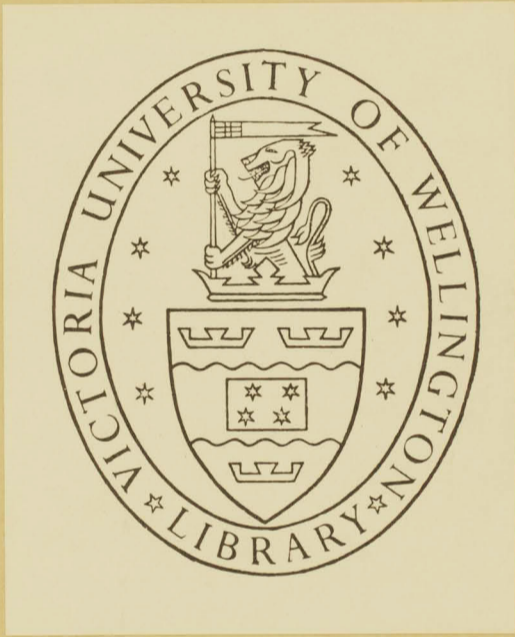


IX PRYCE, R.L. THE DEFENCE OF NECESSITY IN THE CRIMINAL LAW.

R. L. PRYCE

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THE DEFENCE OF NECESSITY IN THE CRIMINAL LAW

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## I. INTRODUCTION

In 1801 Sir William Scott said "the law of necessity is not likely to be well furnished with precise rules; necessity creates the law, it supersedes rules ..... It is not to be considered, a surprise, therefore, if much instituted rule is not to be found on such subjects. "Today the law of necessity is as uncertain and ill-defined as it ever was. Considerable doubt remains as to the existence, scope and extent of the defence. This has not given rise to much concern. Any deficiencies in necessity's status in the criminal law have been regarded as predominantly theoretical. Alleged difficulties of defining the circumstances in which the defence might be admitted have resulted in an unwillingness to provide it with an express statutory basis. Such existence as the defence does enjoy at common law is preserved by S.20(1) Crimes Act 1961. The purpose of this paper is to consider whether it is both possible and desirable to clarify, in statutory form, the precise nature of this doctrine.

## II. LEGISLATIVE HISTORY

In England, the seat of the common law, only one attempt has been made to statutorily define the defence. In 1878 Sir James Stephen's Criminal Code Bill was introduced into the House of Commons. S.23<sup>2</sup> attempted to provide the means of determining when necessity might be admissible in answer to a criminal charge. The 1878 Bill was never passed. Its ramifications were so great that a Royal Commission was appointed to enquire into the Bill and report upon the problems of codification. The Draft code prepared by the Commissioners made no provision for general defences, for which it was severely criticised,<sup>3</sup> and consequently a statutory basis for necessity was not inserted. Even if the Draft Code had made such a provision it would have been to no avail. The Bill of 1880, which was based on the Commissioner's Report, was never passed because the Government of the day fell and a new Parliament was elected. No further action has been taken in England in attempting to legislate on the defence.

Some of the reasons for this are made clear by the Report of the Royal Commission in 1879. The first is a refusal to believe that the defence of necessity could have any practical, meaningful role. Reference is made to the type of case with which casuists have amused themselves for centuries by speculating as to the moral issues involved. The best known of these hypothetical situations is that where two drowning persons struggle with each other for a plank of wood. Quite rightly, the Commissioners dismiss the likelihood of such a case ever reaching court and if it did, suggest that the particular circumstances might well render it easy of solution.

<sup>4</sup>The second reason given is the sheer practical difficulty of defining the circumstances in which the defence might be admitted. "We are certainly not prepared to suggest that necessity should in every case be a justification. We are equally unprepared to suggest that necessity should in no case be a defence. We judge it

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1. The Gratitude 3C. Rob 240 at 266; 165 E.R.450 at 459.

2. *Infra*.

3. Brett and Waller. Cases and Materials in Criminal Law (2nd ed.) 82.

4. S.204(2) Crimes Act 1961 seems to apply here.

better to leave such questions to be dealt with when, if ever, they arise in practice by applying the principles of law to the circumstances of the particular case".<sup>5</sup>

In R v Dudley and Stephens<sup>6</sup> the Commission's approach was impliedly criticised. Lord Coleridge C.J. said it would have been "unsatisfactory" to he and his fellow judges if the "eminent" members of the Commission could have clarified whether the received definitions of necessity were in their judgements correct and exhaustive, and if not, in what way they should be amended.<sup>7</sup> As it was, he said, he had to apply the principles of law to the circumstances of the case.<sup>8</sup> Dudley is the only case of its type in English law. This begged the question, therefore, of what were the applicable principles of law. In effect, the Commissioners abdicated their function and left the matter to be resolved by the common sense of the judiciary.

Although the Commission which prepared New Zealand's Draft Criminal Code in the 1880s had originally inserted a provision on necessity, this too was later omitted because of the very same reason of difficulty of definition. Such an obstacle has not prevented varying foundations being made in other countries, some of which have a Common Law system. Later in this article I will examine these formulations in order to consider whether matters of common principle can be drawn from them. Before discussing whether it is in fact possible to legislate effectively in this field, however, it is necessary to consider whether reform is desirable. This can only be done once one has an understanding of the present status of necessity in the common law.

### III. NECESSITY AT COMMON LAW

#### (a) R v Dudley and Stephens

One can only describe necessity's treatment in the common law as most unfortunate. This stems directly from the inadequate coverage given in Dudley's case, where an English court was forced to consider, for what is the only time, an express defence of necessity to a criminal charge. In a recent South African case<sup>9</sup> Rumpff J.A. thought that the judgement of Lord Coleridge C.J. in Dudley was "influenced by a measure of emotionalism".<sup>10</sup> Undoubtedly, the emotionalism surrounded the bizarre nature of the facts of the case has been one factor hindering the realisation of necessity's potential as a defence in less sensational circumstances. Viewed in a more rational light, necessity may well prove to be both logical and constructive in its application.

The facts as found by the jury in Dudley were very simple. The crew of a yacht were forced to abandon it during a storm and seek safety in an open boat. After days without food and water Dudley and Stephens agreed to kill the cabin boy, who was weakened by famine and drinking sea water. He was incapable of offering any resistance. The other member of the crew, a man named Brooks, refused to be a party to the killing. He did, however, join with the others in feeding on the boy's flesh and blood for four days, after which time they were rescued by a passing vessel. The boy was so weak he was unlikely to have survived until the rescue in any event, and if the men had not fed upon him they themselves would probably not have survived to be so picked up. At the time of the killing there was no reasonable prospect of relief.

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5. Draft Code, Note A to p. 10.

6. (1884) 14 Q.B.D. 273.

7. Ibid, 286.

8. Idem.

9. S v Booyens and Soliath case No. 398/1970 (CPD).

10. C.V. Paley "Compulsion: Fear and the Doctrine of Necessity" Acta Juridica (1971), 205 at 241.

There was no appreciable chance of survival except by such a killing, but assuming the existence of this necessity there was no reason why the boy should have been sacrificed instead of any of the men. Though he was the weakest and most likely to die, he had just as much right to life as the others.

In defence to the charge of murder made against Dudley and Stephens, counsel argued that the killing occurred "under pressure of necessity"<sup>11</sup>. This proposition was firmly rejected by the Court of Queen's Bench. Lord Coleridge C.J. noted that the crew might possibly have been picked up the next day, or not at all. In either case the killing would have been an "unnecessary and profitless"<sup>12</sup> act. The contention that the killing could be anything but murder was both "new and strange".<sup>13</sup> The proposition appeared to be "at once dangerous, immoral and opposed to all legal principle and analogy"<sup>14</sup>. After his implied criticism of the Royal Commission he considered the applicable principles of law and found that the temptation to do the act in question was not within the accepted scope of necessity. Nor was this to be regretted, he claimed, because although law and morality are not the same, the absolute divorce of law from morality would be of fatal consequence. He foresaw "awful danger"<sup>15</sup> in admitting the principle contended for because of the impossibility of defining by what criteria an alleged necessity was to be assessed. The result in U.S. v Holmes<sup>16</sup> was correct, but the acceptance of the lot as the proper mode of determining who was to be sacrificed in a necessity situation was hardly "an authority satisfactory to a Court in this country"<sup>17</sup>. Conceding that the prisoner's deeds were not "devilish",<sup>18</sup> Lord Coleridge, C.J. nevertheless considered that a principle such as necessity, once admitted, might be made "the legal cloak for unbridled passion and atrocious crime"<sup>19</sup>. He conceived his duty to be to ascertain the law as best he could and leave it to the sovereign to exercise that prerogative of mercy which the Constitution has <sup>intrusted</sup> instructed to the <sup>hands</sup> lords fittest to dispense it. He concluded by saying that judges are often compelled to set up standards they cannot themselves reach and to lay down rules they could not themselves satisfy. But temptation is not an excuse, and judicial compassion for a prisoner cannot change or weaken in any manner the legal definition of a crime.

The existing confusion as to the present status of necessity in our criminal law is a result of the conflict of opinion as to the precise effect of Dudley. Stephen could find no legal principle in the judgement.<sup>20</sup> He regarded the decision as inconclusive as to whether one could kill to preserve one's life in circumstances not

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11. Supra, 277

12. Ibid, 279

13. Ibid, 281

14. Idem.

15. Ibid, 287

16. 26 Fed. Cas. 360 (1842)

17. Supra, 285

18. Ibid, 288

19. Idem.

20. A Digest of the Criminal Law (8th ed.) 10 n.2

amounting to self-defence. He based this interpretation on the ground that the jury found only that the men probably would not have survived but for the killing. In Stephen's view, then, necessity of its very nature suggests something more compelling than mere probability. He consequently argues that Dudley should be restricted to its rather peculiar facts. He receives support from Rumpff J.A. who regards Dudley as not being a case of true necessity.<sup>21</sup> Professor Glenville Williams suggests Dudley may be distinguishable if the facts are such that necessity not only declares that one must die but also indicates who that one is.<sup>22</sup> An appropriate example is where a group of mountaineers is roped together and the last climber slips. He is faced with certain death, and threatens to drag his companions down with him. In such a situation the choice is not as to who is to die, as in Dudley, but as to how many. Hall, after noting that the punishment consisted of six months imprisonment, argues it is possible to conclude that, from a functional view of the criminal law, the case in fact approved the doctrine of necessity.<sup>23</sup>

The other view is perhaps most forcibly expressed by D.A. Stroud, who claims that nothing can be said in favour of Stephens "invented" principle of necessity, except that his admission that the extent of the principle is unascertained renders it comparatively harmless.<sup>24</sup> He regards the "supposed" excuse of necessity as fortunately now settled for Dudley.<sup>25</sup> According to Stroud, the ratio decidendi of the case is the broad and salutary principle that except in self-defensive situations, homicidal conduct is forbidden. Smith and Hogan, while recognising the possibility of the argument that the decision was based on the premise that no necessity existed, claim that there is always the possibility of some unforeseen intervention.<sup>26</sup> They say that if necessity is not admitted where there is a high degree of possibility of disastrous consequences if action is not taken, then it can never be admitted. Consequently they contend it is difficult to avoid the conclusion that Dudley decided it is no defence to the killing of an innocent person that such action was necessary to save the lives of others. With regard to the argument that the case was really decided on the basis that no actual necessity existed, it is pointed out that the jury merely found that it was no more necessary to kill the boy than any of the men. In effect they accepted the argument that it was imperative that one be killed if the others were to survive. But they rejected the notion that that person of necessity was the boy.

It is difficult to accept Stephen's view that the case contains nothing of principle. The language of the Court is unmistakably condemnatory. Discussing Lord Bacon's treatise on necessity, Lord Coleridge C.J. said that if it was meant to lay down the broad proposition that a man may save his life by killing, if necessary, an innocent and unoffending neighbour, then it certainly is not the law.<sup>27</sup> It is equally

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21. Paley, *Supra* 240

22. Criminal Law: The General Part (2nd. ed.) 744

23. General Principles of Criminal Law (2nd ed.) 433

24. Mens Rea (1914) 258

25. *Ibid*, 259

26. Criminal Law (2nd ed.) 138

27. *Supra*, 286



difficult to regard Dudley as settling whether the defence exists in general, as Stroud does. The true position it is submitted, is that Dudley is authority for the proposition that in the law of homicide necessity does not afford a defence to the killing of an innocent person for the purpose of saving other life. It would be wrong to regard the decision, as some have tended to do, as representing a total rejection of the defence in the whole field of criminal law. A legal principle can be found in the judgement, but the reasoning upon which it is based fails to indicate the criteria upon which future cases of a different nature can be properly decided. It is this factor which is the root cause of the diversity of academic opinion on the subject. This state of affairs leads one naturally to a consideration of the actual decision by the Court.

Stephen thought Dudley to be rightly decided but on the wrong grounds. He based his conclusion as to the actual decision on the ground that no necessity was proved to have existed. The writer's view is that while necessity existed, it was of a type to which the law should not give official sanction. This point will be expanded upon later. Suffice it to say at this stage that the writer's conception of what should be regarded as necessity justifying a breach of the criminal law would not provide a defence in the Dudley situation. Like Stephen, then, the writer agrees with the result of the case. It by no means follows, however, that the reasoning by which that result is achieved is flawless.

The Court, in effect, took the attitude that there must be absolute certainty of need before any action taken can be justified. On the facts, this meant that at the time of the killing the prisoners must have been able to positively assert that (i) the boy would have died from natural causes before the rescue (ii) Brooks and themselves would also have so died had they not fed on the boy's flesh (iii) they would have been rescued after the killing of the boy but before they themselves died. Clearly, this exacts on extremely high standard. It makes no allowance for a miraculous rescue from adversity which no reasonable man could anticipate. A recent example illustrates the problem.<sup>28</sup> On October 13th 1972, a plane crashed in the Andes mountains in Peru. Some of the survivors resolved to gain sustenance from those passengers who had died. On October 21st they heard on a transistor radio that the search for them had been called off and their hope for a quick rescue vanished. Were they to abstain from eating human flesh on the virtually non-existent chance of being rescued in isolated, mountainous terrain? The reasoning in Dudley would lead to the manifestly absurd result that the survivors would still be criminally responsible in that there was no certainty they would not be rescued. This consequence had led to the suggestion that the Dudley decision was based simply on a judicial refusal to accept that there could never be circumstances justifying the defence of necessity.

Perhaps the most obvious flaw in the reasoning is the belief that there would be an "awful danger" in admitting the defence in that it might become "the legal cloak for unbridled passion and atrocious crime". In one of the few cases to subsequently discuss Dudley, Edmund Davies L.J. expressed the same view when he said "necessity can

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28. The Dominion, January, 1973

very easily become a mask for anarchy."<sup>29</sup> As Smith and Hogan point out, it is not easy to see how this far reaching consequence would follow from the admission of the defence in circumstances so rare that there is no comparable reported case in English law.<sup>30</sup> Stroud supports the Court's reasoning in refusing to accept the defence because otherwise it would leave a man without principle of positive law to guide his actions at that particular time when he most needed a restraining rule of conduct.<sup>31</sup> Against this approach, it has been argued that it is difficult to believe that a person's conduct in such circumstances would be materially influenced by the purportedly deterrent effect of the strict letter of the law. It must be admitted that Stroud's stand received some support from the fact that Brooks refused to be a party to the killing. Whatever the reasons for his refusal, one cannot ignore the possibility that it was due, at least to some extent, to a fear of the probable legal consequences of committing the proscribed act. However the fallacy of Stroud's support of Dudley in this respect is that the decision in fact fails to provide a restraining rule of conduct. Indeed, if a person was aware of the Dudley result he might be positively encouraged to proceed with his unlawful behaviour. The prospect of a nominal prison sentence, as the prisoners received, would hardly be a weighty factor in making one's choice between death by starvation and a chance of survival. If Brooks had been fearful of legal consequences, however, he would have understood the choice to have been between death by starvation or death by hanging. There is some cogency in Williams argument that in light of the nominal punishment imposed, the conviction for murder seems pointless. He in fact describes the actual six months term of imprisonment as "gratuitous cruelty."<sup>32</sup>

Several points of criticism can be made of reliance on the crown to exercise its power of pardon in difficult cases. In so replying, the Court in Dudley took the easy way out of dealing with the class of problem with which it was confronted. The opportunity should have been taken to state some general principle. In effect, the judiciary abdicated its function just as the Royal Commission of 1879 <sup>had</sup> ~~did~~. The argument that necessity is virtually impossible to assess is insincere when the argument goes on to say that a politician, who exercises the power of pardon, can assess it.<sup>33</sup> The evidentiary problems which are said to hinder or prevent easy judicial solution of the type of case in question must surely present equal difficulty to a politician. A judge by his very training and standing in the law is surely better suited for deciding a case on general principle. As it is, the judicial attitude appears to be that difficult cases in which the defence of necessity is raised should be left to the common sense of the layman. This is tantamount to an admission of inability to provide satisfactory justice through the machinery of substantive law. One suspects that the judiciary would expect a politician faced with a problem in this field to take heed of the unexpressed but thinly veiled sympathies of the Court. This

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29. London Borough of Southwark v Williams (1971) 2 All ER. 175 at 181

30. *Supra*, 189

31. *Supra*, 262

32. *Supra*, 741

33. *Williams*, *ibid*, 735

in itself could lead to difficulties. Fuller's mythical but nonetheless usefully realistic case of the "Speluncean Explorers" illustrates this point well.<sup>34</sup> Both the trial judge and jury communicated to the Chief Executive requesting that the sentences of convicted murderers be commuted to six months imprisonment. On appeal Truepenny C.J. commended the principle of executive clemency and proposed to follow the example of the Judge and jury. As Keen J. was quick to point out and condemn, Truepenny C.J. in his judgement in effect gave instructions to the Chief Executive on how to decide the matter.<sup>35</sup> Foster J. rightly viewed any communication to the executive as a sordid and obvious expedient designed to escape the embarrassments of the case.<sup>36</sup> Fuller's model suggests the judiciary may possibly be reluctant to ever release anything but superficial control over the fate of a case, even it declines to provide itself with substantive controls through the means of a general principle of necessity. It also illustrates the sheer fiction and farce which results from meaningless convictions. Williams claims needless convictions are an abuse of the machinery of the criminal law and tends to adulterate its emotive effect.<sup>37</sup> The writer, for one, would not argue against such a claim. To convict and then reprove makes a mockery of the law. Why not simply discharge the accused on the ground that the general principle of necessity affords a defence?

Just as I supported the result in Dudley because there was no necessity in killing the boy before any of the others, so do I support the comments made in it on U.S.v Holmes. In the latter case the crew of a sunken ship threw some passengers overboard in order that their lifeboat could stay afloat. The Grand Jury refused to indict Holmes, one of the crew involved, for murder, but did indict him for manslaughter. Baldwin C.J. in charging the jury stated that the law of necessity only applies where the peril involved is instant, overwhelming and leading to no alternative. Because the danger had been foreseen and mentioned, the action taken was premeditated. The Court said that in such a case, the proper course was to select by lot those who were to be sacrificed. Because this method of solving the crisis had not been used, Holmes was convicted. It is submitted that the Court in Dudley was right in rejecting "the rather strange ground" upon which Holmes' actions would have been justified. If some of the passengers had objected to being included in a ballot, the killing of them would have been in the same manner, for legal purposes, as the boy in Dudley. Even if their consent had been obtained, this of itself would be insufficient to justify their killing: see S.63 Crimes Act 1961. As Brett says, Holmes was not a case of true necessity,<sup>38</sup> because there was no reason why those thrown overboard should have been passengers in preference to the supernumerary sailors i.e. those sailors not needed to man the lifeboat. The great American jurist Cardozo supports this treatment of Holmes, saying that "there is no rule of human jettison."<sup>39</sup> The doubtful ballot princ-

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34. "The Case of the Speluncean Explorers" (1949) 62 Harv. L. Rev. 616

35. Ibid, 632

36. Ibid, 620

37. Supra, 723

38. An inquiry into criminal guilt, 156

39. Selected Writings, 390

iple was a mere attempt to afford a ground for defence in a situation to which the defence of necessity could not apply.

The final point worthy of consideration is the morality of the decision in Dudley. It has been pointed out that it is absurd to suggest that the divorce of law from morality would be a fatal consequence in that an admission of the defence of necessity would lead to unparalleled lawlessness. The facts of such a case as Dudley are too singular for that to occur. But although the divorce of law from morality would not be of fatal consequence to the administration of our criminal law, it is suggested that it would be most undesirable. Admittedly, as the Court itself conceded the acts of Dudley and Stephens were not "devilish" in the sense one would use that word to describe many homicides. One can fully understand and sympathise with the position the prisoners found themselves in. But condonation of their action in pre-meditately killing the boy is a step the writer is not prepared to take. Brooks demonstrated through his refusal to participate in the killing that the legal standard imposed was not impossibly high. If it were, of course, serious discussion of the aims and purposes of the criminal law would be necessary. Dudley and Stephens themselves appear to have realised their moral guilt. They attempted to justify the killing to each other on the supposedly objective and altruistic basis that, being married, their responsibilities in life compared to those of the single youth dictated priorities as to who should live and die. In addition, when they actually committed the offence they prayed to God for forgiveness. A survivor of the 1972 Andes mountains plane crash who ate the flesh of other, already dead passengers, described such actions as "really Christian."<sup>40</sup> He drew an analogy between Christ's giving of his body to save mankind, and the dead passengers providing, by their flesh, sustenance and consequently hope of rescue to their surviving companions. Cannibalism has received little attention from textbook writers. The eating of human flesh is not expressly proscribed, although it is possibly covered by S.150 (2) Crimes Act 1961 which deals with improper or indecent interference with human remains. A certain social stigma no doubt attaches to it, but it apparently has had no significant legal history. Brooks himself was prepared to eat the flesh and drink the blood of the dead boy. No legal action seems to have been taken as a consequence of this. Perhaps his actions can be explained in his accurately estimating the legal significance attached to the two distinct acts of feeding upon a person already dead and actually killing in order to provide oneself with relief from hunger. The writer's view is that while the law can perhaps afford to be rather lenient on the former, the same cannot apply to the latter. Clearly, however, there is no one answer to the moral questions implicit in the situation the prisoners found themselves to be in Dudley.

To summarise this consideration of the case, the writer has concluded that the decision was a correct one. Some of the judgement's actual content has been criticised, but its major weakness is the failure to clearly state some broad principle of a defence of necessity. The undesirable consequence of this is the uncertainty in our criminal law as to the existence, scope and extent of the defence at common law. Because it was not applied in the only case in which it was raised as a defence, it

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40. The Dominion, Supra

does not necessarily follow that the doctrine of necessity does not in fact exist. To this question the writer now turns.

(b) Does the defence exist?

It is obvious that any assertion that necessity does in fact exist must be based on implication from dicta and the results of certain cases. Williams is a strong champion of the existence of the defence. In his article "The Defence of Necessity" he asserts with "some assurance" that there is such a doctrine.<sup>41</sup> This, he says, does not even need judicial authority; it can be proved by hypothetical example. He also claims that a criminal statute that makes no mention of the defence can be regarded as impliedly subject to it.<sup>42</sup> It need scarcely be said that the writer regards this evidence as most unconvincing.

In his textbook Williams adopts a rather more concrete approach. He refers to Moore v Hussey where Hobart J. said "all law admits certain cases of just excuse, when they are offended in letter, and where the offender is under necessity, either of compulsion or inconvenience."<sup>43</sup> Reliance is also placed on Serjeant Pollard's famous argument in Reniger v Fogossa that the law is not broken if only the words and not the intent and spirit of them is breached.<sup>44</sup> Some judicial support of the existence of the defence is found in R v Hicklin, where it is said that if a small-pox hospital were on fire and a person, in attempting to save its inmates, took some of them into the crowd, he would not be guilty of an offence.<sup>45</sup> Further, in R v Tolson Wills J. was of the opinion that a breach of a municipal regulation would be excused if done in order to save life or put out a fire.<sup>46</sup> The only possible explanation of the abortion case of R v Bourne<sup>47</sup> would appear to be that the defence of necessity was impliedly recognised.<sup>48</sup> Williams also refers to the American case of The William Gray<sup>49</sup> to support his argument. There the principle of necessity was admitted and the Court in effect recognised the defence as having been ingrafted from time immemorial into the common law of England, from which United States jurisprudence is borrowed.

It will be apparent from the authorities cited that William's basis for maintaining his argument is very suspect indeed. Dicta, counsel's arguments and the observations of a foreign court are hardly persuasive authorities. Indeed, Moore and Reniger were not criminal cases at all. There can be no doubting the existence of the defence in civil cases. The judgements in London Borough v Williams, for example, provide recent authority that there is a defence of necessity in tort. One American writer argues that fundamentally no legal distinction can be drawn between

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41. (1953) 6 Current Legal Problems, 216

42. *Ibid.*, 224

43. (1609) Hob. 93 at 96; 80E.R. 243 at 246

44. (1550) 1 Plowd. 18; 75E.R. 29

45. (1868) L.R. 3 Q.B. 360 at 376

46. (1889) 23 Q.B.D. 168 at 172

47. (1938) 3 All E.R. 615

48. See G. Williams "The Law of Abortion" (1952) 5 Curr. L. Prob. 128

49. 29 Fed. Car. 1300 (1810)

civil and criminal law with respect to the application of the doctrine.<sup>50</sup> Whatever the American position maybe, it is clear that the English judiciary does not agree with him. Even Williams is prepared to concede that the authorities he relies on are "partly offset" by a few cases of comparatively recent date where the alleged existence of the defence was ignored or rejected.<sup>51</sup>

To conclude, it is submitted that the balance of authority is clearly against there being a defence of necessity in the criminal law. The cases of comparatively recent date which Williams refers to will be discussed in the next question to be dealt with, namely, whether it is desirable that there be such a defence.

(c) Is there a need for a defence?

It is often said that the matter as to whether there should be a recognised principle of necessity is of no practical importance. Garrow and Willis, for example, claim that the imposition of merely nominal penalties can cover exceptional cases.<sup>52</sup> It is also said that the power of the police to decide not to prosecute provides additional protection against unjust convictions. This is well illustrated by the recent decision of the Canadian Justice Department to file no charges against the pilot of a plane who ate the flesh of a dead passenger following a crash in isolated territory.<sup>53</sup> A further argument is that even if a prosecution is commenced, the jury would ensure that justice is done. This overlooks the possibility of the jury merely giving a special verdict on the facts. The use of the special verdict was criticised in Brody's "Son of the Speluncean Explorer";<sup>54</sup> a model case which reviewed the reasoning in Fuller's original mythical "Speluncean Explorers". The Supreme Court of Newgarth as constituted in the later model was prepared to question the convictions in the earlier case. One of the reasons given by Abner G. was that the limited special verdict prevented the spelunkers from receiving a fair and full trial.<sup>55</sup> Society's judgement as to the rights and wrongs of an act committed under an alleged necessity could only be mirrored by an ordinary jury verdict.

Whatever other criticisms can be made of reliance on such safeguards as the decision to prosecute, the imposition of nominal penalties and the jury's verdict, their main failing is that they all contain a discretionary element. As Handy J. stated in the "Speluncean Explorers"; looking candidly at the realities of the administration of criminal law, the jury, the decision to prosecute and the decision to pardon are not held within a rigid framework of rules that precludes factual error and precludes emotional and personal factors.<sup>56</sup> There can be, it is considered, no substitute for a clearly expressed substantive provision as a means of safeguarding a person's fundamental rights in the criminal law. The question is whether such rights are being so violated as to justify statutory reform in the field of necessity.

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50. F.H. Bohlen "Incomplete Privilege to Inflict Intentional Invasions of Interests of Property and Personality"; (1926) 39 Harv.L. Rev. 307 at 319.

51. Criminal Law: The General Part, 727

52. Criminal Law (5th ed.), 29

53. The Dominion, May 7th, 1973

54. 55 Iowa L. Rev. 1233 (1970)

55. Ibid, 1246

56. Supra, 640

In the writer's opinion, the answer is in the affirmative.

The most striking authority upon which reliance is placed is R v Kitson<sup>57</sup> where the appellant was convicted of driving a motor car under the influence of alcohol. He was sentenced to four months imprisonment and disqualified from driving for three years. Kitson had fallen asleep while a passenger in the front seat of a car being driven by his brother-in-law. When he awoke there was no-one in the driving seat but the car was moving down a hill. The appellant immediately grabbed the steering wheel and tried to control the car. He claimed he did not put on the handbrake because of the greasy condition of the road. The car followed an erratic course, which the police observed, down the hill for a distance of three hundred yards until it came to rest on a grass verge. The Court held that the car was subject to the appellant's control, and as he was admittedly unfit to drive, convicted him of the offence of drunken driving. The defence of necessity does not even appear to have been raised in argument, though one would have thought the case provided a classic situation in which to apply it.

Kitson is one of those cases which Williams refers to as partly offsetting the authorities he relies on in claiming that necessity does exist. It also shows the need for such a defence. Another case which comes into this category is Workman v Cowper<sup>58</sup>. There a man shot a foxhound because the lambing season was approaching and he had formed the opinion there was no other way he could protect <sup>his</sup> ~~the~~ neighbour's property. He was convicted of maliciously shooting the animal, although the Court recognised his conduct was perfectly reasonable.

Dicta in Buckoke v Greater London Council<sup>59</sup> provide alternative evidence of the judicial attitude to necessity. Lord Denning M.R. put to counsel the hypothetical situation of a fire engine driver driving through a red light, the road being clear in all directions, in order to save a person whom he could see was in instant peril from encroaching flames on the upper story of a house. He then suggested that the driver might be excused in crossing the lights in that he could plead the defence of necessity.<sup>60</sup> Both counsel denied that the driver had any such avenue open to him. The circumstances went to mitigation, they said, and did not take away his guilt.<sup>61</sup> Lord Denning M.R. accepted that counsel were correct but said that the driver should be congratulated for his action, not prosecuted.<sup>62</sup> This, it is submitted, not only confirms that there is no such defence as necessity, but also clearly illustrates the need for one. It is anomalous that a person be congratulated for a breach of the criminal law. It is far more sensible to say that no offence was committed because necessity afforded a defence.

The results in such cases as Kitson and Workman are undoubtedly bad law if one believes law is reason, and that criminal law commands are addressed to ordinary people acting from ordinary motives in ordinary situations.<sup>63</sup> They reflect a mechanical

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57. (1955) 30 Cr. App.R. 66

58. The Times, February 3rd, 1961

59. (1971) 2 W.L.R. 760

60. In New Zealand there would be a statutory defence available under Reg.18(1) of the Traffic Regulations 1956.

61. *Supra*, 765

62. *Idem*.

63. Brett, *Supra*, 155

application of statute law without a consideration of the fundamental purposes of penal policy.<sup>64</sup> Take Kitson's case for example. It is no doubt a laudable policy to attempt to eradicate drunken driving in the interests of society as a whole. But the obvious purpose of the law in question was to discourage citizens over indulging when they knew they were going to drive afterwards. As Foster J. noted in the "Speluncean Explorers"; there is a distinction between intelligent and unintelligent fidelity to enacted law. "The correction of obvious legislative errors or oversights is not to supplant the legislative will but to make that will effective."<sup>65</sup> This approach to statutory interpretation was criticised in "Son of the Speluncean Explorer",<sup>66</sup> but as will be seen it is preferable to the main ground upon which the later Supreme Court of Newgarth would have avoided a conviction. In Kitson, from a policy point of view, the Court apparently preferred the appellant to do nothing and let the car run down the hill of its own free will. By attempting to get the car under control he unwittingly exposed himself to the quite severe and absolutely unwarranted punishment which was imposed. Kitson's case is proof enough, it is submitted, that reliance cannot be placed on such invariables as the power to forgo prosecution and the discretion of the judge to ensure that justice is done in exceptional cases.

The important points to be learnt from Kitson are illustrated by a United States case, Butterfield v State.<sup>67</sup> The appellant lived alone and did not possess a telephone. One night he got himself drunk in the privacy of his own home. He sustained a serious head injury which required immediate medical treatment. He did not have anyone to take him to hospital, nor could he call an ambulance. Consequently he drove himself and was convicted on a drunken driving charge. He was fined \$50 and imprisoned for thirty days. It was argued he was on the highway because of necessity. The Court said it was aware of no such defence. In a dissenting judgement Davidson J. claimed the law had long recognised the principle of necessity. He then went on to state that the offence of drunken driving is not an offence against either the person or property of another. No individual suffers any injury in the mere violation of that law. The offence is promulgated by the legislature as a protection of society. There are, however, times when the interests of society must be subordinated to the protection of individual rights. An appropriate example of this, thought Davidson J., was the exemption from traffic laws enjoyed by ambulances and fire engines in the course of their duty. The violation of such laws is excused because of the necessity arising from the need to aid some individual. It occurred to him to be sound logic and reasoning to say that if a driver of these public utilities can violate the traffic laws in order to render assistance to some individual, then the individual can do the same thing in order to help himself.

R.S. Clark argues that in such a situation as confronted the Court in Butterfield, the best solution is probably that the totality of the situation is not due to the

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64. Williams, Supra, 728

65. Supra, 626

66. Supra, 1237

67. (1958) 317 S.W. 2d 943



fault of the defendant.<sup>68</sup> Such a conclusion is reached even though the defendant must accept some blame because of his intoxicated state. Williams pointedly suggests that in the majority's view, the fault of the appellant was that he preferred not to bleed to death.<sup>69</sup> In the 1959 Annual Survey of American Law the Court's statement that it was aware of no such defence as necessity is criticised as being a shocking display of ignorance of the basic principles of criminal law, an ignorance resulting in an inhuman decision.<sup>70</sup> This, no doubt, was in part a reference to the case of Browning v State,<sup>71</sup> which Davidson J. expressly relied on in his dissenting opinion. The charge in Browning was one of reckless driving. State authorities had set up a road block and intended to make what would have been an illegal arrest of the appellant. The latter feared that in being arrested, he would be injured by the police. Consequently he drove right through the roadblock, thereby exposing himself to the charge made. It was held that necessity excused his apparently illegal act. Clearly the circumstances were thought to be such as to create an exception to the generally desirable policy of ensuring that a minimum standard of safety be attained. Browning obviously cannot be treated as evidence of the existence of a defence of necessity in English law. It provides, however, an actual factual situation which exposes inadequacies in New Zealand's present criminal law.

Two Canadian cases provide further illustrations of the desirability of some definite recognition of the defence of necessity. In R v Vickers<sup>72</sup> the defendant was convicted of killing a cow moose contrary to a game statute and was sentenced to two months imprisonment and fined \$5000. The moose had charged the defendant who had killed in self-defence. The New Brunswick Supreme Court construed the offence as being one of strict liability. Recognising that conviction might lead to hardship in some cases, the Court relied on the discretion of the prosecution not to bring charges to ensure that justice was done. In the circumstances the defendant was deemed to be at fault in that he must have known before venturing into the forest that it was forbidden to kill moose under any circumstances, yet he exposed himself to the risk of having to do so. Having clearly expressed its opinion on the law, the conviction was quashed on a procedural point.

In a case dealing with the same circumstances, R v Breau,<sup>73</sup> the same Court distinguished Vickers on the ground that the relevant part of the judgement was obiter. The Court said through no fault of his own the defendant found himself in a situation of dire peril from which he could only extricate himself by taking the action he did. His acts were warranted under the principles of the common law (an obvious reference to necessity) and a distinct and positive legislative enactment was necessary to alter them. These two cases illustrate the inherent danger of reliance on the discretion

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68. Defences to Offences of Strict Liability, 182

69. *Supra*, 728

70. at p.117

71. 31 Ala. App. 137, 13 So. 2d 54

72. (1959) 33 C.R. 182

73. *Ibid*, 13

not to prosecute. The authorities obviously ignored the gentle hint given in Vickers when they brought the charge against Breau. One new point also emerges from these decisions. In its attempt to do justice, the Court in Breau was forced to adopt a method rather dubious in principle. The application of a recognised defence of necessity would obviate the need to resort to tactics hardly consonant with the reasoned and orderly development and application of the criminal law.

It is clear from this consideration of necessity at common law that the lack of instituted rule on the defence which Sir William Scott referred to in 1801 has led to an unsatisfactory position today. Injustice has occurred in several cases. A statutorily recognised defence of necessity is the only solution to this. Furthermore, it is submitted that the doctrine cannot be satisfactorily accommodated under the guise of some other defence.

(d) Necessity and other defences.

Certain provisions of the Crimes Act 1961 already incorporate elements of necessity. Compulsion and self-defence are prime examples.<sup>74</sup> Taken collectively, however, these do not provide exhaustive coverage of the possible factual situations which can arise. Only a distinct doctrine of necessity can do that.

Of the authorities mentioned, only Breau and Vickers readily suggest the applicability of another defence. In those two cases, one would have thought that self-defence would have afforded a justification for the action taken. No other defence automatically springs to mind with regard to the other decisions, though. Take, The William Gray for example. There the captain of a vessel decided to seek refuge in a port during a violent storm, and in so entering breached an embargo statute. The defence of impossibility could not be validly pleaded because the captain clearly elected to adopt the course taken. He could have continued to battle the elements if he had so wished. However, instead of risking the lives of his crew he chose to commit the lesser evil of violating legislation. This is clearly a necessity rather than impossibility situation. In any event, reliance on impossibility can create as many problems as one is trying to solve. It is as ill-defined and uncertain as necessity.

Of all the established, recognised defences compulsion or duress bears the greatest similarity to necessity. In both the accused is faced with a choice of evils: shall he break the criminal law or submit to the infliction of some evil on himself or another?<sup>75</sup> The only distinguishing feature is that in compulsion the threat is one of physical violence, whereas in necessity it may come from any source. In effect, then, S.24 of the Crimes Act 1961 is a narrow expression of the broader principle of necessity. It is submitted that S.24 along with S.48 and other sections containing elements of necessity should be retained in their present form. That would leave absolutely no doubt as to their specific purpose. For the shadowy residual area not covered by the existing legislation, however, a general provision on necessity is called for.

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74. See ss.24 and 48 respectively.

75. Smith and Hogan, *Supra*, 142

(e) Necessity and Strict liability.

There will be those who maintain that such an amendment to the Crimes Act 1961 is totally unjustified. Their views must be respected. However, it is submitted that there can be no escaping some amendment to that statute, even if it is to the effect that the general principle of necessity will in no case constitute a defence. It will not have escaped the observant reader's notice that the cases relied on to show the need for a defence of necessity have invariably been ones dealing with strict liability. The need for at least some amendment arises from the existing confusion of the case law in New Zealand as to the defences available to an offence of strict liability.

It is customary to describe an offence of strict liability as one in which proof of actus reus suffices to create criminal responsibility. Consequently, lack of mens rea is purportedly irrelevant. Actus reus is commonly described as constituting the physical ingredient of an offence. There must, however, be a willed act for there to be an actus reus. Without this mental stimulus the actus reus cannot be produced at all.<sup>76</sup> In strict legal theory, one would therefore think that only automatism can provide a defence to an offence of strict liability. This is so because it is only in a state of automatism that the brain does not provide the mental spark directing the actions of the body. Leaving aside for the moment any argument that necessity does in fact negative actus reus, as some have suggested, it would therefore appear, prima facie, that necessity does not afford a defence to an offence of strict liability. Clark notes that none of the text-writers have considered specifically whether the doctrine so applies.<sup>77</sup> He himself declines to enter into a discussion on whether necessity negatives actus reus or mens rea. He does recognise however that whatever else Dudley may have decided, it certainly does not prevent the application of the doctrine in the strict liability field.<sup>78</sup> A far more recent decision, and one which has caused great controversy within New Zealand, is that of Kilbride v Lake.<sup>79</sup> This case and its subsequent treatment has led to disturbing confusion in our law on strict liability. It makes one wonder whether necessity has a potential at common law as a defence to an offence of the type in question.

In Kilbride v Lake the appellant parked his car bearing a current warrant of fitness in a street. He left it there for a short time. On his return he found that the current warrant had disappeared and a traffic ticket had been placed on the car. He was charged under Regulation 52(1) of the Traffic Regulations 1956 which provides that "no person shall operate a motor vehicle.....unless there is carried on the vehicle a current warrant of fitness". Woodhouse J. did not find it necessary to decide whether the offence was one of strict liability, but even if he had no liability would have ensued because he held there was no actus reus. In so doing he arrived at a decision of practical merit but of doubtful validity in strictly legal terms. His Honour rightly stated that an act must be willed for there to be an actus reus. He said it was a cardinal principle that a person cannot be made criminally responsible

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76. Per Woodhouse J. in Kilbride v Lake (1962) N.Z.L.R. 590 at 593

77. *Supra*, 180

78. *Ibid*, 179

79. (1962) N.Z.L.R. 590

for an act or omission unless it was done or omitted in circumstances where there was some other course open to him.<sup>80</sup> If this condition is absent, he continued, any act or omission must be regarded as involuntary. There was no chain of causation linking the appellant to the disappearance of the warrant, simply because he was unaware of it..

By referring to voluntariness in the sense of lack of knowledge, Adams has cogently argued that Woodhouse J. imported an element of mens rea into the decision.<sup>81</sup> This is so even though the case was decided on the express point that mens rea was irrelevant because actus reus had not been established. Adams rejects Woodhouse J's inclusion of voluntariness in the actus reus,<sup>82</sup> After a study of considerable depth, he concludes that he is following common usage in treating voluntariness as a mental element which may properly be regarded as falling within the term mens rea. While casting great doubt on the validity of the reasoning, Adams nevertheless supports the result achieved in Kilbride. In effect, though not in so many words, he calls for a distinction to be drawn between offences of absolute and strict liability. In the former, proof of the physical ingredient of the offence would found liability. In the latter, however, a limited number of defences would be available which would really import an element of mens rea into the offence.

Adams treatment of voluntariness in the sense used in Kilbride as going to mens rea, has a parallel in subsequent decisions which have considered the case. In Police v Taylor,<sup>83</sup> for example, Turner J. distinguished Kilbride on the ground that the offence he was dealing with did not enable him to consider whether mens rea was a constituent element of such.<sup>84</sup> But as Clark points out, this is to completely misunderstand what Woodhouse J. decided in Kilbride.<sup>85</sup> He expressly refrained from deciding the case on any basis of mens rea. It would seem probable that Turner J. in Taylor adopted the interpretation he did simply because he did not support the line of reasoning taken in Kilbride. He would not appear to be the only member of the New Zealand judiciary to take such a stand.<sup>86</sup>

To summarise the effect of Kilbride v Lake, then, it would appear that Woodhouse J. opened the way in New Zealand for the application of defences to offences of strict liability other than that the defendant's act was not willed. His treatment of voluntariness, in the sense he uses it, does not stand close scrutiny. He imports voluntariness, which is really an element of mens rea, into actus reus. In effect, he allows a mens rea defence to apply even in a strict liability situation. Clark has argued that the decision is an example of the defence of accident.<sup>87</sup> Whether there is such a defence is open to doubt. The same applies to act of God, act of a stranger and latent defect. More importantly, for the purposes of this article, one wonders whether the scope of Kilbride, or any logical extension of it, provides grounds for pleading necessity in

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80. Ibid, 593

81. "Voluntariness in Crime: A critical examination of Kilbride v Lake" Vol. 2  
Otago Law Review 427

82. Ibid, 433

83. (1965) N.Z.L.R. 87

84. Ibid, 88

85. "Accident-or what Became of Kilbride v Lake" Essays on Criminal Law In New Zealand  
Clark (Ed.),47 at 61

86. E.g. McCarthy J. in Andrew & Andrew Ltd v Transport Department (1968) N.Z.L.R. 692

87. Supra, 53

defence to an offence of strict liability. Legislative reform in this area of the law is obviously necessary in order to remedy the confusion that exists.

(f) Conclusion

To conclude this survey of necessity at common law, it is submitted there is a good case for arguing that the principle should receive statutory recognition. Even legislation which expressly denies that the doctrine can constitute a valid defence to a criminal charge would have its merits. The vagueness which has surrounded history must be done away with. Uncertainty in the criminal law, especially in a codified system as New Zealand possesses is clearly undesirable. Assuming, then, the need to define a defence of necessity, one may now turn to the equally fundamental question of whether it is in fact possible to do so.

IV. DEFINING A DEFENCE

(a) Formal definitions

Whatever difficulties lawyers in England and New Zealand have conceived themselves to be under, these have not prevented their counterparts in other countries, some of which have their legal structures based on the Common Law, from developing varying definitions of necessity. It is proposed to now consider these, in order to establish whether certain fundamental matters of common principle can be drawn from them.

Perhaps the best known formulation is that contained in S.3.02 of the American Law Institute's <sup>Model</sup> modern Penal Code. In substance this provides that an otherwise illegal act is justifiable in order to avert another evil when: (i) the evil sought to be averted is greater than that sought to be prevented by the law ~~of~~ defining the offence charged (ii) there is no other relevant provision affording a defence (iii) the issue of competing values has not been foreclosed by a deliberate legislative choice (iv) the need for the action taken has not arisen through the negligence or recklessness of the actor. Williams considers this much the best definition yet attempted.<sup>88</sup> The authors of S.3.02 concede that it is imprecise but urge that this cannot be avoided and that the wise course is to state a general principle within the framework of which specific decisions can be made as the occasion arises.<sup>89</sup> This is all one could ever ask for. Homicide is apparently intended to be covered, because the comments accompanying the Institutes Tentative Draft say that an actor <sup>can</sup> rightly point out that the object of the law of homicide is to save life and that if he has by his conduct effected a net saving of innocent lives the numerical preponderance in the lives saved establish an ethical and legal justification for the act.<sup>90</sup> This appears to imply that in homicide situations the relevant value by which the action is deemed to be necessary is the number of lives saved. Thus the killing of two innocent persons in order to preserve the life of an extremely important person would not be justified under the doctrine. Howard argues that S.3.02 seems to create insoluble problems.<sup>91</sup>

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88. Supra, 731

89. Brett and Waller, Supra, 82

90. Tentative Draft No.8, S.3.02, Comments, p.8

91. Australian Criminal Law, 371

He points out that the basis of the rule is a choice between evils and that the notion of evil or harm is often too imprecise to produce a predictable result. It is submitted that this criticism has no great substance in that the necessity for an action has to be evaluated by some standard of values. The need for the absence of fault is in accordance with the spirit of S.1.02(1)(C) of the model Penal Code which provides that the general purpose of the provision governing the definition of offences is to safeguard conduct that is without fault from condemnation as criminal. A further feature of S.3.02 is that the issue of whether an action was necessary is an issue for determination at the trial. Williams points out that even an unreasonable belief as to the necessity of an act is capable of negating mens rea.<sup>92</sup> This would tend to suggest that the defence of necessity goes to actus reus, though the matter is far from clear from a reading of S.3.02.

Certain states within the United States have developed their own definitions. S.339.47 of the Wisconsin Judiciary Report on the Criminal Code 1953, for example, provides that pressure of natural physical forces which causes the actor reasonably to believe that his act is the only means of preventing imminent public disaster or imminent death or great bodily harm to himself or another is a defence to a prosecution for any crime based on that act except murder. This is what Hall calls teleological necessity.<sup>93</sup> In the case of a murder charge, necessity reduces the offence to manslaughter under S.339.47. Kadish and Paulsen claim that while the provision accepts the principle of necessity, it casts it in terms so narrow that its effect may well be to reduce the scope of the doctrine at common law.<sup>94</sup> Certainly the phrase "natural physical forces" is rather more restrictive than is perhaps desirable. As in S.3.02 the test of whether necessity existed is an objective one. Unlike the Institute's provision, however, fault does not seem to be relevant. Perhaps the most significant difference between the two is that the Wisconsin definition refers to imminent danger whereas S.3.02 makes no express reference to the immediacy of the crisis situation. A further distinction, which is more apparent than real, is that S.339.47 affords a defence where the danger is either to the actor or another, while S.3.02 leaves the matter open. It would seem that under the latter definition that so long as the evil averted justifies it, the actor may act positively in his own interests.

The other American formulation the writer wishes to refer to is that found in S.35.05 of the New York Penal Law 1967. Conduct is not criminal when it is necessary as an emergency measure to avoid an imminent public or private injury which is about to occur by reason of a situation occasioned or developed through no fault of the actor and which is of such gravity, according to ordinary standards of intelligence and morality, the desirability and urgency of avoiding such injury clearly outweigh the desirability of avoiding the injury sought to be prevented by the statute defining the offence in issue. The necessity and justification of such conduct may

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92. *Supra*, 745

93. General Principles of Criminal Law (2nd ed.) 425

94. Criminal Law and its Processes (2nd ed.) 534

not rest upon considerations pertaining only to the morality and advisability of the statute. This latter point renders S.35.05 unavailable to such people as the mercy killer and the crusader who considers a penal statute unsalutary because it tends to obstruct his course.<sup>95</sup> Once again, the defence is objectively<sup>assessed</sup>, the Court ruling as a matter of law whether the claimed facts and circumstances would, if established, constitute necessity. The most interesting feature of the New York provision, which is certainly a most appealing one, is the reference to such standards as ordinary intelligence and morality. True necessity involves a clear choice the nature of which leaves the reasonable man with no real alternative.

Of countries in the British Commonwealth, India and Australia are two that possess a statutory defence of necessity in some form. The relevant Indian provision is S.81 of the Penal Code.<sup>96</sup> This provides that nothing is an offence merely by reason of its being done with the knowledge that it is likely to cause harm, and in good faith for the purpose of preventing or avoiding other harm to person or property. It is a question of fact in such a case whether the harm to be prevented or avoided was of such a nature, and so imminent, as to justify or excuse the risk of doing the act with the knowledge that it was likely to cause harm. S.81 has been criticised as appearing to mix up the question of law whether an intention is criminal, the question of fact whether a person had a certain intention and the question (which is really two questions, one of fact and one of law, but is made a question of fact) whether the harm to be prevented was of such a nature as to justify or excuse the accused.<sup>97</sup> Even the editor of the Code conceded that the section was very obscure.<sup>98</sup> He said that we are not told, except by two illustrative examples, what are the circumstances under which a deliberate act could be done without a criminal intention. Nor is it clear whether the harm to be prevented or avoided must be harm to others, or may be merely harm to the actor himself. The illustrative examples referred to are the salient feature of S.81, and appear to be unprecedented. Their value is doubtful, because it should not be necessary to resort to such measures if the substantive provision is itself clear enough to provide outlines of broad principle.

In Australia S.25 of the Criminal Codes of Western Australia and Queensland are identical. It provides that subject to express provisions relating to compulsion, provocation and self-defence, a person is not criminally responsible for an act or omission done or made under such circumstances of sudden or extraordinary emergency that an ordinary person possessing the ordinary power of self-control could not be reasonably expected to act otherwise. Sir Samuel Griffith C.J. justified S.25 in his report to the Queensland Attorney-General on the ground that no man should be expected to be wiser than the ordinary run of mankind.<sup>99</sup> This, no doubt, was intended to mean that an ordinary person should not be expected in an emergency situation to

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95. McKinney's Consolidated Laws of New York, Book 39, Penal Law 57 (1967)

96. This provision, like others, may be out of date. If so, it nonetheless provides an alternative definition worthy of analysis.

97. H. Stephen "Homicide by Necessity" (1884) 1 L.Q.R.51 at 59.

98. *Ibid*, 60.

99. Brett and Waller, *Supra*, 82

cooly and accurately evaluate all the factors involved as he could have done with time for reflection. So long as the circumstances were such as to test the self-control of an ordinary man beyond all reasonable endurance, his action will be justified. The precise effect and scope of S.25 is open to doubt. Howard says that whether it covers the Dudley type of situation would depend on whether the words "sudden ..... emergency" and the reference to loss of self-control, which tends to stress an absence of time for reflection, are regarded as governing the sense of the whole section.<sup>1</sup> It is submitted that the word "extraordinary" would be the contentions one in any attempt to apply the section to a Dudley situation, for the prisoners there were in admittedly very peculiar circumstances. The writer considers any attempt to explain the killing in Dudley on the basis of loss of self-control to be rather artificial. The prisoners plotted to kill the boy. Their action was premeditated. S.25 obviously has its weaknesses in that it fails to clarify some important points. It may be reasonable for an ordinary person who is starving to kill another to feed on his flesh. But no greater value is preserved by the killing of one to save another. Any definition of necessity should make quite clear that action taken must not merely be reasonable, but reasonable for a specific purpose, namely the preservation of a value greater than that sought to be protected by the proscription of the act in question. S.25 does not do this.

The defence of necessity has been recognised in some European countries including Germany, Italy, Switzerland and the Soviet Union. Art.39(1) of the German Draft Penal Code 1962 renders lawful any act committed in the event of an imminent or otherwise unavoidable danger to life, limb, freedom, honour, property or other legally protected interest in order to avert such danger from the actor or another provided (i) the interest protected significantly outweighs that harmed (ii) the means employed are not excessive for the aversion of the danger. Paragraph (2) provides that if the actor erroneously assumes the existence of circumstances otherwise justifying his conduct under paragraph (1), he shall be punished only if he can be blamed for the error. The significant aspect of Art.39(1) is the broad coverage given to the defence. "Honour", for example, seems to be rather all too vague a term.

Similarly vague is the whole of Art.52 Italian Penal Code 1930 which provides that an act compelled by necessity to defend one's own or other's interests against actual danger or unjust injury is not punishable provided that the defence is proportionate to the injury. This definition is poorly expressed and is perhaps the most unsatisfactory of those the writer has discovered. It fails to state what is an act compelled by necessity, and what constitutes "actual danger or unjust injury".

In Soviet law it is the absence of social danger which is the criterion of justification.<sup>2</sup> Art.14 of the Criminal Code of the R.S.F.S.R. as amended to July 3rd 1965, provides that an action shall not constitute a crime if it is committed in extreme necessity. Such a situation exists where there is a threat to the interests of the state, or the rights or person of the actor or other citizens. The defence is only available where the danger cannot be eliminated by other means and if the harm caused is less significant than that prevented.

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1. Supra, 370

2. H. Berman "Principles of Soviet Criminal Law" (1947) 56 Yale Law Journal 814.



The final formal definition the writer wishes to refer to is that found in S.23 of Stephen's Criminal Code Bill of 1878, which of course, never became law. The substance of this was that no act was an offence if done only to avoid otherwise unavoidable consequences which, had they followed, would have inflicted upon the person doing the act, or others whom he was found to protect, inevitable and irreparable evil. No more than was reasonably necessary was to be done for the stated purpose, and the evil intended to be inflicted was not to be intended nor likely to be disproportionate to the evil intended to be avoided. If the actor had placed himself in the emergency situation through his own fault, then he had no defence. An interesting point arising from S.23 is that the defence of necessity could only operate in relation to strangers if the actor was bound to protect them. It is not clear whether this involved a moral or legal obligation. The latter seems the most likely, because the criminal law distains recognising moral duties. Furthermore, the nature of a moral duty is so imprecise that it would itself give rise to problems of definition.

(b) Text-book definitions.

Before attempting to evaluate the essential features of these various definitions discussed above, one should perhaps refer to the interpretations of some writers as to the true nature of necessity. Not surprisingly, because of the confusion surrounding the defences, these differ considerably.

Williams says that by necessity is meant the assertion that the conduct in issue promotes some value higher than that of literal compliance with the law.<sup>3</sup> Generally, he continues, the act is limited to cases where the harm sought to be avoided is an immediate and physical one. The need for the defence, he says, arises only in respect of intentional acts.<sup>4</sup> In other words it is relevant only to offences which possess mens rea as an essential ingredient. This is arguably because in non-intentional cases it is assumed, rather as the Draft Penal Code of the American Law Institute does, that some other defence is available. Nevertheless, this is hardly consistent with his criticism of such a strict liability case as Kitson, nor his assertion elsewhere that if an act is in fact necessary there is no actus reus.<sup>5</sup> On the other hand, it is in no way contradictory to a passage in his article, where he rejects the claim that an act done under necessity is not voluntary.<sup>6</sup> ie. assuming voluntariness is part of the actus reus. It is further consistent with his argument that the belief in the necessity of an action need not be reasonable, for such a mental state is capable of negating mens rea.

Any suggestion that necessity negatives actus reus would receive considerable support. Thus in Brody's "Son of the Speluncian Explorer" the later Supreme Court of Newgarth stated it would not have convicted the spelunkers because they acted from an instinct of survival, an instinct spontaneous, automatic, impulsive, unreflecting, and involuntary.<sup>7</sup> Their fundamental instincts as living organisms, the Court continued, took

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3. Criminal Law: The General Part, 722

4. Ibid, 734

5. Ibid, 743

6. "The Defence of Necessity" 6 Curr.L.Prob. 216 at 223

7. Supra, 1245

control of their intellectual capacities, and they were thereby disabled from understanding and evaluating their act so that it would be deemed wilful. Perhaps this is what Blackstone meant when he said that an unwarrantable act without a vicious will is not an act at all.<sup>8</sup> Paley also seems to support the view that necessity negatives actus reus. He considers the circumstances in which the competing values are to be weighed to be most important. He illustrates his ideas in a model which contains elements of the Kitson and Butterfield situations.<sup>9</sup> If A is sick and B, who is intoxicated, rushes A to hospital in <sup>B's case</sup> B's action violates the State's right not to have intoxicated persons drive on the road and also risks the right of A and other road users to journey in safety. Paley submits that if the risk and violation taken cumulatively were reasonable, B's action would be justified.<sup>10</sup> In other words, the necessity of the situation would negative actus reus, drunken driving being a strict liability offence.

It is submitted that the above exploration of the defence is fanciful and lacks validity. A person acting under necessity has complete command of his faculties. He intends doing what he does. He consciously exercises his will. He is not an automaton. The real point is that in exercising his will, he, as a reasonable man, has no real choice. The exigency of the situation dictates what he does. Only in this sense is his action not wilful and beyond his control. He certainly is fully aware of and understands what he is doing. Perhaps Howard puts this point best when he says that the test of necessity is whether the circumstances were of such a character as would overcome the ordinary power of human resistance and in fact overcome the defendant's resistance.<sup>11</sup> Loss of natural resistance to a breaking of the law is not necessarily consonant with loss of self-control in the sense of acting as an automaton. Howard also rightly states that the scope afforded the defence in ordinary situations will be governed by the extent to which the courts are impressed by the doctrine of strict liability.<sup>12</sup>

Other writers tend to support the view that necessity does not negative actus reus. Brett's conception of the defence is that in putting forward the defence a person is asserting that he was not <sup>morally</sup> voluntary blameworthy or in the traditional language of the law, he had no mens rea.<sup>13</sup> Kenny claims the defence is not available where: (i) a lesser evil is averted than that committed (ii) there is an alternative remedy open (iii) more harm than is necessary occurs.<sup>14</sup> Kenny also states that strictly speaking there is no such defence in the sense that the action is inevitable or unavoidable, for if it were the actor would have the defence that the act was not

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8. Commentaries on the Laws of England

9. Acta Juridica (1971) at 219

10. *Ibid*, 226

11. *Supra*, 369

12. *Ibid*, 372

13. *Supra*, 145

14. Outlines of Criminal Law (19th ed.) 67

voluntary.<sup>15</sup> In Turner's twelfth edition of Russell on Crime the treatment of the doctrine is based on a similar theme. It is claimed that the word "necessity" is only used by the defence in the vain hope of making a criminal deed appear to have been the result of some involuntary conduct instead of what it really is, viz. the result of a voluntary choice of that alternative which the defendant found to be the less disagreeable to himself.<sup>16</sup>

Burns suggests that the defence may be raised in circumstances where the danger is a threat to either the actor or other persons.<sup>17</sup> Harris and Wilshire, however, claim that mere personal necessity cannot justify the commission of a criminal offence.<sup>18</sup> If the latter view were correct, it would make nonsense of Brody's attempt to explain necessity in a homicide situation on the basis of an instinct for survival. A person may not necessarily act on his own behalf. A modified version of Illustration A of S.81 of the Indian Penal Code provides an appropriate case in point. The captain of large liner A suddenly and without any fault on his part, finds himself in such a position that before he can stop his vessel he must run down pleasure launch B with twenty passengers on board. His only alternative is to change course and hit small yacht C with one person in it. Death is inevitable, and the only question is how many are to die. If he does change course, he certainly will not be doing so because of any instinct for his personal safety. Rather, he will be committing what he sees to be the lesser evil of killing one to save others. Consequently the writer sees little merit in distinguishing between the possible motives which cause a person to act as he does. So long as the action occurs in a situation of necessity, that should suffice to provide a good defence to a criminal charge.

(c) Case law.

The case law on necessity does not, of course, provide any real guide in helping one to ascertain its true nature. In Dudley, when the Court decided that the necessity claimed was not within the accepted scope of the defence, it was really referring only to situations of self-defence. The justification of self-defence has, of course, subsequently been given statutory recognition.<sup>19</sup> Its former existence at common law, however, would tend to suggest that necessity only arises where there are circumstances of great danger to life. This impression is confirmed by the recent decision of the English Court of Appeal in London Borough v Williams. Though a tort case, Lord Denning M.R. felt justified in referring to Dudley. It was held that the law only allows encroachment on private property where there are situations of great and imminent peril to life. The Court appears to have accepted that necessity in such circumstances would provide a complete & defence to an action in tort. In the criminal case of Buckoke, however, Lord Denning M.R. agreed with counsel that any defence of necessity goes to mitigation and does not take away guilt.

To add to the confusion, one need merely refer to the American cases. In The

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15. Ibid, 72

16. Russell on Crime (12th ed.) 93

17. A Casebook in the Law of Crimes, 193

18. Criminal Law (18th ed.) 23

19. S.48 Crimes Act 1961

William Gray the Court held that there was an absence of will on the captain's part due to the necessity existing at the time, and consequently no offence was committed. This case seems to support the view that necessity negatives actus reus. Livingston C.J. said that necessity excused the defendant altogether, and therefore considerations of mitigation were irrelevant. In U.S. v Holmes Baldwin C.J. repeated the point when he declared necessity to devest an act of unlawfulness and to be quite distinct from mitigation.

(d) Conclusions.

It is submitted that from the above definitions and analyses of the true nature of necessity, certain matters of principle can be drawn. There is not of course, and never will be, universal accord on every point. This should be regarded as a healthy state of affairs. Only through criticism can one hope to attain the unattainable which, in this case, is a faultless definition of necessity.

The writer would regard the following to be absolutely essential elements of any provision giving statutory recognition to a general defence of necessity: (i) there must have been circumstances of great and imminent peril (ii) the danger must have been to the legally protected property or personality rights of the actor or others whether he was bound to protect them or not (iii) the danger threatened clearly and decisively outweighed the evil involved in the illegal evasive action (iv) the issue of competing values was not already foreclosed by a deliberate legislative choice (v) there was no other course open by which to avoid the danger (vi) the action taken was, having regard to all the circumstances, that of a reasonable man (vii) the action taken was no more than necessary to avert the evil threatened (viii) the need for the action taken was not attributable to any fault on the actor's part (ix) the test of the alleged necessity is objective, not subjective, to be determined by the jury once the judge has ruled as a matter of law that there is evidence of necessity fit to go to the jury.

The above factors, to a large degree, have already been discussed and speak for themselves. Necessity can apply to, and is only intended to cover, situations of extraordinary emergency demanding immediate action. Thus in Kitson the intoxicated passenger had to react smartly when he became aware that the car was moving down the hill. In The William Gray the captain had to make a snap decision to seek refuge by sailing into the port. In Dudley, however, the murder of the boy was the result of deliberate planning.

As has been discussed, there is no good reason why a person cannot act on the behalf of, or for the benefit of, others, Stephen's Criminal Code Bill of 1879 seems to distinguish legal and moral obligations to act, but these seem irrelevant in times of danger. A guardian may have a legal duty to protect a child in distress, but a stranger may have an equally compelling moral duty to do so. Why should the stranger be prevented from taking advantage of the defence of necessity merely because his obligation to act arose from a matter of which the Court distains taking judicial Notice? On the other hand, there is validity in acting only when it is intended to protect the legally protected property or personality rights of others. Only where there is a threat to something of value in the eyes of the law should necessity be admitted as a defence. Rights to both physical and material security come into this category. The appellant in Kitson acted first and foremost to protect himself, but also to avoid the damage which could have been done to the car.

The compelling nature of the principle of necessity would by definition appear to require that there be a clear advantage in breaking the law to avert a greater evil. This is best illustrated in cases of strict liability. An offence of this type is, of course, created on the basis that compliance with the law is of paramount importance and outweighs any considerations of criminal culpability. However, as Kilbride v Lake illustrates, a court may recognise that literal application of the law may create hardship in individual cases. Consequently defences to offences of strict liability have arisen. In a case such as Kitson, it is submitted, there was a clear advantage to be gained by breaking the law. On the other hand, in Dudley there was no greater value preserved in killing the boy instead of any of the others. The strictly logical consequence of the attitude the writer takes to the Dudley situation would be that the whole crew must perish because no particular individual within that group of necessity must die. This result, is of course, open to the criticism that even if the boy was not necessarily the one who should have been sacrificed, nevertheless the greater value of the survival of the rest of the crew must prevail. Because of the extremely mitigating circumstances as they existed in Dudley, a possible compromise to this paradoxical situation is that in such a case a murder charge should be reduced to manslaughter. The writer, for one, would have no quarrel with such a move. It would have the dual advantage of sufficiently condemning the action taken while at the same time recognising that it occurred under absolutely extraordinary circumstances. In the other type of homicide situation as exemplified by the mountain climbing disaster and Illustration A of S.81 of the Indian Penal Code, necessity should be a complete defence. Where necessity dictates not only that someone must die, but who that person is, the writer sees considerable merit in the argument of the American Law Institute that the preponderance in the number of lives saved establish an ethical and legal justification for the act.

Obviously enough, necessity can only afford a defence where the legislature itself has not decided upon the issue of competing values relevant to a particular case. Such legislative action would normally manifest itself in the form of the creation of an offence of absolute liability. Thus in the Kitson situation, if drunken driving were an absolute rather than strict liability offence, necessity could have no possible application.

Furthermore, because of its exceptional character, necessity can only apply where there was no other course open than to break the law to avert the greater evil. An act committed under necessity is a measure of last resort. If there is another alternative open by which the greater value can be preserved, and which does not involve a breach of the law, then it must be taken.<sup>20</sup>

The writer also believes that an action committed under necessity must be that of a reasonable man. This, of course, is ensured to a large degree by the fact that only where there is a clear advantage to be gained by an illegal action will there be a justification for it. The whole conduct of the defendant, and any excessive illegal action on his part, will be evidence which the Court will have to take into account in order to decide whether the alleged necessity has been made out. In this respect,

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20. Clark, Defences to Offences of Strict Liability 180

there is some similarity with the defence of provocation, where the issue of whether there was a proper and reasonable relationship between the mode of resentment and the provocation given is a relevant evidentiary consideration in deciding whether the accused lost his self-control. Any action not justified by necessity, as in provocation, must be criminally accounted for.

It is considered that the notion of fault has a valid role to play in any attempt to define the limits of a principle of necessity. Necessity excuses otherwise illegal action. If a person is forced to breach the law because of his own negligence or recklessness, he should suffer the consequences which normally flow. Any concept of fault, however, must be construed fairly narrowly. In the Kitson or Butterfield type of situation, the writer supports Clark's view that the best explanation is probably that the totality of the situation is not due to the fault of the defendant. In Kitson the defendant awoke when the car was already beginning to roll down the hill. In Butterfield there was some suspicion that the defendant was knocked over the head by an intruder. Clearly, the respective defendant's intoxicated states were not the instigating factors of the chains of events which occurred.

Finally, it remains to say that the true test of necessity should be an objective one. The writer believes that a purely subjective test would be open to abuse. The test should be whether the illegal action was in fact necessary, not whether the defendant believed it to be so. Mere bona fides should not be enough. The very fact that the jury will decide whether there was a necessity will introduce a sufficiently subjective element into the assessment. Such a state of affairs is by no means undesirable, however, because as Brody points out in "Son of the Speluncean Explorer", it is through the medium of an ordinary jury verdict that society's decision as to the reasonableness or otherwise of the defendant's action can be given. Such a decision will, of course, only be possible if the judge rules as a matter of law that there is evidence of necessity fit to go to the jury upon which it could find such a justification.

To conclude, it is suggested that in spite of apparent difficulties in the past, there is no good reason why a defence of necessity cannot be satisfactorily defined. The above elements, it is believed, provide a sound core upon which to base such a provision. In declining to actually define a defence himself, the writer does not feel he can be fairly accused of abdicating his function as the Royal Commission of 1879 and the judiciary may be. The purpose of this article is expository, not definitive. The exacting and precise task of definition may be left, safely one hopes, in the skilled hands of an experienced draftsman.

#### V. CONCLUSION

The nature of necessity, as this article clearly shows, is highly controversial. The writer's basic conclusions are that it is both desirable and possible to define the defence. So long as necessity remains a potential justification under S.20 Crimes Act 1961 for an otherwise criminal act, the confusion which has surrounded its history will remain.



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