CHAPTER 10

JUSTIFICATIONS AND EXCUSES

Justification, excuse and criminal responsibility

10.1 It is commonly said that motive is irrelevant to criminal responsibility. Indeed, the Penal Codes SI/Ki/Tu s 9 third para expressly provides:

> Unless otherwise expressly declared, the motive by which a person is induced to do or omit to do an act or to form an intention is immaterial so far as regards criminal responsibility.

Nevertheless, under special circumstances, a person's reasons or motive can negate criminal responsibility by providing a special defence of justification or excuse. Contextual defences of justification or excuse can be invoked even though the physical and fault elements of an offence are present. Indeed, it is typically when the elements of an offence have been committed that such a defence is needed and is raised.

10.2 This chapter will focus on four defences connected with extenuating circumstances that make a person's reasons for their actions acceptable or at least tolerable. Three are found in the Penal Codes: defence of person or property; compulsion; and medical necessity. Another one has been widely accepted at common law: a residual general defence of 'necessity'. Defences available to police officers exercising powers of arrest are considered in the wider context of legislation relating to criminal procedure: see **Chapter 16**.

10.3 There is a question as to whether common-law defences of justification or excuse which have not been incorporated in legislation can still be recognised. The Penal Codes of Solomon Islands, Kiribati and Tuvalu are based on the Griffith Code which was conceived as a complete statement of the law. Yet, as was noted in **2.15**, there are some gaps in the coverage of general defences. In particular, the modern common law has recognised a residual general defence of necessity. In *Luavex v R* [2007] SBCA 13, the Solomon Islands Court of Appeal was prepared to assume that the general common law defence of necessity might survive in the Codes, embedded in the references to 'unlawful' action in offences such as murder and manslaughter. It was, however, suggested in **2.16** that it is unlikely that any *new* common-law defences of a general character would be recognised.

10.4 Contextual defences are sometimes characterised either as justifications or as excuses. A claim of justification is a claim that conduct was not wrongful under the circumstances. Where a justification for the commission of the conduct elements of

an offence is accepted, it should constitute a good defence. In contrast, a claim of excuse concedes the wrongfulness of the conduct but claims that it does not merit criminal liability. For example, self-defence has traditionally been conceived as a justification whereas compulsion or duress has traditionally been conceived as an excuse. Excuses do not presumptively negative criminal liability. Excuses such as intoxication, emotional stress or financial hardship are generally addressed through the exercise of sentencing discretion after conviction. It is only for the strongest excuses that a complete defence is provided, usually on the basis that any ordinary person might or even would have acted in the same way.

10.5 However, as was noted in **2.17**, the Penal Codes do not distinguish systematically between defences of justification and defences of excuse in the way that some other jurisdictions do. In those jurisdictions which make a systematic distinction, it is common for defences of justification to be expressed in the formula, 'It is lawful for…', whereas defences of excuse are expressed in the formula, 'A person is not criminally responsible for…'. Under the Penal Codes, however, all defences use the formula, 'A person is not criminally responsible for…'.

10.6 In raising any defence of justification or excuse, the defendant carries an evidential burden to put it in issue. This means that there must be some evidence to support the defence. This evidence must be introduced for the defendant if it has not already there in the evidence for the prosecution: see **2.20**-**2.21**. If there is supporting evidence, the prosecution must disprove the defence beyond reasonable doubt. However, the prosecution need not address the defence unless it is in issue.

Defence of person or property

10.7 Rather than make any detailed provision on the use of force in defence of a person or property, the Penal Codes of Solomon Islands, Kiribati and Tuvalu have simply incorporated the common law. Section 17 provides:

> Subject to any express provisions in this Code or any other law in operation…, criminal responsibility for the use of force in the defence of person or property shall be determined according to the principles of English common law.

10.8 A leading statement on the common law of self-defence is that of Lord Morris in *Palmer v R* [1971] AC 814 at 831; (1971) 55 CrAppR 223:

> It is both good law and good sense that a man who is attacked may defend himself. It is both good law and good sense that he may do, but only do, what is reasonably necessary.

This statement has been repeatedly endorsed by the Solomon Islands Court of Appeal: see, for example, *Bolea v R* [2013] SBCA 15 at [34]; *Waidia v R* [2015] SBCA 12 at [12]. Although the statement deals expressly only with self-defence, the general principle has been taken to apply also to defence of another person and to defence of property: see, for example, *Waidia v R* [2015] SBCA 12 at [13]. In the legislation of some other jurisdictions, distinctions are drawn by reference to what is being defended. No such legal distinctions are drawn at common law, although the answer to what is reasonably necessary in a particular case may depend in part on who or what is being defended.

10.9 'Reasonable necessity' is a composite expression that encompasses several related notions:

- In order to avert or repel the attack, it must be necessary to use force;
- It must be necessary to use the amount of force that was used;
- The use of that amount of force must be reasonable in light of the harm inflicted and the benefit obtained.

10.10 Reasonable necessity means that there must be no other way of averting or repelling the attack except by the force that is used. It must be necessary both to use some force and to use that degree of force. This test does not, however, require precise measurement. It is understood that a person under attack is entitled to some leeway in assessing the danger and the options for dealing with it. In *Palmer*, it was said at 832:

> If there has been an attack so that self-defence is reasonably necessary, it will be recognised that a person defending himself cannot weigh to a nicety the exact measure of his defensive action.

This might be called 'the margin of error principle'. Under this principle, 'reasonably necessary' might be taken to mean 'roughly necessary'.

10.11 Where excessive force is used it is immaterial to liability that some lesser force would have been justified. The conduct is unlawful. Penal Codes SI s 235; K/T s 228 provides:

> Any person authorized by law…to use force is criminally responsible for any excess, according to the nature and quality of the act which constitutes the excess.

The justifiability of lesser force would be a matter to be considered in sentencing if at all. There is, however, one qualification to this general proposition. The Penal Codes SI s 204(b); Ki/Tu s 197(b) provide for a reduction of a homicide from murder to manslaughter where the defendant used excessive force but was justified in causing some harm: see, for example, *Ofea v R* [2019] SBCA 9. However, a stringent condition is attached. The defendant must have 'acted in such terror of immediate death or grievous harm as in fact deprived him for the time being of the power of self-control'. With this condition attached, it is difficult to discern the point of SI s 204(b); Ki/Tu s 197(b). In its absence, a defendant who lost self-control in the face of terror of immediate death or grievous harm would still have a defence of provocation to reduce the offence to manslaughter: see **5.41**-**5.55**.

10.12 The concept of reasonable necessity has also been taken to encompass another notion: that tolerating the attack would be unacceptable. This is often expressed by saying that the use of the force must be *reasonable* as well as necessary: see, for example, *Ofea v R* [2019] SBCA 9, [30]-[31]. In *Boas v R* [2015] SBCA 21 at [21], it was said that the principle outlined by Lord Morris in *Palmer* 'allows such force as is reasonable and proportionate, in the circumstances of the case'. Thus, the degree of force that is necessary to avert or repel an attack may not be reasonable to use. The harm caused may be too great to justify the action. This principle is particularly important as a limitation on the use of lethal force to defend property: it will rarely be justified. Even in self-defence, force may be judged excessive not only because it was unnecessary but also because it was unreasonable.

10.13 Although necessary force is not always reasonable to use, force must be necessary if it is to be reasonable. Some formulations of the defence are therefore expressed simply in terms of entitlement to use *reasonable* force. For example, in *Beckford v R* [1988] AC 130 at 145, it was said:

> [T]he test to be applied for self-defence is that a person may use as much force as is reasonable in the circumstances as he honestly believes them to be in the defence of himself or another.

See also *Waidia v R* [2015] SBCA 12 at [15].

10.14 The distinction between necessity and reasonableness was drawn in a somewhat different way in *Waidia v R* [2015] SBCA 12. It was said at [15]:

> In assessing the reasonableness of the force used, the court should consider, *inter alia,* two questions:
>
> - was the use of force necessary in the circumstances, i.e. was there a need for any force at all?, and
> - was the force used reasonable in the circumstances?
>
> … There is…an objective element to the test. The court must…ask whether, on the basis of the facts as the accused believed them to be, a reasonable person would regard the force used as reasonable or excessive.

This formulation restricts the question of necessity to the issue of whether any force was needed, and treats the question of whether the force used was reasonable as pertaining to the amount of force used. However, this formulation does not distinguish between the necessity of using force to avert or repel an attack and the necessity of trying to avert or repel it rather than tolerating the attack at the time and subsequently seeking the assistance of police. Such a distinction can be critically important in cases involving defence of property rather than defence of a person.

10.15 A defender may not have to wait for an attack to be under way before using force in defence of the person. Although the common law traditionally required an assault to be occurring for defensive force to be justified, modern formulations do not incorporate this requirement. Pre-emptive strikes may therefore be permissible. In *Beckford*, above at 144, it was said:

> Furthermore a man about to be attacked does not have to wait for his assailant to strike the first blow or fire the first shot; circumstances may justify a pre-emptive strike.

This can be important for particularly vulnerable defenders, such as women defending themselves against stronger males. Once the attack has commenced, it may be too late for defensive force to be effective.

10.16 The questions of necessity and reasonableness are to be answered on the facts as the accused honestly believed them to be: see *Beckford*, above at 145; *Waidia v R* [2015] SBCA 12 at [15]. This allows for the defence to be potentially available despite a mistake of fact. Nevertheless, the reasonableness of the response is ultimately an objective matter. It is immaterial that the person may have thought the response was reasonable. In the result, a person who overreacts may lose the defence. A subjective belief in the necessity of the response will be of no avail if the response was objectively unreasonable: see *Waidia v R* [2015] SBCA 12 at [15].

10.17 Cases in several jurisdictions have discussed the idea of reasonable necessity in relation to the dilemmas faced by abused women who kill their violent partners instead of attempting to leave them. A leading authority is *R v Lavallee* [1990] 1 SCR 852, where the Supreme Court of Canada accepted expert evidence of how prolonged abuse in a relationship may lead to a reduced capacity to perceive alternatives and take initiatives. This has been called 'learned helplessness' and said to be part of a 'Battered Woman Syndrome' (BWS). *Lavallee* held that, in a jurisdiction requiring reasonable grounds for a belief in the necessity of killing, what might be reasonable for someone to believe should be determined by reference to what might be reasonable for a person who has been psychologically damaged by abuse to believe. More recently, BWS theory has become widely rejected as general explanation of why female victims can kill their male abusers. The objection to BWS theory is that 'learned helplessness' does not fit the reality of most abused women: see the comments of Kirby J in *Osland v R* [1998] HCA 75; (1998) 197 CLR 316 at 370-4. They do perceive the alternative option of leaving the relationship but choose not to take it because of factors such as domestic ties that cannot be abandoned (for example, to children), the danger that an attempt to leave will generate an attack, the danger that the abuser will track down the escapee and renew the abuse, and the lack of anywhere to go. It is argued that killing the abuser can be viewed a reasonably necessary response in the circumstances rather than a peculiar response to be explained and excused by psychological impairment.

Compulsion and spousal coercion

10.18 The Penal Codes SI/Ki/Tu s 16 establish a defence of compulsion, which relieves a person from criminal responsibility for an offence committed to avoid a threat that death or grievous bodily harm will otherwise be inflicted. Section 16 provides:

> A person is not criminally responsible for an offence if it is committed by two or more offenders, and if the act is done or omitted only because during the whole of the time in which it is being done or omitted the person is compelled to do or omit to do the act by threats on the part of the other offender or offenders instantly to kill him or do him grievous bodily harm if he refuses; but threats of future injury do not excuse any offence.

A similar defence at common law is called the defence of 'duress'. The defence under s 16 can apply to any kind of offence. It is restricted to threats against the person committing the offence. However, the residual general defence of necessity, see below **10.33**-**10.41**, may provide an alternative when threats are directed against someone else.

10.19 There is a significant difference between the defence of compulsion and the

defence of defence of person or property. Under defence of person or property, a person is not criminally responsible for committing what would otherwise be an offence in order to resist a threat or attack; the conduct is directed against the person making the threat or attack. Under compulsion, however, a person is not criminally responsible for committing what would otherwise be an offence against another person in compliance with a demand to commit the offence or suffer consequences; the conduct is characteristically directed against an innocent third party.

10.20 A defence of compulsion should be available only when it was actually necessary to obey the instruction in order to avoid the threat being implemented. The threat must be realistic. There must also have been no reasonable alternative for escaping the execution of the threat, such as seeking the protection of the police. Section 16 addresses the issue of necessity by requiring that the threat be of instant death or grievous bodily harm. Threats of future injury are expressly excluded, presumably on the ground that a gap in time will afford opportunities to take evasive action. This may, however, be too restrictive. A threat can be realistic even though it is not to be effected until sometime in the future. A similar restrictive provision in the Canadian Criminal Code has been held to violate the principles of fundamental justice which are constitutionally protected under the Canadian Charter of Rights and Freedoms s 7: *R v Ruzic* 2001 SCC 24, (2001) 153 CCC (3d) 1. Moreover, time restrictions have been dropped from modern formulations of the common law: see, for example, *DPP for Northern Ireland v. Lynch* [1975] 1 All ER 913 at 931; *R v Hassan* [2005] UKHL 22 at [21].

10.21 A scheme for a defence of compulsion might be expected to make some provision respecting proportion between, on the one hand, the harm threatened and, on the other hand, the harm inflicted in order to escape the implementation of the threat. The costs of preservation may be too high and in such cases sacrifices should be required. There is no specific provision to this effect in s 16. However, the restriction to threats of death or grievous bodily harm do address one side of the balance.

10.22 Section 16 does not deny the defence because of a prior relationship of criminal violence between the person threatened and the person making the threat, such as membership of a violent criminal gang. This is unlike the common law: *R v Hassan* [2005] UKHL 22 at [21]. It is also unlike legislative schemes in a number of other jurisdictions: see, for example, the Fiji Crimes Act s 40(3). The rationale for the restriction would be that the threat could have been avoided by not entering into the relationship.

10.23 The Solomon Islands Court of Appeal has held that, although s 16 does not exclude the defence just because the defendant had voluntarily joined a violent criminal organisation, membership of such an organisation could be a material fact in

determining ‘whether or not there was compulsion in the relevant sense’: *Kejoa v R* [2006] SBCA 6. The Court said:

> Given the wording of s.16 it cannot be said that the defence could never succeed in the Solomon Islands where the accused had voluntarily laid himself open to the duress. But in all cases when an accused in the Solomon Islands had voluntarily laid himself open to the duress that would be a very material consideration in determining whether he committed the crime 'only because' he was 'compelled' to do so by a threat to 'instantly kill him or do him grievous bodily harm.' Often in such a case the crime would be committed not 'only because' of an established threat of the relevant kind but also because of the membership of the organization. Further, if one joined an organization knowing its members were subjected to threats of that kind it would be difficult for an accused to establish as a fact that he was 'compelled' to commit the crime.

The Court also said that the words ‘only because’ brought into play two conditions that the House of Lords had laid down in *Hassan* at [21]: that the criminal conduct sought to be excused would have to be directly caused by threats and that the defence would only be available if ‘there was no evasive action he could reasonably have been expected to take’.

10.24 The defence of compulsion is framed in entirely objective terms which by themselves would not accommodate any mistake of fact on the part of the defendant about the existence or nature of a threat. However, the defence of reasonable mistake of fact under Penal Codes SI/Ki/Tu s 10 can be available to supplement the defence of compulsion. A mistake about the existence or nature of a threat can therefore be compatible with the defence of compulsion as long as the mistake is a reasonable one.

10.25 Section 19 (SI/Ki/Tu) provides:

> …on a charge against a married person for any offence other than treason or murder it shall be a defence to prove that the offence was committed in the presence of and under the influence of that person’s spouse.

This does not require that a threat be made. It recognises that a person can feel forced to commit an offence simply by a demand from a spouse. The provision appears directed to cases where one partner in a coercive domestic relationship requires that the other participate in an offence. In the context of a coercive domestic relationship, a demand might easily be effective even in the absence of an explicit threat of death or grievous bodily harm. Section 19 requires the defence to be proved by the

defendant. However, this reversal of the onus of proof might be held unconstitutional, as have some other attempts to reverse the onus of proof: see **5.43**.

Punishment of a child

10.26 Use of force to correct or punish a child is not expressly established as a defence in the Penal Codes. However, the provision on the offence of cruelty to children provides that nothing in the section affects the right of certain persons to administer reasonable punishment: SI s 233(4); Ki/Tu s 226(4). The Codes therefore recognise by implication a defence to the use of force against a child for the purpose of punishment. The defence is available to a parent, teacher or other person having lawful control of a child.

10.27 Similar defences elsewhere have been interpreted narrowly, as requiring a child old enough to learn from the punishment, and as excluding the infliction of bodily harm. See, for example, *Canadian Foundation for Children Youth & the Law v Canada (Attorney General)* 2004 SCC 4, [2004] 1 SCR 76.

Medical necessity

10.28 The Penal Codes SI s 234; Ki/Tu s 227 are titled 'Surgical operation'. They state that a person is not criminally responsible for performing a surgical operation under certain circumstances:

> A person is not criminally responsible for performing in good faith and with reasonable care and skill a surgical operation upon any person for his benefit (SI) [the benefit (Ki/Tu)], or upon any unborn child for the preservation of the mother's life, if the performance of the operation is reasonable, having regard to the patient's state at the time and to all the circumstances of the case.

The main relevance of this provision arises in cases where a patient is unconscious or for some other reason is unable to give consent to surgery. The section provides a defence for what might otherwise be an unlawful wounding or assault.

10.29 There are three conditions for what might be called the defence of 'medical necessity':

- The operation is for the person's benefit (subject to the qualification respecting an unborn child);
- it is reasonable to perform it; and
- it is performed in good faith and with reasonable care and skill.

10.30 A mistake about the medical condition of the patient or about how to operate will not preclude the defence so long as the mistake was reasonable under the circumstances. An unreasonable mistake, however, may amount to a lack of reasonable care and skill and create liability for criminal negligence.

10.31 An operation may be performed not only for the benefit of the patient but also upon an unborn child for the preservation of the mother's life. The section therefore creates an exception to the prohibitions on abortion under Penal Codes SI ss 157-159; Ki/Tu ss 150-152. The residual general defence of necessity has performed a similar role at common law

10.32 In their express terms, Penal Codes SI s 234; Ki/Tu s 227 permit only a very narrow range of abortions. The life of the mother must be at stake. Yet, when a similarly-worded Queensland provision was at stake in *K v T* [1983] 1 Qd R 396, it was suggested than an abortion could be performed 'to preserve the woman from a serious danger to her life or her physical or mental health (not being merely the normal dangers of pregnancy and childbirth) which the continuance of her pregnancy would entail'. Reliance for this interpretation was placed on two decisions from other jurisdictions: *R v Bourne* [1939] 1 KB 687; [1938] 3 All ER 615 and *R v Davidson* [1969] VR 667. In *Bourne*, it was said, at 693–4, that the phrase 'for the purpose of preserving the life of the mother' in an English statute should be taken to encompass acting in order to prevent a woman becoming 'a physical or mental wreck'. In *Davidson*, it was held that the common law defence of necessity was available in Victoria on conditions similar to those recognised in *Bourne*. Applying this approach to the Penal Codes involves interpreting the word 'life' as meaning a life of a certain mental quality rather than just a physical life.

The common law defence of necessity

10.33 A theme running throughout the defences of justification and excuse is the necessity of breaking the law in order to prevent some perceived worse harm occurring. The general defence of necessity at common law is a residual defence which picks up appropriate cases of necessity which are not covered by other, more specific defences. The defence has been raised, albeit with mixed success, in a variety of contexts including driving dangerously to escape pursuers, escape from lawful custody to avoid being killed or harmed, unlawful importation of people to avoid dangers to them, mercy killings, survival homicide where one person is killed in order that others may live, and quasi-political action where the law is broken to prevent harm to a whole community. In some jurisdictions, the defence has performed a role in legitimising surgical operations where the patient is unable to give consent and also abortions to preserve the life or health of the mother. However, under the Penal Codes of Solomon Islands, Kiribati and Tuvalu, these medical procedures are covered by the specific

defence of medical necessity under Penal Codes SI s 234; Ki/Tu s 227.

10.34 There has been a long-standing debate about whether the common law should recognise an open-ended defence of necessity. The argument against recognition is that it would undermine the authority of criminal prohibitions. Nevertheless, the defence has been widely accepted in the modern common law, subject to tightly-framed conditions being met: see especially *Perka v R* [1984] 2 SCR 232, discussed below at **10.36**. There are also some statutory versions where the defence is usually labelled 'emergency' rather than 'necessity': see, for example Fiji Crimes Act s 41.

10.35 The residual general defence of necessity has not been expressly incorporated in the Penal Codes of Solomon Islands, Kiribati and Tuvalu. Nevertheless, in *Luavex v R* [2007] SBCA 13, the Solomon Islands Court of Appeal was prepared to assume that the defence survives in the Codes, embedded in the references to 'unlawful' action in offences such as murder and manslaughter.

10.36 A critical step in the recognition of necessity as a common law defence was the decision of the Supreme Court of Canada in *Perka v R* [1984] 2 SCR 232. *Perka* has been described by the Samoa Court of Appeal as 'the leading authority in common law jurisdictions': *Stehlin* [1993] WSCA 5. *Perka* at 259 provided a detailed explanation of the defence:

> 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,…; (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 society's expectation of 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 applies only in circumstances of imminent risk where the action was taken to avoid a direct and immediate peril, and (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.

10.37 Subsequently, in *R v Latimer* [2001] 1 SCR 3 at [28], the Supreme Court of Canada extracted three tests from *Perka* for the defence to succeed:

> First, there is the requirement of imminent peril or danger. Second, the

> accused must have had no reasonable legal alternative to the course of action he or she undertook. Third, there must be proportionality between the harm inflicted and the harm avoided.

Latimer involved the 'mercy killing' of a severely disabled daughter who was experiencing a great deal of pain and facing another painful operation. It was held that none of the tests were satisfied: there was no clear and imminent peril because on-going pain did not constitute an emergency; the option of struggling on with pain management presented a reasonable legal alternative; and killing her was a disproportionate response because the harm inflicted was 'immeasurably more serious than the pain resulting from Tracy's operation which Mr Latimer sought to avoid'.

10.38 In *Luavex v R* [2007] SBCA 13, the Solomon Islands Court of Appeal adopted a similar set of restrictive conditions that were first articulated by Sir James Stephen in the nineteenth century and then later endorsed in the English Court of Appeal in *Re A (Children)* [2000] 4 All ER 961, 2 WLR 480:

> In his reasons for judgment in Re A (above), Brooke LJ at 573, acted on the views on this subject of Sir James Stephen. According to that learned author, there are three requirements for its application. They are that: (i) the act is needed to avoid inevitable and irreparable evil; (ii) no more should be done than is reasonably necessary for the purpose to be achieved; and (iii) the evil must not be disproportionate to the evil avoided.

In *Luavex*, an unsuccessful attempt was made to invoke a defence of necessity for the killing of one group of members of the Bougainville Revolutionary Army by another group of the BRA, allegedly in order to stop criminal depredations that were being inflicted on the local community. It was held that there was no evidence to establish that the particular victims were responsible for any depredations or that the killings were the only available means of stopping them.

10.39 The restrictive conditions articulated on the one hand in *Perka* and in *Latimer* and on the other in *Re A (Children)* are similar. Both require that a serious danger be faced, that there be no other way of avoiding it, and that the harm inflicted not be worse than the harm avoided. There is, however, a significant difference between the two formulations. *Perka* and *Latimer* impose a time-frame: the harm to be avoided must be 'imminent'. The rationale is presumably that, unless harm is imminent, there will be time to plan an alternative way of preventing it from occurring. However, *Re A (Children)* [2000] 4 All ER 961 does not impose any such requirement. Indeed, it was expressly stated at 1051:

> The principle is necessity, not emergency.

This seems correct. It would be inappropriate to insist on such a narrow timeframe that

immediate action is needed to prevent harm occurring. It can sometimes be clear what must be done, even though it is not essential that it be done at this moment. A striking example is provided by *Re A (Children)* itself. The case involved conjoined twins, one of whom had deficient lungs and heart such that she was kept alive by her stronger sister. Medical opinion was that, unless they were separated, the weaker twin would inevitably die within six months and that her death would cause the death of her sister. However, while separation would preserve the life of the stronger twin, it would cause the immediate death of the weaker one. A declaration that separation would be lawful was obtained from the English Court of Appeal and the separation was conducted.

10.40 Committing the offence must be necessary for dealing with the danger. However, it is not sufficient that committing the offence was *a* reasonable way of dealing with the danger. It must have been the *only* reasonable way of dealing with it. This requirement would deny the defence in several of the much-debated survival scenarios where one person must die in order that another or others might live. *Dudley and Stephens* (1884) 14 QBD 273 is a famous example. In that case, shipwrecked and starving sailors killed one of their number to provide food. Necessity was argued unsuccessfully as a defence to murder. There are several possible interpretations of the reasoning in the case. One interpretation is that necessity cannot be a defence to murder where there would be no good reason why one person rather than another should be the one selected to die. On this interpretation, there could be a different result where it was clear who had to be sacrificed if anyone was to be saved. An example would be a case where two mountaineers were roped together, and one fell and would have dragged both down if the other had not cut the rope. The defence could be available for killing another person if that was the only reasonable way of saving anyone. However, if there was no good reason why one person rather than another should be the one selected to die, then self-sacrifice as well as killing another would both be reasonable options and the defence would therefore be unavailable.

10.41 There has been some discussion at common law as to whether the defence of necessity should be excluded for certain offences, particularly murder, because of the requirement that the harm inflicted be not disproportionate to the harm avoided. Another interpretation of *Dudley and Stephens* is that intentionally killing one person to save the life of another can never pass the test of proportionality. Indeed, in *Latimer* (see above, **10.37**), it was said at [40]: 'It is difficult, at the conceptual level, to imagine a circumstance in which the proportionality requirement could be met for a homicide.' Nevertheless, *Re A (Children)* shows how even a killing may be a reasonable response under circumstances where it is clear who must die if anyone is to live.