

CASE NOTE

MEDICINAL CANNABIS USE AND THE CRIMINAL DEFENCE OF NECESSITY: *R V QUAYLE AND ATTORNEY-GENERAL'S REFERENCE* (NO 2 OF 2004) [2006] 1 All ER 988

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I INTRODUCTION

The medicinal use of the plant *cannabis sativa* has a long history stretching back to ancient China. In the 19th and early 20th century it was an essential ingredient in most Australian popular patent medicines and as recently as the 1950s appeared in official pharmacopoeias as a legal medicine. However when the United Kingdom and Australia became signatories to the United Nations *Single Convention on Narcotic Drugs*,¹ they committed to proscribe the use of cannabis, not only as a recreational drug but as a medicine as well.

In the last 20 years, scientific research has begun to unravel the complex chemistry of the plant and to isolate its active ingredients. Although much of the scientific community believes that more research is needed to establish the efficacy of its medicinal uses, a growing body of studies has indicated its usefulness in the treatment of a range of serious medical conditions such as HIV/AIDS, multiple sclerosis, chronic pain and nausea, cancer and others.

In the last 10 years, cannabis has been legalised in Holland and legalised for medicinal purposes in 12 states in the United States of America. 'Sativex', an extract of cannabis, has been legalised in Canada and is legally available on prescription for multiple sclerosis

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¹ *Single Convention on Narcotic Drugs*, opened for signature 30 March 1961, 520 UNTS 204 (entered into force 13 December 1964).

sufferers in England. However, in Australia the use of cannabis for any purpose whatsoever remains illegal.

Such criminality has presented some seriously ill patients with an invidious choice – either to suffer extreme pain and/or death because no other medication except cannabis is fully effective in relieving their symptoms or to break the law by acquiring and using cannabis illegally.

This has led some commentators to speculate that such fact situations may fulfil the requirements for the application of the common law doctrine of necessity.² This doctrine is adumbrated in a thin line of case law going back to 1500 and encompassing such cases as *R v Dudley and Stephens*, the infamous murdered cabin boy case.³ The essence of the defence is that, where a choice of two evils results in a defendant committing a criminal offence in order to avoid endangering life or limb, the courts will be slow to convict on the basis of the commission of the lesser of two evils.

There is considerable discussion among the authorities as to the elements of the defence – whether the basis of the defence is justification or excuse and its relationship to duress.⁴ Several English cases in the last 20 years have sought to lay down criteria for the invocation of the necessity doctrine. Part of the difficulty in establishing a consistent doctrine of necessity is the wide variety of fact situations in which it has been raised. These range from threats of suicide,⁵ through to a case where the defendant was found in possession of an unlicensed gun after taking it from someone who threatened to kill someone with it,⁶ to divulging state secrets.⁷

² David Heilpern and Georgia Rayner, 'Drug Law and Necessity - An Opportunity For Change' (1997) 22 *Alternative Law Journal* 188.

³ (1884) 14 QBD 273.

⁴ C M V Clarkson, 'Necessary Action: A New Defence' (2004) *Criminal Law Review* 81; Winnie Chan and A P Simester, 'Duress, Necessity: How Many Defences?' [2005] 16 *King's College Law Journal* 121.

⁵ *R v Martin (Colin)* [1989] 1 All ER 652, CA; *R v Rodger* [1998] 1 Cr App R 143.

⁶ *R v Pommell* [1995] 2 Cr App R 607.

⁷ *R v Shayler* [2002] 2 All ER 477 (*Shayler*); on appeal [2003] 1 AC 247 (House of Lords).

Furthermore, there is a related but separate body of cases, generally subsumed under the rubric of cases of 'medical necessity', both in Australia,⁸ and England.⁹ Many of these cases raise the defence in the context of doctors performing abortions or sterilisations to save patients' lives. It is in this class of cases of 'medical necessity' that defendants in the United Kingdom,¹⁰ the United States,¹¹ and Australia,¹² have sought to base their defence. In these cases, the courts were not required, for various reasons, to squarely address whether the doctrine applies to a case where a defendant pleads that he or she should not be convicted for possessing, cultivating or administering a prohibited drug where he or she does so to avoid severe pain and/or death.

These and other issues relating to medicinal cannabis use were addressed by the Criminal Division of the English Court of Appeal before Mance LJ and Newman and Fulford JJ in *R v Quayle (Quayle)*.¹³ The case consisted of appeals by five defendants against their sentences under the *Misuse of Drugs Act 1971* (UK) or the *Customs and Excise Management Act 1979* (UK), together with an Attorney-General's Reference to the Court in respect of the acquittal of another person charged under the Act.

⁸ *R v Davidson* [1969] VR 667 (*Davidson*); *R v Wald* (1991) 3 NSWDCR 25; *K v Minister for YACS* [1982] 1 NSWLR 311.

⁹ *R v Bourne* [1939] 1 KB 687; *Gillick v West Norfolk and Wisbech Area Health Authority* [1986] 1 AC 142; *Re F (Mental Patient: Sterilisation)* [1990] 2 AC 1 (*Re F*).

¹⁰ *R v Lockwood (Phillip David)* [2002] EWCA Crim 60; *R v Brown (Peter)* [2003] EWCA Crim 2637 (*Brown*).

¹¹ *United States v Randall*, 1104 Daily Wash L Rep 2249 (DC Sup Ct, 1976); *United States v Aguilar*, 583 F 2d 667, 693 (9th Cir, 1989); *State v Diana*, 604 P 2d 1312 (Wash Ct App, 1979); *Jenks v State*, 582 So 2d 676 (Fla Dist Ct App, 1991); *United States v Bailey*, 444 US 394, 410 (1980); *United States v Oakland Cannabis Buyers Co-operative*, 532 US 483 (2001).

¹² *Davidson*, above n 8.

¹³ *R v Quayle and Attorney-General's Reference (No 2 of 2004)* [2006] 1 All ER 988.

II THE FACTS OF THE CASES

Quayle, Wales and Kenny were charged and convicted of cultivating cannabis under several sections of the *Misuse of Drugs Act 1971* (UK). They all admitted self-medicating with that cannabis which they grew to treat severe and chronic pain from which they suffered as a result of accidents. But they claimed they only did so from necessity because no other legally available drug could be used successfully to treat their pain without serious adverse side-effects. At their trials all three produced evidence from medical and other expert witnesses that cannabis was efficacious in treating such pain.

In Wales' case his doctor added that he 'was unable to tolerate anti-inflammatory drugs because [of] their gastric effect and the risk of them causing pancreatitis'¹⁴ and another expert witness testified that such drugs could cause peritonitis, which can be fatal.¹⁵

Taylor and Lee were convicted of knowingly being concerned in the fraudulent evasion on the prohibition on the importation of a Class B controlled drug, cannabis, under s 170(2) of the *Customs and Excise Management Act 1979* (UK). They had been arrested at an airport trying to smuggle cannabis into England from Switzerland. They intended to sell the cannabis to some of the 700 patients on the books of Taylor's 'Tony's Holistic Clinic' in London, many of whom suffered from multiple sclerosis or HIV/AIDS.

Ditchfield, the subject of the Attorney-General's Reference to the Court, was a medicinal cannabis campaigner who provided cannabis free of charge to those he considered in need of it. Police found cannabis and cannabis resin in his car and he was subsequently charged with possession and intent to supply under ss 5(3) and 5(2) of the *Misuse of Drugs Act 1971* (UK). Unlike the other appellants, Ditchfield successfully pleaded necessity, leading the Attorney-General to seek the court's opinion on whether

the defence of necessity be available to a defendant in respect of an offence of possession of cannabis or cannabis resin with intent to supply, contrary to section 5(3) of the *Misuse of Drugs Act*

¹⁴ Ibid 993.

¹⁵ Ibid 994.

1971, if his case is that he was in possession of the controlled drug intending to supply it to another for the purpose of alleviating pain arising from a pre-existing illness such as multiple sclerosis?’¹⁶

III THE COURT'S JUDGMENT

After summarising the defendants' cases, the judgment spelt out the legislative framework of the *Misuse of Drugs Act 1971* (UK) and the several parliamentary reports on medicinal cannabis. It then recited the parties' cases before considering '[t]he legislative scheme' and the *European Convention on Human Rights*. Finally, the Court set out '[t]he detailed requirements of any defence of necessity' and employed them to dismiss all the appeals and to answer the Attorney-General's Reference question in the negative.¹⁷ These 'requirements' for a defence of necessity – the need for extraneous circumstances, the danger of physical injury and the imminence of the danger – form the focus of this commentary.

A The need for extraneous circumstances

The *Quayle* Court relied on the authority of a handful of earlier cases to establish that the danger against which the defendant acts must be in the form of 'extraneous circumstances'. It held that 'the cases of *Quayle*, *Wales* and *Kenny* lack at least one fundamental and essential ingredient, namely, that the allegedly causative feature of the commission of the offence must be extraneous to the defendant.'¹⁸ The Court referred with approval to the judgment of Levesen J in *R v Brown*,¹⁹ which stated that 'the causative feature of the applicant's commission of the offence was, or may have been, extraneous to the applicant on the basis that the defence does not extend to include the subjective thought processes and emotions of

¹⁶ Ibid 998.

¹⁷ Ibid 1028.

¹⁸ Ibid 1010.

¹⁹ *Brown*, above n 10.

the defendant.’²⁰ The Court went on to approve the following ruling in *R v Rodger*,

where the suicidal thoughts of a prisoner were judged to be no defence to the offence of breaking prison. Suicide or depression is an innate affliction, as are the side effects of pain relief using lawful medication.²¹

It is argued that this ruling is clearly wrong in fact. The word ‘innate’ is defined as ‘existing in a person ... since birth, ... inherent’,²² whereas the side effects of ‘lawful medication’ are not inherent to the patient taking it but to the medication itself. Moreover the Court’s comments on ‘side effects’ trivialise the seriousness of these effects when applied to the constant and debilitating wasting, nausea and other effects which can be caused by ‘lawful medication’. So much is this so, that such patients can either die of these side effects or are obliged to discontinue these drugs, with consequent ill effects on their medical condition(s). In any case the serious illnesses which oblige medicinal cannabis users to break the law are clearly, with the possible exception of inherited conditions, ‘extraneous’ to the defendant and not subject to ‘the subjective thought processes and emotions of the defendant.’²³

IV PAIN IS NOT ENOUGH

This discussion relates back to the previous heading of ‘extraneous circumstances’, where the Court in *Quayle* seems to conflate ‘extraneous’ with ‘objective’. In order to understand the argument of the Court, it is necessary to quote at some length from the judgment. In concluding the discussion of extraneous circumstances, the Court states as follows:

²⁰ Cited in *Quayle*, above n 13, 1017.

²¹ *Ibid.*

²² J A Simpson and E S C Weiner, *The Oxford English Dictionary* (2nd ed, 1989) vol VII, 991.

²³ *Quayle*, above n 13, 1017.

that for the defence of necessity of circumstances to be available, there must be extraneous circumstances capable of objective scrutiny by judge and jury ... [76] It is however, submitted on behalf of Messrs. Quayle, Wales and Kenny that any such test is satisfied ... because of the objectively ascertained facts giving rise to the pain that they suffer ... and because pain is capable of some degree of objective scrutiny and is not wholly subjective. ... [W]e do not gain any real assistance from cases ... where distinctions may or may not have been drawn between injury and harm or pain. [77] The reason why we would not accept the submission is that the law has to draw a line at some point in the criteria which it accepts as sufficient to satisfy any defence of duress or necessity. If such defences were to be expanded in theory to cover every possible case in which it might be felt that it would be hard if the law treated the conduct in question as criminal, there would be likely to be arguments in considerable numbers of cases where there was no clear objective basis by reference to which to test or determine such arguments. There is, on any view, a large element of subjectivity in the assessment of pain not directly associated with some current physical injury. ... The legal defences of duress by threats and necessity by circumstances should in our view be confined to cases where there is an imminent danger of physical injury.²⁴

In summary, the Court regarded pain as ‘innate’ and ‘subjective’, not ‘extraneous’ and ‘objective’. On that basis the appellants failed.

It is argued that in the cases of Quayle, Wales and Kenny, each of them *did* suffer pain ‘directly associated with some current physical injury’. Moreover, even if the defence of necessity were restricted to ‘imminent danger of physical injury’, other categories of medicinal cannabis-using patients would qualify on account of, for example, blindness from glaucoma or chronic nausea or wasting from HIV/AIDS, not to mention suicide.²⁵

²⁴ Ibid 1026.

²⁵ See also, David Ormerod, ‘Necessity of Circumstance, Case Comment, R v Quayle’ [2005] *Criminal Law Review* 148, 152.

V THE NEED FOR IMMINENCE AND IMMEDIACY

Although their Honours' third detailed requirement for a necessity defence is headed, 'Imminence and immediacy', they themselves cite, with seeming approval, Lord Woolf's assessment of *R v Abdul-Hussain (Abdul-Hussain)*²⁶ in *R v Shayler (Shayler)*²⁷ – which case had the effect of 'making it clear that the harm threatened need not be immediate but should be imminent.'²⁸ In *Abdul-Hussain* the threat was explained as 'hanging over one's head'. This Damoclean analogy is apt to describe the position of seriously ill people who will suffer or die if they do not illegally use medicinal cannabis. Again, in *Re A: Conjoined Twins: Surgical separation (Re A)* the requirement was stated as, 'one of necessity, not emergency.'²⁹

Contrary, then, to the emphasis on immediacy in *Quayle*, it may be sufficient for the defence of necessity that the danger prompting the illegal action is 'imminent', meaning 'impending' which imports meanings of 'inescapable', 'threatening', or 'forthcoming'.³⁰ It is argued that there is no logical reason why a necessity defence should require urgency. This view gains some support from two Australian commentators who claim that '[a]n extraordinary emergency may not entail this notion of suddenness or unexpectedness. It may occur over a period of time such as living in a war zone.'³¹ It is perhaps also noteworthy that s 10.3 of the *Criminal Code Act 1995* (Cth) defines this element of the defence as 'sudden or extraordinary'.³² In this sense 'extraordinary' can connote 'exceptional' or 'unusual' rather than 'impending'.

²⁶ [1999] Crim LR 570.

²⁷ *Shayler*, above n 7.

²⁸ *Quayle*, above n 13, 1015.

²⁹ *Re A: Conjoined Twins: Surgical separation* [2001] 2 WLR 280 (*Re A*); see also, *Re F*, above n 9.

³⁰ J R L Bernard (ed), *Macquarie Encyclopaedic Thesaurus* (1990) [245]; Peter Mark Roget, *Roget's Thesaurus of English Words and Phrases*, (New Edition, 1987), [155].

³¹ Simon Bronitt and Bernadette McSherry, *Principles of Criminal Law* (2nd ed, 2005) 335, citing *Pagawa v Mathew* [1986] PNGLR 154.

³² Emphasis added.

All told, the Court's three requirements still leave the 85,000 multiple sclerosis patients in the United Kingdom,³³ as well as the many other thousands of medicinal cannabis users without a legal defence. A differently constituted defence of necessity could deliver a just outcome to these unfortunate people.

VI THE DISTINCTION BETWEEN NECESSITY AND DURESS

Besides its failure to adequately define the essential elements of a necessity defence, the *Quayle* Court fails to make a clear distinction between 'duress' and 'necessity'. Throughout much of the judgment the Court speaks of duress in relation to the facts in *Quayle*, though none of these defendants raised duress as a defence. For example, at page 1027, in its conclusions, the Court refers to 'over-rid[ing] the defendant's will' which is an element of duress but not of necessity. Indeed they quote with approval the dicta of Lord Woolf CJ in the Court of Appeal judgment in *Shayler*, that 'the distinction between duress of circumstances and necessity has, correctly, been by and large ignored or blurred by the courts.'³⁴

The distinction between necessity and duress needs to be made, because in cases of duress the mind of the defendant is overborne so that he or she is rendered incapable of making an independent and voluntary decision whereas, in necessity cases, the defendant perceives that he or she can choose between two options – 'evils' – and does so on the basis of weighing up the consequences of those options. This distinction is borne out in Brooke LJ's judgment in *Re A* where he distinguished between what he called 'necessity caused by wrongful threats' and 'cases of pure necessity' where the actor's mind is not irresistibly overborne by external pressures.³⁵ Fairall and Yeo make the same point in stating that

³³ United Kingdom, *Report of the Independent Inquiry into the Misuse of Drugs Act 1971*, Police Foundation, London (1999) (*The Runciman Report*) [85], cited in *Quayle*, above n 13.

³⁴ *Shayler*, above n 7, quoted in *Quayle*, above n 13, 1015.

³⁵ *Re A*, above n 29, 569.

[n]ecessity does not of itself displace the element of voluntary action. ... A person acting under necessity does not disown the physical act but seeks to explain the behaviour as a rational, moral and in any case forgivable response to extreme circumstances.³⁶

In a recent case commentary on the decision in *Quayle*, Professor David Ormerod is also of the opinion that '[t]he courts have recently begun to treat the defences of duress of circumstances and necessity as synonymous.'³⁷ He goes on to argue that there are good grounds for treating the two defences separately and that these reasons have been accepted by the courts.³⁸ Ormerod concludes that '[c]larification from the House of Lords as to the elements of the defence of necessity, its rationale, and its relationship to duress of circumstances is urgently needed.'³⁹

Whereas the Court in *Quayle* eschewed the existence of any general principles of the necessity defence, Brooke LJ in *Re A* quotes Sir James Stephen who clearly identified three such principles, namely:

- (i) the act is needed to avoid the inevitable and irreparable evil;
- (ii) no more should be done than is reasonably necessary for the purpose to be achieved; and
- (iii) the evil inflicted must not be disproportionate to the evil avoided...⁴⁰

In his discussion of *Quayle*, Professor Ormerod claims that, '[a]pplying those criteria it would not come as a surprise if a jury,

³⁶ Paul Fairall and Stanley Yeo, *Criminal Defences in Australia* (4th ed, 2005) 102, [6.10].

³⁷ Ormerod, above n 25, 151, citing *Shayler*, above n 7; *Jones et al* [2004] EWCA Crim 1981; *R v Hasan* [2005] UKHL 22 (17 March 2005). See also, William Wilson, 'The Structure of Criminal Defences' [2005] *Criminal Law Review* 108.

³⁸ Citing *Re F*, above n 9; *R v Bournewood Community Mental Health Trust NHS; Ex parte* [1999] 1 AC 458; *R v Safi* [2004] 1 Cr App R 12; *Re A*, above n 29.

³⁹ Ormerod, above n 25, 153.

⁴⁰ *Re A*, above n 29, 1052.

having heard expert evidence of the genuine nature of pain being avoided, regarded the action of breaking the law as justified.’⁴¹

VII CONCLUSION

For the reasons discussed above, it is submitted that the medical necessity requirements imposed by the Court in *Quayle* are unrealistic and unworkable in the context of the illegal use of medicinal cannabis. It remains to be seen how Australian courts will deal with this very real dilemma facing medicinal cannabis users.

⁴¹ Ormerod, above n 25, 152.

