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Regina v Dudley & Stephens Anatomy of a Show Trial

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Abstract

At the centre of *Regina v Dudley & Stephens*, "*Dudley & Stephens*" is the defence of necessity and its place in a criminal law built on volitional conduct. At Roman law the defence arose first from the facts but was then contingent on the drawing of lots. This second feature did not find favour with St Thomas Aquinas, who deleted it when he wrote the defence of necessity into Church law. From Church law the defence passed into common law, again sans lot, but it was anomalous in regard to kindred defences, in that it was absolute. The English Court in *Dudley* & *Stephens* was right to have seen this anomaly as being in need of correction but instead of correcting this in a practical manner, and manipulated the case so that a pronouncement of Victorian morality could be made. This was a prime example of Arnold's observation that: "in the public trial we find the government speaking ex cathedra"[1].

Keywords

Defence of Necessity, *Dudley v Stephens*, Thomas Aquinas, *US v Holmes*

1. Literature Review

There has been a vast amount of material written on the defense of necessity over the centuries. The review provided here is far from exhaustive and consists largely of those works referred to directly in this paper.

Core historical writings on the defence of necessity:

Moral Duties in Cicero Hecaton, DE OFFICUS bk. III xxiii (Trans Walter Miller, Harvard University Press 1913, rpt 1975).

Summa Theologica St. Thomas Aquinas (1485).

The Elements of the Common Lawes of England Francis Bacon (1630).

[1]Arnold, *Symbols of Government* New Haven: Yale University Press 1934.

Historia Placitorum Coronæ, *The History of the Pleas of the Crown*, *by Sir Matthew Hale*, *Knight*, *sometime Lord Chief Justice of the King's Bench*, edited by Sollom Emlyn (London, (1736)).

Commentaries on the Laws of England, William Blackstone (2002).

Factual background to *Dudley* & *Stephens* and customary law of the time.

Cannibalism and the Common Law AWB Simpson Penguin 1986.

Modern expositions on the defense, particularly those most influential or expressly referred to in this paper.

The Case of the Speluncean Explorers Lon L. Fuller *Harvard Law Review* 1949.

Rethinking Criminal Law' George Fletcher Oxford University Press, 2000.

Two Men and a Plank C Finkelstein. Legal Theory 7 (2001) 279-306.

Excused Necessity in Western Legal Philosophy K Ghanayam 19 Can. J. L. & Jurisprudence 31 2006.

2. Introduction

Dudley & *Stephens* is the quintessential criminal case in the common law pantheon because at its centre is the question of what constitutes volitional behaviour. In *Dudley* & *Stephens* volitional behaviour is pitched against necessity and the contest between these factors have generated an enormous amount of legal writing, as exampled above. Having been such a focus of attention for so long, it might be wondered what further could be said about this case.

The research approach in this paper is to track the historical articulation of the defence of necessity and to demonstrate how its truncation, by the deletion of the use of the lot, created an anomaly in English law. The methodology adopted here is to address the following issues in order to demonstrate the thesis that the original defence, which utilised selection by lot, was a valid rule in extremis, as found in *US v Holmes* but that without the lot, the law is reduced to impractical demands, as it was in *Dudley* & *Stephens*. It is also argued that *Dudley* & *Stephens* was in essence a political show trial, which upheld the moral order of Victorian England:

1) That the defence of necessity had been initially subject to the drawing of lots, in Roman law and perhaps previously. When St Thomas Aquinas incorporated this defence into canon law he dropped the drawing of lots as an element of the defence, arguably because he saw it as an appeal to fate and so was un-Godly. The defence then passed into common law, sans lot, but it was an anomaly and the Court in *Dudley v Stephens* was correct to see it as so.

2) In *US v Holmes* it had been held that the drawing of lots was appropriate in extremis. The English Court, an aristocratic body, could not abide anything so democratic as the lot and saw *Dudley* & *Stephens* as an opportunity to refute the reasoning in *US v Holmes*.

3) One of the central features of *Dudley* & *Stephens* was the "special verdict", by which the jury abrogated their duty to give a verdict and the Court usurped this function. Similarly, the Judgment is one of the final touches in the English

aristocracy's obliteration of the commoner's control of customary law. The vehicle for the destruction of customary law was legislation by Parliament. Parliament had been an institution almost entirely under aristocratic control but by the time of *Dudley* & *Stephens* and the growth of suffrage, the certainty of this power base was in question. In *Dudley* & *Stephens* the English lords were pitching for ideological control sanctioned by a legal system which was firmly in their control. As such *Dudley* & *Stephens* is not in essence a criminal case, it is a political case and a show trial at that.

3. The Transition of the Defence of Necessity from Roman to Common Law

The conflict in criminal law between wilfulness and compulsion has long taxed legal thinkers. The Plank dilemma, that is the moral dilemma of two drowning men struggling over a plank that will only support one of them, is ascribed to various philosophers around the second century B.C, including the Greek, Carneades of Cyrene. Another supposed source, the Roman Stoic Hecaton, though that the solution was to draw lots. Fate was then the arbiter and the right was with whom fate favoured. In Roman law the defence of necessity was treated "casuistically" or case by case (Ghanayam, 2006). If this is correct then clearly the defence was available to the Roman jurists. Within classical Roman society hard choices, such as who would pay the price in a decimation, were typically decided by lot. In myth the three brothers, Zeus, Poseidon and Hades cast lots to see which kingdom they would have, the sky, the sea or the underworld.

St. Thomas Aquinas, one of whose great projects was the incorporation of Roman law into Church law, adopted the defence into Church law as a special case saying that "necessity knows no law". Aquinas was first a Churchman, for whom the interrelationship between free will and Providence was central. Accordingly, he was uncomfortable with the pagan element of the casting of lots, as the core mechanism in the Roman defence of necessity and so expunged it. In Aquinas' cosmos Providence does not share the stage with the three sisters and so he could not admit the jurisdiction of the fates and the validity of the casting of lots. This meant that the defence passed into Canon law bereft of its central and validating element, the casting of lots.

Aquinas's approach also found favour with influential casuists such Hugo Grotius and Samuel Pufendorf who extended the defence of necessity, for conservation of life, to the justification of larceny in the circumstance of starvation.

Francis Bacon (1561-1626) in his *The Elements of the Common Lawes of England* also known as his *Maxims of the Law* includes a three-fold defence of necessity, "conservation of life", "necessity of obedience" and "necessity of the act of God or of a stranger". As an example of conservation of life, Bacon refers explicitly to the plank dilemma and it is Aquinas's necessity, without the Roman lot, that Bacon is referencing, stating that it "is neither *se defendendo* nor by

misadventure, but justifiable"[2]. Bacon further said that "the chargeth no man with default where the act is compulsorie, … [and that] … such necessity carrieth a priviledge in it selfe"[3].

Bacon's proposition is that the law does not apply where there is "so great a perturbation of the judgement and reason as in presumption of law man's nature cannot overcome". In particular when Bacon says the action is justified and "carrieth a priviledge in it selfe", he placed it above self-defence and negligent misadventure, both of which, at the time, operated as mere excuse and an excuse that was outside the law, vesting only in a royal pardon[4]. This created an anomaly. It also runs into the difficulty that the presumption of volition is a founding premise of English criminal law, which sets the scope of enquiry within the judicial system, at a practical and pragmatic level.

Matthew Hale (1609-1676) in his Pleas of the Crown took a different approach to Bacon as he saw self-defence as legitimate necessity, stating that "the law permits him in his own defence to kill the assailant, for by the violence of the assault, and the offence committed upon him by the assailant himself, the law of nature, and necessity, hath made him his own protector"[5]. However he balked at the priority of the defence of necessity stating that even if the only escape from peril of death is to kill an innocent this is still murder. Hale also refuted the casuists Grotius and Pufendorf's extension of the necessity of conservation of life, to the justification of theft in the circumstance of starvation, as discussed below, but nowhere did Hale directly discuss the plank dilemma.

William Blackstone (1723-1780), in his *Commentaries on the Laws of England*, set out his views on wilfulness and compulsion as follows:

[a]s punishments are only inflicted for the abuse of free will, which God has given to man, it is just that a man should be excused for those acts which are done through unavoidable force of compulsion … [and]

Choice between two evils … when a man has a choice of two evils set before him and chooses the less pernicious one. He rejects the greater evil set before him and chooses the less pernicious one[6].

When addressing the Plank dilemma Blackstone adopted Bacon's defence of necessity but attempted to reconcile it with Hales' position, by basing the defence of necessity on self-defence, saying:

… since their both remaining on the same weak plank is a mutual, though innocent, attempt upon, and an endangerment of, each other's life[7].

Blackstone was a great jurist but it is difficult to see how the passive act of clinging to a plank can constitute any attempt upon another, known to criminal law. To advance such a proposition takes us beyond the province of criminal law and into the sphere of morality. The result of this line of reasoning in the com-

[2] *The Elements of the Common Lawes of England*.
[3] Ibid.
[4] Finkelstein. *Two Men and a Plank*, Legal Theory 7 (2001) 279-306. 280 Note 5.
[5] *Hale The History of the Pleas of the Crown* Vol. 1. p51.
[6] Blackstone *Commentaries on the Laws of England*, 186.
[7] Ibid.

mon law was to create a "state of nature" exception to the law which was anomalous and a legal *terra nullius*.

Despite this being the common position in England, the Roman defence of necessity, as it pertained to its core dilemma, that of the Plank or like watery tribulations, arguably continued to apply in regard to the facts in *Dudley* & *Stephens*. In AWB Simpson's in depth study of Dudley & Stephens, *Cannibalism and the Common Law* Simpson sets out what he describes as the "only sustained technical criticism"[8], of the case. This, Simpson says was Sir G S Baker's argument that jurisdiction over acts on the high sea were originally held by the Courts of Admiralty "which applied not the common law of England but a body of law of international character based upon Roman law or 'civil' law as it is technically called"[9]. While the Courts of Admiralty no longer existed, "Baker argued that this transfer of jurisdiction did not alter the fact that the appropriate law to be applied was civil not common law"[10]. Sir G S Baker said that Chief Justice Mansfield had explicitly ruled in *R v Depardo* (1807)[11] that the Admiralty applied civil law and maritime customs. Baker argued that: "the practice … of casting lots … maybe …, [was] one of the *consuetudines marinae* spoken of by Lord Mansfield"[12].

Baker also drew upon Everad Otto, a commentator on Pufendorf, who said in regard to the defence of necessity, "therefore the judgement of the lot will be necessary, as in the history of Jonah"[13]. This reference Otto derives from the *Book of Jonah* (ch.1 v 7) which relates to when Jonah was travelling by sea from Joppa to Tarshish, in spite of God's direction. God sent a storm against the ship Jonah was travelling on. The seamen drew lots to see who was responsible for the storm and the lot fell on Jonah. Baker concludes that, "Joppa being on the Syrian coast and comparatively close to Rhodes, this maritime custom might very possibly be of Rhodian origin. This, if certain, would be a very curious fact since the Rhodian sea-laws are a part of Admiralty law"[14]. None of these arguments were ever made or referred to in *Dudley* & *Stephens* although in stating the indictment the Court noted that the crime was "within the jurisdiction of the Admiralty"[15].

4. US v Holmes

After the American ship the *William Brown* sank in 1841, numerous survivors were crowded aboard a lifeboat. Claiming that the boat was overloaded and in peril of capsizing, the seamen aboard jettisoned 16 male passengers. Of the seaman one Alexander Holmes was subsequently charged with manslaughter. Sig-

[8]Simpson 1986: p. 248.
[9]Ibid 249.
[10]Ibid.
[11]Taunton, 26.
[12]Op cit.
[13]Op cit.
[14]Op cit.
[15]*Dudley* & *Stephens* 273.

nificantly the ship's Mate had raised the issue of drawing lots with Holmes and others before taking to another lifeboat. Further the passenger whom Holmes was charged with killing, Francis Askin, appealed to Holmes saying "*if God don't send us some help*, *we'll draw lots*, *and if the lot falls on me*, *I'll go over like a man*"[16]. Holmes' did not accept Askin's plea. Holmes defence was that jettisoning Askin was a necessity to keep the lifeboat afloat in the heavy seas and that as the seamen were required to man the boat, those jettisoned had to be the passengers, though it was a case of gentlemen before ladies. As a matter of fact, the Court found that not all the seamen in the boat were needed to man it.

Justice Baldwin of the Circuit Court of Pennsylvania also observed that:

When the ship is in no danger of sinking, but all sustenance is exhausted, and a sacrifice of one person is necessary to appease the hunger of others, the selection is by lot. This mode is resorted to as the fairest mode, and, in some sort, as an appeal to God, for selection of the victim.

… If time have existed to cast lots, and to select the victims, then, as we have said, sortition should be adopted. In no other than this or some like way are those having equal rights put upon an equal footing, and in no other way is it possible to guard against partiality and oppression, violence and conflict[17].

In sentencing Holmes to 6 month's imprisonment, on top of some month's remand in custody and a fine of $20, Baldwin J. held that "the seamen, beyond the number necessary to navigate the boat, in no circumstances can claim exemption from the common lot of the passengers"[18].

5. Dudley & Stephens: The Customary Law Context

Britannia may have ruled the waves but it was not a one sided contest. In the year of *Dudley* & *Stephens*, 1884-85, five hundred and sixty one British registered vessels were lost and death (by all causes) of crew and passengers was 4259[19]. As a subset of tragedy at sea, the deprivations of the shipwrecked and instances of cannibalism amongst survivors received particular attention by the media and the public. To the modern mind cannibalism is an almost fantastical relic of the distant past but cannibalism was far from being unknown amongst ship-wrecked English seamen in the 19th century. While in most instances the dead were consumed, in extreme circumstances it was the customary practice to draw lots to select a victim. As set out below, customary practice, while open to criticism as being self-serving, was rationalised by a pragmatism which could be described as utilitarian.

Privations after shipwreck were exacerbated by the fact that seamen were notoriously underfed. In the case of the wreck of the *England*, a passing ship, the *Lord Melville*, would not take survivors as they had no provisions themselves[20].

[16]Holmes 4.
[17]Ibid 14.
[18]Ibid 1.
[19]Cannibalism and the Common Law: 98.
[20]Ibid 118.

In 1807 survivors of the *Nautilus* ate those who died so soon after the shipwreck, that it was "quite extraordinary"[21]. The sinking of the *Medusa* in 1816, which inspired Gericault's *Rideau de la* "*Medusa*", gave rise to cannibalism after 3 days and the jettisoning of sick survivors after 6 days. Of the 150 abandoned on a raft only 15 survived to be rescued, 15 days after the sinking[22].

In 1835 the Francis Spaight capsized, leaving the survivors without food or water in a dis-masted and swamped wreck. On the sixteenth day after the capsizing the Captain decreed that lots should be drawn between the Captain decreed that lots should be drawn between the cabin boys, as their loss was less than "those who had wives and children depending on them"[23]. The lot was said to have fallen on one Patrick O'Brien who was killed and his blood drunk by the crew[24]. The *Francis Spaight* was referred to in Parliamentary Select Committee reports in 1836 and 1839 but no one was ever charged with the killing of Patrick O'Brien, and "the only legal proceedings to arise out of the death"[25] was for the Limerick magistrates to bind the boy's mother over to keep the peace, following complaints of harassment from the captain.

As discussed above, it was the sinking of the *William Brown* in 1841 and the American Court's observations in *Holmes* in regard to the drawing of lots, which arguably lay behind the decision by senior figures in the English establishment to make an example of an act of cannibalism. Following the sinking of the *Euxine* in 1874 and an act of cannibalism on the part of survivors, not denied, an attempt was made to bring a prosecution for the murder and cannibalism in *Regina v Archer and Muller*[26]. The case foundered for a variety of reasons, one perhaps being that it coincided with Samuel Plimsoll's campaign, in which he had just been suspended from Parliament for an outburst against Edward Bates, the owner of the *Euxine*. AWB Simpson, drawing an inference from the fact that it was the Parliamentary Under-Secretary for State who conveyed the decision not to proceed with a prosecution, says that the "crew of a ship owned by a prominent Conservative ship owner, himself notorious among seamen for staving his crews, had actually been reduced to eating each other … would hardly have been politically welcomed"[27].

6. Dudley & Stephens: The Facts

Captain Tom Dudley, a professional sailing captain who plied the racing and cruising trade of England's channel ports, was engaged to deliver the yacht *Mignonette* to Sydney, Australia. Dudley hired a crew of three, mate Edwin Stephens, seaman Edmond Brooks and cabin boy Richard Parker. Shipwrecked by a storm in the South Atlantic, the crew managed to take to the lifeboat but

[21]Ibid116.
[22]Ibid.
[23]Ibid 131.
[24]Ibid.
[25]Ibid 135.
[26]Ibid 176-193.
[27]Ibid 192.

2000 miles from land, with no sail, no water and only two pounds of turnips for provisions, their situation was dire. After 15 days in the open boat Dudley broached the topic of drawing lots to decide who would be sacrificed for the others, but was opposed by Brooks, who was the strongest of them all. Two days later, their strength ebbing, Dudley again raised the drawing of lots but he was again contradicted by Brooks. Dudley conferred with Stephens, stating that he believed the boy, 17-year-old Parker, was dying. Dudley related that Stephens and he had wives and families' dependent upon them. Twenty days after being shipwrecked Dudley slew Richard Parker by bleeding him and the three survivors drank his blood and fed off his body. Later Dudley said "the lad dying before our eyes, the longing for his blood came upon us"[28]. They were rescued four days later by a passing ship.

When landed at Falmouth Harbour Dudley made a full and frank statement of the events to the Board of Trade, as required by the Merchant Shipping Act of 1854 and an amending Act of 1876. Subsequently interviewed by Sergeant Laverty of the Harbour Police, who had heard of the death of Parker, Dudley freely admitted that he had killed Parker and surrendered the pocket knife with which he had killed and bled the boy, although he asked for its return as a memento of the fateful voyage. Initially public opinion was against the surviving crew on account of the failure to apply the customary practice of drawing lots. When the full story became known, including Dudley's attempts to cast lots, public opinion in the maritime port swung over "entirely on the side of Dudley and his men"[29]. There was not a lot of support for a prosecution and the governing body, the Board of Trade, "telegraphed that no action should be taken"[30]. However, on the orders of the Home Secretary, the Registrar General of Shipping requested that the Treasury solicitors charge the survivors with the murder of Richard Parker.

7. Dudley & Stephens as a Show Trial

Show trials are managed events and so are run from the top. In *Dudley* & *Stephens* whereas the governing body was the Board of Trade it was the Home Secretary who determined that charges would be laid[31]. Once the charges had been laid before the Falmouth magistrates the Attorney-General directed the crown prosecution and set out the crown's strategy, which was to seek a conviction for murder but for there to be clemency. Clemency was signalled at the outset by the crown not opposing bail, which was extremely unusual in a capital case, where a conviction entailed the mandatory death penalty.

Despite having a full confession from Dudley no evidence was offered against Brooks, in order for him to be available as a prosecution witness. Brooks was then cast as the hero of the piece, despite his complicity, at least after the fact.

[28]Ibid. 64.
[29]Ibid 84.
[30]Ibid 8.
[31]Ibid 89.

His deposition before the Falmouth magistrates was either lost or suppressed. In show trials nothing is left to chance and individual culpability is irrelevant.

The function of show trials is to be defining and authoritative, so they must be conducted at the highest level of the Court. Here the normal process presented a problem, as capital cases were heard by a jury. This caused two difficulties. A not guilty decision was fatal as retrials were unheard of then and even if called for, the unanimity that a show trial required would be lost. A guilty finding was almost as bad, as with a guilty finding there was no binding precedent created, it would be simply a finding on the facts, distinguishable from other fact scenarios.

There was one way of circumventing the jury making a decision and putting the issue before a superior Court, which was by the jury returning a "special verdict". The trial Judge selected by Lord Chief Justice Coleridge, was Baron Huddleston. Simpson claims that it was "highly probable that some careful thought was given to this appointment by the Lord Chief Justice" as Baron Huddleston "had a reputation for getting his own way with juries"[32]. This view draws support from the manner in which Baron Huddleston conducted the case, which appears to have had the goal of achieving a special verdict from the outset.

8. Before the Exeter Assize Court

Presiding over the grand jury prior to hearing the facts or the defence submissions, Huddleston gave a formal ruling on the law of necessity concluding with the remark that, "I know no such law"[33]. Referring to *US v Holmes* Huddleston held that the casting of lots would "verge on the blasphemous"[34] and enhanced the premeditation of the offence. Later, to the same jury convened for the criminal trial, Baron Huddleston stated:

"I shall lay down as a matter of law that there was no justification. I shall lay that down distinctly and absolutely"[35].

By denying that necessity provided any justification for Dudley and Stephens' actions, Huddleston put the jury in an invidious position, and he left them in no doubt as to what that position was saying:

If I was to direct you to give your verdict, I should have to tell you, and you would be bound to obey me, that you must return a verdict of guilty of wilful murder[36].

As Huddleston's stance could have appeared manifestly unfair to the jury, he told them that they could find a "special verdict" on the facts, in which case the issue would be decided by a higher Court. This was an obsolete procedure last performed 100 years previously, in *Hazels Case* (1785)[37], but one which had not been abolished. Importantly such a step put the case before a High Court, thence establishing a binding precedent.

[32]Ibid 198.
[33]Ibid 201.
[34]Ibid.
[35]Ibid 207.
[36]Ibid 212 per Huddleston, B.
[37]Leach Crown Cases 368.

Thinking that they only had the choice of finding Dudley and Stephens guilty of murder, a capital offence punishable only by the death sentence, or giving a "special verdict" the jury chose the latter. Thoughtfully Huddleston had a draft of the special verdict ready for them, which they proceeded to assent to, paragraph by paragraph. The jury did however insert two observations into the verdict. Firstly that "Richard Parker was likely to die first"[38] and secondly that "they would have died if they had not had his body to feed off"[39]. Huddleston transcribed the latter statement as "that if the men had not feed of the body of the boy they would **probably** not survived"[40] (emphasis added). The jury meekly assented to this modification but it was precisely these qualifications, the juries "likely", compounded by Huddleston's "probably", that Lord Chief Justice Coleridge repeated twice in his Judgment, to underscore the lack of any necessity to kill Parker.

If the case was to effect a denial of the doctrine of necessity it was essential to avoid any conclusion that anyone had to be sacrificed. This was essentially a question of fact, to be determined by the jury. If the jury concluded that in fact survival was dependant on the sacrifice of someone, any statement of the court, that as a matter of law there was no defence of necessity, would be robbed of the power of unanimity. Huddleston resolved this problem by rephrasing the issue as, "was there any necessity of taking the boy rather than drawing lots. I should think you would consider no. Thereof I propose to add this …. Assuming any necessity to kill anybody there was no greater necessity for killing the boy than any of the other three men"[41]. Here Huddleston deviously made out he agreed with the casting of lots but his formulation sidestepped this issue of lots and tied necessity to the selection of Parker. This tailoring of the issues to the facts did not prevent Huddleston or the Chief Justice from pronouncing broadly on the defence of necessity.

Huddleston's draft also included an unsolicited plea of forgiveness on behalf of the accused. While obvious to counsel, the jury would not have known that a plea of forgiveness by the accused would effectively negate any plea of insanity. The jury did request that their compassion towards the accused be recorded, which was recorded with in a fashion that did not too obviously demonstrate the absurdity of recommending mercy to the still innocent, there having been no verdict.

Huddleston's partisan approach was also demonstrated by his rewriting the record to fit the prosecution case. The official assented record simply described the *Mignonette* as a "yacht" and stated that the crew had been forced "to put into an open boat"[42]. When the defence raised the issue of whether the Court had jurisdiction over an open boat on the high seas Huddleston's solution was

[38]Ibid 214.
[39]Ibid
[40]Ibid.
[41]Ibid 215.
[42]Ibid.

simply to substitute "a registered English vessel"[43] for "yacht" while the "open boat" became a "dinghy belonging to the said vessel"[44]. This was an important point as there was a real issue of jurisdiction at large.

In Arthur Collins QC, Dudley and Stephens' defence fund had acquired the services of a most experienced advocate. However, Collins' conduct only makes sense if he had been given very clear messages of prospective clemency from the beginning. This indication, coupled with the Court's absolute refusal to take any cognisance of the defence of necessity, left Collins with very little room to move, if he were to act in the best interests of his clients. Tellingly Collins' defence was marked by a number of lapses. Collins never developed an argument that the circumstances were such as would reasonably reduce the crime to one of manslaughter[45]. Nor did he raise the question of malice, which is central to the definition of murder. The question of temporary insanity was never put to the Court. In view of the highly irregular proceedings, a QC of Collins' calibre arguably could have frustrated the trial on technical grounds. Forceful judges holding court can intimidate most juries but it is the role of counsel and particularly senior counsel, to match up when such pressures are being exerted. Most significantly Collins never told the jury that they could reject Huddleston's choice of a finding of guilty or a special verdict and make their own determination. In his defence summation Collins did make an appeal to the inevitable necessity forced upon the seamen and to the absence of precedential punishment for such acts. Huddleston, irritated at this "unauthorised appeal" told the jury that they "were not at liberty to disregard his ruling"[46].

It appears that Collins decided that it was in his clients' best interests not to antagonise the crown, but to rely upon the broad hints of clemency, which could have only been agreed to at the top. It is also significant that Collins was at the time of the trial seeking official preferment and the following year he was knighted and appointed Chief Justice of Madras"[47].

Huddleston had skilfully created the occasion for a leading case, attended by the full panoply of the law, but exactly how this was to be consummated was problematic. Huddleston probably envisaged that the case would be moved to the Court of Crown Cases Reserved, by the old process of *certiorari*, for determination, and then return to the Assize Court for sentencing. This failed to factor the effect of the Judicature Acts of 1873, 1875 and 1881, which had greatly changed this procedure, amalgamating the formerly distinct Assize Court into the new overarching High Court of Justice. Under the new procedure cases could only be heard upon conviction by the Court of Crown Cases Reserved. The Attorney General then proposed that the Cornwall Assize Court be increased in size to three judges and be moved to London. However, this mechanism soon ran into difficulties. It was discovered that the Judicature Act of 1873 transferred

[43]Ibid.
[44]Ibid.
[45]Op cit 207.
[46]Ibid 212.
[47]Ibid 240.

jurisdiction of such cases to the Queen's Bench Division and so finally it was resolved to have the case heard before five judges of this august body. It was however clearly stated in the Act that the divisional courts "should consist at most of two or three judges"[48] this inconvenient requirement being resolutely ignored.

9. Before the Queen's Bench

The Attorney General, for the prosecution, argued that the only justification for taking the life of another was one of self-defence and submitted that "there was no authority or precedent in favour of the claim that an innocent person could be lawfully killed by another to save the latter's life"[49]. The Lord Chief Justice called upon the defence to refute this "very strong impression in our minds"[50]. Arthur Collins QC was told to address only the issue of murder, the issue of manslaughter being peremptorily ruled out despite the special verdict leaving manslaughter as a potential outcome.

In his opening submissions Collins raised a key issue. The special verdict, as originally transcribed before Huddleston and as evidenced by the original verbatim transcript concluded with the words: "But whether upon the whole matter the prisoners were or are guilty of murder the Jury are ignorant and refer to the court"[51]. This was the formula used in *Rex v Pedly*[52] and *Rex v Hazel*[53] but such a formula surrendered to the judges the jury's right to determine guilt or innocence. In the precedent cases of *Rex v Mackalley*[54] and *Rex v Oneby*[55] this issue had been resolved by making a verdict conditional, stated as "Whether this is murder or manslaughter the jury pray the advice of the court and find accordingly"[56]. Collins pointed out that the original formulation, as transcribed before Huddleston, had been removed and wording conforming to the legally correct formulation substituted, This rewriting of the record was held by the Queen's Bench to be merely "a clerical matter"[57] and was passed over. This was despite the fact that *Rex v Mackalley* and *Rex v Oneby* provided that in the absence of a conditional finding the trial proceedings were void as the jury had not performed its function, as Collins stated: "unless there was a finding the judges would give the verdict"[58].

Collins' primary submission was that the defence of necessity applied to the facts and that this defence justified or excused the killing. Collins maintained four bases for his defence of necessity:

1) that the English court should follow *US v Holmes*;

[48]Ibid 223.
[49]Ibid 229.
[50]Ibid 276.
[51]Ibid 227.
[52]Leach Crown Cases 242.
[53]supra at note 41.
[54]9 Co. Rep. 65b.
[55]2 Ld. Raymond 1485.
[56]Simpson 227.
[57]Ibid 228.
[58]Ibid.

2) the "state of nature" thesis; that the men's actions were not voluntary;

3) that the Utilitarian principle that actions are right if they tend towards the greatest possible happiness should be followed and that this meant that those with dependants should have priority over those that didn't;

4) and as mitigation, that the killing should be excused because of the overwhelming pressure of circumstance.

The court took only a few moments to reject the defence stating "we are all of the opinion that the conviction should be affirmed"[59]. *US v Holmes* was rejected in principle and as not being binding on an English court. The state of nature thesis was rejected outright and Collins' attempt to argue involuntariness foundered on the deliberate nature of the act. The Queen's Bench could not see how Utilitarianism, given the assumption of human equality, could select who could be killed for the benefit of others. Collins was hampered by the absence of any formal selection by lot but given the Court's antipathy to the "custom of the sea" it is doubtful if the Court's attitude would have been any different had such selection taken place. As for mitigating circumstances the traditional view of the Court is that such factors can only mitigate punishment but in a capital case the Court could only impose the penalty of death. Questions of mercy are outside the prerogative of the court and reside with the executive. It was the Court's view that "it is just when temptations are strongest and the difficulties of self-control most acute that the law should reinforce the individual conscience with the threat of punishment"[60].

10. The Reasons of the Court

In setting out the reasons of the court, Lord Coleridge's first referred to the special verdict, stating:

The jury returned a special verdict, the legal effect of which has been argued before us[61].

In fact, the special verdict was a *fait accompli*, the only aspect being raised by Collins was its rewording, which had been brushed of as a technicality. Mr Justice Grove, alone of the bench, was concerned about taking over the role of the jury but even he considered the matter "pure form, almost a clerical matter"[62]. The issue of jurisdiction returned to haunt the court once judgement had been given and particularly Justice Denman, who was unsure of the meaning of the word "Judgment" in this context. If it was a pronouncement of sentence, then where was the verdict, if it was a verdict, then Collins was correct when he claimed that the court had taken over the role of the jury.

Lord Coleridge's first concern was to validate the jury's abrogation of its role in succumbing to Huddleston's pressure to seek a special verdict. He did this by

[59]Ibid 236.
[60]Ibid 234.
[61]Dudley & Stephens para 1.
[62]Op cit. 228.

describing this as an act of "cold precision"[63]. This was a case in which there was a full and frank confession and a prosecution eyewitness. Neither manslaughter or temporary insanity was ever put before the Jury and the one live issue, necessity, the jury equivocated over, succumbed to Huddleston's pressure and abdicated their role. The term "precision" has no application in these circumstances and its use demonstrates that the court is parading the fiction of unanimity.

Addressing the defence of necessity Lord Justice Coleridge stated that:

[T]he real question in the case [is] whether killing under the circumstances set forth in the verdict be or not be murder. The contention that it could be anything else was, to the minds of us all, both new and strange, and we stopped the Attorney General in his negative argument in order that we might hear what could be said in support of a proposition which appeared to us to be at once dangerous, immoral, and opposed to all legal principle and analogy …

A central feature of the show trial is that it is not enough to balance competing viewpoints, the impugned approach must be treated as being unsupportable, inconceivable, almost madness. In using such an extreme phraseology as "*new and strange … at once dangerous*, *immoral*, *and opposed to all legal principle and analogy*" Lord Coleridge again presents a fiction, as the doctrine was neither new, nor strange to English law. Lord Coleridge and all of the august members of the Queen's Bench were familiar with Bacon's Maxims and knew that Sir William Blackstone's *Commentaries on the Laws of England* enunciated two principles capable of supporting the doctrine of necessity, as set out above. It was a matter of record that Blackstone's principles had been used extensively to support Dudley and Stephens by their first counsel, Harry Tilly, before the Falmouth magistrates[64]. The fourth report of the Criminal Law Commissioners had, in their 1839 Digest of Law (Article 39) included a defence of necessity to homicide, as had the Digest to the Seventh Report (1843) by Article 29.

In its determination the Queen's Bench did refer to St Aquinas, Grotius and Pufendorf, and noted that "the proposition as to the plank … is said to be derived from the canonists"[65] but there is no engagement with the dilemma sough to be solved by these legal thinkers. Despite the close analogy to the Plank dilemma, the Court baldly stated that "the temptation to the act which existed here is not what the law ever called necessity"[66]. This is plainly wrong, whether Aquinas *et al* were right or not, Dudley & Stephens was a paradigm "plank" situation. The Queen's bench gave Sir Francis Bacon a pass, saying that if he "meant to lay down a broad proposition … it is certainly not law at the present day"[67].

Because the drawing of lots had been deemed blasphemous by Baron Huddleston and so excised from the trial, the Queen's Bench could then ignore the rule it provides in extremis, Lord Coleridge stating;

[63]Ibid 279.
[64]Op. cit. 78.
[65]Dudley & Stephens, 8.
[66]Op. cit. 286.
[67]Dudley & Stephens, 6.

It is not needful to point out the awful danger of admitting the principle which has been contended for. Who is to be the judge of this sort of necessity? By what measure is the comparative value of lives to be measured? Is it to be strength, or intellect, or what?

In regard to the facts before it the Queen's Bench held the act "… was clearly murder, unless the killing can be justified by some well recognised excuse"[68], confusing the distinct legal categories of justification and excuse. Inconsistency and confusion do not trouble show trials as they are not meant to be rationally analysed but taken as absolute truth.

A signal feature of *Dudley* & *Stephens* is the lack of consideration of precedent. *McGrowther's case*[69] a case involving the defence of compulsion in relation to a charge of treason, was not considered although arguably relevant in that Lee CJ had held:

"The only force that doth excuse, is … present fear of death; and his fear must continue all the time the party remains with the rebels"[70].

Of general application but glossed over by the Queen's Bench was *Stratton's Case*[71], in which Lord Mansfield held:

Necessity forcing man to do an act justifies him, because no man can be guilty of a crime without the will and intent in his mind. When a man is absolutely, by natural necessity, forced, his will does not go along with the act.

Customary law was not even mentioned. Show trials are typified by the absolute denial of alternative authority, to the point of them being rendered invisible.

The Court placed its reliance on Lord Holt as set out above and as follows:

But, further still, Lord Hale in the following chapter deals with the position asserted by the casuists, and sanctioned, as he says, by Grotius and Pufendorf, that in a case of extreme necessity, either of hunger or clothing; "theft is no theft, or at least not punishable as theft, as some even of our own lawyers have asserted the same". "But", says Lord Hale, "I take it that here in England, that rule, at least by the laws of England, is false; and therefore, if a person, being under necessity for want of victuals or clothes, shall upon that account clandestinely and animo furandi steal another man's goods, it is felony, and a crime by the laws of England punishable with death" (Hale, Pleas of the Crown, i. 54.).

If, therefore, Lord Hale is clear—as he is—that extreme necessity of hunger does not justify larceny, what would he have said to the doctrine that it justified murder[72]?

This is sleight of hand. It can be seen that neither of Hales' examples actually address the facts in *Dudley* & *Stephens*, which approximate the plank dilemma and engaged the question; should one be sacrificed for the many? Such a scenario does not figure in either of Hale's examples and no attempt was made by the Queen's Bench to analogise between the facts before them and those which

[68]Ibid 7.
[69]How. St. Tr 391:141
[70]Ibid 142.
[71]21 How. St. Tr. (Eng.) 1046-1223.
[72]Ibid.

formed the basis of Hale's approach. Further Hales' view in regard to stealing to live, is itself hyperbole, *animos furundi* means intention to steal. In addition, it is important that Hale's comments are in regard to felony, not larceny, which is the crime Grotius and Pufendorf address. The distinction is relevant as the difference between felony and larceny is significant in the weighing of benefit/dis-benefit.

Most importantly there is a signal distinction between the facts in *Dudley* & *Stephens* and Hales example as the *mens rea* elements of the crimes differ, intentional conduct for felony versus malice for murder. The key here is that unlike in *Holmes*, were the charge was one of unlawful homicide, to unleash the awful power of the Court in a show trial; the Queen's Bench had to be wielding a capital offence.

In the initial defence of Dudley and Stephens, before the magistrates, Tilly, the lawyer then acting, had drawn heavily on a leading Utilitarian, Sir James Stephens, one of the current Criminal Law commissioners, and author of the *Commentaries on the Laws of England*, which addressed the doctrine of necessity in terms of the Utilitarian "felicitous calculous". At the time Utilitarianism was at its height and the "felicitous calculous" provided a rationale opposed to the ideology being advanced by the Queen's Bench. Not only was this threat negated but Sir Stephens was enlisted to counter *United States v Holmes*, the most significant obstacle to the Queen's Bench's judicial authority, by Lord Coleridge, as follows:

… in which it was decided, correctly indeed, that sailors had no right to throw passengers overboard to save themselves, but on the somewhat strange ground that the proper mode of determining who was to be sacrificed was to vote upon the subject by ballot, can hardly, as my Brother Stephens says, be an authority satisfactory to a court in this country[73].

Despite the Queens Bench ruling running directly counter to the Utilitarian "felicitous calculous", its foremost advocate, Sir James Stephen's made no comment on the case. It is inconceivable that Lord Coleridge would have referred to Sir Stephens as he did without knowing that Stephens' loyalty to the establishment meant that the Queen's Bench could deal with the utilitarian argument without any criticism from that direction. Comfortable in having co-opted Sir Stephens, the Queen's Bench went so far as to explicitly reject a Utilitarian approach to the issue. In his postscript to the case, Mr Justice Grove made a direct counter to the utilitarian rationale, positing the argument that if the men had not been soon rescued and had continued the process of drawing lots one would reach a point where perhaps three had died so that one might live, saying this would be the reverse of utility. Despite the obvious flaw to this reasoning, no public rejoinder was made by Sir Stephens. Simpson says that after the Judgment Sir Stephens let it be known he entirely agreed with the decision, "least any crack in the judicial fabric weaken the authority of the decision"[74].

[73]Dudley & Stephens 8.
[74]Op cit 248.

11. The Great Example

Against the pragmatism of the Court in *Holmes* the Queen's Bench ultimately denied the defence of necessity on the authority of the "Great Example **whom we all** profess to follow"[75] (emphasis added). In one foul swoop Lord Coleridge converts the entire nation, everyone with a duty to sacrifice themselves. Strangely this duty does not appear to be a well-known part of Christ's message, as Lord Coleridge is unable to cite a single parable to support it.

As the Queen's Bench had already purported to find legal authority in Lord Hale the higher authority of Christ was not necessary to determine the case but this was not what was happening. In a show trial the facts, or some semblance of them, are just the framework for the pronouncement of establishment ideology. This the Queen's Bench did as follows:

… The temptation to the act which existed here was not what the law has ever called necessity. Nor is this to be regretted. Though law and morality are not the same, and many things may be immoral which are not necessarily illegal, yet the absolute divorce of law from morality would be of fatal consequence; and such divorce would follow if the temptation to murder in this case were to be held by law an absolute defence of it. It is not so. To preserve one's life is generally speaking a duty, but it may be the plainest and the highest duty to sacrifice it. War is full of instances in which it is a man's duty not to live, but to die. The duty, in case of shipwreck, of a captain to his crew, of the crew to the passengers, of soldiers to women and children, as in the noble case of the Birkenhead; these duties impose on men the moral necessity, not of the preservation, but of the sacrifice of their lives for others[76].

Unpacking this statement, it begins with an untruth. The *Dudley* & *Stephens* situation was a paradigm "plank dilemma". Hecaton, Roman law, Aquinas, Bacon and Blackstone rightly or wrongly argued the defence of necessity applied in these circumstances. There was no precedent for a murder conviction in Customary law and Admiralty law held no wrong had been committed in such circumstances.

The Court then makes claim that allowing the defence to operate would result in an "absolute divorce of law from morality … of fatal consequence" presumably implying consequences fatal not only to cabin boys but to society at large. This is simply theatrical hype, or did the Queen's Bench really think that society was in danger of being dissolved in a cannibal feast? It should be noted that the operation of necessity as an absolute defence was of their own making, as there had always been the option of laying charges of manslaughter, as in *Holmes*.

The identification of law and morality in this passage is reinforced at the conclusion with the Queen's Bench founding the duty of self-sacrifice on "moral necessity". As such the *Dudley* & *Stephens* represents the abject surrender of the law's great project, the "perfection of reason"[77]. The reason the great jurists es-

[75]Ibid.
[76]Ibid.
[77]Sir Edward Coke.

chewed morality in law was because morals differ whereas reason is universal. That the leading judges of their time were unable to found their decision on legal thinking was not suprising as they had cut themselves of from rationality and precedent.

The Queen's Bench then sets out a muddle of arguments. First it claims that preserving "one's life is generally speaking a duty" without any basis for this assertion. This claim is then contradicted by the claim that "it may be the plainest and the highest duty to sacrifice it". This assertion is then supported by the claim that "war is full of instances in which it is a man's duty not to live". This overstates the fact. Certainly soldiers have a duty to put themselves in situations where they may not live, but this is not a "duty not to live", in fact their duty is to outlive the other side. Especially hazardous roles, such as assault troops generally volunteer, as the survivors are promoted. In western culture suicide missions are invariably by volunteers.

The duty, "in case of shipwreck, of a captain to his crew", is the flip side of the dictatorial powers of a sea captain, with power comes responsibility. Importantly this duty is co-incidental to a captain's duty to the ship owner and underwriters. An abandoned ship is subject to salvage without negotiation.

The Queen's Bench baldly states that a crew has a duty to passengers, without any reference to authority or precedent. In *Holmes* the Court stated that the crew had a duty to the passengers, as common carriers, but in extremis all had the same right bar an exception made to those needed to pilot the lifeboat.

There is no duty of soldiers to women and children, as the concept of collateral damage informs us. In the case of the *Birkenhead* the soldiers were ordered to stand by, it was their duty to obey orders. In any event the women and children at issue were their own wives and children, a material fact not mentioned by the Queen's Bench.

Any doctrine based on "the great example", which cannot muster one verse of scripture and leaps straight from the Prince of Peace to a military duty to die for King and Country is an exercise in ideological acrobatics. The religious motif is sustained throughout the Judgment with the repetitive use of the word "temptation" together with such characterisations such as unbridled passion … if not "devilish deeds"[78]. To use these terms as descriptors of the desperate delirium of dying men is a nonsense. Moreover in reaching for an ideological basis for the Judgment Lord Coleridge ends up back with Bacon's defence of necessity of obedience, insofar as he cites the Roman officer quoted in Bacon's Maxims as saying: *Necesse est ut eam*, *non ut vivam*, which translates, "it is necessary to serve (the empire) not live"[79].

As such *Dudley* & *Stephens* is an ideological amalgam of imperial dictate and orthodox theological authority. The "necessity to serve" is simply submission to overwhelming force. In *Dudley* & *Stephens* this power is manifested in the manner of the trial culminating in the death penalty.

[78]Ibid 11.

[79]Ibid.

The Judgment's basis in orthodox theological authority surfaces at the outset with Baron Huddleston rejection of the ruling in *US v Holmes*, validating the casting of lots, on the basis that it "verges on the blasphemous"[80]. The Bible defines blasphemy in John 10:33 and Mark 2:7 as calling a mere human God or saying a man has the power to forgive sins. It can be seen there is not a great fit here. At best the casting of lots determines an outcome by chance, which can be viewed as an appeal to fate. It appears then that Huddleston is either using the term "blasphemous" as theatre or is saying that the casting of lots absolves sin, which is to conflate morality with law (It is noted that the pragmatic Justice in *Holmes* resolved this complex theological problem by simply equating fate with Providence, a stance which the Scholastics might quibble at but which arrives at a practical solution).

Contrary to what appears to be Huddleston's view it is not Christ's message that fate is the hand of God. Christ's message is to choose salvation and as such is based on free will. Free will cannot exist in a world ordered by fate or God. A Christian prays for forgiveness, for strength of faith etc. not to change the world. Christ's defeat of fate, by rising from the dead, stems from his act of free will, his choice to be crucified. It follows that the casting of lots, as an appeal to fate not God, would only be blasphemous if God was fate. God as fate is not the Christian God, but the jealous God of the Old Testament. It is this priestly religion, the religion of rules, that the court masquerades as Christianity.

Throughout the judgement Lord Coleridge utilises the word temptation, which is a Christian concept, but to characterise Dudley and Stephens' action as succumbing to temptation misrepresents temptation, at least as a Christian concept. In Christian theology the classic example of temptation is Satan's attempt to tempt Jesus. This occurs when Jesus is fasting in the desert, so there is some parallel to Dudley and Stephens' situation, although of course there is a primary distinction in that Jesus chose to fast, Dudley and Stephens did not. Jesus could leave the desert, there was no way out in the Dudley and Stephens' situation. Satan does not offer Jesus a donut, or perhaps more relevantly someone's body to fed off. Jesus is offered power over the world. The point is that it is an offer unrelated to Jesus's survival, he is fasting not starving. Jesus can and does refuse Satan's offer, he does not chose evil. As a Christian concept temptation only exists where there is a choice, to do good or to do evil. In the *Dudley* & *Stephens* situation there is only the Blackstonian choice between two evils, them all dying or one being sacrificed, so they others may live, possibly in time to be rescued. Lord Coleridge does not use the word "temptation" with any accuracy, its use is merely as a moralistic pejorative.

The reason the Queen's Bench did not engage with Blackstone's choice between evils principle, is because this was a show trial and any consideration of whether on the facts of the matter Dudley and Stephens were in the grip of the "unavoidable force of compulsion" admits of its possibility. In a show trial the very possibility of another result is denied. More fundamentally, the Queen's

[80]Op cit 201.

Bench could not engage with Blackstone's second principle as this brings into play the customary law of the sea.

Going back to the beginning, be that Jonah's travels or the appalling losses at sea at the time, life for a seaman was tough. Shipwrecks were not uncommon, crews and passengers were reduced to cannibalism and in extremis lots were cast to see who would be sacrificed for the others. There was precedent in the *Francis Spaight* for sacrificing of those without dependants, such as cabin boys. Dudley references this at the time, saying that Stephens and he had wives and families' dependent upon them. This is part of the calculous. The wives and children of mariners lost at sea in 1884 may no longer have starved on the streets as they would have 50 years before but their future would be in the horrors of the poor house. This was a reality that the gentlemen of the Queen's Bench would never know. Rather than engage with such practical solutions to thorny problems on a principled basis, the Queen's Bench misrepresented the motives at issue. This was not a case of temptation or unbridled passion. Dudley and Stephens did not indulge in an act of gluttony.

12. Conclusion

Dudley & *Stephens* was the leading English authority on the common law doctrine of necessity for about 100 years. In 1964 the official view was found in Brett & Waller which described the case in these terms[81]:

The jurors, being men of great sagacity found all these facts by way of a special verdict. They declined to give their view whether these facts amounted to murder and instead prayed the advice of the court (Huddleston B) being likewise a man of great sagacity; the court reserved the question for argument before a court of five judges of the Queen's Bench division.

Despite Brett & Waller's heaping of sagacity upon sagacity on the Queen's Bench, Dudley and Stephens were entirely disregarded at Nuremburg. In the *Krupp Trial* the Tribunal referred to the fact scenario in *Holmes* and cited *Stratton's Case* in its adoption of "the Anglo-American rule" as follows:

"Necessity is a defence when it is shown that the act charged was done to avoid an evil severe and irreparable; that there was no other adequate means of escape; and that the remedy was not disproportioned to the evil"[82].

It was not until George Fletchers' *Rethinking Criminal Law*, published in 1984, that the thinking behind *Dudley* & *Stephens* was really questioned. This raises the issue that in *Dudley* & *Stephens* the highest Court in England had ceased to be a court that applied reason and instead had become the vehicle for proclaiming moral standards. Worse still the muddled morality of the Court was proclaimed by leading elements of the legal profession, such as Brett & Waller, to be the pinnacle of wisdom. In essence this was a collapse of one of the most fundamental pillars of the English legal system, the separation of church and

[81] *Cases & Materials in Criminal Law*. Melbourne: Butterworths 1962.

[82] US Military Tribunal Nuremberg, Judgment of 31 July 1948 Vol. IX p 90.

state. The separation of church and state is the basis of an independent Court, as when this is so, the law is not bent towards policing moral or ideological precepts. It is then free to apply practical wisdom to the difficult legal problems that arise.

It has been argued that what fundamentally differentiates humans is that we are a rule making species. The lot provided a rule for extreme situations, which was a step above the law of the jungle. Aquinas removed the validating mechanism of the lot from the Roman defence of necessity, because it clashed with his religious beliefs but this deprived it of a principled foundation. Such was Aquinas' authority that subsequent common law jurists, of the stature of Bacon and Blackstone, accepted his truncated version of the defence, without question. The Queen Bench's was right to be concerned that the defence, as adopted from Aquinas, could be a "legal cloak for unbridled passion and atrocious crime" but this was a concern which arose from the Court's denial of customary law, which retained the mechanism of the lot.

The central flaw in *Dudley* & *Stephens* arose from Baron Huddleston's lying to the jury that as a matter of law there was no justification, when the legal authority for such a proposition was the one he was involved in contriving. This misrepresentation led to the special verdict which took from the jury its right to determine the facts. The Queen's Bench in its critique of the utilitarian calculation asked: "[w]ho is the judge of this sort of [brute] necessity? By what measure is the comparative value of lives to be measured"[83]. The reason the Court has to ask itself these questions is because they had ousted the usual means by which questions of fact are answered. It is the jury, the representatives of society, who were the rightful judge of these questions.

The first question asks: when does a state of necessity exist? This is a question of fact and queries as whether on the facts there was no choice or only the Blackstonian choice of evils, not being able to be negated beyond reasonable doubt. The answer to this question is both factual and normative. That is, what were the material facts and what does society expect from its members in such a fact situation. As set out above, the Jury found that "they would have died if they had not had his [Richard Parker's] body to feed off". This was a finding of fact that there was a state of necessity. Into this statement Baron Huddleston interjected the word "probably", falsifying the record.

The second question relates to the choice of Richard Parker, the cabin boy. There are two factors here, firstly Dudley's evidence that Parker would have died first and secondly the customary practice of lots being drawn between cabin boys, on the basis that they had no families to support. Here the Jury found: "Richard Parker was likely to die first". Although much was made by the Queen's Bench of the word "likely", findings at law are not required to be absolute, that is an impossibly high standard. The word "likely" in context means that the prosecution could not negate the evidence, that Parker was dying and would have died first, beyond reasonable doubt. With this finding there is no need for the Queen's

[83]Ibid.

Bench's second question, as the Jury found that the selection process was based on who was "likely to die first" rather than the cabin boy option. Hard cases make bad law, properly the Court never seeks to answer a question which is not required of it.

A legal code is meant to be instructive of conduct and in the operation of defences it instructs in regard to positive action. The casting of lots provided a mechanism for resolving a dire situation. A core problem with *Dudley* & *Stephens* is that it does not provide a clear guide.

The first order of failure is that it provides two antithetical value systems, one purportedly Christian and the other martial, but gives no means of discerning which is appropriate in what circumstance. The second order of failure is that each value system has its own set of problems. Within the "Christian" value-set there is no mechanism for determining upon whom the supreme unction of sacrifice is to be bestowed upon. Do we all rush for the razor blades? What happens if two of us get there at the same time?

The martial value-set also has problems. Outside of the military ranks there is no bona fide authority for the giving and taking of such orders. Even within the military ranks there is no formal obligation for the specific sacrifice of military for civilians. As discussed above the case of the *Birkenhead* was a false analogy. The Queen's Bench appeared to endorse *Holmes*, in that it held that in extremis there is an obligation on a Captain to the crew, which arises from the responsibility that comes with the broad powers invested in a ship's Captain. However, transferred to a military context this runs against the norm that martial duties generally operate the other way round, inferiors owe duties to superiors. Such a position, that martial duties are owed by inferiors to superiors conforms with Lord Coleridge's advocacy of a defence of necessity when obedience to the empire is in issue, insofar as he endorsed the Roman maxim that it is "necessary to serve, not to live", discussed above. As noted above a necessity to serve, or the defence of following orders, was not an approach that found favour at Nuremburg.

Conflicts of Interest

The author declares no conflicts of interest regarding the publication of this paper.

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