

## **NECESSITY**

“Necessity is the defense one pleads when circumstances force one to perform a criminal act. Duress, or coercion, applies when human beings force one to act.” *Commonwealth v. Garuti*, 23 Mass. App. Ct. 561, 564 (1987), quoting from *United States v. Nolan*, 700 F.2d 479, 484 n.1 (9th Cir.), cert. denied, 462 U.S. 1123 (1983).

For a defendant to be entitled to necessity defense instruction, he or she must present some evidence on each of the four underlying conditions of the defense: (1) a clear and imminent danger, not one which is debatable or speculative; (2) a reasonable expectation that his or her action will be effective as the direct cause of abating the danger; (3) there is no legal alternative which will be effective in abating the danger; and (4) the Legislature has not acted to preclude the defense by a clear and deliberate choice regarding the values at issue. If the defendant satisfies these foundational conditions, the burden is then on the commonwealth to prove beyond a reasonable doubt the absence of necessity. *Commonwealth v. Magadini*, 474 Mass. 593, 597 (2016).

**In some situations, necessity may excuse a person’s committing what would otherwise be a criminal offense. A person is allowed to commit what would otherwise be a criminal offense if the person acts out of necessity. The rule of necessity exists because it would be unjust and contrary to public policy to impose criminal liability on a person if the harm that results from his breaking the law is significantly less than the harm that would result from his complying with the law in that particular situation.**

**If evidence of necessity is present, the Commonwealth must prove beyond a reasonable doubt that the defendant did *not* act out of necessity. In other words, if you have a**

reasonable doubt whether or not the defendant acted out of necessity, your verdict must be not guilty.

To prove that the defendant did not act out of necessity, the Commonwealth must prove one of the following three things beyond a reasonable doubt:

*First:* That the defendant was not faced with a clear and imminent danger, but rather one that was debatable or speculative; or

*Second:* That the defendant did not reasonably expect that his (her) actions would be effective in directly reducing or eliminating the danger; or

*Third:* That the defendant had a reasonable legal alternative which would have been effective in reducing or eliminating the danger,

You may not find the defendant guilty unless the Commonwealth proved beyond a reasonable doubt that the defendant did in fact commit the offense, and also proved beyond a reasonable doubt that one or more of those three

**factors were absent and therefore the defendant did not act out of necessity.**

NOTES:

1. **Fourth element when there is a limiting statute.** There is a fourth element to a necessity defense: that “the Legislature has not acted to preclude the defense by a clear and deliberate choice regarding the values at issue.” *Commonwealth v. Schuchardt*, 408 Mass. 347, 349-350 (1990); *Commonwealth v. O’Kane*, 53 Mass. App. Ct. 466, 470 n.3. However, this is usually not a jury issue:

- *If there is no relevant statute on whether a necessity defense is available*, the judge should either omit all reference to this fourth element, or inform the jury that the Legislature has made the defense potentially available in this situation, leaving the jury to decide whether the evidence satisfies the first three elements.
- *If there is a relevant statute that has precluded a necessity defense* in this situation, the judge should so rule as a matter of law and not instruct the jury on the defense of necessity.
- *If there is a relevant statute limiting a necessity defense to specified circumstances*, the judge should instruct the jury on the first three elements, and also inform the jury that they must determine whether the facts of the case fall within the limited circumstances specified by statute.

*Commonwealth v. Lora*, 43 Mass. App. Ct. 136, 140 & n.7 (1997).

2. **Burden of Production.** The defendant must present some evidence on each of the four elements before the judge must instruct on, and permit the jury to consider, a necessity defense. *Commonwealth v. Kendall*, 451 Mass. 10, 16 n.5 (2008) (affirming denial of defendant’s request for necessity instruction because no evidence that defendant was without alternative to abate emergency). However, with respect to the third element, the law does “not require a defendant to rebut every alternative that is conceivable; rather, a defendant is required to rebut alternatives that likely would have been considered by a reasonable person in a similar situation.” *Commonwealth v. Magadini*, 474 Mass. 593, 601 (2016) (defendant’s testimony that he had been denied entry to the local homeless shelter, that he was unable to rent an apartment despite repeated attempts, and that he had no place else to stay was sufficient for the issue to go to the jury; whether it is an effective legal alternative for a homeless person to seek shelter outside of his or her home town is a question of fact for the jury to decide). In determining whether an instruction on a necessity defense is warranted, “all reasonable inferences should be resolved in favor of the defendant, and, no matter how incredible his testimony, that testimony must be treated as true.” *Id.* at 600.

3. **Motions in limine.** Generally a judge should not exclude a necessity defense on a motion in limine. “It is, perhaps, more prudent for the judge to follow the traditional, and constitutionally sounder, course of waiting until all the evidence has been introduced at trial before ruling on its sufficiency to raise a proffered defense. If, at that time, the defendant has failed to produce some evidence on each element of the defense, the judge should decline to instruct on it . . . . In that event, the judge may, if appropriate, give curative instructions to caution the jury against considering evidence not properly before them . . . . We believe that ordinarily a judge should not

allow a motion which serves to exclude, in advance of its being offered, potential evidence of the [necessity] defense. Since a judge is required to instruct on any hypothesis supported by evidence, in most instances proffer of disputed matter at trial, ruled upon in the usual course, is more likely to be fair and result in correct rulings” (citations and internal quotation marks omitted). *Commonwealth v. Hood*, 389 Mass. 581, 595 & n.5, quoting from *Commonwealth v. O'Malley*, 14 Mass. App. Ct. 314, 325 (1982). See also *Hood*, 389 Mass. at 596-598 (Liacos, J., concurring) (expressing belief that allowance of such a motion in limine, over a proper offer of proof, is reversible error).

See *Kendall*, 451 Mass. at 15-16 (necessity defense not available to intoxicated defendant who drove seriously injured girl friend to hospital but offered no evidence that legal alternatives were unavailable, e.g., seeking other assistance from others nearby); *Commonwealth v. Leno*, 415 Mass. 835, 839-41 (1993) (necessity defense not available to operator of illegal needle exchange program); *Schuchardt*, 408 Mass. at 349-50 (necessity defense deals with generally recognized harms, not those — such as the arms race — which are debatable and the subject of legislation and regulation); *Commonwealth v. Iglesia*, 403 Mass. 132, 135-36 (1988) (burden on Commonwealth to prove beyond a reasonable doubt the absence of necessity; permissible to charge first on relevant factors and then define burden of proof); *Commonwealth v. Weaver*, 400 Mass. 612, 614-15 (1987) (necessity instruction properly denied where insufficient evidence that defendant's actual motive was to avoid greater evil; opinion includes firearm example); *Hood*, 389 Mass. at 590-595 (necessity instruction properly denied where defendant failed to offer sufficient evidence that no effective alternatives were available); *Commonwealth v. Ben B.*, 59 Mass. App. Ct. 919, 920 (2003) (same); *Commonwealth v. Brugmann*, 13 Mass. App. Ct. 373, 376-81 (1982) (same; discusses policy grounds for necessity defense); *Commonwealth v. Averill*, 12 Mass. App. Ct. 260, 261-63 (1981) (necessity instruction properly denied where no evidence that defendants expected an immediate reduction in perceived danger, since there must be reasonable anticipation of “a direct causal relationship” between act and abatement of danger). But see *Magadini*, 474 Mass. at 602 (necessity caused by cold weather may be a defense to trespassing for a homeless person).

4. **Prison escape.** If a necessity defense is raised in a prison escape case, at a minimum there must be evidence that the defendant: (1) was faced with a specific threat of death, forcible sexual attack or substantial bodily injury in the immediate future; (2) had no time for complaint to the authorities, or shows a history of futile complaints; (3) had no time or opportunity to resort to the courts; (4) used no force or violence toward prison personnel or other innocent persons in escaping; and (5) immediately surrendered to authorities once safe from the immediate threat. *Commonwealth v. Thurber*, 383 Mass. 328, 330-333 (1981); *O'Malley*, 14 Mass. App. Ct. at 319-322. See *United States v. Bailey*, 444 U.S. 394, 411-413 (1980).