CHAPTER 10

JUSTIFICATIONS AND EXCUSES

Justification, excuse and criminal responsibility

10.1 Despite having committed the conduct elements and any fault elements of an offence, a defendant will sometimes claim a justification or excuse for what happened. In most jurisdictions, there are two ways in which account may be taken of such a claim: it may be treated as a mitigating factor in sentencing or it may afford a defence. However, In the criminal law of Vanuatu, there are three ways in which such a claim may be taken into account:

- In most instances, the claim will be treated simply as a mitigating factor in sentencing. This is how excuses such as emotional stress or financial hardship are addressed.
- Some claims will constitute defences and relieve the defendant of criminal responsibility. There are several such defences in the Penal Code: reasonable mistake of fact under s 12; some forms of insanity under s 20; superior orders under s 22; defensive force under s 23(1)-(3); preventing an offence or arresting an offender as a justification for the use of reasonable force under s 23(4).
- Some claims will 'diminish responsibility' rather than provide a defence. Three types of claim are treated in this way in the Code: abnormality of mind under s 25; compulsion or coercion under s 26; provocation under s 27; and voluntary withdrawal from an attempt under s 28(5) or from a conspiracy under s 29(3).

10.2 The present chapter will cover four types of claim: superior orders; defensive force; compulsion or coercion; and provocation. Some other types of claim are examined in other chapters.

- The defence of reasonable mistake of fact under s 12 was examined in Chapter 4 together with an analysis of how a mistake of fact, whether or not reasonable, can negative a fault element. The s 12 defence of reasonable mistake of fact can be available for offences like rape which lack a specific fault element.
- The defence of insanity under s 20 will be discussed separately in Chapter 11. The diminishing of responsibility because of an abnormality of mind will also be analysed in that contest. Section 25 provides for a finding of abnormality of mind 'if a plea of insanity fails'. Abnormality of mind therefore involves a less extreme form of mental disorder than insanity.
- Defences available to police officers using force to prevent offences or make

arrests are considered in the wider context of legislation relating to criminal procedure: see Chapter 16; voluntary withdrawal from an attempt or from a conspiracy is examined in Chapter 13.

10.3 The chapter will also examine whether common-law claims of justification or excuse that have not been incorporated in the Penal Code can still be recognised. In particular, the modern common law has recognized a residual general defence of necessity. As was noted in **2.17**, the Solomon Islands Court of Appeal in *Luavex v R* [2007] SBCA 13 left open the question of whether the defence of necessity survives as a matter of common law in that jurisdiction. However, it is unlikely that any *new* common-law defences of a general character would now be recognised.

10.4 The treatment of diminished responsibility is a distinctive feature of the Vanuatu Penal Code. There are jurisdictions in which a defence of 'diminished responsibility' can operate as a partial defence to murder, reducing the offence to manslaughter. However, in Vanuatu, diminished responsibility is not a defence to any offence. Instead, it is an alternative kind of response which affects sentencing options. Section 24 provides:

> Wherever criminal responsibility is diminished by law, the punishment shall be mitigated at the discretion of the court.

This provision applies to diminished responsibility due to compulsion, coercion or provocation. Diminished responsibility in these cases therefore requires some reduction in the sentence from that which would otherwise be imposed. It is not within the sentencing discretion of a court to decline to make a reduction. A court only has sentencing discretion with respect to the amount of the reduction.

10.5 The position is somewhat different for diminished responsibility due to abnormality of mind. In that case, s 25(2) provides that a court may make an order respecting 'custody and treatment' for the safety of other people and the person's own well-being rather instead of a sentence of punishment. Nevertheless, abnormality of mind is not a defence but merely a ground for a special disposition following conviction.

10.6 The Vanuatu provisions on abnormality of mind and provocation are unusual in another respect. In most jurisdictions, these claims operate only as partial defences to the offence of murder, reducing the offence to manslaughter in order to enable sentencing discretion to be exercised. In Vanuatu, however, the claims can be made with respect to any offence.

10.7 As was noted in **2.18**, the Vanuatu Penal Code does not distinguish systematically between defences of justification and defences of excuse in the way that some other jurisdictions do. A claim of justification is a claim that conduct was not wrongful under the circumstances. Where a justification for the commission of the conduct elements of an offence is accepted, it should constitute a good defence. In contrast, a claim of excuse concedes the wrongfulness of the conduct but claims that it does not merit criminal liability. For example, defensive force has traditionally been conceived as a justification whereas compulsion has traditionally been conceived as an excuse. However, excuses do not presumptively negative criminal liability. They are generally addressed through the exercise of sentencing discretion after conviction. Only the strongest of excuses haves been accepted as defences anywhere. Moreover, in Vanuatu, the option of diminished responsibility covers some of the ground of excuses: for example, cases of compulsion which might afford a defence in other jurisdictions.

10.8 In making any claim of justification or excuse, the defendant carries an evidentiary burden to put it issue. This means that there must be some evidence to support the defence. This evidence must be introduced for the defendant if it has not already there in the evidence for the prosecution: see **2.23-2.24**. If there is supporting evidence, the prosecution must disprove the defence beyond reasonable doubt. However, the prosecution need not address the defence unless it is in issue. The Penal Code s 9 expressly provides:

> Unless otherwise expressly provided by law, the burden shall rest upon the prosecution to disprove beyond reasonable doubt any plea of provocation, compulsion, coercion, self-defence, necessity, consent, accident or mistake of fact which has been sufficiently raised by the defence as an issue.

Superior orders

10.9 There has been some debate internationally about whether it is appropriate to recognise a defence of 'superior orders'; that is, a defence that the defendant was ordered to commit the offence by a superior to whom obedience was ordinarily due. The defence might be applicable to persons such as members of the armed forces, police officers and the crew of ships, for whom disobedience to a superior order might ordinarily constitute an offence. For example, an order might be given to assault another person as a disciplinary measure. The defence has particular significance for Vanuatu because of its potential applicability in cases where customary chiefs order the commission of offences.

10.10 Vanuatu is one of the jurisdictions which gives explicit recognition to the defence. However, the critical condition is that the order must not have been 'manifestly unlawful' or known to be made without authority. Section 22 of the Penal Code states:

> No criminal responsibility shall attach to an act performed on the orders of a superior to whom obedience is lawfully due, unless such order was manifestly unlawful or the accused knew that the superior had no authority to issue such order.

There may be room for debate over whether 'lawfully due' encompasses matters of customary law. In any event, the courts have taken the view that reliance on an order from a customary chief cannot provide a defence for actions which clearly violated the Penal Code. Orders to commit such actions will generally be 'manifestly unlawful' and therefore known to be made without authority. See, for example, the unsuccessful attempts to raise the defence for intentional homicide in *Public Prosecutor v Dala* [2011] VUSC 351 and for serious property offences in *Public Prosecutor v Kaper* [2018] VUSC 169.

Defence of person or property

10.11 All jurisdictions allow some degree of force to be used in defence of a person or property. Vanuatu is no exception. The Penal Code s 23 provides:

> (1) No criminal responsibility shall attach to an act dictated by the immediate necessity of defence of the person acting or of another, or of any right of himself or another, against an unlawful action, provided that the means of defence be not disproportionate to the seriousness of the unlawful action threatened…
>
> (3) No criminal responsibility shall attach to an act, not being an act to which subsection (1) applies, done in necessary protection of any right of property, in order to protect the person acting or another, or any property from a grave and imminent danger, provided that the means of protection used be not disproportionate to the severity of the harm threatened.

These provisions apply not only to defending a person's own person or property but also defending the person or property of another. They also make it clear that property can be defended not only by using force to protect it but also to protect the person using the force.

10.12 The trigger for the right to use force in defence of the person is 'unlawful action' requiring the response as a matter of 'immediate necessity'. The common law traditionally required an assault to be occurring before defensive force was justified and it is likely that 'unlawful action' in s 23(1) would be interpreted in the same way. A defender may therefore have to wait for an attack to be launched or threatened before using force in defence of the person. This can be problematic for particularly vulnerable defenders, such as women defending themselves against stronger males. Once the attack is about to commence, it may be too late for defensive force to be effective. Pre-emptive strikes are not permitted even in cases involving women caught in violent relationships who may be able to diagnose certain warning signs and predict the onset of violence from their partners. The requirement for an assault to be occurring has been removed in many modern formulations of self-defence, allowing for pre-emptive strikes where necessary. However, the wording of s 23(1) appears to exclude this approach.

10.13 The test of necessity does not require precise measurement. It is understood that a person under attack is entitled to some leeway in assessing the danger and the options for dealing with it. A leading statement on the common law of self-defence is that of Lord Morris in *Palmer v R* [1971] AC 814 at 832; (1971) 55 CrAppR 223:

> If there has been an attack so that self-defence is reasonably necessary, it will be recognised that a person defending himself cannot weigh to a nicety the exact measure of his defensive action.

'Necessity' might therefore be taken to mean 'roughly necessary'.

10.14 There are two aspects to necessity:

- It must be necessary to use force In order to avert or repel the attack;
- It must be necessary to use the amount of force that was used;

There must be no other way of averting or repelling the attack except by the use of force. There must also be no other way of averting or repelling the attack except by the degree of force that is used. A limitation on the degree of force allowed is expressly imposed by the requirement in s 23(1) and (3) that the force used 'be not disproportionate' to the seriousness of the action or harm that is threatened.

10.15 The concept of necessity has often been taken to incorporate another notion: that tolerating the attack would be unacceptable. This is sometimes expressed by saying that the use of the force must be *reasonable* as well as necessary. In *Boas v R* [2015] SBCA 21 at [21], it was said that the principle outlined by Lord Morris in *Palmer* 'allows such force as is reasonable and proportionate, in the circumstances of the

case'. In the legislation of some other jurisdictions, distinctions are drawn by reference what is being defended, with more extensive rights to use force in defence of the person than in defence of property. No such legal distinctions are drawn in the Vanuatu Code but the answer to what is necessary in a particular case may depend in part on what is being defended

10.16 There is therefore a moral dimension to the concept of necessity. The degree of force that is necessary to avert or repel an attack may not be reasonable to use. The harm caused may be too great to justify the action. The attack must then be tolerated: a complaint can always be made to the police afterwards. This principle is particularly important as a limitation on the use of lethal force to defend property: it will rarely be justified. Even in self-defence, force may be judged excessive not only because it was unnecessary in the sense that the attack could have been averted or repelled by lesser force but also in the sense that it could have been tolerated and a complaint to the police made afterwards. This dimension of necessity is another factor underlying the requirement that the means of defence or protection 'be not disproportionate' to the seriousness of the action or harm threatened.

10.17 A limitation on the degree of force allowed is imposed by the requirement in s 23(1) and (3) that the force used 'be not disproportionate' to the seriousness of the action or harm that is threatened. Section 23(2) provides particular guidance about how the use of lethal force can be permitted in resisting some of the most serious offences against the person:

> (2) Without prejudice to the generality thereof, subsection (1) shall apply to the intentional killing of another in defence of an attack causing a reasonable apprehension of death, grievous harm, rape or sodomy.

This provision does not expressly state that intentional killing is not permitted under any other circumstances. However, the use of lethal force in other circumstances would rarely, if ever, be judged necessary. In particular, it has been widely doubted that lethal force in defence of property would ever be necessary. However, some jurisdictions do permit such force to be used to defend a dwelling.

10.18 Where excessive force is used it is immaterial to liability that some lesser force would have been justified. The conduct is unlawful. The justifiability of a lesser degree force would be a matter to be considered in sentencing if at all.

10.19 The necessity of the force is ultimately an objective matter. A subjective belief in the necessity of the response will be of no avail if the response was objectively unnecessary. In the result, a person who overreacts may lose the defence. It is

immaterial that the person may have thought the response was necessary. Nevertheless, the question of necessity is to be answered on the facts as the accused honestly believed them to be, as long as this belief is reasonable. This is the result of the combined effect of s 23 and the defence of reasonable mistake of fact under s 12.

10.20 Cases in several jurisdictions have discussed the idea of necessity in relation to the dilemmas faced by abused women who kill their violent partners instead of attempting to leave them. A leading authority is *R v Lavallee* [1990] 1 SCR 852, where the Supreme Court of Canada accepted expert evidence of how prolonged abuse in a relationship may lead to a reduced capacity to perceive alternatives and take initiatives. This has been called 'learned helplessness' and said to be part of a 'Battered Woman Syndrome' (BWS). *Lavallee* held that, in a jurisdiction requiring reasonable grounds for a belief in the necessity of killing, what might be reasonable for someone to believe should be determined by reference to what might be reasonable for a person who has been psychologically damaged by abuse to believe. More recently, BWS theory has become widely rejected as general explanation of why female victims can kill their male abusers. The objection to BWS theory is that 'learned helplessness' does not fit the reality of most abused women: see the comments of Kirby J in *Osland v R* [1998] HCA 75; (1998) 197 CLR 316 at 370-4. They do perceive the alternative option of leaving the relationship but choose not to take it because of factors such as domestic ties that cannot be abandoned (for example, to children), the danger that an attempt to leave will generate an attack, the danger that the abuser will track down the escapee and renew the abuse, and the lack of anywhere to go. It is argued that killing the abuser can be viewed a reasonably necessary response in the circumstances rather than a peculiar response to be explained and excused by psychological impairment.

Compulsion and coercion

10.21 The Penal Code 26 provides for diminished responsibility in two situations where another person may have forced the defendant to commit the offence:

> (1) Criminal responsibility shall be diminished in the case of an offence committed by a person acting –
>
> (a) under actual compulsion or threats, not otherwise avoidable, of death or grievous harm;
>
> (b) under the coercion of a parent, spouse, employer or other person having actual or moral authority over such person.

10.22 The provision respecting compulsion in s 26(1)(a) corresponds to the defence of duress at common law. In a case of compulsion, a person has diminished responsibility for committing an offence in compliance with a demand to commit the offence or suffer consequences. The conduct is characteristically directed against an innocent third party. Two major conditions are attached in s 26(1)(a):

- The threat must be 'not otherwise avoidable': there must also have been no reasonable alternative for escaping its execution, such as seeking the protection of the police.
- The threat must be of death or grievous harm. An allowance for compulsion might be expected to make some provision respecting proportion between, on the one hand, the harm threatened and, on the other hand, the harm inflicted in order to escape the implementation of the threat. The costs of preservation may be too high and in such cases sacrifices should be required. There is no specific provision respecting proportionality in s 26 and no restriction on the kinds of offence that can be committed. However, the restriction to threats of death or grievous harm does address one side of the balance.

There is no restriction on who may be harmed by the threat. A threat directed at the defendant may therefore be of harm to another person such as a family member.

10.23 The defence of compulsion is framed in entirely objective terms which by themselves would not accommodate any mistake of fact on the part of the defendant about the existence or nature of a threat. However, the defence of reasonable mistake of fact under the Penal Code s 12 can be available to supplement the provision relating to compulsion.

10.24 The provision respecting coercion in s 26(1)(b) does not require that a threat be made. It recognises that a person can feel forced to commit an offence simply by a demand from a person in a position of authority over them. The inclusion of 'spouse' in the list of authority relationships might be questioned. However, it appears directed to cases where one partner in a coercive domestic relationship requires that the other participate in an offence. In the context of a coercive domestic relationship, a demand might easily be effective even in the absence of a threat of death or grievous harm.

10.25 Diminished responsibility for compulsion or coercion can be denied because of a prior criminal relationship between the person threatened and the person making the threat. Section 26(2) provides:

> Criminal responsibility shall not be diminished under subsection (1) if the person acting has voluntarily exposed himself to the risk of such compulsion, threats or coercion.

A similar restriction on the defence has been recognised at common law: *Palazoff* (1986) 43 SASR 99. The restriction is directed at a person who becomes involved in a criminal organisation which is likely to use threats of violence in order to prevent its members withdrawing. The rationale for such a limitation is presumably that there was an alternative to succumbing to the threats: that is, not joining the criminal organisation in the first place. This may seem a tough but sensible approach where the threats are made against the person who has been involved in the organisation. It does represent too severe a position, however, when the threats are directed against a third party. In effect, it amounts to a demand that the third party be sacrificed because of the subject's prior criminal involvement.

Provocation

10.26 Persons accused of offences of violence sometimes claim that they were 'provoked' by the victims so that they lost their self-control. There are several ways in which evidence of provocation may be relevant in criminal proceedings in Vanuatu:

1. Provocation may sometimes be taken into account as a mitigating factor in sentencing.
2. Provocation may sometimes support a claim that a fault element of an offence was lacking. For example, the accused on a charge of intentional homicide may contend that they acted in a 'blind rage' in which there was neither intention to kill nor foresight of the risk of doing so.
3. If certain conditions are met, loss of self-control due to provocation may diminish responsibility for the conduct under Penal Code s 27 and require a reduction in the sentence. This is a distinctive feature of the Vanuatu Penal Code. Diminished responsibility is available for any offence.

Diminished responsibility, the third use of evidence of provocation, is the present concern.

10.27 Many other jurisdictions recognise another way in which evidence of provocation can be used: as a partial defence to the offence of murder, reducing the offence to manslaughter even though the fault elements for murder are present. Provocation was recognised as a partial defence to murder at common law and has been incorporated in the statutes of many jurisdictions. The widespread recognition of provocation as a partial defence to murder is connected with the historical lack of sentencing discretion for this offence. Only by reducing the offence to manslaughter could provocation be taken into account as a mitigating factor in sentencing. In some jurisdictions, the partial defence has been abolished when discretionary sentencing for murder has been introduced.

10.28 The Vanuatu Penal Code already contains sentencing discretion for intentional homicide and therefore does not need a partial defence. Nevertheless, the conditions for diminished responsibility under s 27 reflect some of the conditions for the partial defence elsewhere. Section 27 states:

> (1) Criminal responsibility shall be diminished in the case of an offence immediately provoked by the unlawful act of another against the offender or, in his presence, his spouse, descendant, ascendant, brother, sister, master or servant, or any minor or incapable person in his charge, provided that the reaction constituting the offence be not disproportionate to the degree of provocation.
>
> (2) Without prejudice to the generality of subsection (1), the intentional killing or wounding of another shall be deemed to be not disproportionate to provocation caused by violent blows or injuries.
>
> (3) In order that criminal responsibility be diminished, provocation must be of such degree as to deprive a normal person of his self-control.

Section 27 differs from the partial defence in that:

- It provides for diminished responsibility instead of a defence
- But diminished responsibility is available for any offence.

Nevertheless, s 27 resembles the partial defence, particularly in the s 27(3) requirement of provocation to a degree that would deprive a 'normal person' of self-control. Alternative terms that have been widely used in relation to the partial defence are 'ordinary person' and 'reasonable person'.

10.29 It has often been said that the essence of the partial defence of provocation is not provocation in itself but rather loss of self-control due to provocation. A subjective test of actual loss of self-control is not expressly included for diminished responsibility in s 27(1). However, in the absence of evidence that the defendant actually lost their self-control, it could be difficult to persuade a court that there was evidence of provocation to such a degree as to deprive a normal person of self-control. The focus on the reactions of an objective normal person was explained by Chetwynd J in *Public Prosecutor v Bani* [2016] VUSC 29 at [20] in this way:

> The original concept was based on the requirement that in order for provocation to succeed in diminishing criminal responsibility there must be a complete and sudden loss of control…However the question was never, could an accused rely on provocation by reference to the actual effect of the victims behaviour on him but rather what was the effect it would have had on the reasonable man. The concept of the reasonable man was borrowed from tort.

If the reasonable man would not have lost his self control then there is no provocation even if the accused proves he actually lost his self control.

10.30 The purpose of the objective test is to deny the defence of provocation to persons who lose self-control because of unusual temperament or excitability, or because of self-induced states such as intoxication. The rationale sometimes advanced is that society needs protection against dangerous persons. However, this is unconvincing in relation to a partial defence to murder because a successful defence of provocation would still lead to a conviction for manslaughter, and even less convincing in Vanuatu when the result of a successful claim of diminished responsibility is merely a reduction in sentence.

10.31 The limits of self-control for a normal person are open to debate. See, for example, the division within the High Court of Australia in *Green v R* [1997] HCA 50; (1997) 191 CLR 334 over whether an ordinary Australian might react to an unwanted homosexual advance by killing the other person. A bare majority thought that an ordinary Australian might react in this way but the minority vigorously dissented. On the operation of the 'normal person' test, see further, **10.35-10.38**.

10.32 There are several additional conditions specified in s 27(1). These are designed to ensure that the claim for diminished responsibility is both genuine and understandable:

- The provocation must take the form of an 'unlawful act'. This appears to exclude provocation by words alone, even though they may be particularly unpleasant. There must be something like an assault that would constitute an offence or perhaps a tort.
- The offence must be 'immediately provoked'. Substantial delay may indicate that the reaction was driven by motives of revenge or punishment rather than loss of self-control. However, the requirement that the reaction be 'immediately provoked' has been interpreted loosely. In *Public Prosecutor v Bani* [2016] VUSC 29 at [15], Chetwynd J appeared to endorse decisions from England and New Zealand to the effect that there could be 'a build-up of emotions over time' and a 'slow burn rather than an instant explosion of passion'.
- The reaction to the provocation must not be not 'disproportionate to the degree of provocation'. The language of proportionality does not sit easily with loss of self-control. If there has been a loss of self-control then it is quite likely that the force used will be disproportionate. Indeed, in cases of homicide, the force used will always be disproportionate to some extent, unless there are circumstances of justification (such as self-defence) which afford more valuable claims than those of diminished responsibility. This is reflected in the

inclusion of the special provision in s 27(2) deeming intentional killing or wounding 'to be not disproportionate to provocation caused by violent blows or injuries'. However, there are degrees of loss of self-control. Provocation which would be sufficient to cause a normal person to lose self-control and punch the provoker may not be sufficient to cause an ordinary person to lose self-control to the extent of strangling the provoker. The requirement for the reaction to be not disproportionate captures this feature of loss of self-control.

10.33 Section 27 does not limit diminished responsibility to cases where the provocation was aimed at the defendant. The provocation could be aimed at another person with whom the defendant has a close relationship – 'his spouse, descendant, ascendant, brother, sister, master or servant, or any minor or incapable person in his charge' - if that person is present at the time. Moreover, a generalised insult, such as a racial or ethnic slur, could be provocation to other persons of the same group who hear it.

10.34 Moreover, there is nothing is s 27 that would restrict diminished responsibility to cases where the reaction to provocation was aimed at the person who gave the provocation. Section 27 could apply where a person who loses self-control 'runs amok' and attacks persons other than the provoker.

Provocation: the objective test

10.35 The provocation must have been of a degree to make a 'normal person lose self-control. The tersm 'ordinary person' and 'reasonable man' or 'reasonable person' have been used elsewhere to describe the level of self-control which is expected: see, for example, see *DPP v Camplin* [1978] AC 705, at 718; [1978] 2 All ER 168; *Loumia v DPP* [1986] SBCA 1. In *Stingel v R* [1990] HCA 61**; (**1990**)** 171 CLR 312, the High Court of Australia held that any reference to a reasonable person would be inappropriate. A reasonable person would never respond to provocation by loss of self-control and violence. Yet an ordinary person, who is subject to the inadequacies of most people, can sometimes behave in this way. It was also said in *Stingel* that 'ordinary' does not mean 'average'. The notion of ordinariness was taken to include a range of levels of self-control, with the critical point being the lowest rather than the average level within this normal range. The same interpretation might be given to the term 'normal' in the Vanuatu Code.

10.36 The expected level of normal self-control can be adjusted by taking account of the age and a possibly the sex of a defendant: *DPP v Camplin* [1978] AC 705, at 718; [1978] 2 All ER 168; *Loumia v DPP* [1986] SBCA 1; *Republic v Bakaatu* [1996] KICA 1. In

a case involving a young person, the provocation must be likely to cause an ordinary person of the age of the accused to lose self-control. This development recognises that young persons are widely believed to have lesser powers of self-control than adults. The House of Lords in *Camplin* spoke of adjustments of the standard for both age and sex but the High Court of Australia in *Stingel* confined itself to age. Most courts everywhere have rejected the adjustment of the standard of the standard of self-control in any other way. Other variables affecting levels of self-control are taken into account only for the purpose of determining the limits within which levels of self-control can be regarded as ordinary or normal.

10.37 McHugh J, dissenting in *Masciantonio v R* (1995) 183 CLR 58, [1995] HCA 67, argued that insisting on an essentially uniform standard for the ordinary person, as cases like *Stingel* and *Camplin* do, produces inequality rather than equality before the law. At issue here is the competition between formal and substantive conceptions of equality. Maintaining a uniform standard of the normal or ordinary person preserves formal equality but may produce substantive inequality for persons with characteristics that make it difficult for them to attain the levels of self-control of most people. McHugh J was mainly concerned about differences in self-control stemming from ethnic or cultural background. Perhaps more problematic is the significance of mental impairment bearing on the power of self-control, since it may be possible to accommodate ethnic and cultural differences within the range of normal or ordinary levels of self-control.

10.38 The insistence on a uniform objective standard was briefly repudiated by a majority decision of the House of Lords in *R v Smith* [2001] 1 AC 146; [2000] 4 All ER 289. *Smith* was a case of mental impairment in which it was alleged that serious clinical depression had reduced the accused's capacity to refrain from acting violently. The issue was whether the jury could take this into account in measuring the accused's loss of self-control against an objective standard. A majority of the House of Lords said that it could be taken into account. Their reasoning was that the point of an objective test is simply to demand that the accused exercise reasonable self-control, given any characteristics of the particular accused which might affect the power of self-control to be expected of that accused. Some flexibility is necessary to avoid injustice. However, the orthodox position was reasserted by the majority of the Privy Council in *Attorney General for Jersey v Holley* [2005] 2 AC 580. The majority in *Holley* held that an accused's alcoholism as a disease could not be taken into account. It was said that loss of self-control had to be judged by applying a uniform objective standard of the degree of self-control expected of an ordinary person of the defendant's age and sex with ordinary powers of self-control.

10.39 There is another less controversial way that particular characteristics of the accused can become relevant to the objective test. The gravity of any instance of provocation will often depend on its context, and characteristics of the accused are part of this context: see *DPP v Camplin* [1978] AC 705, at 718; [1978] 2 All ER 168; *Republic v Bakaatu* [1996] KICA 1. For example, a racial or ethnic slur may be serious when it is directed to the person who is actually a member of the insulted group, whereas it may be absurd when directed to someone who has been mistakenly supposed to be a member of that group. Thus, personal characteristics of the accused can be considered whenever these are relevant to assessing the gravity of the provocation. There is therefore an important distinction between characteristics of the accused affecting the power of self-control and characteristics affecting the gravity of the provocation. Of course, this may involve drawing a fine line when provocation involves a slur about a characteristic such as mental instability. Such a condition could also lower the level of self-control. One of the factors influencing the decision in *Smith*, above at **10.38**, was the practical difficulties encountered in taking account of characteristics for one purpose but not the other.

10.40 Among the factors that can magnify the gravity of provocation are previous incidents between the parties. Cumulative provocation can occur in which the final incident becomes 'the straw that broke the camel's back'. The final incident must still be sufficiently grave to cause a normal person to lose self-control, yet it can be something which would be relatively trivial considered in isolation. The background of a history of provocation may be what gives the final insult its distinctive gravity. See *Republic v Bakaatu* [1996] KICA 1; *Bebeunga v Republic* [2019] KICA 7, at [9].

The common law defence of necessity

10.41 A theme running throughout the defences of justification and excuse is the necessity of breaking rules of law in order to prevent some perceived worse harm occurring. The general defence of necessity at common law is a residual defence which picks up appropriate cases of necessity which are not covered by other, more specific defences. The defence has been raised, albeit with mixed success, in a variety of contexts including driving dangerously to escape pursuers, escape from lawful custody to avoid being killed or harmed, unlawful importation of people to avoid dangers to them, mercy killings, survival homicide where one person is killed in order that others may live, and quasi-political action where the law is broken to prevent harm to a whole community. In some jurisdictions, the defence has performed a role in legitimising surgical operations where the patient is unable to give consent and also abortions to preserve the life or health of the mother. However, medical necessity is a specific defence in the criminal statutes of some other jurisdictions.

10.42 There has been a long-standing debate about whether the common law should recognise such an open-ended defence as necessity. The argument against recognition is that it would undermine the authority of criminal prohibitions. Nevertheless, the defence has been widely accepted in the modern common law, subject to tightly-framed conditions being met: see especially *Perka v R* [1984] 2 SCR 232 (SCC), discussed below at **10.44**. There are also some statutory versions where the defence is usually labelled 'emergency' rather than 'necessity': see, for example Fiji Crimes Act s 41.

10.43 The residual general defence of necessity has not been expressly incorporated in the Vanuatu Penal Code. However, the offence of intentional homicide under s 106 requires an 'unlawful' act or omission and the definitions of some other offences in statutes and at common law refer to the conduct being 'unlawful'. The Solomon Islands Court of Appeal in *Luavex v R* [2007] SBCA 13 was prepared to assume that the defence survives in the Penal Code of that jurisdiction, embedded in the references to 'unlawful' action in offences such as murder and manslaughter.

10.44 A critical step in the recognition of necessity as a common law defence was the decision of the Supreme Court of Canada in *Perka v R* [1984] 2 SCR 232. *Perka* has been described by the Samoa Court of Appeal as 'the leading authority in common law jurisdictions': *Stehlin v Police* [1993] WSCA 5. *Perka* at 138-139 of the judgment provided a detailed explanation of the defence and its ingredients:

> It is now possible to summarize a number of conclusions as to the defence of necessity in terms of its nature, basis and limitations: (1) the defence of necessity could be conceptualized as either a justification or an excuse, (2) it should be recognized in Canada as an excuse,…; (3) necessity as an excuse implies no vindication of the deeds of the actor, (4) the criterion is the moral involuntariness of the wrongful action, (5) this involuntariness is measured on the basis of society's expectation of appropriate and normal resistance to pressure, (6) negligence or involvement in criminal or immoral activity does not disentitle the actor to the excuse of necessity, (7) actions or circumstances which indicate that the wrongful deed was not truly involuntary do disentitle, (8) the existence of a reasonable legal alternative similarly disentitles, to be involuntary the act must be inevitable, unavoidable and afford no reasonable opportunity for an alternative course of action that does not involve a breach of the law; (9) the defence applies only in circumstances of imminent risk where the action was taken to avoid a direct and immediate peril, and (10) where the accused places before the court sufficient evidence to raise the issue, the onus is on the Crown to meet it beyond a reasonable doubt.

10.45 Subsequently, in *R v Latimer* [2001] 1 SCR 3 at [28], the Supreme Court of Canada extracted three tests from *Perka* for the defence to succeed:

> First, there is the requirement of imminent peril or danger. Second, the accused must have had no reasonable legal alternative to the course of action he or she undertook. Third, there must be proportionality between the harm inflicted and the harm avoided.

Latimer involved the 'mercy killing' of a severely disabled daughter experiencing a great deal of pain and facing another painful operation. It was held that none of the tests were satisfied: there was no clear and imminent peril because ongoing pain did not constitute an emergency; the option of struggling on with pain management presented a reasonable legal alternative; and the killing was a disproportionate response because the harm inflicted was 'immeasurably more serious than the pain resulting from Tracy's operation which Mr Latimer sought to avoid'.

10.46 In *Luavex v R* [2007] SBCA 13, the Solomon Islands Court of Appeal adopted a similar set of restrictive conditions that were first articulated by Sir James Stephen in the nineteenth century and then later endorsed in the English Court of Appeal in *Re A (Children)* [2000] 4 All ER 961, 2 WLR 480:

> In his reasons for judgment in Re A (above), Brooke LJ at 573, acted on the views on this subject of Sir James Stephen. According to that learned author, there are three requirements for its application. They are that: (i) the act is needed to avoid inevitable and irreparable evil; (ii) no more should be done than is reasonably necessary for the purpose to be achieved; and (iii) the evil must not be disproportionate to the evil avoided.

In *Luavex*, an unsuccessful attempt was made to invoke a defence of necessity for the killing of one group of members of the Bougainville Revolutionary Army by another group of the BRA, allegedly in order to stop criminal depredations that were being inflicted on the local community. It was held that there was no evidence to establish that the particular victims were responsible for any depredations or that the killings were the only available means of stopping them.

10.47 The restrictive conditions articulated on the one hand in *Perka* and in *Latimer* and on the other in *Re A (Children)* are similar. Both require that a serious danger be faced, that there be no other way of avoiding it, and that the harm inflicted not be worse than the harm avoided. There is, however, a significant difference between the two formulations. *Perka* and *Latimer* impose a time-frame: the harm to be avoided must be 'imminent'. The rationale is presumably that, unless harm is imminent, there will be time to plan an alternative way of preventing it from occurring. However, *Re A (Children)* [2000] 4 All ER 961 does not impose any such requirement. Indeed, it was expressly stated at 1051:

> The principle is necessity, not emergency.

This seems correct. it would be inappropriate to insist on such a narrow timeframe that

immediate action is needed to prevent harm occurring. It can sometimes be clear what must be done, even though it is not essential that it be done at this moment. A striking example is provided by *Re A (Children)* itself. The case involved conjoined twins, one of whom had deficient lungs and heart such that she was kept alive by her stronger sister. Medical opinion was that, unless they were separated, the weaker twin would inevitably die within six months, causing the death of her sister. However, while separation would preserve the life of the stronger twin, it would cause the immediate death of the weaker one. A declaration that separation would be lawful was obtained from the English Court of Appeal and the separation was conducted.

10.48 Committing the offence must be necessary for dealing with the danger. However, it is not sufficient that committing the offence was *a* reasonable way of dealing with the danger. It must have been the *only* reasonable way of dealing with it. This requirement would deny the defence in several of the much-debated survival scenarios where one person must die in order that another or others might live. *R v Dudley and Stephens* (1884) 14 QBD 273 is a famous example. In that case, shipwrecked and starving sailors killed one of their number to provide food for the others. Necessity was argued unsuccessfully as a defence to murder. There are several possible interpretations of the reasoning in the case. One interpretation is that necessity cannot be a defence to murder where there would be no good reason why one person rather than another should be the one selected to die. On this interpretation, there could be a different result where it was clear who had to be sacrificed if anyone was to be saved. An example would be a case where two mountaineers were roped together, and one fell and would have dragged both down if the other had not cut the rope. The defence could be available for killing another person if the death of that person was the only reasonable way of saving anyone. However, if there was no good reason why one person rather than another should be the one selected to die, then self-sacrifice as well as killing another would both be reasonable options and the defence would therefore be unavailable.

10.49 There has been some discussion at common law as to whether the defence of necessity should be excluded altogether for certain offences, particularly murder, because of the requirement that the harm inflicted be not disproportionate to the harm avoided. Another interpretation of *Dudley and Stephens* (see above, **10.48**) is that intentionally killing one person to save the life of another can never pass the test of proportionality. Indeed, in *Latimer* (see above, **10.45** at [40]), it was said: 'It is difficult, at the conceptual level, to imagine a circumstance in which the proportionality requirement could be met for a homicide.' Nevertheless, *Re A (Children)* (see above, **10.47**) shows how even a killing may be a reasonable response under circumstances where it is clear who must die if anyone is to live.