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NECESSITY

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Sharon Samuels
G.D. McKinnon

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NECESSITY

I. HISTORICAL PERSPECTIVE

The philosophical underpinnings of the defence of necessity can be traced as far back as ancient Greece.

From earliest times it has been maintained that in some situations the force of circumstances makes it unrealistic and unjust to attach criminal liability to actions which, on their face, violate the law. Aristotle, *Ethics* (Book III, 1110 a), discusses the jettisoning of cargo from a ship in distress and remarks that "any sensible man does so" to secure the safety of himself and his crew.¹

As early as 1550, necessity was successfully raised as a defence. Pollard, Sergeant at Law, arguing for the defendant, found favour with the judges of the Exchequer Chamber in the case of *Reniger v. Fogossa* (1551), 1 Plowden 1 at p.18, 75 E.R. 1. Pollard maintained that:

...in every law there are some things which when they happen may break the words of the law, and yet not break the law itself; and such things are exempted out of the penalty of the law, and the law privileges them although they are done against the letter of it, for breaking the words of the law is not breaking the law, so as the intent of the law is not broken. And therefore the words of the law of nature, of the law of this realm, and of other realms, and of the law of God also will yield and give way to some acts and things done against the words of the same laws, and that is, where the words of them are broken to avoid greater inconveniences, or through necessity, or by compulsion...

Subsequent philosophical textwriters agreed that it would be unjust for criminal liability to attach to the actions of a person in circumstances where, for example, the instinct for survival compelled that person to break the law. Sir Francis Bacon was the first English textwriter to distinguish between killing in self defence and the killing of an innocent person for the "necessity of conservation of life".

First, for conservation of life: if a man steals viands to satisfy his present hunger, this is no felony or larceny.

So if divers be in danger of drowning by the casting away of some boat or bark and one of them to get some plank, or on the boat's side to keep himself above water, and another to save his life thrust him from it, whereby he is drowned; this is neither se defendendo, nor by misadventure but justifiable.

So if felons be in gaol, and the gaol by casualty is set on fire whereby the prisoners get forth, this is no escape, nor breaking of prison.²

¹ Dickson J. in *Perka et al v. The Queen* [1984] 14 C.C.C (3d)385 @ 392-395.

² *The Elements of the Common Law*, (1630) pp.29-30.

Bacon viewed only the second of these three examples as justifiable and entirely lawful (being analogous to a lawful killing to avert a felony). He viewed the first and third examples as unjustifiable but excusable nonetheless.

In the 17th century, Hobbes, in *Leviathan* stated that an act of self preservation in circumstances where the instinct for survival compelled that person to break the law should be "totally excused".³ In the 18th century Kant wrote that where such an act involved the killing of another, the "act of self preservation through violence is not inculpable but is still unpunishable".⁴

In 1783, Blackstone described how the defence of necessity could be categorized as either a justification or an excuse. On the topic of excusatory necessity he wrote:

As punishments are therefore only inflicted for the abuse of that free will, which God has given to man, it is highly just and equitable that a man should be excused for those acts which are done through unavoidable force and compulsion"⁵

On the topic of justificatory necessity, under the heading "Choice between Two Evils" he wrote:

This species of necessity is the result of reason and reflection and obliges a man to do an act, which, without such obligation, would be criminal. This occurs when a man has his choice of two evils set before him, and chooses the less pernicious one. He rejects the greater evil and chooses the less. As where a man is bound to arrest another for a capital offence, and being resisted, kills the offender, rather than permit him to escape.⁶

As will be discussed, the distinction between justificatory and excusatory necessity is integral to the conceptualization of the defence of necessity and continues to be the subject of much debate.

English Approach - Duress of Circumstances

Reniger v. Fogossa supra, (1550), *Mouse's Case* (1608) 12 Co.Rep. 63; 77 E.R. 1341 and *Moore v. Hussey* (1609) Hob. 93; 80 E.R. 243 are all examples of early English cases in which judges were willing to recognize the defence of necessity. *Mouse's Case, supra*, was an action for trespass, where the defendant had thrown the plaintiff's goods overboard. The court held that both the crew and the passengers were entitled to do so. The rationale behind this decision has been characterized as "the justification of the lesser harm (the loss of goods) to avoid the greater harm (the loss of lives)."⁷

³ Thomas Hobbes, *Leviathan*, (1651) Pelican ed., p.157.

⁴ Immanuel Kant, *The Metaphysical Elements of Justice* (1797).Translator Ladd 1965.

⁵ W.Blackstone, *Commentaries on the Law of England*, Vol IV (1783 ed.) p.27.

⁶ Ibid pp.30-31.

⁷ S M.H.Yeo, *Compulsion in the Criminal Law*, 1990, The Law Book Co. Ltd., Australia @ 46.

In *Moore v. Hussey*, *supra*, an action in trespass was brought against the defendant, who had aided her husband in taking away the plaintiff's ward. The defendant claimed that she had participated only because her husband was her sole source of maintenance. Lord Hobart held that her conduct should be excused as all "laws admit certain cases of just excuse when they are offended in letter, and where the offender is under necessity, either of compulsion or inconvenience"⁸.

Despite these early cases, a long standing debate ensued as to whether the defence of necessity existed at all at common law. Proponents of the view that necessity should not be recognized often cited the well known case of *R. v. Dudley* (1884) 14 Q.B.D. 273. In *R. v. Dudley*, *supra*, three starving sailors in a lifeboat sacrificed the life of a cabin boy and ate his flesh in order to survive. The men were rescued four days later and the defence of necessity was held not to apply. The three men were convicted of murder and sentenced to death. The death sentence was then commuted to six months imprisonment. In justifying this decision, Lord Coldrige warned against permitting "compassion for the criminal to change or weaken in any manner the legal definition of the crime". However, the underlying reasons behind the decision have been subject to interpretation.

The ratio decidendi is difficult to extract. Perhaps it was held that a situation of necessity was not present since the men might have been rescued at any time; perhaps the case is a denial that necessity as a defence exists at all; perhaps it was that there was no reason that the boy should have suffered so that the men could live...Perhaps the real reason was that necessity might apply to excuse a less serious offence in order to avert a more serious disaster, but that murder can never be excused on those grounds."⁹

The more recent case of *Southwark London Borough Council v. Williams et al* [1971] 1 Ch. 734 had also been cited by those of the view that necessity should not be recognized as a defence at common law. In that case, it was held that the defence of necessity would not be available to a starving person who entered a house to take food as a matter of survival. Nor would the defence be available to squatters who entered a vacant house because they were homeless. In explaining why he believed the defence should not be available in such circumstances, Edmund Davies L.J. stated that "necessity can very easily become a mask for anarchy"¹⁰.

Most recently, a limited form of the defence of necessity has been recognized in England in the form of 'duress of circumstances', which is viewed as a counterpart to 'duress of threats'. Both forms of duress are specific defences (i.e. applicable only under specified circumstances).¹¹ The leading cases in this regard are *R. v. Martin* [1989] 1 All E.R. 652 @ 653-654 and *R. v. Conway* [1988] 3 W.L.R. 1238.

⁸ *Moore v. Hussey*, *supra* @.96; 246.

⁹ Alan W. Mewett & Morris Manning, *Criminal Law*, 1985, Butterworths.

¹⁰ *Southwark London Borough Council v. Williams et al* *Supra* @ 746.

¹¹ Smith & Hogan, *Criminal Law*, 6th ed. 1988 pp.222-229, *R.v. Conway* [1989] Q.B. 290 and *v Martin* [1989] 1 All E.R. 652, 88 Cr. App R.343.

In *R. v. Conway, supra*, the defence of duress of circumstances succeeded on a charge of dangerous driving. Evidence given by the accused was that he had feared for his life and the life of his passenger while being chased by two men whom he believed to be assassins. The two men were in fact police officers. A condition of the defence was that it would only be available if it could be said that, objectively, the accused was acting to avoid death or serious injury.

In *R. v. Martin, supra*, the court accepted this defence for a driver charged with driving with a suspended licence. This was because he had reasonably feared that his wife would commit suicide if he did not drive. Simon Brown J. described the duress of circumstances defence as follows:

The principles may be summarized thus: first, English law does, in extreme circumstances, recognize a 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 an 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.

Duress of circumstances is thus limited to situations where "circumstances create a danger of death or serious bodily harm analogous to that which would ground a defence of duress if there had been a threat from another person."¹² As the conditions which must be met are the same as those for a defence of duress, "the defence of 'necessity of circumstances' cannot play the broad role of a residual defence of necessity."¹³

¹² Eric Colvin, *Principles of Criminal Law*, 1991 @ p239 at footnote 219.

Note that in Canada duress is also a specific defence, but is viewed as a subset of the general, residual defence of necessity.

¹³ Ibid. Note that the term 'residual' is often used to describe the defence of necessity in jurisdictions where there are no limitations on the kinds of circumstances under which an acquittal might be permitted. In such jurisdictions the residual defence of necessity acts to supplement the gaps left by more specific defences, such as duress.

Canadian Approach

The Criminal Code has never contained a provision relating to a general, residual defence of necessity. However, by virtue of s.8(3) of the Code, the general residual defence of necessity is now preserved as a common law defence.

Morgentaler v. R. [1976] 1 S.C.R. 616 was the key decision for the acceptance of the defence of necessity in Canada. At issue in that case was whether the defence of necessity might be applicable where statutory conditions required for a legal abortion had not been fulfilled. Dr. Morgentaler testified that his patient, who was six to eight weeks pregnant, was in psychological distress and that in his opinion an abortion was necessary and indispensable. The Supreme Court of Canada held that there was no evidence of exceptional or urgent circumstances upon which to ground the defence. In addressing the issue of whether or not the defence of necessity exists at all in Canada, Pigeon J. implied that it could exist in "very exceptional circumstances"¹⁴ Dickson J. expressly left the question open:

On the authorities it is manifestly difficult to be categorical and state that there is a law of necessity, paramount over other laws, relieving obedience from the letter of the law. If it does exist it can go no further than to justify non-compliance in urgent situations of clear and imminent peril when compliance with the law is demonstrably impossible. No system of positive law can recognize any principle which would entitle a person to violate the law because on his view the law conflicted with some higher social value.¹⁵

Consequently, it was held in several lower courts that *Morgentaler v. R.*, *supra*, had confirmed the existence of the defence.¹⁶ Finally, in *Perka v. R.*, *supra*, the Supreme Court of Canada unanimously and expressly recognized that the defence of necessity exists in Canadian law. That case involved the importation of illegal drugs into Canada. Evidence was that the ship carrying the drugs was forced ashore during a storm and that the drugs were off-loaded on Canadian soil by the defendants as a matter of urgency to avoid capsizing. It was argued that the defence of necessity should apply. The defendants were acquitted after the trial judge put necessity to the jury. The Supreme Court of Canada determined that the trial judge had been correct in instructing the jury upon the defence of necessity, but ordered a new trial on grounds of misdirection regarding the conditions of the defence. Dickson J. discussed the defence of necessity in great detail and summarized his conclusions as follows:

It is now possible to summarize a number of conclusions as to the defence of necessity in terms of its nature, basis and limitations: (1) the defence of necessity could be conceptualized as either a justification or an excuse; (2) it should be recognized in Canada as an excuse, operating by virtue of s. 7(3) [now s.8(3)] of the *Criminal Code*; (3) necessity as an excuse implies no vindication of the deeds of the actor; (4) the criterion is the moral involuntariness of the wrongful action; (5) this involuntariness is measured on the basis of societies expectation of

¹⁴ *supra* @ p.659.

¹⁵ *supra* @ p.678.

¹⁶ i.e. see *R. v. Morgentaler* (No.2) (1976) 27 C.C.C. (2d), 64 D.L.R. (3d), 718.

appropriate and normal resistance to pressure; (6) negligence or involvement in criminal or immoral activity does not disentitle the actor to the excuse of necessity; (7) actions or circumstances which indicate that the wrongful deed was not truly involuntary do disentitle; (8) the existence of a reasonable legal alternative similarly disentitles; 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; (10) where the accused places before the court sufficient evidence to raise the issue, the onus is on the Crown to meet it beyond a reasonable doubt.¹⁷

In addition, Dickson J. outlined a proportionality requirement for the defence of necessity, to the effect that the "defence cannot succeed if the response was disproportionate to the peril".¹⁸

In summary, the essential elements required for the defence of necessity to succeed in Canada may be stated as follows:

- (1) There must be circumstances of imminent risk where the action is taken to avoid a direct and immediate peril.
- (2) The accused's 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.
- (3) The harm inflicted must be less than the harm sought to be avoided.¹⁹

¹⁷ *Perka v. R.*, *supra* @ 405-406.

¹⁸ *Perka v. R.*, *supra* @ 407.

¹⁹ Don Stuart, *Canadian Criminal Law: A Treatise*, 2nd ed, 1987, Carswell.

II. THE NATURE OF NECESSITY

Conceptualization of Necessity as a Justification or Excuse

In examining the conceptual foundation of the defence of necessity, Dickson J., in *Perka*, *supra*, characterized necessity as an "ill defined and elusive concept" which in his view was partly due to misconceptions surrounding the principles of justification and excuse. In this regard he observed that:

Despite any superficial similarities, these two principles [justificatory and excusatory necessity] are in fact quite distinct and many of the confusions and difficulties in the cases (and, with respect, academic discussions) arise from a failure to distinguish between them.²⁰

The theory of justification and excuse may be explained as follows:

This normative theory categorizes criminal defences into justifications and excuses. A person who claims a justification acknowledges her or his responsibility for the harmful conduct but contends that it was done in circumstances which made the conduct rightful in the eyes of society. Since society encourages or at least tolerates the performance of such conduct, the actor deserves praise or permission rather than blame and consequent punishment. Society determines whether conduct is justifiable on the basis of social utility: If the actor's conduct causes less harm than the harm which he or she thereby avoids, the conduct is justifiable. This comparative exercise has been variously described as the "balancing of harms approach"²¹, "lesser evils doctrine"²² and the "notion of superior interest"²³.

A person who claims an excuse concedes that the harm caused by her or his conduct is greater than that which it avoids. Accordingly, a plea of excuse is relevant only after it has been determined that the actor's conduct was unjustified and therefore wrong in society's eyes. After all, if the conduct was justified, there would be nothing to excuse. What an excuse does is to conclude that while the conduct was wrong, some characteristic of the actor which is tested by the threatened danger makes it inappropriate for society to punish her or him. Criminal responsibility is not attached to the actor because society both recognizes and has compassion for the human frailty found in him or her. Such compassion is imparted because society assesses the actor as having acted in the way an ordinary person could have acted when placed in similar circumstances. It would be harsh for society to demand more from the actor than it would from its other members. In such cases, while praise is not bestowed on the actor, pardon is.²⁴

²⁰ *Perka v. R*, *supra*, @ 396.

²¹ S.Kadish, *Respect for Life and Regard for the Criminal Law*, (1976) 64 California Law Review, 871 @882.

²² G. Fletcher, *Rethinking criminal law*, (1978), pp788-798.

²³ A. Esser, *Justification and Excuse*, (1976), 24 American Journal of Comparative Law.

²⁴ Stanley M.H. Yeo, *op cit* n.7 @ p.6.

In *Perka v. R.*, *supra*, the only disagreement in the judgments related to the question of whether the necessity defence should be conceptualized as an excuse or as a justification. Wilson J. disagreed with the majority view that the appropriate jurisprudential basis on which to premise the defence of necessity should be exclusively that of excuse. It was her view that necessity could also be characterized as a justification in situations where there were conflicting legal duties. However, Dickson J., speaking for a clear majority conceptualized necessity solely as an excuse. The rationale behind this approach seems to have been based on the fear that "the recognition of a residual necessity defence, without concrete limitations on the circumstances where it might be raised, could undermine the authority of the criminal law."²⁵ and "very easily become a mask for anarchy."²⁶ As well, at pp. 397-398 Dickson J. reiterated the view which he had expressed in *Morgentaler v. R.*, *supra*, that "no system of positive law can recognize any principle which would entitle a person to violate the law because it conflicted with some higher social value." Elaborating on this view, Dickson J. stated the following:

The Criminal Code has specified a number of identifiable situations in which an actor is justified in committing what would otherwise be a criminal offence. To go beyond that and hold that ostensibly illegal acts can be validated on the basis of their expediency would import an undue subjectivity into the criminal law. It would invite the courts to second-guess the legislature and to assess the relative merits of social policies underlying criminal prohibitions. Neither is a role which well fits the judicial function...

Conceptualized 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, recognizing that a liberal and humane criminal law cannot hold people to the strict obedience of laws in emergency situations where 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 are excusable.

Dickson J. derived this view of necessity from Fletcher's notion of "moral or normative involuntariness"²⁷ This theory holds that when normal human instincts compel a person to break the law, that action must be seen as involuntary. Such action deserves no punishment and therefore must be excused. According to Fletcher, however, such an action would not be excused where the harm inflicted was greater than the harm averted. On this issue, Don Stuart was of the view that the majority judgement in *Perka v. R.*, *supra*, misapplied Fletcher's approach:

The majority judgement misapplies Fletcher's approach. That author suggests that the balancing of interests will depend on whether the defence is a justification or excuse. Conduct will be justified "only so far as the benefit of the conduct exceeds the cost", while excused conduct may be perceived as morally involuntary even though the cost is substantially greater than the benefit gained. Fletcher's major

²⁵ Eric Colvin, *op. cit.* n.12 @ 242.

²⁶ Edmund Davies L.J. in *Southwark London Borough Council v. Williams*, *supra*, (*op.cit* n. 9), as quoted by Dickson J. in *Perka v. R.*, *supra* @ p. 398.

²⁷ Fletcher, *Rethinking Criminal law*, (1978) @52-57.

thrust is to stress the advantages of the German approach of "individualized excusing conditions". In *Perka* the court classifies necessity as an excuse but nevertheless in its third requirement asserts a mechanistic balancing-of-harms test which seems more appropriate to a justification.²⁸

Subsequent commentators have agreed that the theory of justification and excuse is integral to the conceptualization of necessity. However, many have taken issue with Dickson J.'s 'excusatory formulation' of the defence as "narrow" and "rigid"²⁹ and internally inconsistent³⁰. A number of commentators and legislative proposals for codification are in agreement with the view that the border between justification and excuse is unclear and that criminal defences should therefore not be categorized as such. The Law Reform Commission of Canada, in its report on Recodifying Criminal Law, has adopted this position:

As has been pointed out, justifications and excuses overlap and one and the same defence, for example necessity, may operate now as an excuse, now as a justification³¹. For this reason, no attempt has been made to categorize each defence as either one or the other.³²

The same view has been taken in the Australian Interim Report, Review of Commonwealth Criminal law,

It will have been observed that the distinction between excuse and justification is not drawn in the drafts proposed in New Zealand, Canada or the United Kingdom. Smith and Hogan, Criminal Law, 6th edition at p. 225, mentions that in *Perka v. The Queen*, the Supreme Court of Canada held that necessity may be an excuse, but not a justification and added: "There seems to be no practical difference except that it perhaps made the court feel better". The review committee is not convinced of the need to perpetuate in the modern law the common law distinction between justification and excuse.³³

Professor Kent Greenwalt has been a chief critic of the theory of justification and excuse.³⁴ He argued that this lack of clarity makes classification of criminal defences difficult. Further, this criticism holds that even if it were possible to categorize criminal defences in this manner, society's values and expectations would not necessarily be reflected as a result.³⁵

Eric Colvin, in his examination of the overlapping nature of justification and excuse has made the following observations:

²⁸ Don Stuart, op cit n. 19 @ 434.

²⁹ Eric Colvin, op cit n. 12 @ 205.

³⁰ Eric Colvin, op cit n. 12 @ 245.

³¹ Eric Colvin, Principles of Criminal Law (Toronto: Carswell, 1986) @ 178-179.

³² Report 31, *Recodifying Criminal Law*, 1987 @ 34.

³³ Interim report, *Review of Commonwealth criminal Law*, 1990, Australia. @ 145-146.

³⁴ See *The Perplexing Borders of Justification and excuse*, (1984), 84 Columbia law review and *Distinguishing justification from Excuse*, (1986) 49 Law and Contemporary Problems, 89.

³⁵ Stanley M.H. Yeo, op. cit n..7 @ p. 8.

- 1) Dickson J.'s final formulation in *Perka v. R.*, *supra*, of an excusatory defence of necessity is internally inconsistent. On one hand he proposes that "appropriate and normal resistance" to pressure is required of the accused in order for the defence of necessity to be available³⁶. This is in keeping with an excusatory necessity defence. On the other hand, a balancing of evils test is suggested. This proportionality test, which requires that the harm sought must, objectively speaking, outweigh the harm inflicted, is essentially "more in tune with the characterization of necessity as a justification. In effect it resurrects the idea that necessity exculpates where prima facie unlawful conduct serves a greater good. Yet this was the idea that Dickson J. was at pains to reject in his conceptualization of the defence."³⁷
- 2) Disagreement as to whether necessity should be conceptualized as an excuse or justification relates back to the original issue of whether it should be recognized at all.

The obstacle for those advocating recognition of the defence has always been concerns about the open endedness of their claims. Those who would reject the defence have not denied that exceptional circumstances may arise in which it is 'necessary' to commit that which would ordinarily be an offence. What they have contended, however, is that the circumstances which should permit this kind of exculpation are or can be covered by specific defences like self-defence and like that afforded to surgeons by s. 45³⁸. Moreover they have feared that the recognition of a residual defence, without concrete limitations on the circumstances where it might be raised, could undermine the authority of criminal law. It could lead to the result that the criminal law was unable to function as an authoritative guide for behavior because its behavioral standards were regarded as always subject to situational review on a case by case basis. If criminal law came to be a set of merely provisional standards, amenable to displacement wherever a court was convinced that this was situationally appropriate, then the criminal law which we know would be dead. Such fears about the defence of necessity are probably unfounded. They have nevertheless underpinned the long resistance to its recognition, and they have played some part in its current conceptualization as an excuse rather than a justification.³⁹

Note that Glanville Williams has offered an interesting drafting proposal to address the concern that the legislative process could be undermined by a recognition of justificatory necessity. He suggests adding the requirement to any formulation of the necessity defence that the accused be acting "to avoid immediate physical harm to person or property".

This formula would also have the effect of excluding damage to political or cultural values, for instance, as well as damage that may happen only on a long term calculation, where the solution must be left to the government and legislature.⁴⁰

³⁶ Dickson J. in *Perka v. R.*, *supra*, @ 138-139.

³⁷ Eric Colvin, *op. cit.* n. 12 @ 245.

³⁸ See *Morgentaler v. R.*, *op. cit.* n.16. s.45 of the Criminal Code confers protection from criminal responsibility for surgical operations reasonably performed with reasonable care and skill.

³⁹ Eric Colvin, *op. cit.* n. 12 @ 241-242.

⁴⁰ Glanville Williams, *Necessity*, *The Criminal Law Review*, [1978], 128 @ 136.

Glanville Williams has also addressed Dickson J.'s concern that "no system of positive law can recognize any principle which would entitle a person to violate the law because on his view the law conflicted with some higher social value".

[This] sentence does not properly represent the defence of necessity as it is put forward by its supporters. Necessity does not excuse a person merely because *he* thought his conduct served a higher value; his opinion must be ratified by the court of trial.⁴¹

In order to further guard against undue subjectivity, he suggests that rather than permitting the jury to determine whether the defence has been made out, as is the present practice, the trier of law should be given this role (see p. 15 for further discussion on this issue).

In the light of above commentaries and criticisms, the current trend in the codification of the common law, of either rejecting the distinction between justification and excuse, or acknowledging the distinction but not attempting to categorize the defences as such, appears reasonable.

It should be noted, however, that explicit recognition of the distinction is also a viable option. Stanley M.H. Yeo has expressed the view that "it is disappointing that the Canadian Law Reform Commission, Report No.31, recommended just one provision to cover both defences".⁴² It was his view that both categories of necessity should be recognized and drafted as two separate sections and that "necessity should be a justification where a lesser harm is done to avoid a greater and an excuse where the accused was under such pressure as made it difficult or impossible for him or her to comply with the law".⁴³ The Australian Review Committee, which was established to report and make recommendations on Principles of Criminal Responsibility and Other Matters in Australia, examined Yeo's proposal but declined to accept it.⁴⁴

Spontaneity

A requirement of the defence of necessity, as per Dickson J. in *Perka v. R.*, *supra*, is that the accused must have faced "clear and imminent peril", where human instincts cry out for action and make a counsel of patience unreasonable."⁴⁵ This implies that at least a degree of spontaneity is required for the necessity defence to succeed. In the subsequent case of *R v. Morgantaler, Smoling and Scott*, (1985) 48 C.R. 3rd 1 at p. 83, the Ontario Court of Appeal carried this view one step further, adopting Fletcher's view that a lack of spontaneity automatically disqualifies the accused from entitlement to the necessity defence. As per Fletcher: "Planning, deliberating, relying on legal precedents - all of these are incompatible with the uncalculating

⁴¹ Ibid @p.134.

⁴² Stanley M.H. Yeo, op cit n. 7 @ 51, at footnote101.

⁴³ Interim report, *Review of Commonwealth criminal Law*, 1990, Australia. @ 145. Also, see p. 145 for an outline of Yeo's draft proposals.

⁴⁴ Ibid @ 145-146.

⁴⁵ *Perka v. R.* *supra*, @ 400.

response essential to 'involuntary' conduct."⁴⁶ While this passage was not part of Dickson J.'s analysis in *Perka v. R*, *supra*, the Supreme Court of Canada has affirmed the portion in *Morgentaler, Smoling and Scott*, *supra*, which adopted Fletcher's view.

This position has been viewed as unduly harsh. As per Eric Colvin, it is integral to the conception of excusatory necessity that it must be confined to situations of overwhelming "involuntariness". However, while planning and deliberation are often difficult to reconcile with "involuntariness", the two ideas are not totally incompatible.

It seems artificial to exclude automatically all instances where a person has deliberated about a course of action but nevertheless feels compelled to take it. consider, for example, *R.v Dudley and Stephens*, [*supra*] where some members of the starving crew of a wrecked yacht killed and ate one of their colleagues in order to save their own lives. They were denied the defence of necessity, a decision which has been much debated. Should the defence be automatically excluded because discussions preceded the killing? This seems a crude way of disposing of the difficult issues raised by the case. It is difficult to see why a sense of compulsion should be discounted merely because it has been articulated and considered.⁴⁷

As per Colvin:

[The] approval of the passage from Fletcher suggests that a forward or long-term agreement⁴⁸ could never be excused under the necessity defence, no matter if this was the only way to prevent some harm occurring. This does not appear to be an inevitable result of the rulings in *Perka*. If, however, it is an essential component of the doctrine of normative involuntariness, it is submitted that the doctrine be abandoned.⁴⁹

No Reasonable Legal Alternative to Disobeying the Law

According to Dickson J. in *Perka v. R*, *supra*, the defence of necessity would apply only where compliance with the law was demonstrably impossible. His view was that "The importance of this requirement that there be no reasonable legal alternative cannot be over stressed."⁵⁰ This limitation on the defence of necessity was a key issue in both *Perka*, *supra*, and in *Morgentaler, Smoling and Scott*, *supra*. In *Perka*, *supra* the trial judge had improperly instructed the jury on this requirement, which was held to be grounds for ordering a new trial. In *Morgentaler, Smoling and Scott*, *supra*, the concern was that abortions could be performed in accordance with the provisions laid out in the Criminal Code.

⁴⁶ Fletcher, *Rethinking Criminal law*, (1978).

⁴⁷ Eric Colvin, op cit n.12 @ p.204-205.

⁴⁸ In *Morgentaler, Smoling and Scott*, *supra*, the long-term agreement at issue was to perform abortions without restriction to cases of medical need.

⁴⁹ Eric Colvin, op cit n.12 @ 244.

⁵⁰ *Perka v. R*, *supra*, @ 400.

Don Stuart has commented on this requirement, and is of the view that "[l]iteral insistence on Mr. Justice Dickson's requirement of demonstrable impossibility of complying with the law would make the defence almost extinct."⁵¹

Note that this requirement has not been specifically included in any of the draft legislative proposals, however, the Law Reform Commission of Canada, in Report 31⁵², has worded the defence so that "No one is liable if...such harm or damage could not effectively have been avoided by any lesser means". This would presumably include any reasonable legal means of compliance .

Proportionality

- As discussed on p.10 of this paper, Dickson J.'s formulation of the proportionality requirement in *Perka v. R*, *supra*, has been criticized as being internally inconsistent. The justificatory proportionality test, which requires that the harm sought must, objectively speaking, outweigh the harm inflicted has been adopted by the Law Reform Commission of Canada, in Report 31⁵³. The Model Penal Code of the American Law Institute⁵⁴ also includes this formulation of the proportionality requirement .

Note the following criticism of the justificatory proportionality requirement as described by Donald Galloway:

While we accept that there are some things in this world that are more important than a single human life, or his desire to avoid pain,...we also know that at some point a person's tolerance to pain can be reached and he will seek alternatives, no matter how much is at stake... The proportionality demand is not sensitive to the fact that people can reach the end of their tether, and that in such cases, we may sympathize with their predicament to the extent of holding them blameless.⁵⁵

The implication of this passage is that an excusatory form of necessity should be available as well, so that in certain circumstances the accused would be excused from punishment even though his or her conduct could not be justified in terms of choice of the lesser evil.

Objective and Subjective Tests

It has been suggested that a codal provision for the defence of necessity should be drafted so that the "defendant should be able to plead either that his act enhanced a higher social value or that he acted as any reasonable man would have acted under the circumstances...The defence should be available where the defendant subjectively believes in the necessity to act, though "greater

⁵¹ Don Stuart, op cit. n.19 @ 447.

⁵² s.3(9). @ p.36.

⁵³ Ibid.

⁵⁴ Model Penal code-Complete Statutory Text: The American law institute 1985 s.3.02.

⁵⁵ Donald Galloway, *Necessity as a Justification: A Critique of Perka*, 1986, Dalhousie Law Journal.

value" should be tested objectively."⁵⁶ Glanville Williams has offered an interesting perspective on this issue in his commentary on a formulation of the necessity defence as put forward by the Law Commission. The formulation (which was subsequently rejected) was as follows:

"[necessity] should be available where the defendant believes that his conduct is necessary to avoid some greater harm than that which he faces. The harm to be avoided must, judged objectively, be found to be out of all proportion to that actually caused by the defendant's conduct".

Glanville William's criticism of this formulation illustrates the problems with the subjective component of the limitation:

I concurred in this draft as a member of the Working Party, but, on the first [sentence], I now think that it was a mistake to formulate the requirement in terms that assume the defendant to be a philosopher. A man who acts to save his wife's life does not consider in a calculating way whether her life is of greater value to society than the interest he jeopardizes. No doubt the court must attempt this evaluation, but that is part of the objective test in the second [sentence].

The formulation which has been outlined by the Supreme Court of Canada is in keeping with this perspective. Dickson J., in *Perka v. R*, *supra*, outlined an objective test with regards to the proportionality requirement only. He stated that the trial judge must direct the jury to the following questions: "Was the response proportionate? In comparing the response to the danger that motivated it, was the danger one that society would reasonably expect the average person to withstand?"⁵⁷

The issue of the accused's subjective belief was explicitly addressed by the Supreme Court of Canada in *Morgentaler v. R* [1976] 1 S.C.R. 616. In that case it was held that: "the accused's belief that the emergent circumstances he faces will result in death or serious harm to himself or another, and that compliance with the law is impossible, must be based on reasonable grounds".⁵⁸ In other words, an unreasonably held subjective belief in an 'imminent peril' would be insufficient to raise the defence. Note that the Canadian Law Reform Commission has proposed codification of the limitation as laid down in *Perka v. R*, *supra*, and makes no mention of any subjective test.⁵⁹

Negligence and Foreseeability

Dickson J. in *Perka v. R*, *supra*, outlined the following limitation to the defence at pp. 403-404:

⁵⁶ P.H.J. Huxley, *Proposals and Counter Proposals on the Defence of Necessity*, Criminal Law Review [1978].

⁵⁷ *Perka v. R*, *supra*, @ 407.

⁵⁸ Ewaschuk, *op. cit.* n. 19 @ 21-19, 21:3060. See Mewett and Manning, *Criminal law* 2nd. ed. 1985, Butterworths, who suggest that the standard is reasonable and probable grounds.

⁵⁹ Report 31, Recodifying Criminal Law, 1987 @34.

If the necessitous situation was clearly foreseeable to a reasonable observer, if the actor contemplated or ought to have contemplated that his actions would likely give rise to an emergency requiring the breaking of the law, then I doubt whether what confronted the accused was in the relevant sense an emergency. His response was not in that sense "involuntary". "Contributory fault" of this nature, but only of this nature, is a relevant consideration to the availability of the defence... Mere negligence however, or the simple fact that he was engaged in illegal or immoral conduct when the emergency arose will not disentitle an individual to the defence of necessity.

P.H.J. Huxley has proposed that codification should "include a limiting provision based upon the antecedent negligence or recklessness of the defendant."⁶⁰ The Report and Draft Code Bill for England and Wales has included a provision to the effect that the defence of duress of circumstances "does not apply to a person who knowingly and without reasonable excuse exposed himself to the danger."⁶¹ Similar provisions have been included in the Australian Interim Report⁶² and the American Model Penal Code⁶³ as well.

Necessity and Murder

Much debate has centered around the issue of whether necessity could ever be a defence to murder. As discussed on page 3 of this paper, the well known 19th century English case of *R. v. Dudley and Stephens, supra*, has been subject to a variety of interpretations. One interpretation is that necessity could never be a defence to murder.⁶⁴ Another interpretation holds necessity cannot justify the taking of a life, where the choice of which life to sacrifice is premeditated and unfair. While the Law Reform Commission of Canada holds that "at common law it was clear that necessity was no defence to murder"⁶⁵ Colvin has reached a different conclusion. According to his view, the predominant consensus today is that in very exceptional circumstances necessity could operate as a defence to murder.⁶⁶ He has used the following hypotheticals to illustrate situations where the defence might be appropriate:

(i) a mountaineer who is roped to a fallen companion and who cuts the rope in order to save himself from being dragged down with the companion, and (ii) a shipwrecked sailor who is clinging to a plank which will only support one person and who pushes another from the plank in order to save himself from drowning...The strongest case for necessity is probably that of the mountaineer. Here it is clear who must die in order that anyone will be saved...The defence would be more difficult to mount in the case of the sailors on the plank, and also for *Dudley and Stephens*. ...Nevertheless, it might be thought that self-sacrifice, as

⁶⁰ P.H.J. Huxley, op. cit n.53.

⁶¹ A criminal code for England and Wales, Draft Bill, Law Commission No. 177.

⁶² *Australian Interim Report*, op. cit n.41, Part IX p.12.

⁶³ Model Penal code-Complete Statutory Text: The American law institute 1985 s.3.02.

⁶⁴ The case was cited for this proposition by Dickson J. in *Morgentaler v. R.* [1976] 1 S.C.R. 616 @ 617.

⁶⁵ Report 31, *Recodifying Criminal Law*, 1987 @ 34.

⁶⁶ Eric Colvin, op cit n. 12 @ 248.

an alternative to killing another, lies beyond the normal burdens to which society can reasonably expect its members to submit. If the "appropriate and normal resistance" formulation of the proportionality test prevails, then the necessity defence may be available in these cases, too.

Note that the Law Reform Commission of Canada has recommended codifying the exception that necessity "does not apply to anyone who purposely causes the death of or seriously harms another person"⁶⁷. Duress of circumstances in the Draft Bill for the United Kingdom is similarly unavailable in the case of murder and attempted murder.⁶⁸

Don Stuart has commented that "it is most disappointing to find the Law Reform Commission of Canada recommending that the defence of necessity not be available to anyone who purposely kills or seriously harms another person."⁶⁹

Judge or Jury

As noted on p.11, Glanville Williams has suggested that, in order to guard against undue subjectivity when weighing "lesser evils", the trier of law should be given the role of determining whether the defence has been made out, rather than permitting the jury to do so, as is the present practice. On this issue, P.H.J. Huxley has taken the opposite view. In drafting the necessity defence, it is his suggestion that:

It would be necessary to state expressly the function of judge and jury; in particular that it shall be for the judge and jury to decide whether necessity is a defence on the particular facts. To allow the judge to decide this issue would mean that he would be deciding an evidential issue on the basis of public policy. It would also create an unjustifiable anomaly with the defence of duress.⁷⁰

None of the legislative proposals for codification of the criminal law have considered either suggestion.

⁶⁷ Report 31, *Recodifying Criminal Law*, 1987 @ 34.

⁶⁸ A Criminal Code for England and Wales, Draft Bill, Law Commission No. 177.

⁶⁹ Don Stuart, op. cit n. 19 @ 447.

⁷⁰ P.H.J. Huxley, op. cit n.54 @ 149.

III. CODIFICATION

Canada-Draft Criminal code

Provision 3(9), as found in Report 31, *Recodifying criminal Law*, is as follows:

Chapter 3. Defences

3(9) Necessity

a) General Rule. No one is liable if:

- (i) he acted to avoid immediate harm to the person or immediate serious damage to property;
- (ii) such harm or damage substantially outweighed the harm or damage resulting from that crime; and
- (iii) such harm or damage could not effectively have been avoided by any lesser means.

b) Exception. This clause does not apply to anyone who himself purposely causes the death of, or seriously harms, another person.

Commentary on provision 3(9), as found in Report 31 is as follows:

Comment

The duty to obey the law may conflict with the pressure stemming from natural forces or from some other source not covered by the more specific defences known to law. Such cases may be covered by the residual defence of necessity. Though not included in the present *Criminal Code*, it is well recognized by case-law and has been clarified by the Supreme Court of Canada.[in *Perka v. R.*, supra] . For the sake of comprehensiveness, clause 3(9) incorporates and codifies the rule laid down there.

The application of the defence in any given case involves a judgement call. The trier of fact must consider whether the harm to be avoided was immediate; necessity relates only to emergencies. He must decide whether the harm avoided substantially outweighed the harm done, once again a matter for assessment.

At common law it was clear that necessity was no defence to murder. This Code replaces that restriction with a more general one parallel to that used in duress and based on the same principle. The defence will not therefore avail one who himself purposely causes the death of, or seriously harms, another person.

Commentary on the topic of justification and excuses generally, as found in Report 31, is as follows:

Comment

A person committing the conduct with the culpability requisite for a crime may still escape liability on account of special circumstances excusing or justifying his behavior. They justify it when it is right for him or anyone else in those same circumstances to act that way. They excuse it when, though the act itself is wrong,

he should not be censured or convicted for doing it on account of special pressures liable to make any other ordinary person do the very same. As has been pointed out, justifications and excuses overlap and one and the same defence, for example necessity, may operate now as an excuse, now as a justification. [Eric Colvin, *Principles of Criminal Law* (Toronto, Carswell, 1986-p.178-179). For this reason, no attempt has been made to categorize each defence as either one or the other.

Many of these defences are based on the principle that it is right, when necessary to choose the lesser of two evils. Some of them, for example, duress, self-defence and advancement of law are simply specific instances of that principle. Then there is the residual defence of necessity to deal with cases not covered by specific provisions. Most of them are contained in the *Criminal Code*. However, all currently recognized substantive defences are included in this code for the sake of completeness.

Observations

1. The Law Reform Commission states that provision 3(9) is a codification of the defence of necessity as laid down in *Perka v. R.*, *supra*. It may be observed, however, that there has actually been some deviation from *Perka v. R.*, *supra*:

- i) The majority view in *Perka v. R.*, *supra*, (while internally inconsistent) was that necessity should be conceptualized as an excuse. The Law Reform Commission has made no attempt to explicitly categorize the defence as either an excuse or a justification, since, in its view, the two categories overlap. (p.7-11).
- ii) The requirement in provision 3(9) that the harm suffered must be to "person" or "property" goes beyond what was outlined in *Perka v. R.*, *supra*. This may have the effect of "excluding damage to political or cultural values" and may address the fear that the legislative process could be undermined by the defence of necessity. Another view is that this condition is too restrictive and "most disappointing".⁷¹(p. 10).
- iii) The Law Reform Commission has not explicitly included the requirement that there be no reasonable legal alternative to disobeying the law. However the language used is broader than that used in *Perka v. R.*, and encompasses this notion. The phrase that "no one is liable if...such harm or damage could not effectively have been avoided by any lesser means" presumably includes any reasonable legal means of compliance.(p.12-13)
- iv) The Law Reform Commission has included no limiting provision with respect to negligence and foreseeability, as outlined in *Perka*, *supra*. (p. 14-15).

2. The degree of spontaneity required for the defence to succeed has not been articulated beyond the use of the word "immediate". Thus the effect of planning or deliberation on the availability of the defence is uncertain.

⁷¹ Don Stuart, *op cit* n.19 @ 447.

3. The objective nature of the proportionality requirement is in keeping with *Perka v. R.*, *supra*. No mention is made of any subjective test as was outlined in *Morgentaler v. R.* *supra*. (p.13-14).
4. The proportionality requirement that "no one is liable if such harm or damage substantially outweighed the harm or damage resulting from that crime" does not acknowledge the fact that a person's tolerance threshold to pain may be reached, whereby they cannot resist the instinct to act (i.e. the conduct may thereby be characterized as "involuntary") (p.13).
5. The added provision that necessity is no defence to murder, or to serious harm to a person, is controversial and may not accurately reflect the common law. (p.15-16). As per Don Stuart, "it is most disappointing to find the Law Reform Commission of Canada recommending that the defence of necessity not be available to anyone who purposely kills or seriously harms another person."⁷²
6. No mention has been made as to whether a judge or jury should decide if the defence of necessity has been made out. (p. 11, 16)

Other Anglo American Jurisdictions

1. United kingdom

The Law Commission in the United Kingdom chose not to codify a general residual defence of necessity. Rather, the more limited defence of "duress of circumstances", analogous to "duress of threats" is codified. The defence is limited to circumstances where it is immediately necessary to avoid death or serious harm to one's self or another person. It is not available when the threat is to property. Note that there is a subjective element to the formulation of the defence. The belief of the accused in the urgency of the peril is relevant. An objective proportionality requirement is not described as a balancing of evils, but rather as a reasonable reaction to the "gravity" of the situation. As in Canada, the defence is not available in cases of murder or attempted murder. There is a negligence limitation with respect to voluntary exposure to danger. The clause reads as follows:

43. (1) A person is not guilty of an offence [to which this section applies] when he does an act under duress of circumstances.
- (2) A person does an act under duress of circumstances if -
 - (a) he does it because he knows or believes that it is immediately necessary to avoid death or serious personal harm to himself or another; and
 - (b) the danger that he knows or believes to exist is such that in all the circumstances (including any of his personal characteristics that effect its gravity) he cannot reasonably be expected to act otherwise.

⁷² Don Stuart, *op cit* n.19 @ 447-448.

(3) This section -

[(a) applies to any offence other than murder or attempt to murder;]

(b) does not apply -

(i) to a person who uses force for any of the purposes referred to in section 44(1) or 185; or

(ii) to a person who acts in the knowledge or belief that a threat of a kind described in section 42(3)(a)(i) has been made; or

(iii) to a person who has knowingly and without reasonable excuse exposed himself to the danger.

Commentary on the Clause 43 of the Draft Bill is found in Vol. 2 of the Draft Code and is as follows:

12.20 *Analogy with duress by threats.* Clause 43 adopts with minor amendments a clause which the Code team included in their Bill under the title "defence of necessity". It provides a defence to one who acts in order to avoid an imminent danger of death or serious personal harm to himself or another if in the circumstances he cannot reasonably be expected to act otherwise. The defence is modelled, so far as appropriate, on the defence of duress by threats. The Code team, who observed that the kind of situation covered by their clause is sometimes called "duress of circumstances", were critical of our failure, in the Report on Defences of General Application (1977) Law Com 83, to recognize the force of the analogy with duress by threats. We are now persuaded that, as the team put it, [t]he impact of some situations of imminent peril upon persons affected by them is hardly different in kind from that of threats such as give rise to the defence of duress"; and we are satisfied that the proposed defence should be provided by the Code.

12.21 *Authority.* We are fortified in this conclusion by the fact the Court of Appeal has twice recently, in the context of the offence of reckless driving, recognized a defence of this kind - though without having occasion to consider all its details or to give it general application. In *Conway*, the later of the two cases, the defence was said to be conveniently called "duress of circumstances". We agree. It is appropriate thus to emphasize the analogy with the case of threats.

12.22 *Elements of defence.* Subsection (2) states the elements of the defence. Like duress by threats, it is limited to cases where death or serious personal harm is threatened. The danger must be imminent. Like duress by threats, the defence is limited "by means of an objective criterion formulated in terms of reasonableness"; but once again the standard, of conduct required is that applicable to one having the actor's personal characteristics so far as they affect the gravity of the danger.

12.23 *Application of defence.* Subsection (3) excludes murder and attempt to murder from the scope of the defence; avoids any inconvenient overlap between this and certain other defences (para. (b)(i) and (ii)); and sustains the analogy with duress by threats by excluding the case where the actor has knowingly and without reasonable excuse exposed himself to the danger (para. (b)(iii)).

2. United states

The Model Penal Code has a provision for necessity, under the following heading "Justification Generally: Choice of Evils". It is a general residual defence, as in Canada, and New Zealand. It explicitly formulates the defence as a justification. It contains a proportionality requirement similar to the Canadian one. As well, it contains a limiting provision dealing with recklessness or negligence, along the same lines as the Australian and United Kingdom proposed codifications. Finally, as in the United Kingdom, and Australia, the subjective knowledge or state of mind of the actor is an explicitly required element of the defence,

Section 3.02. Justification Generally: Choice of Evils.

- (1) Conduct that the actor believes to be necessary to avoid a harm or evil to himself or to another is justifiable, provided that:
 - (a) the harm or evil sought to be avoided by such conduct is greater than that sought to be prevented by the law defining the offense charged; and
 - (b) neither the Code nor other law defining the offense provides exceptions or defenses dealing with the specific situation involved; and
 - (c) a legislative purpose to exclude the justification claimed does not otherwise plainly appear.
- (2) When the actor was reckless or negligent in bringing about the situation requiring a choice of harms or evils or in appraising the necessity for his conduct, the justification afforded by this section is unavailable in a prosecution for any offence for which recklessness or negligence, as the case may be, suffices to establish culpability.

Commentary as found in the Model Penal Code is as follows:

Explanatory Note

Subsection (1) states a general principle of choice of evils, with limitations on its availability designed to confine its use to appropriate cases. The evil sought to be avoided must be greater than that sought to be prevented by the law defining the offense. The legislature must not have previously foreclosed the choice that was made by resolving the conflict of values at stake.

Subsection (2) applies in this context the general provision of Section 3.09(2). As provided in Subsection (1), the actor's belief in the necessity of his conduct to avoid the contemplated harm is a sufficient basis for his assertion of the defense. Under Subsection (2), however, if the defendant was reckless or negligent in appraising the necessity for his conduct, the justification provided by this Section is unavailable in a prosecution for an offense for which recklessness or negligence, as the case may be, suffices to establish culpability. The same provision is made for cases in which the defendant recklessly or negligently brings about the situation requiring the choice of evils.

3. Australia

The Review Committee of the Australian Crimes Act (1990) has declined to recognize a general residual defence of necessity. Rather, the Committee has recommended that the more limited defence of duress of circumstances be codified. The defence is therefore only available where there was fear of imminent serious physical injury, sexual assault or death. The reasons for this are that "[t]he possibility that an undefined defence of necessity might be used by activists and political extremists is too great to allow the matter to remain open to argument." With a view to this fear, the Committee also recommended that the codification should expressly abrogate any further defence of necessity. The proposed defence has a subjective requirement, does not distinguish between excusatory and justificatory necessity, and does contain limiting provisions with respect to negligence and murder. There is no balancing of harms or proportionality provision. The harmful action taken must have been the only option available. The Proposed Consolidating Law as put forward by the Review committee is as follows:

Necessity

3V (1) Subject to subsection (2), a person is not guilty of an offence if the person did the relevant act because he or she believed that:

- (a) Circumstances existed that, if the act was not done, would have resulted in the death of any person, serious physical injury being caused to any person or a serious sexual assault being made upon any person; and
- (b) there was no way, other than doing the act, of preventing that occurrence.

(2) Subsection (1) does not apply if:

- (a) the person acted with intent to kill another person; or
- (b) the person knowingly, and without any reasonable excuse, exposed himself or herself to the risk of those circumstances existing.

Necessity not otherwise available

3W Except as provided in subsection 3U (1) [duress] or 3V (1), a person is not to be excused from criminal responsibility for doing an act because of necessity or in a sudden emergency.

Commentary on the Proposed Consolidating Law as put forward by the Review committee is as follows:

- (g) the proposed consolidating law should further provide in relation to the defence of necessity as follows:

- (i) necessity should be a defence to any crime unless the accused acted with an intent to kill; and
- (ii) the defence should not be available to a person who knowingly and without reasonable excuse exposed himself or herself to the risk of such danger;
- (f) the proposed consolidating law should abolish (so far as Commonwealth offences are concerned) any other defence available for the reason that the accused acted under necessity or in a sudden and extraordinary emergency; and
- (g) although it would be desirable for an accused to be required to give notice of the defence of duress or necessity, it would not be appropriate to include such a requirement in the proposed consolidating law.

New Zealand

The New Zealand Draft Crimes Bill has codified a general residual defence of necessity. It has an objective requirement only, makes no mention of justification or excuse, and has no proportionality or balancing of harms requirement. No reference is made to the application of the section in cases of murder or negligence. The provision is as follows:

30. Necessity - A person is not criminally responsible for any act done or omitted to be done under such circumstances of sudden or extraordinary emergency that a person of ordinary common sense and prudence could not reasonably be expected to act otherwise.

Commentary found under the Explanatory Note is as follows:

Clause 30 is also new. It protects a person from criminal responsibility for anything done in an emergency if a person of ordinary common sense and prudence could not reasonably be expected to act otherwise. It is based broadly on clause 46 of the proposed Criminal Code (U. K.) and section 3.02 of the Model Penal Code (U. S.).

IV. ISSUES FOR CONSIDERATION

1. Recognition of the Defence of Necessity:

Should a general residual defence of necessity be recognized in the Criminal Code?

(i) Arguments for Limiting or Abolishing the Residual Defence of Necessity

- (a) As per Edmund Davies in *Southwark London Borough Council v. Williams*, *Williams supra*, "necessity could very easily become a mask for anarchy"⁷³.
- (b) As per Lord Denning in *Southwark London Borough Council v. Williams*, *supra*, "necessity would open the door to many an excuse"⁷⁴
- (c) As per Dickson J. in *Morgentaler v. R*, *supra*, "no system of positive law can recognize any principle which would entitle a person to violate the law because in his view the law conflicted with some high social value."⁷⁵
- (d) The Review Committee of the Australian Crimes Act (1990) has declined to recognize a general residual defence of necessity. The reason for this is that "[t]he possibility that an undefined defence of necessity might be used by activists and political extremists is too great to allow the matter to remain open to argument." With a view to this fear, the Committee also recommended that the codification should expressly abrogate any further defence of necessity.

(ii) Arguments for Recognizing the Residual Defence of Necessity

- (a) It has been determined by the Supreme Court of Canada that a general residual defence of necessity does exist in Canada.
- (b) "The case for a continued recognition and refinement of such a defence is compelling. The most powerful argument is that its rationale is substantially the same as the defence of duress which, we have seen, is now considered 'a concession to human infirmity in the face of an overwhelming evil'."⁷⁶
- (c) "It is also quite clear that a fairly general residual defence of necessity can perform a valid function in a variety of contexts. We should trust the good sense of judges and juries"⁷⁷.
- (d) "[F]ears about the defence of necessity are probably unfounded"⁷⁸ (p.10)

⁷³ *Supra* @ 745-746.

⁷⁴ *Supra*, @ 743.

⁷⁵ *Supra*, @ 497.

⁷⁶ Don Stuart, op cit n.19 @ 442

⁷⁷ Don Stuart, op cit n.19 @ 447

⁷⁸ Eric Colvin, op. cit. n.12 @241-242

2. Scope of the Defence:

- (i) If a general residual defence of necessity should be recognized in the Criminal Code, should it exclude damage to political or cultural values? This might be provided for explicitly or implicitly. A requirement that the accused must have been acting to "avoid immediate physical harm to person or property" may be viewed as implicitly precluding harm to political or cultural values.
- (ii) Should an even more limited defence be codified, such as "duress of circumstances", (as recommended by the Law Commission in the United Kingdom). Such a defence would be limited to circumstances where it is immediately necessary to avoid death or serious harm to one's self or another person and would not be available when the threat is to property.

3. Justification and Excuse:

- (i) Should the distinction between justificatory and excusatory necessity be purposely rejected or excluded in the codification of the defence of necessity?
- (ii) Should the distinction between justification and excuse be explicitly acknowledged? If so, should the defence of necessity be codified accordingly, as two separate sections, as recommended by Stanley Yeo? In such a codification the following principles would apply:

Justificatory necessity: The balancing of harms test would be recognized as essentially justificatory. The accused's choice between evils would be deemed justified where the conduct caused was less harmful than the harm averted.

Excusatory necessity: In certain circumstances, the accused would be excused from punishment even though his or her conduct could not be justified in terms of choice of the lesser evil. Excusatory necessity would only be available where the behavior of the accused was "involuntary" in the sense that no ordinary person could be expected to have acted otherwise. (Note that the objective proportionality requirement as it now stands precludes this possibility. See p.10).

4. Subjective and Objective Tests:

(i) Objective tests:

Should the proportionality requirement be drafted with an objective test only? That is, should it be a requirement of the necessity defence that the harm to be avoided must, from an objective standpoint, have been greater than the harm sought?

- (a) If so should this objective requirement be considered at the point in time when the accused made the choice between the two evils? That is, that the accused must have acted as any reasonable person would have acted under the circumstances?

- (b) Should the objective requirement be determined after the fact as well, so that it must be objectively clear that a higher social value has in fact been enhanced? A mistaken yet objectively reasonable belief held at the time of the occurrence, that the harm sought would outweigh the harm averted, would then be insufficient to raise the defence.

(ii) Subjective test:

- (a) Should the accused's subjective belief in the necessity to act be a requirement of the defence? (p.13,14)

5. **Direct and Imminent Peril:**

Should the degree of spontaneity required for the defence of necessity to succeed be explicitly codified, beyond the requirement that the peril be "direct and immediate"? If so, what degree of spontaneity should be required for the defence to succeed? Should planning or deliberation automatically preclude availability of the defence?

6. **Reasonable Legal Alternative:**

Should the requirement that there be "no reasonable legal alternative to disobeying the law" be an explicit requirement of the defence of necessity? The phrase "no one is liable if...such harm or damage could not effectively have been avoided by any lesser means", as proposed by the Law Reform Commission, may be sufficient to encompass this notion.

7. **Foreseeability:**

Should there be a requirement similar to the English Draft Code Bill that the defence should not be available to a person who "knowingly and without reasonable excuse exposed him or herself to the danger"?

8. **Murder:**

Should necessity be unavailable, without exception, to "anyone who himself purposely causes the death of, or seriously harms, another person"?

9. **Judge or jury:**

Should the function of judge and jury be expressly stated in the codification of the defence of necessity? If so, should a provision be included to give the trier of law the exclusive role of determining whether the defence of necessity has been made out? (This would be done in order to guard against undue subjectivity when weighing "lesser evils").