at 614) that this aversion to second-guessing the relative merits of social policies underlying criminal prohibitions:

> ... does not really deal with the situation where someone commendably infringes a regulation in order to prevent another person from committing what everyone would accept as being a greater evil with a gun. In that situation it cannot be satisfactory to leave it to the prosecuting authority not to prosecute, or to individual courts to grant an absolute discharge. The authority may ... prosecute because it is not satisfied [that D] is telling the truth, and then, even if [D] is vindicated and given an absolute discharge, [D] is left with a criminal conviction which, for some purposes, would be recognised as such.

Dealing with the trial judge's ruling on delay, Kennedy LJ concluded that the test laid down in *Martin* was not necessarily appropriate in a case such as this. Instead, following Smith and Hogan (*Criminal Law*, eighth edition, p. 244,

in relation to duress by threats (now ninth edition, p. 242)), he said that it was appropriate to ask whether P had 'desist[ed] from committing the crime *as soon as he reasonably [could]*'. Since the evidence was equivocal on this point, it was something, he concluded, that ought to have been left to the jury. Accordingly, the Court quashed P's convictions and ordered a retrial.

There must be a close nexus, or link, between the threatened harm and the otherwise criminal course of action (*Cole* [1994] Crim LR 582). Unlike duress by threats, where the link is found in the threat itself ('commit offence X or else'), there must be a sufficient degree of directness and immediacy between the harm and the offence before duress of circumstances may properly arise. In *Cole*, C alleged that he committed two robberies in an attempt to repay moneylenders who, he said, had threatened and beaten him, and also threatened his girlfriend and child, in relation to his debt. The Court of Appeal affirmed C's convictions, holding that duress by threats did not arise (the moneylenders had not ordered C 'to commit robbery' to repay his debt), and 'duress of circumstances' failed. There was no threat of 'imminent peril', and C's cause of conduct was 'not as close and immediate as in *Willer*, *Conway* and *Martin*, where the offence was virtually a spontaneous reaction to the physical risk arising' (compare *Ali* [1995] 1 Cr LR 303: A, a drug addict, indebted to a drug supplier, X, was given a gun by X and told to pay up the following day; A's voluntary association with X negated A's entitlement to raise duress by threats) (see also *Heath* [2000] Crim LR 109: voluntary association with drug dealers).

### Hong Kong

Duress of circumstances has not yet been expressly recognized by the courts of Hong Kong. However, it is a welcome development of the common law and it is to be expected that in due course it will be adopted as part of the common law of Hong Kong.

### Burden of proof

Like duress (by threats), D bears an evidential burden in relation to necessity, or 'duress of circumstances', unless statute dictates otherwise. Once properly raised, it is for the prosecution to negative or disprove duress beyond reasonable doubt. However, if there is no evidence to support the defence, then the judge is entitled to withdraw duress from the jury (*Pommell* [1995] 2 Cr App R 607, at 611, per Kennedy LJ; see also *Baker and Wilkins* [1999] 2 Cr App R 335 and *Heath* [2000] Crim LR 109).



### *Reform proposals*

At the same time as the English courts have expanded duress in a manner likely to be followed in Hong Kong, they have been invited to go further and remove some of the traditional limitations on duress, whether by threats or circumstances. A number of commentators, including Glanville Williams (*Textbook of Criminal Law*, second edition, pp. 625–6), have argued that duress ought to be available even for threats of lesser harms than death or serious physical injury, provided that the harm threatened exceeds the harm resulting from commission of the offence, i.e. a balancing of harms. However, this has generally been resisted, with the courts holding to the view that the reform of the law of duress is a matter for the legislature, rather than the courts. Reform, it is said, can be properly considered only along with the question of shifting the burden of proving duress, presently lying on the prosecution, to the defendant (see, for example, *Cole* [1996] Crim LR 470). Several English criminal law reform bodies have in fact proposed legislation along these lines (see, for example, (UK) Law Commission, Law Com No. 218, *Offences Against the Person*), but this has yet to bear fruit.

## MARITAL COERCION

Where one spouse (husband or wife) threatens the other or creates circumstances compelling the other to commit an offence, the latter may plead duress at common law. In addition, a wife who is threatened or coerced by her husband may raise the defence of marital coercion. This defence is similar in nature to duress and was first recognized at common law. It enabled a wife who committed an offence in her husband's presence to assert that she did so under his coercion; in the absence of evidence that she acted on her own initiative, the law presumed the wife to have been acting under her husband's coercion, leading to an acquittal.[16]

The common law defence was abolished in 1930 and replaced by a statutory defence, now found in section 100 of the Criminal Procedure Ordinance (cf. section 47 of the Criminal Justice Act 1925). This provides:

[16] A wife was also immune at common law from liability as an accessory after the fact if she assisted her husband after his commission of an offence; see *Lee Shek-ching* [1986] HKLR 304.

> Any presumption of law that an offence committed by a wife in the presence of her husband is committed under the coercion of the husband is hereby abolished, but on a charge against a wife for any offence other than treason or murder it shall be a good defence to prove that the offence was committed in the presence of, and under the coercion of, the husband.

Importantly, whereas coercion was presumed at common law from the mere fact of the husband's presence, section 100 requires the wife to prove (i.e. the legal burden of proof is upon the wife) both the husband's presence and also the fact of his coercion, on the balance of probabilities.

Marital coercion overlaps with duress, in that coercion includes such threats as would constitute duress, but the marital defence appears to extend beyond threats of death or serious physical injury, to the use of coercive moral force by the husband. This was the view of the English Crown Court in *Richman* ([1982] Crim LR 508), in which it was held that coercion is not established merely by showing that the wife acted out of (or the husband persuaded his wife to act out of) love or loyalty, but that there is no need to prove the husband used physical force or even threatened physical force. Marital coercion may arise, for example, if a husband merely threatens to leave his wife.

This view has been adopted in Hong Kong (see *Kong Man Heung* [2000] 1 HKC 406 (decided in 1986); see also *HKSAR* v *Au Yuen Mei* [2000] 1 HKC 411: report of recent directions to jury on marital coercion).

The UK Law Commission has recommended the abolition of this defence (Law Com No. 83).

## SUPERIOR ORDERS

In general, it is not a criminal defence for a person to assert that he or she was acting on the orders of a superior, whether military or civil. This was accepted by the Privy Council, on appeal from the Court of Appeal of Hong Kong, in *Yip Chiu-cheung* ([1994] 2 HKCLR 35, [1995] 1 AC 111). Rejecting a suggestion that an undercover law enforcement officer acting on instructions from his agency was not thereby a party to a conspiracy to traffic in dangerous drugs, Lord Griffiths observed (at 39):

> The High Court of Australia in *R.* v *Hayden* (No. 2) (1984) 156 CLR 532 declared emphatically that there was no place for a general defence



> of superior orders or of Crown or executive fiat in Australian criminal law. Gibbs, C.J. said at page 540:
>
> > "It is fundamental to our legal system that the executive has no power to authorise a breach of the law and that it is no excuse for an offender to say that he acted under the orders of a superior officer".
>
> This statement of law applies with the same force in England and Hong Kong as it does in Australia.

This view of the law was also subsequently affirmed by the House of Lords in England in *R* v *Clegg* ([1995] 1 AC 482).

On the other hand, D may sometimes be able to rely on superior orders to negate mens rea. If, for example, as a result of an order (which turns out to be unlawful), a police officer mistakenly believes that it is necessary to use a degree of force greater than might otherwise be justified in dealing with a present danger, the officer may argue that he or she intended to use only lawful force. If accepted, this may entitle D to be acquitted of an offence against the person based on the use of unlawful force. Similarly, superior orders may give rise to a defence of claim of right, as where D, pursuant to orders, mistakenly believes that it is necessary to destroy property belonging to another person in order to save some other property, thereby establishing a 'lawful excuse' within section 64(2) of the Crimes Ordinance.

PART IV

# Participation and Inchoate Liability

# 8

# Participation



## INTRODUCTION

Criminal liability is not limited to the person who physically commits an offence. A range of other persons may also be criminally liable by virtue of their 'participation' in the commission of the offence in various ways.

Firstly, a person who assists, encourages or procures (i.e. causes) another to commit the offence may be criminally liable as a party to that offence. In this situation, the person who physically commits the offence — who intentionally does the act that kills another (murder), or recklessly does the act that destroys property belonging to another (criminal damage), or intentionally does the act inflicting personal violence on another (common assault), or has sexual intercourse with a woman recklessly without her consent (rape) — who, in other words, commits the actus reus together with the necessary mens rea, is known as the 'principal'. The other parties, those liable by virtue of the fact that they assisted, encouraged or procured the commission of the offence, are collectively known as secondary parties' or 'accessories'. Together, the principal and secondary parties constitute the 'parties' to the offence, although the latter are also known as 'accomplices' for evidential purposes.

Secondly, persons who assist *after* the commission of an offence may in some circumstances be criminally liable, though not as parties to the offence (as was once the case). Instead, they may attract liability under

section 90 or 91 of the Criminal Procedure Ordinance covering respectively assisting offenders and concealing offences (below, p. 383).

Thirdly, a person may, exceptionally, be liable for the criminal conduct of another because of his or her relationship to, or responsibility for, the conduct of the other. This is known as 'vicarious liability' (below, p. 388).

Lastly, corporations may in certain circumstances be criminally liable even though they do not as such have a physical body or mind with which to act or think; instead 'corporate liability' arises by treating the conduct of company personnel as the conduct of the corporation (below, p. 395).

This chapter considers each of these four forms of participation liability.

## PRINCIPALS

Where several persons jointly play a role in committing an offence, each of them may be criminally liable according to their own conduct and state of mind. It is necessary to draw a general distinction between the principal offender and secondary parties.

### The Principal

The principal (hereafter 'P') is 'the perpetrator', 'the one whose act is the most immediate cause of the actus reus of the offence',[1] 'the one who, with any necessary fault elements, does the acts constituting the external elements of the offence',[2] or 'the person who personally participates in the physical transaction of the actus reus of an offence'.[3] As these expressions illustrate, determining whether a person is a principal (or 'principal in the first degree' as it was known prior to the abolition of the distinction between felonies and misdemeanours in Hong Kong; see below, p. 334) essentially depends on whether or not the person physically participated in the performance of the actus reus of the offence: the principal is the one who performed the fatal act — the one who stabbed and thereby wounded the victim, the one

1 M. J. Allen, *Textbook on Criminal Law* (fifth edition), London: Blackstone Press Ltd., 1999, p. 185.

2 Law Commission (UK), Working Paper No. 43 (*Parties, Complicity and Liability for the Act of Another* 1972), 5–6.

3 P. Gillies, *The Law of Criminal Complicity*, Sydney: Law Book Co. Ltd., 1980, p. 39.



who had sexual intercourse with a female without her consent, the one who took the victim's wallet, and so on.[4]

#### *Joint principals*

In some cases, more than one person may qualify as a principal. Suppose, for example, A and B both stab the victim who subsequently dies from blood loss. Assuming each stab wound is proved to be a legal 'cause' of the victim's death, both A and B have committed the actus reus of murder or manslaughter. Each may therefore be charged as a principal offender, with liability depending on proof of mens rea. If they are acting together, A and B are known as 'joint principals'.

Joint principals may also exist where two (or more) persons acting together between them perform the actus reus of an offence, as where P1 threatens the victim, enabling his or her partner, P2, to take the victim's wallet without resistance. Their combined acts — P1's threat and P2's act of theft — constitute the actus reus of robbery, contrary to section 10 of the Theft Ordinance. P1 and P2 may therefore be jointly charged with robbery as principal offenders or 'joint principals'.

Some offences require *joint* principals. For example, the offence of statutory conspiracy, contrary to section 159A of the Crimes Ordinance (see Chapter 9, p. 416) requires 'a person' (P1) to 'agree with any *other* person or persons' (P2, P3, etc.) to commit an offence.

#### *'Innocent agent'*

In some situations, a person may be treated and charged as a principal, even though he or she was not the person who physically performed the actus reus. This includes cases where the apparent 'principal' is at law incapable of committing an offence,[5] for example, a child under seven years of age ('*dolix incapax*'; see Chapter 6, p. 213), or is suffering from mental abnormality amounting to insanity (see Chapter 6, p. 224), but D can be

4 Where the offence is a 'state of affairs' offence, the principal is the person who falls within the statutory description; see Smith and Hogan, *Criminal Law* (ninth edition, Butterworths, 1999), p. 125.

5 In some circumstances, the principal may be exempt, not from liability as in the case of a child under seven years, but from prosecution. In such cases, D may still be liable as a secondary party; see, for example, *Austin* [1981] 1 All ER 374.