

NECESSITY OR DURESS

“Necessity is the defense one pleads when circumstances force one to perform a criminal act. Duress, or coercion, applies when human beings force one to act.” *Commonwealth v. Garuti*, 23 Mass. App. Ct. 561, 564, 504 N.E.2d 357, 359 (1987), quoting from *United States v. Nolan*, 700 F.2d 479, 484 n.1 (9th Cir.), cert. denied, 462 U.S. 1123 (1983).

I. NECESSITY

The defendant has offered evidence suggesting that he (she) may have acted out of necessity in this matter. In some situations, necessity may excuse a person’s committing what would otherwise be a criminal offense. The rule of necessity is sometimes called the rule of “competing harms” or “the lesser evil.” It is based on the premise that sometimes, under exceptional circumstances, the values that are normally protected by obedience to the law can be overshadowed by other, more important values.

The rule of necessity exists because it would be unjust and contrary to public policy to impose criminal liability on a person if the harm that results from his breaking the law is significantly less than the harm that would result from his complying with the law in that particular situation.

Optional examples. For example, a person may be justified in trespassing on his neighbor's land to save a child being attacked by a dog. Another example would be a person who does not have a firearms license, but who may be justified in taking a gun for safekeeping away from someone who indicates an immediate intent to use it improperly.

Before you may find the defendant guilty of the offense charged, the Commonwealth must prove beyond a reasonable doubt that the defendant did not act out of necessity.

Three factors must be present for the rule of necessity to apply:

First: That the defendant was faced with a clear and imminent danger, not one that was debatable or speculative;

Second: That the defendant reasonably expected that his (her) actions would be effective in directly reducing or eliminating the danger; and

Third: That there was no legal alternative which would have been effective to reduce or eliminate the danger.

Before you may find the defendant guilty, the Commonwealth must

prove that the defendant did in fact commit the offense, and must also prove beyond a reasonable doubt that one or more of those three factors were absent and therefore the defendant did not act out of necessity.

There is a fourth element to a necessity defense: that “the Legislature has not acted to preclude the defense by a clear and deliberate choice regarding the values at issue.” *Commonwealth v. Schuchardt*, 408 Mass. 347, 349-350, 557 N.E.2d 1380, 1381-1382 (1990); *Commonwealth v. O’Kane*, 53 Mass. App. Ct. 466, 470 n.3, 760 N.E.2d 291, 295 n.3 (2001). However, this is usually not a jury issue:

- *If there is no relevant statute on whether a necessity defense is available*, the judge should either omit all reference to this fourth element, or inform the jury that the Legislature has made the defense potentially available in this situation, leaving the jury to decide whether the evidence satisfies the first three elements.
- *If there is a relevant statute that has precluded a necessity defense* in this situation, the judge should so rule as a matter of law and not instruct the jury on the defense of necessity.
- *If there is a relevant statute limiting a necessity defense to specified circumstances*, the judge should instruct the jury on the first three elements, and also inform the jury that they must determine whether the facts of the case fall within the limited circumstances specified by statute. *Commonwealth v. Lora*, 43 Mass. App. Ct. 136, 140 & n.7, 681 N.E.2d 876, 880 & n.7 (1997).

The defendant must present some evidence on each of the four elements before the judge must instruct on, and permit the jury to consider, a necessity defense. *Commonwealth v. Kendall*, 451 Mass. 10, 16 n.5, 883 N.E.2d 269, 274 n.5 (2008) (affirming denial of defendant’s request for necessity instruction because no evidence that defendant was without alternative to abate emergency).

Generally a judge should not exclude a necessity defense on a motion in limine. “It is, perhaps, more prudent for the judge to follow the traditional, and constitutionally sounder, course of waiting until all the evidence has been introduced at trial before ruling on its sufficiency to raise a proffered defense. If, at that time, the defendant has failed to produce some evidence on each element of the defense, the judge should decline to instruct on it In that event, the judge may, if appropriate, give curative instructions to caution the jury against considering evidence not properly before them We believe that ordinarily a judge should not allow a motion which serves to exclude, in advance of its being offered, potential evidence of the [necessity] defense. Since a judge is required to instruct on any hypothesis supported by evidence, in most instances proffer of disputed matter at trial, ruled upon in the usual course, is more likely to be fair and result in correct rulings” (citations and internal quotation marks omitted). *Hood*, 389 Mass. at 595 & n.5, 452 N.E.2d at 197 & n.5, quoting from *Commonwealth v. O’Malley*, 14 Mass. App. Ct. 314, 325, 439 N.E.2d 832, 838 (1982). See also 389 Mass. at 596-598, 452 N.E.2d at 197-198 (Liacos, J., concurring) (expressing belief that allowance of such a motion in limine, over a proper offer of proof, is reversible error).

See *Kendall*, 451 Mass. at 15-16, 883 N.E.2d at 273-274 (necessity defense not available to intoxicated defendant who drove seriously injured girl friend to hospital but offered no evidence that legal alternatives were unavailable, e.g., seeking other assistance from others nearby); *Commonwealth v. Leno*, 415 Mass. 835, 839-841, 616 N.E.2d 453, 455-457 (1993) (necessity defense not available to operator of illegal needle exchange program); *Commonwealth v. Hutchins*, 410 Mass. 726, 575 N.E.2d 741 (1991) (necessity defense not available to charge of marijuana

possession, based on its medical alleviation of symptoms of painful skin disease); *Schuchardt, supra* (necessity defense deals with generally recognized harms, not those — such as the arms race — which are debatable and the subject of legislation and regulation); *Commonwealth v. Iglesia*, 403 Mass. 132, 135-136, 525 N.E.2d 1332, 1333-4 (1988) (burden on Commonwealth to prove beyond a reasonable doubt the absence of necessity; permissible to charge first on relevant factors and then define burden of proof); *Commonwealth v. Weaver*, 400 Mass. 612, 614-615, 511 N.E.2d 545, 547-548 (1987) (necessity instruction properly denied where insufficient evidence that defendant's actual motive was to avoid greater evil; opinion includes firearm example); *Commonwealth v. Hood*, 389 Mass. 581, 590-595, 452 N.E.2d 188, 194-197 (1983) (necessity instruction properly denied where defendant failed to offer sufficient evidence that no effective alternatives were available); *Commonwealth v. Ben B.*, 59 Mass. App. Ct. 919, 920, 796 N.E.2d 432, 434 (2003) (same); *Commonwealth v. Brugmann*, 13 Mass. App. Ct. 373, 376-379, 433 N.E.2d 457, 460-463 (1982) (same; discusses policy grounds for necessity defense); *Commonwealth v. Averill*, 12 Mass. App. Ct. 260, 261-263, 423 N.E.2d 6, 7-8 (1981) (necessity instruction properly denied where no evidence that defendants expected an immediate reduction in perceived danger, since there must be reasonable anticipation of "a direct causal relationship" between act and abatement of danger).

II. DURESS

The defendant has offered evidence suggesting that he (she) may have acted under duress or compulsion. Our law holds that free will is essential to the commission of a criminal act, and therefore a person may not be found guilty for an act which he (she) committed under duress.

Before you may find the defendant guilty, the Commonwealth must prove beyond a reasonable doubt that the defendant did not act under duress. To have duress, three things must be present:

***First:* The defendant must have received a present and immediate threat which caused him (her) to have a well-founded fear of imminent death or serious bodily injury if he (she) did not do the criminal act. The threat must be imminent and must be present throughout the commission**

of the crime;

Second: The defendant must have had no reasonable opportunity to escape; and

Third: The defendant, or any other person of reasonable firmness, must have had no other choice and been unable to do otherwise in the circumstances.

If relevant to the evidence. **The defense of duress is not available to a person who voluntarily enters into a criminal enterprise and willingly places himself in a situation in which it is likely that he could be subject to such coercion. The defense is also not available to a person who recklessly places himself in a situation where it is likely that such coercion may be applied.**

Before you may find the defendant guilty, the Commonwealth must prove that the defendant did in fact commit the offense, and must also prove that one or more of those three factors were not present and therefore the defendant did not act out of duress.

Commonwealth v. Robinson, 382 Mass. 189, 198-209, 415 N.E.2d 805, 812-817 (1981); *Commonwealth v. Perl*, 50 Mass. App. Ct. 445, 447, 737 N.E.2d 937, 940 (2000) (reaffirming imminence requirement); *Commonwealth v. Egardo*, 42 Mass. App. Ct. 41, 44-45, 674 N.E.2d 1088, 1091, rev'd on other grounds, 426 Mass. 48, 686 N.E.2d 432 (1997) (preferable to avoid language that "a threat of future harm is not enough," since this formulation has been criticized as emphasizing the proximity requirement at the cost of logic, since all threats involve future harms); *Garuti*, 23 Mass. App. Ct. at 565, 504 N.E.2d at 360. The Supreme Judicial Court has assumed without deciding that duress is a defense even to a homicide charge, and that the Commonwealth's burden of disproving duress once it is properly raised is constitutionally based. *Robinson*, 382 Mass. at 206, 415 N.E.2d at 816.

The common law presumption that a wife who commits a crime in the presence of her husband has been coerced by him into doing so, see e.g., *Commonwealth v. Helfman*, 258 Mass. 410, 416, 155 N.E. 448, 450 (1927); *Commonwealth v. Egan*, 103 Mass. 71, 72 (1869), has been abolished. The same rules of proof apply to coercion by a husband as by anyone else. *Commonwealth v. Barnes*, 369 Mass. 462, 467-468, 340 N.E.2d 863, 867 (1976).

NOTES:

1. **Abusive relationship evidence.** Where there is an issue of duress, "a defendant shall be permitted to introduce either or both of the following in establishing the reasonableness of the defendant's apprehension that death or serious bodily injury was imminent, the reasonableness of the defendant's belief that he had availed himself of all available means to avoid physical combat or the reasonableness of a defendant's perception of the amount of force necessary to deal with the perceived threat: (a) evidence that the defendant is or has been the victim of acts of physical, sexual or psychological harm or abuse; (b) evidence by expert testimony regarding the common pattern in abusive relationships; the nature and effects of physical, sexual or psychological abuse and typical responses thereto, including how those effects relate to the perception of the imminent nature of the threat of death or serious bodily harm; the relevant facts and circumstances which form the basis for such opinion; and evidence whether the defendant displayed characteristics common to victims of abuse." G.L. c. 233, § 23F.

2. **Prison escape.** Assuming a necessity defense to be available in a prison escape case, at a minimum there must be evidence that the defendant: (1) was faced with a specific threat of death, forcible sexual attack or substantial bodily injury in the immediate future; (2) had no time for complaint to the authorities, or shows a history of futile complaints; (3) had no time or opportunity to resort to the courts; (4) used no force or violence toward prison personnel or other innocent persons in escaping; and (5) immediately surrendered to authorities once safe from the immediate threat. *Commonwealth v. Thurber*, 383 Mass. 328, 330-333, 418 N.E.2d at 1253, 1256-1257 (1981); *O'Malley*, 14 Mass. App. Ct. at 319-322, 439 N.E.2d at 835-837. See *United States v. Bailey*, 444 U.S. 394, 411-413, 100 S.Ct. 624, 635-636 (1980).

3. **Threatened harm to third parties.** See *Commonwealth v. Perl*, *supra* (duress defense applicable to threats of harm to third parties).