



# ‘Duress of circumstances and voluntary association’: *R v Phair* [2022] NICA 66

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## ABSTRACT

In the case of *R v Phair*, the Northern Ireland Court of Appeal was tasked with interpreting the scope and application of the comparatively recent criminal defence of ‘duress of circumstances’. While the defence of duress by threats is well established, duress of circumstances has received comparatively little judicial or academic attention. The judgment provides important clarification on the doctrinal and theoretical underpinnings of the defence. Further, the decision is instructive as to how courts should approach the limitation of ‘voluntary association’ which may operate to prevent a defendant successfully pleading the defence.

**Keywords:** duress; duress of circumstances; duress of threats; necessity.

## INTRODUCTION

The defence of duress has existed in English law for centuries.<sup>1</sup> The defence centres on circumstantial pressure and arises where a defendant has completed all of the definitional elements of an offence but, in the circumstances of the case, the defendant’s actions are excused. The defence has most commonly featured in cases where a defendant commits a criminal offence, but does so as a result of threats of death or serious injury. A typical case would involve a defendant being threatened that if they follow orders to carry out some form of assault on another individual, they will be killed. Duress draws heavily on the concept of objectivity, assessing the actions of the defendant against reasonable standards of the ordinary citizen.<sup>2</sup> The defence does not operate to negate a defendant’s *mens rea*, rather it provides an exculpatory excuse to relieve a degree of responsibility for their conduct.

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- 1 Amy Elkington, ‘The historical development of duress and the unfounded result of denying duress as a defence to murder’ (2022) *Journal of Criminal Law* 1.
  - 2 John Child et al, *Simester and Sullivan’s Criminal Law: Theory and Doctrine* (Hart 2022) 849.

A more recent form of duress to be recognised is that of 'duress of circumstances'.<sup>3</sup> Indeed, the defence appears to have arisen 'more or less by accident' rather than developing separately as a distinct, coherent basis for justifying or excusing criminal conduct.<sup>4</sup> Duress by circumstances essentially covers scenarios where an individual carries out a crime, feeling compelled to do so because of fear arising out of a set of circumstances rather than a person threatening him or her (see further below). Both defences of duress by threats and duress by circumstances are governed largely by the same principles, for example neither is available to a charge of murder or attempted murder.<sup>5</sup>

The defence of duress of circumstances has received relatively little attention from the appellate courts in England & Wales.<sup>6</sup> In an Irish context, the Irish Law Reform Commission (drawing heavily on the experience in England and Wales) has recommended that the defence 'be placed on a statutory footing, having the same scope and application as the defence of duress by threats'.<sup>7</sup> The Northern Ireland Court of Appeal decision in *R v Phair*<sup>8</sup> is valuable in helping us to understand the interaction between the different bases of the duress defence as well as potential limitations placed on it.

## BACKGROUND

The appellant was convicted of nine offences after a trial. These included causing death by dangerous driving and causing grievous bodily harm by dangerous driving. The offences related to a fatal car chase which occurred following a failed drugs transaction between the appellant and another man (PT). In short, PT had paid the appellant for cocaine which the appellant did not provide. This resulted in an altercation and a car chase between the two men. The driving of both the appellant and PT was described during the evidence as characterised by speed and

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3 The case of *R v Willer* (1986) 83 Cr App R 225 is generally recognised as the first case to demarcate duress by circumstances as a separate offence. This decision was then followed in *R v Martin* [1989] 88 Cr App R 343 in which the court recognised that 'English law does in extreme circumstances recognise a defence of necessity. Most commonly this defence arises as duress that is pressure upon the accused's will from the wrongful threats or violence of another' [345].

4 David Ormerod and Karl Laird, *Smith, Hogan and Ormerod's Criminal Law* (Oxford University Press 2021) 383.

5 Child et al (n 2 above) 849.

6 Karl Laird, 'Duress: *R v Petgrave (Pascoe)* Court of Appeal (Criminal Division): Holroyde LJ, Russell J and HH Judge Mayo QC: 8 June; [2018] EWCA Crim 1397' (2019) 2 Criminal Law Review 160.

7 Law Reform Commission (Ireland), 'Report: Defences in criminal law' (LRC 95-2009, December 2009).

8 [2022] NICA 66.

'a hot pursuit'.<sup>9</sup> The appellant, who was driving one of the cars, was injured. His girlfriend was killed, and another young woman was also seriously injured. A set of facts was agreed between the defence and prosecution. It was agreed that the death of the appellant's girlfriend was caused by the injuries she sustained in the vehicle collision. It was also agreed that at the time of the accident the appellant's blood contained Alprazolam, also known by the brand name Xanax, well above the range expected following therapeutic use.

The appeal was based on five principal grounds which included the decision to place evidence of the appellant's bad character before the jury, admission of hearsay evidence against the appellant and the placing of a limitation on the defence of duress of circumstances. In relation to the third ground, there was no dispute that the defence of duress was properly left to the jury. However, it was contended that the judge should not as a matter of law have included a voluntary association limitation as part of his direction. In the alternative the appellant argued that there was no evidential basis for the limitation of the defence to be left to the jury.

Under the sub-heading 'defence of duress', the trial judge set out for the jury a route to verdict. It was the final element of this route, which outlined the 'voluntary association limitation', that formed the basis of the appellant's case. The core question was whether the inclusion of this limitation was correct in law where there were no direct threats which compelled the appellant to commit crimes but, rather, he committed crimes due to the circumstances that arose. This third question was framed by the trial judge as follows:

Had the defendant voluntarily put himself in a position in which he knew or ought reasonably to have known that he might be compelled to commit a crime by threats of violence made by other people?

If you are sure that this was the case the defence of duress is not available and you should return a verdict of guilty.

If you are sure that this was not, or you think it may not, have been the case, you should find him not guilty.

The Court of Appeal declined to analyse the nature of duress or engage in any academic debate as to the relationship between this defence and necessity. Instead, the court narrowed its focus on the question of 'whether the defence having arisen, the jury should also have been told that it was not available if the appellant had voluntarily exposed himself to the risk of compulsion to commit crimes'.<sup>10</sup> The court surveyed the

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9 Ibid [6].

10 Ibid [62].

relevant caselaw, starting with the seminal authority of *R v Hasan*.<sup>11</sup> It emphasised the point made by Lord Bingham that a defendant may not rely on duress to which he has 'voluntarily laid himself open'.<sup>12</sup> The rationale for this limitation was based on the imperative of discouraging association with known criminals, and that the law should be 'slow to excuse the criminal conduct of those who do so'.<sup>13</sup> Further echoing the judgment of Lord Bingham in *Hasan*, the Northern Ireland Court of Appeal recognised that the net of voluntary association is cast wide and that it is not confined to foresight of coercion to commit crimes.<sup>14</sup> The Court of Appeal further cited the case of *R v Ali*<sup>15</sup> as authority for the notion that it is 'the risk of being subjected to compulsion by threats of violence that must be foreseen or foreseeable that is relevant, rather than the nature of the activity in which the threatener is engaged'.<sup>16</sup>

The appellant's legal representatives submitted that there are logical public policy and moral distinctions between the two different forms of duress. It was argued that the voluntariness limitation should not apply in circumstances where an individual commits a criminal offence in escaping a threat of death or serious injury from an associate. Public policy, it was argued, should not be so broad as to mean that a criminal associate can never rely on duress of circumstances where they are in the act of attempting to escape from a threat of death or serious injury. The Northern Ireland Court of Appeal was unconvinced by these arguments and refused to draw a distinction between the two forms of the defence. The court sought to highlight commonalities between the two forms of duress and noted that:

... in drawing all of the above strands together it is our view that the voluntary association limitation is not confined to circumstances of direct threat. It seems to us proper to apply it in other circumstances where the threat is implied or derived from circumstances i.e., duress of circumstances. It would be artificial and against public policy to make a distinction.<sup>17</sup>

The court therefore dismissed this ground of appeal, saying that in the circumstances the appellant could have foreseen or ought reasonably to have foreseen the risk of being subjected to compulsion to act in a criminal way by threats of violence to commit criminal offences. In the words of Lord Bingham in the case of *Hasan*, the appellant was unable to rely on the defence of duress to excuse '*any act*' (emphasis added)

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11 [2005] 2 AC 467.

12 Ibid [21].

13 Ibid [38].

14 *Phair* (n 8 above) [72].

15 [2008] EWCA Crim 716.

16 *Phair* (n 8 above) [74].

17 Ibid [84].

which he was compelled to do.<sup>18</sup> In the present case, that included causing death or grievous injury by dangerous driving. Each of the other grounds of appeal were also dismissed.

### COMMENTARY

As a general rule, an individual who voluntarily accepts the risk of being placed in the 'do it or else' dilemma is not permitted to use that dilemma as an excuse within the law of duress (although it may amount to mitigation in some circumstances). There are strong policy reasons behind such an approach: the law should discourage association with known criminals and any consequences which arise from such association will very rarely be excused.<sup>19</sup> As Lord Lowry LCJ remarked in the seminal authority of *R v Fitzpatrick*, a defendant could not be allowed to 'put on, when it suits him, the "breast plate of righteousness"' by raising duress in an effort to escape criminal liability.<sup>20</sup> The appeal in *Phair* concerned the breadth of that rule and how it applies to the different forms of duress (duress of threats and duress of circumstances). The facts of the case did not involve the typical duress by threats scenario, rather the appellant argued that he was impelled to act as he did because, based on what he reasonably believed the situation to be (ie being pursued by a car at speed), he had good reason to fear death or grievous bodily harm would result.

Several interesting points arise from the Court of Appeal's analysis. Firstly, the court did not enquire into the precise relationship between duress of circumstances and necessity as a defence. Indeed, in the case of *R v Conway* the England & Wales Court of Appeal collated the two and concluded that no relevant doctrinal differences exist.<sup>21</sup> In other scenarios, however, the difference between the two may attain more significance. The defence of duress focuses on whether a person of reasonable firmness would have acted similarly, while necessity asks whether, in the circumstances the defendant was in (or reasonably believed themselves to be in), it was legitimate to break the law. As Simester and Sullivan point out, the latter question does not always require an emergency or involve an imminent threat.<sup>22</sup> Furthermore, necessity has traditionally been regarded as a justificatory defence while duress of circumstances has been construed as excusatory

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18 *Hasan* (n 11 above) [38] (Lord Bingham).

19 *Ibid.*

20 [1977] NI 20 [31].

21 [1989] QB 290 [297].

22 *Child et al* (n 2) 866.

in nature by courts in England and Wales.<sup>23</sup> Interestingly, recent academic commentary has analysed doctrinal similarities between the defences in the wake of the Covid-19 pandemic.<sup>24</sup>

The arguments advanced by the appellant on this appeal point are worth considering. Essentially, the appellant's representatives sought to distinguish the type of case where the defendant 'complies' with criminal associates under threat and cases where the same person commits a criminal offence in 'escaping' a threat of death or serious injury from an associate. It is submitted that the Northern Ireland Court of Appeal was correct to reject this conceptualisation and defer to the wider concept of voluntary association as outlined by Lord Bingham in *Hasan*. The case law in this area is underpinned by the notion that association with known criminals is sufficient to disqualify a defendant from relying on the defence.<sup>25</sup> As such, the 'escape' distinction advanced by the appellant in this case could not find support due to the prior association with known criminals. In theory, no attempted escape from associated known criminals could ever permit an 'escape' argument to succeed. It is interesting that later in the judgment the Court of Appeal was content to frame the appeal as an 'escape case' as opposed to one of self-defence.<sup>26</sup> As such, convincing the court that a defendant was escaping a threat of death or serious injury from an associate will itself never be sufficient to ground a defence of duress by circumstance. Indeed, in both cases involving defences of duress by threats and duress of circumstances, a relevant consideration for the jury will also be whether the defendant took reasonable steps to escape from the threat faced. The line between these two forms of escape will likely be highly fact-dependent.

The outcome of the appeal in *Phair* serves to highlight just how important voluntary association will be on any attempt to run a duress defence. As outlined by the England & Wales Court of Appeal in *R v Harmer*, the prosecution must demonstrate no more than the fact that the defendant voluntarily exposed himself to unlawful violence.<sup>27</sup> There was, the England & Wales Court of Appeal held, no further requirement that the defendant foresaw that he might be required under the threat of violence to commit crimes.<sup>28</sup> Interestingly, the third and

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23 William Wilson, *Criminal Law* (Pearson Education 2014) 263; Christopher Clarkson, 'Necessary action: a new defence' (2004) *Criminal Law Review* 81.

24 See, for example: Bill Clawges, 'Reexamining the application of duress and necessity defenses to prison escape in the context of COVID19' (2022) 112 *Journal of Criminal Law and Criminology Online* 83.

25 Child et al (n 2 above).

26 *Phair* (n 8 above) [131].

27 [2002] *Crim LR* 401.

28 *Ibid* [16]–[17].

final question in the trial judge's 'route to verdict' in the present appeal required the jury to ask themselves if the appellant 'ought reasonably to have known that he might be compelled to commit a crime by threats of violence made by other people'.<sup>29</sup> As has been explained above, this in fact puts the prosecution's task too high. Association with known criminals and the related exposure to unlawful violence is sufficient for disqualification of the defence.

Finally, the Court of Appeal was tasked with settling a disparity between law and practice in England & Wales and Northern Ireland. It noted that some 'confusion has arisen by virtue of the Crown Court Bench Book NI which does not specifically provide for a voluntary association limitation being applied to a defence of duress by circumstance'.<sup>30</sup> This position, the Court of Appeal pointed out, was at odds with the Crown Court Compendium in England & Wales and indeed the established caselaw. For example, Lord Woolf LJ in *R v Conway* when examining the parameters of duress of circumstances remarked that 'what is important is that, whatever it is called, it is subject to the same limitations as the do this or else species of duress'.<sup>31</sup> While this omission in the Crown Court Bench Book NI was likely a mere oversight, the Court of Appeal's realignment of the Northern Irish law with England & Wales emphasises the need for coherence and consistency in this area. While duress of threats and duress of circumstances are recognised as separate defences, there is clearly an imperative to recognise their common elements. As Ormerod and Laird have noted, duress of circumstances has developed by analogy to duress by threats, and, as such, there is a 'ready made set of principles to govern it'.<sup>32</sup> The Northern Ireland Court of Appeal decision in *Phair* pays regard to this reality and aids understanding of the operation of duress of circumstances in practice.<sup>33</sup>

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29 *Phair* (n 8 above) [58].

30 *Ibid* [76].

31 [1989] QB 290 [297].

32 Ormerod and Laird (n 4 above) 363.

33 Clarkson has proposed a different direction for the defences of duress, namely advocating for a collapsing of the defences of duress by threats and circumstances, necessity and self-defence into one general defence of necessity, termed 'necessary action'. See Clarkson (n 23 above).