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TORTIOUS NECESSITY; THE PRIVILEGED DEFENSE

by

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The similarities between the laws of torts in the United States of America and England enable one to make an interesting comparison between the two sets of rules applicable to the general defense of necessity. Although both tort systems are derivatives to a greater or lesser extent of the English common law, they have inevitably developed their own individual jurisprudence over the years. Concepts have been refined and extended to produce significant and curious differences which provide an interesting exercise in legal forensic. The similarities of the two tort systems make a comparative study possible, and the differences provide the justification for the analysis.

The common origin of the necessity defense is the English concept of "the common wea." This doctrine was originally considered to justify the invasion of private property in time of war and also excused the demolition of a house on fire to protect other property.[1] Coke, in reporting the Saltpetre Case commented, "for the commonwealth, a man shall suffer damage; as for saving a city or a town, a house shall be plucked down if the next be on fire . . . . and a thing for the commonwealth every man may do without being liable to an action."[2]

This notion began to develop the idea into a principle. Judicial dicta later suggested that if flocks of sheep became intermingled it would not be a trespass to drive the sheep of another.[3] In 1876 in the case of *Kirk v. Gregory*,[4] it was held that in order to safeguard another's property it was not a trespass to remove that property if it was necessary to do so in order to safeguard it. Since then the rule has developed such that it was justifiable to enter land belonging to someone else and to burn the heather growing thereon to prevent the spread of fire to another's land.[5] Thus, the early cases which launch the defense of necessity are based in the tort of trespass.

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1 Y.B. 21 Hen. VII f27b, p 1 (1530).

2 Saltpetre's Case, 77 Eng. Rep. 1294 (1606).

3 Y.B. 21 Hen. VII fo28a, p 1 (1530).

4 Kirk v. Gregory, 1 Ex. D. 53 (1876).

5 Cope v. Sharpe (No. 2), 1 Law Rep. 496 (K.B. 1912).

These cases do establish, however, a generally applicable principle of law. Particularly, the latter instance of *Cope v. Sharp,* which went further than its predecessors. This case holds that the justification sought was primarily for the benefit of the defendant and not the community in that it marks the emergence of the notion of 'private necessity' at large. In this sense, *Cope v. Sharp* does herald a new era for the defense of necessity in that it marks the emergence of the notion of 'private necessity' as opposed to 'public necessity', whose antecedents in the 'common weal' are well established.

Although it had originated from the 'common weal', the availability of the defense of necessity where the community at large was threatened, developed quite easily to afford its protection where only a section of the community was threatened. Thus, it can be seen from *Mouses' Case* in 1608[6] that it was justifiable to jettison cargo from a ship in order to save life. These same principles were expressed more recently in the case of *Esso Petroleum Co., Ltd. v. Southport Corp.*[7] In *Esso,* a ship, named the Inverpool, ran aground on a sandbank in a river estuary. Threatened with the possible breakup of the ship and consequent loss of life, the master of the vessel discharged the cargo of oil into the sea. The owners of the vessel had no obligation to compensate the corporation for the cost of clearing their beaches of the ensuing pollution. It was, the House of Lords considered, a necessary act to save the property and was thus justified. Therefore, its consequences were not compensable. To these two applications of the defense, the dictum of Kennedy, L. J. in *Cope v. Sharp* added the third dimension of 'private necessity', by stating,[8] "[i]t seems that the test is whether in the circumstances at the time when he acted it would appear to a reasonable man to be necessary to act to avoid a real and imminent danger." Therefore, it seems that the three applications of the defense of necessity have intrinsically nothing in them so as to limit their application to trespass and kindred torts, from which the defense emerged.

It has been argued, however, that the common law does not recognize the defense of necessity in the case of an intentional tort.[9] The thesis advanced in support of this proposition appears to confuse the not dissimilar defenses of self-defense, which justifies action adverse to the interests of someone who is not in any way responsible for creating the threat of danger, with that of inevitable accident, where injury to the innocent party is an intended or at least highly probable consequence.[10] Self-defense always presupposes that the plaintiff is

[6] Mouses' Case, 77 Eng. Rep. 1341 (K.B. 1608).

[7] 1956 App. Cas. 218 (1955).

[8] *Cope,* 1 Law Rep. at 510.

[9] F. Newark, 17 MODERN LAW REVIEW 580-81 (1954); F. Newark, 19 MODERN LAW REVIEW 320-21 (1956).

[10] JOHN G. FLEMING, THE LAW OF TORTS 86 (2d ed. 1961).

prima-facie a wrongdoer whereas necessity implies the infliction of harm on an innocent plaintiff.

The general defense of necessity has taken root in the United States and has been slightly modified in both name and application. It is referred to as the defense of privilege by necessity, and its main use is in relation to intentional torts. Thus, an intentional invasion of another's legally protected interests can be 'privileged' if the invasion is done solely for the purpose of protecting a private interest. The proviso, as in English law, is that the means employed to avert the threatened harm are reasonably necessary as being actions which in all the circumstances a reasonable man would do in the face of a real and imminent peril.[11] The rationale for the principle in the United States is the same as in England; namely, that society's concern in the preservation of human and material resources tips the scales in favor of the privilege. Thus, in the case of *Sherrin v. Haggerty*[12] it was held that if the emergency is sufficiently great, and the good it is intended to do is not disproportionate to the harm likely to result, one may trespass upon the land of another to save one's self or one's property.

The approach adopted by American courts is well illustrated by the case of *Vincent v. Lake Erie Transportation Co.*[13] The court in this case considered the vexed question of whether the lawful exercise of the privilege of necessity obligates a defendant to pay compensation for damage resulting from the exercise of the defense. A ship's captain was originally found negligent by a jury for reinforcing the ties holding his ship to a dock after the initial ties had weakened. The captain was faced with the choice of either clinging to the dock, thus creating a risk of damaging it, or foregoing the safety of the dock, risking great physical harm and possibly loss of life. He wisely chose the former and, although originally found guilty of negligence by a jury, was vindicated when the appellate court held as a matter of law that he had acted reasonably and hence was not negligent. The court reasoned that the balance between the risk of relatively slight harm to the dock and great harm to the ship was such that it was reasonable as a matter of law for the captain to risk slight damage to the dock rather than risk almost certain destruction of a valuable ship on the open seas. Nevertheless, the court held the captain liable without specifying the basis of recovery.

In imposing liability, the court reviewed several cases, including *Ploof v. Putman.*[14] In this case, the Supreme Court of Vermont held the plaintiff had not committed a trespass where, without permission, he moored his vessel to defendant's private dock due to weather conditions. The court further held that the

[11] Fleming, *supra* note 10, at 87.
[12] 1953 O.W.N. 962, 964 (1953).
[13] 124 N.W. 221 (Minn. 1910).
[14] 71 A. 188 (Vt. 1908).

defendant was responsible and liable in damages because his representative unmoored the vessel, causing damage to it. Thus, it seems the vessel had not only a privilege but a right to attach itself to the dock. A privilege to do an act merely entails the absence of a duty not to do it; a right entails a duty on the dock owner not to interfere with the defendant's use.

The *Vincent* court also addressed the hypothetical case of a starving man who, according to the court, theologians hold, may without moral guilt take the necessities of life. However, the court stated that it could hardly be said that such a person has no obligation to pay the value of the property so taken when he becomes able to do so. According to the court, the same is true of public necessity in times of war or peace. The taking of private property for public purposes may be countenanced, but compensation must be made.

The *Vincent* court offered another example: defendant's use of a valuable cable lying upon the dock. According to the court, no matter how justifiable appropriation of the cable may be, the owner of the cable may recover its value despite the overwhelming necessity of the situation. In this case, the captain prudently appropriated the plaintiff's property for the purpose of preserving its more valuable property. However, the plaintiff is entitled to compensation for injury done.

The difficulty with *Vincent* is that the following two widely accepted propositions seem to be in conflict:

> (1) Those in charge of the vessel had a privilege to lash the ship to the dock to prevent harm that greatly outweighed the potential damage to the dock; and
>
> (2) The dock owner had a claim for the amount of the damage to the dock.

These two propositions are not only widely accepted, but probably in accord with most people's sense of justice. The contradiction between the two is not inevitable. But the contradiction is unavoidable if the liability of those in charge of the ship is based on breach of a primary duty. This conclusion follows inevitably from the definition of privilege: one has a privilege to do an act when he has no duty not to do the act. It is facially inconsistent to assert that one has breached a duty and one has no duty. As Westen argues:

> the more difficult question is not whether A's right or permission to consume B's property is locally consistent with B's right to compensation (which it truly is), but whether one can simultaneously say that A's consumption of B's property is permitted and yet that it

'infringes' a 'right' of B's that A not consume his property, I think one can.[15]

This inconsistency has not escaped judicial attention. In a similar case, *Anthony v. Haney,*[16] Justice Cooley states: "But if he (the occupier) were liable for any damage for the entry, it must be because the entry is unlawful, and in that case it might be resisted. There can be no such absurdity as the right of entry and the co-existing right to resist the entry." The above-quoted criticism is equally apropos of the *Vincent* case. If then, there is an absurdity, it must be because the result which Chief Justice Cooley criticizes is in conflict with the principles which he assumes determine the existence of the privilege at common law.

The response to this conundrum is found in the previously cited Harvard Law Review article, which uses the notion of incomplete privilege to rationalize the results in *Vincent.* This article also suggests that there is no inconsistency because, as tort law has developed, liability in fact if not in the theory is based on strict liability. The strict liability analysis avoids the conflict noted above if: 1) tort law supports recovery regardless of fault, and 2) such no-fault recovery is not based on a breach of duty. The second proposition seems to follow from the definition of strict liability and is consistent with the analysis in the Harvard Law Review article. The first proposition is addressed in the article by Fletcher[17] which affords support to this theory. However, it is not completely clear that the elements of strict liability in tort are present in the *Vincent* case.[18] One who is strictly liable for acting unreasonably, though by definition not acting unreasonably in the negligence sense, certainly breaches a duty to act reasonably as shown by the case of *Rylands v. Fletcher.*[19] Surely one has a duty not to unreasonably accumulate water. However, the widespread acceptance of strict liability as liability without fault, and thus presumably without breach of duty, makes the second proposition accurate. The first presents more difficulty. In *Vincent,* the court held as a matter of law that the captain acted reasonably in lashing the vessel to the dock. It may be doubted whether courts would apply strict liability to acts which are held to be reasonable in the context of *Vincent.*

The incomplete privilege approach has attracted more support than the strict liability approach. *Vincent* is frequently explained as being based on the intentional tort of trespass which involves breach of duty, and seems to involve the

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15 Peter Westen, *Comment on Montague's Rights and Duties of Compensation,* 14 PHIL. & PUB. AFF. 385, 388 (1985).

16 131 Eng. Rep. 372 (C.P. 1832). *See also* Francis H. Bohlen, *Incomplete Privilege to Inflict Intentional Invasions of Interest of Property and Personalty,* 39 HARV. L. REV. 307-14 (1926).

17 George P. Fletcher, *Fairness and Utility in Tort Doctrine,* 85 HARV. L. REV. 537, 537-46 (1972).

18 RESTATEMENT (SECOND) OF TORTS § 401 (1986). *See also* Romney Marsh v. Corp. of Trinity House, 5 L.R.-Ex. 204 (1870); U.C.C. § 2-316 (1991).

19 3 L.R.-E & I App. 330 (1865).

contradiction described above. However, the incomplete privilege (or partial privilege) reconciles the apparent inconsistency. That is, those in charge of the vessel had a privilege to tie it up to the dock, but no privilege to damage it. Thus, since they have no privilege to damage it, there is no contradiction in holding that the liability is based on breach of duty. It follows that under this theory, there is no inconsistency between a finding that liability is based on the intentional tort of trespass, and a finding that the act is privileged.

Although conventional wisdom accepts the above analysis, it is submitted that the incomplete privilege doctrine itself involves a contradiction. To state that one is privileged to lash the ship to the dock is to state that the privilege of doing the act--lashing the ship--exists. To state that one is not privileged to damage the dock is to say elliptically that one lacks the privilege of doing the act which causes the damage (to talk of a privilege to do damage rather than a privilege to do the act which caused the damage is a category mistake). Since the act which caused the damage is the same act one is privileged to perform, *i.e.,* lashing the ship to the dock, the contradiction is unmistakable.

If strict liability and incomplete privilege are unsatisfactory rationales of *Vincent,* is there any other rationale which reconciles the apparent sense of justice which supports *Vincent* with legal doctrine? It is submitted that the doctrine of restitution reconciles the conflict. This was hinted at in *Vincent* itself when the court analogized the act of those in charge of the vessel to that of a starving person who is appropriating food. Such a person clearly has breached no duty in appropriating a benefit, but must pay for the benefit received. Trespass does not justify recovery, but restitution surely does. Strict liability justifies recovery only if it is assumed, as it is doubtful, that the elements of strict liability are present.

The elements of restitution are present because (1) those in charge of the vessel have appropriated a benefit, and (2) they would be unjustly enriched if not obliged to pay for it.[20] The measure of recovery is the benefit to the ship, measured

[20] The Restatement of Restitution supports a recovery in restitution. It reads:

> 122. BENEFITS DERIVED FROM THE EXERCISE OF INCOMPLETE PRIVILEGE. A person who is privileged to harm the land or chattels of another while acting to preserve hinself or a third person or to preserve his own things or those of a third person is under a duty of restitution for the amount of harm done, except where
> (a) the harm which he seeks to avert is threatened by the things which he destroys or by the tortious conduct or contributory fault of the owner or possessor, or
> (b) his act reasonably appears to be necessary to avert a public catastrophe, or
> (c) he is exercising his privilege as a member of the public to enter land adjacent to a highway which has become impassable.

RESTATEMENT OF RESTITUTION § 122 (1988). *See also* Robert E. Keeton, *Conditional Fault in the Law of Torts,* 72 HARV. L. REV. 401, 410 (1959). *But see* I. GEORGE PALMER, LAW OF RESTITUION § 2.11 (1978). He writes:

by the damage to the dock. The restitution theory avoids the contradictions inherent in any basis of liability such as trespass, which assumes breach of duty and is superior to strict liability because the elements of restitutionary recovery are clearly established. As noted above, the elements of strict liability may not be established since the captain acted reasonably as a matter of law. To be sure, there is secondary authority supporting strict liability, but it is not altogether clear that courts generally would accept such authority. There is no question of breach of duty if the restitutionary basis of recovery is used. The liability of one who lawfully appropriates a benefit, under circumstances that unjust enrichment would ensue if he were not obliged to pay for it, is not based on breach of duty but rather on the ethical sense of the community which demands restitution.

The restitution analysis, which assumes that a benefit was appropriated and that, if such were not the case, there would be no liability, is consistent with the facts of *Vincent.* In that case, there was dictum that, had the vessel been held to the dock by the initial lashings and if additional and deliberate actions had not been taken by those in charge of the vessel, there would have been no liability. Thus it seems that the case is based on the deliberate appropriation of a benefit under such circumstances that the defendant would have been unjustly enriched if not forced to pay for the damage to the dock.

The decision has had to come to terms with the competing interests of restitution for benefits gained at another's expense and the need for legal symmetry. It is immediately obvious that the law of the United States embraces the former concept, while English Law embraces the latter. It does so by remaining true to Hohfeld in considering that if a defendant has a right (privilege) to do an act, then the plaintiff has a duty to permit him to exercise that right.[21]

The great interest in the *Vincent* case for the English Law of Tort is its establishment of the principle (notwithstanding some of its logical infelicities) that a defendant who acts under the compulsion of necessity may have to compensate

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In the *Vincent* case the vessel was saved, but the defendant should have recovered for the damage even if it had been lost, although in that event the defendant would not have benefited. The Restatement (of Restitution) would support restitution in each case, but this almost wholly obliterates the distinction between gain to the defendant and loss to the plaintiff, a distinction which is fundamental in the law of restitution. It is possible to make an analysis of the decision in terms of tort liability, whether the vessel was lost or saved. An unjust enrichment (restitution) theory that produces the same recovery solves no problems; it only creates problems to no purposes.

Palmer seems to accept the incomplete privilege rationale and rejects Keeton's suggestion that if the vessel is lost, the shipowner has avoided a disadvantage. He states that Keeton does not say what the disadvantage is. I suggest that by appropriating the dock, the shipowner received a benefit in that he decreased the risk of the ship sinking even if it does eventually sink. If one steals a lottery ticket, he can hardly claim he took nothing of value because the ticket turned out not to be a winner. The law universally recognizes that avoiding or decreasing risk is of economic value.

[21] Munn & Co. v. Sir John Crosbie, 1 Ex. C.R. 94 (Fed. Ct. 1967) (Canada).

the plaintiff even though he has committed no legal wrong. Only the maritime law of general average contribution, which is designed to spread loss among cargo owners where the property of one is sacrificed to save the ship, reflects the principle in England. The principle emanating from *Vincent* presumably leads to the sacrifice of the less valuable of the two items of property. It could be argued that this approach should also be adopted where the defendant takes the plaintiff's property to save a third party's life. Otherwise, the plaintiff would have to bear the financial burden of saving the life of one he was under no legal duty to rescue. This would appear to be grossly unfair. However, this principle would create a risk that rescuers might hesitate to take property even to save life. It has been suggested, though, that even if English law were to accept the *Vincent* solution it is unlikely that it would be extended to this situation.[22]

In English law, compensation is not easily forthcoming and is apparently non-existent unless negligence is successfully pleaded. This is exemplified in the case of *Rigby v. Chief Constable of Northamptonshire.*[23] Here, the police were held liable for firing a c.s. gas canister into the plaintiff's shop to flush out a dangerous psychopath without having adequate fire-fighting equipment available. The shop was, as a result, burned out. It was held that necessity was a good defense to trespass as such in an emergency. However, the police were held liable in negligence for their failure to ensure that they had sufficient fire-fighting back up when the canister was released onto the plaintiff's property. To put the position at its highest, therefore, the position as to whether compensation is payable to the victims of acts committed because of public necessity is obscure. Bohlen[24] and Glanville Williams[25] argue that no compensation is payable, while Scott and Hildesley[26] and Buller J.[27] think it is. On the other hand, there is an ambiguous dictum in the *Saltpetre* case[28] and an inconclusive obiter dictum in the *Burmah Oil Co., Ltd.* case.[29] In *Burmah,* a majority of the House of Lords held that the Crown must pay compensation for property destroyed by an exercise of the Royal prerogative during the War in order to prevent it from falling into enemy hands. The effect of the judgement has however, been nullified by the War Damage Act of 1965. Winfield makes an interesting suggestion that bare restitution for an act done simply in protection of one's own person or property, or simple compensation for the use or consumption of property might be claimed on quasi-contractual grounds in English law.[30] For example, where a neighbour's fire

[22] W. V. H. ROGERS, THE LAW OF TORT 163 (1983).
[23] 2 All E.R. 985 (Q.B. 1985).
[24] *See* Bohlen, *supra* note 16.
[25] Glanville Williams, *The Defense of Necessity,* 6 CURRENT LEGAL PROBS. 216 (1953).
[26] P.F. SCOTT & A. HILDESLEY, CASE OF REQUISITION 136 (1920).
[27] British Cast Plate Manufaturers (Governor & Co) v. Meredith, 106 Eng. Rep. 1306, 1307 (T.R. 1792).
[28] Mouses' Case, 77 Eng. Rep. 1344 (K.B. 1608).
[29] Burmah Oil Co., Ltd. v. Lord Advocate, 1965 App. Cas. 75 (1964).
[30] WINFIELD & JOLOWICZ ON TORTS 681 (12th ed).

extinguisher is used to put out a fire in one's own house. Although there is not an English authority on this point, an example put by Lord Mansfield in *Hambly v. Trott*[31] is consistent with the suggestion.

The *Rigby* case does involve the interesting interplay between the defense of necessity and negligence. Street suggests that where a plaintiff relies on an allegedly negligent act, the defense of necessity need not be considered since the same standard is then applied to determine the issues of both necessity and negligence by applying the reasonable man test.[32] A defendant when acting under compulsion of necessity must always be in a position to demonstrate that he has acted reasonably. This is true since necessity is not a 'carte blanche' for anyone to behave as they see fit and then retrospectively plead that they acted out of necessity. This is a feature common to both English and American tort law. As Lord Devlin[33] has opined in respect of English law, though the same comment may equally well apply to the American: "The good Samaritan is a character unesteemed by the English law." It is important that people generally not interfere with the person or property of others without due sense of responsibility, particularly as the obligation to compensate for any damage done is uncertain, at least in England. An additional feature that both systems of law have in common is that the defense can only succeed if a defendant can demonstrate that he acted in apprehension of damage occurring as opposed to mitigating the effects of damage that has already occurred. In other words, the defendant's actions must be to some extent anticipatory, and it must be shown that there was a choice between two evils and the defendant chose the lesser of the two. The position is clearly shown by a comparison of two cases.

The first is the South African case of *Greyvensteyn v. Hattingh*[34] which was appealed to the Judicial Committee of the Privy Council. The facts concerned a plague of locusts which entered the plaintiff's land. The defendants reasonably believed that they were heading towards their land. Accordingly, they entered onto an intervening strip of land belonging to third parties which was located between the two properties. Once thereon, they turned away the advancing locusts so that they re-entered the plaintiff's land and thereupon devoured his crops. The defendants were held not to be liable on two grounds. The first was that they were entitled as of necessity to repel an extraordinary misfortune. The second was that if locusts were to be regarded in South Africa as a normal incident of agriculture, the defendants were entitled to get rid of them just as they would be allowed to get rid of any other pests. The defendants' actions were taken prior to the occurrence of

31 1 Comp. 371, 375 (1776).

32 M. BRAZIER, STREET ON TORTS 85 (8th ed. 1988).

33 LORD DEVLIN, SAMPLES OF LAW MAKING 90 (1962).

34 1911 App. Cas. 355 (1911).

harm which was a real and apprehended danger in the face of which the defendants acted reasonably.

These principles again found expression in the later case of *Gerrard v. Crowe*,[35] which was also a Privy Council decision. The parties owned land on opposite sides of a river. The respondents erected an earthen embankment on their land in order to protect it from flood water. When erected, the embankment succeeded in its purpose, but also increased flooding on the plaintiff's land on the opposite bank. It was held that the respondents were entitled to protect themselves and their property by erecting an embankment as they had done, some distance from the edge of their land. They had acted in advance of some real and apprehended danger, and since their acts were quite lawful, they were protected by the defense of necessity in relation to the damage which ensued.

The above situations must be distinguished from actions taken after the event to get rid of the consequences of harm. Thus, it is not possible to get rid of water accumulated on land by artificial means, such as flooding a neighbour's land.[36] This situation prevails even if the accumulation of water is due not to the act of the landowner, but to an extraordinary rainfall. The case of *Whalley v. Lancashire and Yorkshire Railway* illustrates this point.[37] An unprecedented storm and rainfall flooded the drains bordering on the railway embankment owned by the defendants. As a result, a large amount of water was dammed up against the embankment, and it subsequently rose to levels so as to endanger the embankment itself. The defendants pierced it with gullies, and the water flowed away and flooded the plaintiff's land. The defendants were held liable even though it would have been possible for them to have lawfully turned away the flood if they had seen it coming. As Lord Justice Lindley explained; ". . . there is a difference between protecting yourself from an injury which is not yet suffered by you, and getting rid of the consequences of an injury which has occurred to you."[38]

A further dimension of the defense of necessity is whether the defense justifies the infliction of injuries to the person as opposed to property. The dicta in *Scott v. Shepherd*[39] were only obiter, and *Gregson v. Gilbert*[40] is not very reliable authority. The facts show that 150 slaves were thrown overboard from a ship due to a shortage of water. It was held, in an action upon an insurance policy for the value of the slaves, that the facts showed no sufficient evidence of necessity for the captain's act.

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35 1921 App. Cas. 395 (1920).

36 Hardman v. The North Eastern Railway 3 C.P.D. 168 (1878); Maxey Drainage Board v. Great Northern Railway, 1912 L.T.R. 106 (1912).

37 13 Law Rep. 131 (Q.B. 1884).

38 *Id.* at 140.

39 96 Eng. Rep. 525 (K.B. 1773).

40 99 Eng. Rep. 629 (Dougl. 1783).

The decision, however, is of little value for modern purposes. As Winfield suggests: "All that is safe to hazard is that the principle of reasonableness applies here also, that more latitude would be allowed in the protection of the actor's person than of his property and still more where he acts for the public safety and not for his own." Thus, the driver of a fire engine is not in any way privileged in that he must observe traffic signals, according to *Ward v. London County Council.*[41] However, the Road Traffic Regulation Act of 1967, by section 79, exempts fire engines, ambulances and police cars from speed limits but does not as a consequence affect the civil liability of the driver, according to *Gaynor v. Allen.*[42] What little authority there is in the United States seems to deny that a defendant is entitled by the privilege of necessity to inflict serious bodily harm or death. This tentative proposition derives from *Laidlau v. Sage,*[43] where it was assumed that a defendant was liable if, about to be shot by a gunman, he deliberately seizes a bystander as a shield. However, by way of contrast thereto, it was held that no civil liability attached to a person who, after being shot and who was about to fall, instinctively grabbed another for support and who as a result was injured.[44]

This raises the question of the ultimate limits of the defense of necessity. The answer is by no means certain. It seems that only an urgent situation of imminent danger can ever raise the defense, because 'necessity' could simply be a mask for anarchy. Lord Denning M.R. gave vent to these same sentiments saying:

> There is authority for saying that in the case of great and imminent danger, in order to preserve life, the law will permit an encroachment on private property . . . The doctrine so enunciated must, however, be carefully circumscribed . . . . Necessity would open a door which no man could shut. It would not only be those in extreme need who would enter. There would be others who would imagine that they were in need, or would invent a need, so as to gain entry. Each man would say his need was greater than the next man's. The plea would be an excuse for all sorts of wrongdoing. So the courts must, for the sake of law and order, take a firm stand.[45]

Although referring to encroachments on private land, Lord Denning's perception of the need to restrict the ambit of necessity equally applies to the application of the defense where personal injury or death is inflicted. The leading English case, and perhaps the most remarkable illustration in this century of the

[41] 2 All E.R. 341 (K.B. 1934).
[42] 2 Law Rep. 403 (Q.B. 1959).
[43] 52 N.E. 679 (N.Y. 1899).
[44] Filippone v. Reisenberger, 119 N.Y.S. 632 (N.Y. App. Div. 1909).
[45] Southwark L.B. v. Williams, 1971 L.R.-Ch. 734, 743-44 (Ch. App. 1971).

scope of the defense, is *Leigh v. Gladstone.*[46] A suffragette prisoner who was fasting was forcibly fed through the mouth and nose by prison officers. She subsequently sued them for battery and it was held that the forcible feeding was necessary to save her life so that there was no liability.

The proper function of the defense of necessity in the context of medical treatment is to justify emergency treatment carried out on patients unable to give consent to treatment at the relevant time. In the case of *Beatty v. Illingworth,*[47] the defendant surgeon removed both the plaintiff's diseased ovaries though the plaintiff patient had given consent only to the removal of one ovary. The court considered that there had been implied consent, although necessity appears to be a better ground for the decision and is more consistent with the reasoning of *Leigh v. Gladstone*. This is so, notwithstanding that questions remain as to whether that decision would have been the same if the plaintiff had neither been a suffragette nor in prison. It seems that the decision could be justified on the dual grounds of both the specific detail statutory obligations of prison officers to preserve life and on those of necessity.[48] If the latter justification is considered, then there is a consistent thread of logic in the 'medical consent' cases where emergency treatment is required. It was precisely this legal reasoning which was approved of by the court in the case of *F. v. West Berkshire Health Authority.*[49] In this case, a doctor was held to be justified in performing an operation on an adult patient who permanently lacked the mental capacity to give a valid consent. The only proviso to the application of the defense of necessity was the perfectly reasonable and obvious condition that the treatment administered must be in the best interests of the patient.

Despite the consistent legal reasoning it is possible to weave into these cases, they once again raise questions as to the ambit of the defense of necessity. For example, where a defendant has acted in self-preservation, there is no English authority on the availability of the defense. However, it is possible to consider *Scott v. Shepherd*[50] as a case on the defense of necessity. This case excused two persons who threw on the lighted squib after it had been initially lighted and thrown into a covered market on the basis that they had acted in the emergency of the moment to protect themselves and the property of others. Inevitably, such thoughts direct the mind to the ultimate consideration which the criminal law addressed in 1884 in the case of *R. v. Dudley and Stephens.*[51] The question is whether the defense of necessity would justify either killing or cannibalism or both in a severe and

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[46] 26 T.L.R. 139 (1909).

[47] 60 J.P. 740 (1989).

[48] Zellick, *The Forcible Feeding of Prisoners: An Examination of the Legality of Enforced Therapy,* 1976 PUB. LAW 15 (1976); Zellick & Brazier, *Prison Doctors and Their Involuntary Patients,* 1982 PUB. LAW 45 (1982).

[49] 2 All E.R. 545 (1989), *aff'g,* 2 App. Cas. 1 (1990).

[50] 96 Eng. Rep. 525 (K.B. 1773).

[51] 14 Q.B. 273 (1884).

extreme emergency. The answer is by no means certain, and must therefore be speculative although there seems no logical reason why such actions should not be considered within the compass of the defense if circumstances justify.

If the courts draw back from this conclusion, then it would appear to be the dictates of public policy rather than the strict application of legal reasoning that would produce this conclusion. This might well be the hidden reason behind the decision in *Southward London Borough v. Williams.*[52] The court of appeals rejected the argument that necessity could be a defense to trespass by homeless persons in empty public housing. The reasoning was that if homelessness were ever to be a justification for trespass, then no one's house would be safe. This justification of the decision is open to very severe criticism in that the defense was disallowed just because it is open to abuse. Many defenses are nonetheless available in law even though they are equally open to abuse. Perhaps the real justification for the decision is public policy in that the courts were not willing to allow unregulated 'self-help' by groups of people such as homeless persons.[53] If this is the case, then the limits of necessity as a defense will always be difficult to draw since pragmatic considerations in particular instances can outweigh legal logic and analysis. Thus it may be that the defense of necessity cannot conform to a consistent pattern of legal reasoning, but will for the foreseeable future remain a hodgepodge of decisions representing fragmented logic and lacking consistency. As such, the defense may be regarded as representative of much of the law of tort as being subtle, though at times uncertain, and invariably inconsistent.

[52] 1971 L.R.-Ch. 734, 743-44 (Ch. App. 1971).

[53] As an illustration of the vagaries of the defense as applied in England, *see* Ashton v. Turner, 1981 Q.B. 137 (1981); Miller v. Jackson, 1977 Q.B. 966 (1977).