

Chapter 14: General defences

Problem Questions

Below is an example of a problem question and a worked answer. The answer is written in bullet-point form, highlighting how the structure for answering problem questions (discussed in the 'eye on assessment' section of every chapter) can be applied in this area. Remember that when you write your essays, you should use full prose (i.e., not bullet-points).

Dave and Phil are mountaineers attached to the same rope. Phil is hanging below Dave and it becomes increasingly obvious that the rope will break before rescue can arrive and they will both fall to their deaths. If Dave were to cut the rope, Phil would be killed, but the rope would be strong enough to hold Dave until he can be rescued. Dave cuts the rope.

Discuss Dave's potential criminal liability.

Introduction: Your introduction should first make clear that you understand the issues raised within the problem question. Here liability is clear, and our focus is criminal defences. You should also state how you are going to structure your answer – straightforward in this case as there is only a single criminal event.

Step 1: The potential criminal event arise where Dave (D) cuts the rope holding Phil (P).

Step 2: The potential offence is murder.

Step 3:

- **Actus reus:** Does D perform conduct that amounts to an unlawful killing of a human being under the Queen's Peace?
- This is clear on the facts where D cuts the rope.
- **Mens rea:** Does D intend to kill or cause serious harm?

- D's purpose is not to kill or cause serious bodily harm, but he does foresee this outcome as a virtually certain consequence of his conduct and so he could be said to intend it obliquely. There may be some discussion here about the third limb of the *Woollin* test, where a jury may choose not to find intention. However, it is likely that intention will be found.

Step 4: D is likely to rely on a number of defences. In a question of this kind, containing a single criminal event, you should discuss them widely.

- Duress of circumstances? Most of the elements of this defence may be satisfied, but duress is not currently a defence to murder.
- Self-defence? The problem here is that it is counter-intuitive to characterise P's conduct as an attack upon D.
- Necessity? *Re A* shows that necessity can be a defence to murder. Further, in line with *Re A*, and contrary to *Dudley and Stephens*, we can say that P is 'destined to die' (will die either way). This was true of the twin Mary in *Re A*. Our case also seems in line with the criteria discussed in *Re A*: (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; (iii) the evil inflicted must not be disproportionate to the evil avoided. However, *Re A* was explicitly confined to its facts, and does not create transferrable criteria for a general defence. Further, in this case D *believes* the rope is not strong enough, whereas in *Re A* there was irrefutable medical evidence.

Step 5: It is likely (perhaps) that liability will not be found. It is for you to identify which route to this outcome you think is most likely.

Conclusion: You should summarise your findings. In a relatively brief problem question of this kind, you also have the space for a longer discussion here about the relative merits of the law you have applied.

Essay Questions

There are several areas of interest for essay-type questions in relation to the general defences. For example, the fairness and scope of the individual defences, the differences between excuses and justifications, the inconsistent approach of the law between the different defences (e.g., in relation to objective or subjective elements), the potential for reforms, and so on.

Below is an example of an essay-type question, and a bullet-point plan for a possible answer. This is for illustration purposes only. When writing an essay of this kind yourself, there will usually be alternative ways you could structure your answer, alternative points of discussion that could be raised, and you would certainly be expected to write in full prose (i.e., not in bullet-point form). The most important point to take from these plans is how they focus on identifying and discussing the subject matter of the debate within the question, not simply listing information about the relevant topic.

'The role of defences is to ensure that those who satisfy the fault and conduct elements of offences, but who are not genuinely blameworthy, should escape conviction. However, the current law fails in this role.'

Discuss with reference to the defences of self-defence, duress and necessity.

Introduction:

- Your introduction needs to highlight and engage with the central debate within the question: the role of defences to protect those who are not 'genuinely blameworthy' despite completing the elements of a defence.
- You should then explain how you are going to structure your essay. One way for a question of this kind would be to separate the two contrasting ways in which defences seek to identify those who are not genuinely blameworthy: excuses and justifications.

Body of the essay:

- Excuse defences:
 - Acquitted because D could not be expected to withstand the pressure/treat.
 - For example, duress: This defence arises where D has a reasonable belief in threat to life or serious injury, and there is a reasonable overwhelming of D's restraint. The defence excuses where D is not blameworthy, but it may be too narrow. For example, it is not a defence to murder; it will not excuse where D honestly (but unreasonably) believes in threat or has will overborn (even where this is due to low IQ etc.); and the voluntary association exclusion has also been applied very (perhaps overly) restrictively.
- Justification defences:
 - Acquitted because D did the right thing in the circumstances
 - For example, self-defence: This defence applies where D has a subjective belief in force being necessary, and uses an objectively reasonable degree of force (based on the facts as D believes them to be). Again, it could be contended that the defence is applied too narrowly. For example, there has been considerable debate about the reasonableness criterion in circumstances of extreme stress, and for particular groups such as householders. Indeed, this has led to reform within section 43 of the Crime and Courts Act 2013. It could also be argued that self-defence applies too widely, acquitting those who deserve liability. For example, unlike duress, D does not need to have a 'reasonable' belief in the necessity of force. Thus, where D kills, we may question whether D's acquittal under self-defence is compatible with V's Art 2 right to life?
 - For example, necessity: This is a balance of evils defence. We could argue that it applies too widely, as it certainly has the potential to do. However, if we look at where it has been applied in practice, we could argue that it is too narrow. Either way, we could certainly question the lack of clarity with regard to this defence.

Conclusion:

- Your conclusion should summarise your discussion and state in general terms where you stand on the debate, is it even fair to say that defences have this single rationale?
- If this is the shared rationale, would we be better off with a single general defence?