

Answers to self-test questions

Chapter 14

1. Explain the difference between a justification and an excuse.

A justificatory defence makes the defendant's conduct lawful, and thus negates the unlawfulness of the *actus reus* of the offence. Defences such as self-defence and consent are justifications. An excuse does not negate an element of the offence. Duress is an excusatory defence.

2. What is the test for self-defence? Cite an authority for this.

Self-defence is available where a defendant honestly believes that it is necessary to use force and uses force which is proportionate to the circumstances as he believed them to be: *Palmer v R* (1971) and s.76, Criminal Justice and Immigration Act 2008.

3. Is the test for self-defence objective or subjective or both? Explain your answer using case law.

Both. The first limb (use of force is necessary) is subjective. The second limb (reasonable degree of force used) is objective.

4. Can a defendant who acts in the mistaken belief that self-defence is necessary still rely on the defence? Explain your answer using case law.

Yes, because a defendant is to be judged according to the circumstances as he believed them to be, whether his belief is reasonable or not, or mistaken or not: *Williams (Gladstone)* (1987) and s.76(4) of the Criminal Justice and Immigration Act 2008.

5. When, if at all, might a defendant use lethal force in self-defence?

Where the defendant kills another person while using reasonable force to defend himself, the defendant will be able to rely upon self-defence. Where the force used is excessive, this defence will not be available.

6. What is the test for duress? Cite two authorities for this.

The test for duress is derived from *Graham* (1982). The following two questions must be asked:

- (1) Was D impelled to act as he did because he reasonably feared that if he did not so act X would kill him or cause him serious physical injury?
- (2) Would a sober person of reasonable firmness, sharing the characteristics of the defendant, have responded to D's belief by taking part in the killing?

This case was approved recently by the House of Lords in *Hasan* (2005).

7. What are the limitations on the defence of duress?

- (1) Duress is no defence to murder, attempted murder, and some forms of treason;
- (2) The threat relied on must be to cause death or serious injury;
- (3) The threat must be directed against the defendant, or his immediate family, or someone close to him;
- (3) The test for duress is largely objective;
- (4) Duress is only available where the criminal offence has been directly caused by the threats which are relied upon;
- (5) Duress is only available if there was no evasive action he could reasonably have been expected to take;
- (6) The defendant may not rely on duress to which he has voluntarily laid himself open.

8. To what extent, if at all, are the defendant's characteristics relevant to the defence of duress?

The second question in the *Graham* test asks whether a sober person of reasonable firmness, sharing the characteristics of the defendant would have responded to the threats as the defendant did. The case of *Bowen* (1996) is the leading authority. The only relevant characteristics were the age and possibly the sex of the defendant, pregnancy (where the threat of harm is to the unborn baby), serious physical disability and a clinically recognised psychiatric condition, such as evidence of post-traumatic stress disorder (*Emery* (1993)).

9. Explain the difference between duress and duress of circumstances.

The defence of duress of circumstances may be relied upon by a defendant who is compelled to commit an offence by force of circumstances. It is distinct from duress by threats as the “threat” does not come from a person, but from the circumstances in which the defendant finds himself.

10. Is necessity a defence?

This is not entirely clear and the courts have avoided the issue of whether necessity may be relied upon to justify a defendant’s actions in committing a criminal offence in order to avoid a greater evil. If it does indeed exist, necessity does not require a threat made by a person of death or physical injury, but merely a choice between two evils. The courts have used phrases such as duress of circumstances and necessity interchangeably, adding to the confusion surrounding the existence of necessity.