

DURESS

“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).

In some situations, duress may excuse a person’s committing what would otherwise be a criminal offense. Duress is a form of coercion. Our law holds that free will is essential to the commission of a criminal act, and therefore a person may not be found guilty for an act which he (she) committed under duress.

If evidence of duress is present, you may not find the defendant guilty unless the Commonwealth proves beyond a reasonable doubt that the defendant did in fact commit the offense, and also proves beyond a reasonable doubt that the defendant did not act under duress.

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

***First:* That the defendant did not receive a present and immediate threat which caused him (her) to have a well-founded fear of imminent death or serious bodily injury if he (she) did not do the criminal act. The**

threat must be imminent and must be present throughout the commission of the crime; or

Second: That the defendant had a reasonable opportunity to escape; and or

Third: That the defendant, or any other person of reasonable firmness, had a choice and would have been able to do otherwise in the circumstances.

If relevant to the evidence. **The defense of duress is not available to a person who voluntarily enters into a criminal enterprise and willingly places himself in a situation in which it is likely that he could be subject to coercion. The defense is also not available to a person who recklessly places himself in a situation where it is likely that such coercion may be applied.**

To conclude, if there is evidence of duress, the Commonwealth must prove beyond a reasonable doubt that the defendant did in fact commit the offense, and must also prove beyond a reasonable doubt that one or more of those three factors were not present.

Commonwealth v. Robinson, 382 Mass. 189, 198-209 (1981); *Commonwealth v. Perl*, 50 Mass. App. Ct. 445, 447-48 (2000) (reaffirming imminence requirement); *Commonwealth v. Egardo*, 42 Mass. App. Ct. 41, 44-45, rev'd on other grounds, 426 Mass. 48 (1997) (preferable to avoid language that "a threat of future harm is not enough," since this formulation has been criticized as emphasizing the proximity requirement at the cost of logic, since all threats involve future harms); *Garuti*, 23 Mass. App. Ct. at 565.

The same rules of proof apply to coercion by a husband as by anyone else. *Commonwealth v. Barnes*, 369 Mass. 462, 467-68 (1976). The common law presumption that a wife who commits a crime in the presence of her husband has been coerced by him into doing so, see e.g., *Commonwealth v. Helfman*, 258 Mass. 410, 416 (1927); *Commonwealth v. Egan*, 103 Mass. 71, 72 (1869), has been abolished.

NOTES:

1. **Abusive relationship evidence.** Where there is an issue of duress, "a defendant shall be permitted to introduce either or both of the following in establishing the reasonableness of the defendant's apprehension that death or serious bodily injury was imminent, the reasonableness of the defendant's belief that he had availed himself of all available means to avoid physical combat or the reasonableness of a defendant's perception of the amount of force necessary to deal with the perceived threat: (a) evidence that the defendant is or has been the victim of acts of physical, sexual or psychological harm or abuse; (b) evidence by expert testimony regarding the common pattern in abusive relationships; the nature and effects of physical, sexual or psychological abuse and typical responses thereto, including how those effects relate to the perception of the imminent nature of the threat of death or serious bodily harm; the relevant facts and circumstances which form the basis for such opinion; and evidence whether the defendant displayed characteristics common to victims of abuse." G.L. c. 233, § 23F.

2. **Threatened harm to third parties.** See *Commonwealth v. Perl*, 50 Mass. App. Ct. at 451-52 (duress defense applicable to threats of harm to third parties).