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200301276D4;
200404082B4;
200306340D3;
200306341D3;
200405578 B5

Neutral Citation Number: [2005] EWCA Crim 1415
IN THE SUPREME COURT OF JUDICATURE
COURT OF APPEAL (CRIMINAL DIVISION)

Royal Courts of Justice
Strand, London, WC2A 2LL

Friday, 27 May 2005

Before :

LORD JUSTICE MANCE
MR JUSTICE NEWMAN
and
MR JUSTICE FULFORD

Between :

Barry Quayle

First
Appellant

- and -

Reay James Wales

Second
Appellant

- and -

Graham Jack Kenny

Third
Appellant

- and -

Anthony Taylor

Fourth
Appellant

- and -

May Po Lee

Fifth
Appellant

- and -

D (Attorney-General's Reference)

- and -

Regina

Respondent

(Transcript of the Handed Down Judgment of
Smith Bernal Wordwave Limited, 190 Fleet Street
London EC4A 2AG
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Official Shorthand Writers to the Court)

Mr E Fitzgerald QC and Mr P Mytton for the **First Appellant**
Mr E Fitzgerald QC and Mr B Cooper for the **Second Appellant**
Ms K Hodson for the **Third Appellant**
Mr R Menon for the **Fourth Appellant**
Mr Adrian Eissa for the **Fifth Appellant**
Mr Mukul Chawla QC and Mr David McGonigal (instructed by **Crown Prosecution Service**) for the **Respondent** in the first three appeals
Mr Mukul Chawla QC and Ms Jacqueline Hall (instructed by **HM Customs and Excise**) for the **Respondent** in the fourth and fifth appeals
Attorney-General's Reference:
Mr K Sutton for **D (acquitted person)**
Mr J Rees instructed by the **Attorney-General**

Judgment
As Approved by the Court

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Lord Justice Mance:

Introduction and summary of facts

1. There are before us five appeals against conviction and one Attorney General's reference. All these cases raise issues about the availability and extent of any defence of medical necessity in respect of the commission of what would otherwise constitute offences against the legislation governing the cultivation, production, importation and possession of cannabis. We start with a summary of the relevant facts.
2. *Quayle*:
 - i) Mr Quayle now aged 38 is a bi-lateral below-knee amputee as a result of operations in 1997 and 2000. He suffers pain, which he has rated as usually 8/10 and at worst 12/10 (sic). On a search of his home on 9th November 2002, he was found to be cultivating cannabis plants in his loft for his personal use. He said in interview that "I cannot stop because at night it gives me more than anything else they give me, it is the only thing that gives me relief"; he said that he did not take diazepam and temazepam, with which he had been prescribed, because they "knocked him" out and he had two children with attention deficit disorder, who he could not risk not hearing.
 - ii) Mr Quayle was charged with the cultivation of cannabis plant in contravention of s.6(1) of the Misuse of Drugs Act 1971. His defence statement said that "he did grow cannabis, but did so out of necessity and uses it for personal use to alleviate pain". Expert reports were produced on his behalf. Dr Reynolds, a Fellow of the Royal College of Anaesthetists and a member of the Pain Society, saw Mr Quayle on 12th June 2003. He explained that pain is either nociceptive (the result of damaged tissue) or neuropathic (associated with malfunction of the nerves). The former tends to respond to normal pain-killers, the latter to drugs working on nerves, such as those used to treat epilepsy or depression. He set out Mr Quayle's medical history and the drugs with which he had been prescribed by his GP since 1999, and said:

"At night he takes up to four hours to get to sleep. He is prescribed diazepam and temazepam. He claims that his social circumstances discourage him from taking them. Smoking a joint of cannabis relieves his pain and relaxes him so that he gets to sleep within an hour or so."
 - iii) Dr Reynolds concluded:

"Mr Quayle is a man with an extensive history of severe pain, which a long succession of doctors has accepted is genuine. He has received incomplete relief of this symptom despite appropriate conventional medication. Part of his problem is that

his sleep is disturbed despite prescription of regular night sedation. Smoking cannabis gives some assistance with his pain and insomnia.

Without entering into the debate around legality, there is no question in my mind that this patient has taken cannabis with benefit to his chronic symptoms.”

- iv) Victoria Jenkins, a BSc in pharmacology and toxicology, explained that the main psychologically active chemical in all forms of cannabis is tetrahydrocannabinol (THC), that cannabis has analgesic (pain-relieving) properties, muscle-relieving properties and anti-emetic properties and was used medically for these purposes in the 19th century. Her report (endorsed by Mr Longford, a BSc in biological sciences and PhD in toxicology) stated:

“... As with most drugs, the exact effects of cannabis on an individual are difficult to predict.

Mr Quayle suffers from nociceptive and neuropathic pain and it is quite feasible that the pain relief provided by cannabis would be as good if not better than other prescription medications for the treatment of these kinds of pain. Cannabis also produces relaxation and it is therefore likely to assist with any sleep problems that Mr Quayle may have.

.....

Most currently available analgesic drugs have serious side effects and are not always effective in the treatment of pain particularly neuropathic pain, which is resistant to the analgesic effects of drugs such as opioids. Various cannabinoids produce inhibition of pain responses. At present, there is laboratory evidence which supports an analgesic effect of cannabinoids, but there is no reliable clinical evidence to support this. Mr Quayle has been examined by a pain consultant who concluded that he suffered from both nociceptive and neuropathic pain, which is likely to respond well to cannabis. If he suffers from phantom-limb pain, this is also likely to respond well to cannabis.”

- v) On 24th July 2003, at the outset of Mr Quayle’s trial before HHJ O’Rourke in Lincoln Crown Court, the judge ruled that he would not leave any defence of necessity to the jury. Mr Quayle thereupon pleaded guilty and was sentenced to 4 months’ imprisonment suspended for six months. He appeals on the basis that the judge erred in his ruling. The basis of that ruling was that necessity could not be available as a defence unless, firstly, “the commission of the crime was necessary or reasonably believed to be necessary by the defendant for the purpose of avoiding or preventing death or serious injury to himself or another”, as well as, secondly, committed for that reason alone and, thirdly,

objectively reasonable and proportionate. The judge held that “it extends the meaning of the words ‘serious injury to himself’ far too much to imply into that the avoidance of pain or discomfort of however serious a degree when that derives from some condition the defendant is already suffering from”.

- vi) Before us Mr Edward Fitzgerald QC made a submission, evidently not made to the trial judge, to the effect that Mr Quayle’s conduct had not only to be viewed in the context of the serious pain to which he was prone, but that there was also a risk of suicide. He referred to a GP’s medical report dated 5th November 2002, following a review of Mr Quayle on 1st November 2002. It stated that “he still has an irregular sleep pattern, anhedonia and is feeling thoughts of suicide. Constantly on edge for months, leading to certain levels of aggression within the home”. But Mr Quayle was arrested eight days after this report, and his statements after arrest indicate that he had been taking cannabis for some time. The reported thoughts of suicide cannot have led him to take cannabis (or it seems to avoid aggression). It does not surprise us that, in these circumstances, no suggestion was made to the trial judge that the self-administration of cannabis was “necessary” to avoid a risk of suicide, or that no criticism is addressed in the grounds to the fact that the judge in his ruling did not address any such risk.

3. *Wales:*

- i) Mr Wales now aged 53 suffers from a large number of injuries and ailments. He fractured two vertebrae in the Navy in 1968. He broke five further vertebrae in a traffic accident in 1981. He contracted tuberculosis resulting in lung scars and breathing problems in 1983. He had a further accident lacerating his tendons and breaking his left wrist. In 1990 he developed chronic pancreatitis for alcohol-related reasons together with depression and chronic (in his words at one point “life-threatening”) pain. His liver has been damaged by hepatitis B contracted in Thailand. He has rheumatoid arthritis, osteoporosis and osteoarthritis.
- ii) A search of Mr Wales’s home on 4th July 2002 discovered some 20 cannabis plants growing in a back bedroom. He said in interview that he took cannabis to get off morphine (apparently a mistake for dihydrocodeine) tablets to which he had become addicted. Mr Wales was charged with the production of cannabis contrary to s.4(2)(a) of the Misuse of Drugs Act 1971, and a trial spread over three days took place on 13th/15th January 2003 before HHJ Thompson in the Ipswich Crown Court. In support of a defence of medical necessity, Mr Wales adduced evidence that he suffered chronic pain from his pancreatitis as well as from bleeding caused by anti-inflammatory drugs which he had been prescribed for his arthritis. He had become addicted to one drug, dihydrocodeine, which he had been prescribed since 1981, and he would rather smoke cannabis than take morphine. Dihydrocodeine and morphine stopped him eating, while cannabis gave him an appetite and put him above the pain.

“It doesn’t take the pain away; it helps me cope with it”; and it had no side effects. He wished it was in tablet form.

- iii) Mr Wales’s GP, Dr Marcolyn, confirmed that Mr Wales was unable to tolerate anti-inflammatory drugs because of their gastric effect and the risk of them causing pancreatitis; and that he had taken dihydrocodeine for many years and become addicted to it. Dr Bailey, a consultant in anaesthesia and pain management who had treated Mr Wales, said that Mr Wales took 6 to 8 dihydrocodeine tablets a day and occasionally, every two or so months, if things were bad, the stronger opiate, morphine. He had had two or three admissions in the past six months which might be related to withdrawal symptoms from dihydrocodeine or alcohol. He did not qualify for a cannabis trial, because, Dr Bailey said, that was only available for multiple sclerosis (MS) sufferers. Dr Bailey suggested further treatment with dihydrocodeine and celecoxib (although that drug has since, it appears, been withdrawn). Dr Notcutt, a consultant anaesthetist, lecturer and researcher on pain and cannabinoids, described the risks of anti-inflammatory drugs, which he said that he personally would not prescribe. These risks include indigestion, ulcers and peritonitis. He said that peritonitis is serious. It causes as many as 2000 deaths a year in the United Kingdom, though mainly among the elderly. He agreed that, if there was a specific risk of injury from any anti-inflammatory drug, one would not expect it to be prescribed. The overall benefits of cannabinoids were pain relief and pain distancing, in that the patient was distanced from the pain and therefore not so bothered by it. That he said also happens with morphine. Further, cannabis gives improved sleep, relief of muscle spasms and bladder spasms for patients with multiple sclerosis, relief of constipation, relaxation and relief of anxiety, misery and depression. He said that some patients experience side effects which cause them to discontinue using cannabis, and that “A lot of patients don’t like smoking so they eat it or they go without”. However, he said that, if he were able, legally, to write a prescription, he “would be trying cannabis certainly for pain”, in the form of a preparation sprayed under the tongue.
- iv) The judge left the defence of necessity to the jury, who convicted. The summing up is criticised (a) for failure to explain that serious pain could amount to serious injury, in particular because of its psychological consequences; and (b) for a direction that the defence could only be available if the defendant believed that he would (i) imminently and (ii) inevitably suffer serious injury.

4. *Taylor and Lee:*

- i) Mr Taylor was stopped by Customs while passing through the green channel at Luton Airport on 9th February 2003 on arrival from Switzerland. Before any questions were put to him, he handed to Customs his card, reading “medicinal cannabis and natural health consultant”, and when asked volunteered that he had with him organic cannabis for purposes of medical necessity in connection

with a clinic of which he is or was the proprietor, called Tony's Holistic Clinic, in King's Cross. His luggage was found to contain 20.5 kgs of cannabis.

- ii) Mr Taylor is not medically qualified, but the clinic had at the time some 700 patients, many HIV-positive or suffering AIDS and others with MS, all said to have to produce a letter of diagnosis written by a doctor and identification before becoming patients. Mr Taylor at one point described the clinic as a "charity", but at another referred to it as a "business" and explained that 5% of the customers got cannabis free and one-third got it at cost, with the rest therefore paying a full price. He explained that the price of the 20.5 kgs had been SFr 75,000 (some £35,000, although he said the cannabis had been bought on credit) and that this cheap Swiss price "allows a lot of profit" which funded the salaries of five people at the clinic (all including himself apparently remunerated at £7 per hour) as well as expenses such as the airfares. The cannabis was organically grown in Switzerland, and contained no pesticides, which was why he procured it there, rather than on the streets in London. We note in parenthesis that, when a Customs officer stated in interview that "I understand that it's not for your personal use", Mr Taylor replied "Not all of it no". If and so far as this might suggest that some was for his personal use, that has later been denied and the present appeal falls to be considered on the basis that it was all for use in the clinic. Mr Taylor was charged with being knowingly concerned in the fraudulent evasion of the prohibition on the importation of a Class B controlled drug, contrary to s.170(2) of the Customs and Excise Management Act 1979. He was bailed and his passport was surrendered as a condition of his bail.
- iii) A month later, Ms May Po Lee, a former employee in a health shop run by Mr Taylor below his clinic, was stopped while going through the green channel at Luton Airport after arrival from Switzerland. She immediately produced a letter from Mr Taylor indicating that she had cannabis for medical use for which Mr Taylor was responsible. Her luggage was found to contain 5.03 kgs of cannabis. The importation was because Tony's Holistic Clinic was running short of cannabis. Ms Lee explained in interview that she was engaged by Mr Taylor as a courier for the trip, that he had paid for her flight and hotel with his credit card, and that she would have been paid £800 to go and collect the cannabis. She explained that the clinic was a holistic centre dealing with very ill patients, who got a lot a relief from the cannabis, especially towards the end of their lives. Mr Taylor and Ms Lee were, in relation to this importation, both charged with being knowingly concerned in the fraudulent evasion of the prohibition or restriction on the importation of a Class B controlled drug.
- iv) In his defence statement in respect of both charges against him, Mr Taylor maintained that the cannabis was on each occasion imported "strictly for the purposes of alleviating the pain and suffering of established customers all of whom are sufferers from significant debilitating diseases and/or terminal illnesses and were fundamentally dependant on the use of a certain type of cannabis to maintain a basic quality of life", and that "His principal motivation

was a humanitarian concern that people would be subjected to significant pain without the cannabis. He did not believe that other medicines, particularly morphine, would provide the same palliative effect for its users while simultaneously maintaining a quality of life". In her defence statement, Ms Lee said that "The principal reason for her importation of cannabis into the United Kingdom was her belief that if she did not import the substance, the patients of Tony's Holistic Clinic would suffer from serious physical injuries. Ms Lee would not have imported cannabis into the United Kingdom, had she not held this belief".

- v) The defence served various expert reports. Dr Notcutt would have given evidence on pain relief and cannabis, no doubt on the lines set out above in relation to *Wales*. Dr Iverson, author of *The Science of Marijuana* (2000), would have covered the use of cannabis in relation to AIDs sufferers and have spoken to cannabis's relative non-toxicity and its limited adverse effects within a range tolerated for conventional medicines. Dr Grinspoon, author of *Marijuana Revisited* (1978) and *Marijuana, The Forbidden Medicine* (1993) would have spoken of cannabis's "unusual safety" and said that "Cannabis can reduce pain. However, it is inconsistent and can in some cases heighten sensitivity to pain. Consequently, the use of cannabis for pain relief must be considered on a case by case basis". The defence also proposed to call two doctors who had on occasions referred patients to Tony's Holistic Clinic, namely Dr Youle, and HIV specialist at the Royal Free Hospital, Hampstead. The latter would also have supported the view that cannabis has quite clear therapeutic uses, and can help to alleviate medical symptoms.
- vi) It was also proposed to call four or five patients to explain their conditions, why they used cannabis, how it benefited them, why other conventional drugs did not and whether they would have suffered death or serious injury but for the supply to them of cannabis by Tony's Holistic Clinic.
- vii) The matter came on for trial at the Luton Crown Court before HHJ Moss on 13th October 2003. After hearing argument, the judge ruled on 14th October 2003 that both the Crown case and the defence case were sufficiently clear for him to be able to decide whether there was any possible defence of necessity, that there was not, that the defendants' proposed evidence on this subject was inadmissible, and that the Crown did not therefore have any case of necessity to disprove. The judge for the purposes of his reasoning was prepared to accept that pain equates with serious injury, but considered nonetheless that the medical evidence "taken at its highest" did not take the case over the threshold set out in *Martin* [2000] 2 CAR 42. There was insufficient "responsibility" for patients, insufficient connection in time with any risk and the evidence was of choice rather than any "forcing" of either defendant's will.
- viii) As a result of this ruling both defendants pleaded guilty. On 3rd November Mr Taylor was sentenced to 18 months' imprisonment for the first and 6 months consecutive for the second importation, making a total of two years

imprisonment, suspended for two years, and was ordered to pay £7,500 costs. Ms Lee was sentenced to 100 hours community service for her part in the second importation. Both defendants now appeal on the ground that the judge's ruling was in error, the evidence of alleged necessity should have been admitted and the matter left to the jury.

5. *Kenny:*

- i) Mr Kenny now aged 25 injured his back in or about 2000 picking up a piece of glass at work, and his case was that he feels pain every morning and that his back can tighten up for a day or a week.
- ii) On a search of his house on 4th March 2003 there were found 16 cannabis plants and 211.54 gms of cannabis. In interview, Mr Kenny accepted that these were his, and said that he had smoked cannabis - some 5 to 10 reefers a day – to avoid serious ongoing pain and consequent mental suffering caused by his back injury. Cannabis gave him the fastest relief, and had fewer side effects than other drugs. It enabled him to relax and set his pain aside. He was charged with producing the 16 cannabis plants and possessing the 211.54 gms of cannabis contrary to ss. 4(1) and 5(1) of the Misuse of Drugs Act 1971.
- iii) His trial began before HHJ Barry in the Bradford Crown Court on 7th June 2004. The defendant gave evidence along the lines of his interview. He said that his life had been much affected by the back pain which he felt every morning; and at intervals, sometimes once a month, sometimes longer or shorter, he suffered spasms, when he would cry out and hold his breath and be unable to walk, to pull up on his socks or to wash himself; and such an effect could last a day or even longer, up to a week, and he was never able to relax. He had had about ten conventional sorts of painkiller, electronic treatment, one session of acupuncture (but he proved to have a phobia to needles) and, when he became depressed, antidepressants. In these circumstances he had come on most days to use cannabis which gave him the fastest relief and had fewer side effects. Its effect was to distract the pain, to enable him to relax and set the pain aside in his mind, and in due course with its assistance he was able to get himself back on his feet and go to work and with work his depression had lifted.
- iv) The defence also called evidence from Dr Hickey who said that no physical lesions were detectable, but that the defendant suffered chronic back pain - though a doctor could only decide what level of pain on the basis of what the patient said. The defence also called a Mr Atha, who has taken a keen interest in the therapeutic uses of cannabis for over 15 years and is described as a Drug Abuse Research Consultant with the Independent Drug Monitoring Unit, 100 Park Road, Hindley, Wigan. He prepared two very lengthy reports, one dealing with drugs and their production generally and the other with the subject of medical necessity. He said that cannabis could itself have a potent effect in

reducing pain, particularly on a patient's nerves, and could also increase the effectiveness of prescription drugs designed to reduce pain.

- v) At the close of the defence case, the judge ruled after argument that there was no defence of medical necessity capable of being left to the jury. There were in his view public policy limitations on the availability of the defence; it required a fear of a danger extraneous to the defendant himself; and it could not provide a licence to offend as often as necessary over years, in order to avoid pain, when pain, although to some extent ascertainable objectively, was largely only capable of assessment by the sufferer himself. Mr Kenny now appeals on the ground that the judge should have left the defence to the jury.

6. *Attorney Generals' Reference (No. 2 of 2004):*

- i) During the course of this reference, the defendant waived his right to anonymity, so that we can refer to him by name as Mr Ditchfield.
- ii) On 6th September 2003 Mr Ditchfield's car was searched by police, and a spectacles case was recovered from its glove compartment, which was found to contain two plastic bags, one of which contained 6.8 gms of cannabis, the other of which contained 6.88 gms of cannabis resin. In interview Mr Ditchfield said that he was a campaigner who thought that sick people should have the right to use cannabis medicinally, and that, if a sick person with a genuine medical need (such as a sufferer from MS) asked him for cannabis, he would give it to him free. The cannabis in his spectacles case was, he said, of medicinal quality, and was not for his personal use but for supply to anyone with a medical requirement who might need it to relieve their suffering. He said that most of the sick people he knew suffered from terrible diseases, and, although they were prescribed medication, it was cannabis that gave them relief. Mr Ditchfield was charged with two counts of possession of a controlled drug of Class B with intent to supply contrary to s.5(3) of the Misuse of Drugs Act 1971, and two corresponding alternative counts of simple possession of such drug contrary to s.5(2).
- iii) He was tried before The Recorder of Chester, HHJ Elgan Edwards DL, on 13th to 15th January 2004. At the outset of the trial, before evidence, the judge invited and heard submissions whether any defence of necessity could be available to Mr Ditchfield. Initially, he considered not. But he was persuaded in the light of this court's decision in *Philip David Lockwood* [2002] EWCA Crim 60 to revise his view.
- iv) Mr Ditchfield then gave evidence on the lines of his interview, and called a Mr Glyn Williams, a MS sufferer with prostate cancer, who said that Mr Ditchfield had done him the most good, that morphine has side effects and that Mr Ditchfield does not take money.

v) The judge left the defence to the jury, directing them that mental injury can be as serious as physical injury, and leaving them to consider “whether serious injury included the alleviation of symptoms of a dreadful illness like MS”. The jury entered verdicts of not guilty on all counts.

vi) The Attorney General now seeks the opinion of this Court on the following question of law:

“May 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 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?”

The legislative framework

7. Under the Misuse of Drugs Act 1971, a “controlled drug” is any substance or product specified in Part I, II or III of Schedule 2 to the Act. Class A, B and C drugs are any of the substances and products specified in, respectively, Parts I, II and III of Schedule 2. These different grades correspond with the seriousness attached to the offences relating thereto. Prior to 29th January 2004, cannabis and cannabis resin were Class B drugs, while cannabinal (except where contained in cannabis or cannabis resin) and its derivatives were Class A drugs. As from 29th January 2004, cannabis, cannabis resin, cannabinal and cannabinal derivatives have all been reclassified as Class C drugs by the Misuse of Drugs Act 1971 (Modification) (No. 2) Order 2003 (SI 2003 No. 32201). The reclassification followed the recommendation of a report in March 2002 of the Advisory Council on the Misuse of Drugs. The Home Secretary announced his acceptance of this report in July 2002, on the basis that it would reflect more accurately the relative harmfulness of drugs, give the misuse of drugs legislation greater credibility and indicate the government’s priority to tackle Class A drugs.

8. The 1971 Act contains provisions as follows:

“3 Restriction of importation and exportation of controlled drugs

(1) Subject to subsection (2) below-

(a) the importation of a controlled drug; and

(b) the exportation of a controlled drug

are hereby prohibited.

(2) Subsection (2) does not apply-

(a) to the importation or exportation of a controlled drug which is for the time being excepted from paragraph (a) or, as the case may be, paragraph (b) of subsection (1) above by regulations under section 7 of this Act.

(b) to the importation or exportation of a controlled drug under and in accordance with the terms of a licence issued by the Secretary of State and in compliance with any conditions attached thereto.

4 Restriction on the prohibition and supply of controlled drugs

(1) Subject to any regulations under section 7 of the Act for the time being in force, it shall be unlawful for a person-

(a) to produce a controlled drug; or

(b) to supply or offer to supply a controlled drug to another.

(2) Subject to section 28 of this Act, it is an offence for a person-

(a) to produce a controlled drug in contravention of subsection (1) above; or

(b) to be concerned in the production of such a drug in contravention of that subsection by another.

5 Restriction on possession of controlled drugs

(1) Subject to any regulations under section 7 of the Act for the time being in force, it shall not be lawful for a person to have a controlled drug in his possession.

(2) Subject to section 28 of this Act and to subsection (4) below, it is an offence for a person to have a controlled drug in his possession in contravention of subsection (1) above.

(3) Subject to section 28 of this Act, it is an offence for a person to have a controlled drug in his possession, whether lawfully or not, with intent to supply it to another in contravention of section 4(1) of this Act.

(4)

6 Restrictions on cultivation of cannabis plant

(1) Subject to any regulations under section 7 of the Act for the time being in force, it shall not be lawful for a person to cultivate any plant of the genus *Cannabis*.

(2) Subject to section 28 of this Act, it is an offence to cultivate any such plant in contravention of subsection (1) above.”

Ss. 5(4) and 28 of the Act deal with defences not presently relevant (in the case of s.28, relating to knowledge of facts necessary for the relevant offence).

9. S.7 of the 1971 Act provides:

“7(1) The Secretary of State may by regulations-

(a) except from section 3(1)(a) or (b), 4(1)(a) or (b) or 5(1) of this Act such controlled drugs as may be specified in the regulations; and

(b) make such other provision as he thinks fit for the purpose of making it lawful for person to do things which under any of the following provisions of this Act, that is to say section 4(1), 5(1) and 6(1), it would otherwise be unlawful for them to do.

(2) Without prejudice to the generality of paragraph (b) of subsection (1) above, regulations under that subsection authorising the doing of any such thing as is mentioned in that paragraph may in particular provide for the doing of that thing to be lawful –

(a) if it is done under and in accordance with the terms of a licence or other authority issued by the Secretary of State and in compliance with any conditions attached thereto; or

(b) if it is done in compliance with such conditions as may be prescribed.

(3) Subject to subsection (4) below, the Secretary of State shall so exercise his power to make regulations under subsection (1) above as to secure –

(a) that it is not unlawful under section 4(1) of this Act for a doctor, dentist, veterinary practitioner or veterinary surgeon, acting in his capacity as such, to prescribe, administer, manufacture, compound or supply a controlled drug, or for a pharmacist or a person lawfully conducting a retail pharmacy

business, acting in either case in his capacity as such, to manufacture, compound or supply a controlled drug; and

(b) that it is not unlawful under section 5(1) of this Act for a doctor, dentist, veterinary practitioner, veterinary surgeon, pharmacist or person lawfully conducting a retail pharmacy business to have a controlled drug in his possession for the purpose of acting in his capacity as such.

(4) If in the case of any controlled drug the Secretary of State is of the opinion that it is in the public interest –

(a) for production, supply and possession of that drug to be either wholly unlawful or unlawful except for purposes of research or other special purposes; or

(b) for it to be unlawful for practitioners, pharmacists and persons lawfully conducting retail pharmacy businesses to do in relation to that drug any of the things mentioned in subsection (3) above except under a licence or other authority issued by the Secretary of State,

he may by order designate that drug as a drug to which this subsection applies; and while there is in force an order under this subsection designating a controlled drug as one to which this subsection applies, subsection (3) above shall not apply as regards that drug.

.....

(6) The power to make orders under subsection (4) above shall be exercisable by statutory instrument, which shall be subject to annulment in pursuance of a resolution of either House of Parliament.

(7) The Secretary of State shall not make any order under subsection (4) above except after consultation with or on the recommendation of the Advisory Council.”

10. Pursuant to the powers conferred by s.7 as well as certain other sections of the 1971 Act, the Secretary of State made the Misuse of Drugs Regulations 1985 (SI 1985 No. 2066), revoked and replaced with effect from 1st February 2001 by the Misuse of Drugs Regulations 2001 (SI 2001 No. 3998). These regulations contain exemptions from the offence provisions of the 1971 Act. In that connection, they contain schedules numbered 1 to 5, the operation of which is conveniently summarised in the Report of the Independent Inquiry into the Misuse of Drugs Act 1971 (the Runciman Report) as follows. Schedule 1, lists drugs, from both Class A and Class B, which may only be used for medical or scientific research. These include cannabis, cannabis resin, cannabinol and cannabinol derivatives not being dronabinol or its stereoisomers. (Dronabinol is an anti-emetic and appetite stimulant marketed as

Marinol, which was moved from schedule 1 to schedule 2 by the Misuse of Drugs (Amendment) Regulations 1995 (SI 1995 No. 2048)). All these drugs are also designated separately in The Misuse of Drugs (Designation) Order 2001 (SI No. 2001 No. 3997) as drugs to which s.7(4) of the 1971 Act applies. Schedule 2 specifies drugs in relation to which there are controls over prescription, secure storage and record keeping, including cocaine, heroin, methadone and morphine. These drugs may be prescribed and lawfully supplied and possessed on prescription. Otherwise, their supply and possession, together with their importation, exportation and production, are offences except under licence. Schedule 3 lists drugs subject to a less elaborate range of controls. Schedule 4 lists drugs which may lawfully be possessed by anyone provided they are in the form of medicinal products, and may be lawfully imported or exported, if in the form of such products for self-administration. Schedule 5 contains very weak preparations or products which may be freely imported, exported or possessed, but for the production or supply of which authority is needed.

11. The prescriptive nature and the detail of the scheme of regulation, exception and permission contained in the Misuse of Drugs Regulations 2001 is illustrated by the following extracts:

“Exceptions for drugs in Schedules 4 and 5

4(1) Section 3(1) of the Act (which prohibits the importation and exportation of controlled drugs) shall not have effect in relation to the drugs specified in Schedule 5.

(2) The application of section 3(1) of the Act, in so far as it creates an offence, and the application of sections 50(1) to (4), 68(2) and (3) or 170 of the Customs and Excise Management Act 1979, in so far as they apply in relation to a prohibition or restriction on importation or exportation having effect by virtue of section 3 of the Act, are hereby excluded in the case of importation or exportation by any person for administration to himself of any drug specified in Part II of Schedule 4 which is contained in a medicinal product.

(3) Section 5(1) of the Act (which prohibits the possession of controlled drugs) shall not have effect in relation to -

(a) any drug specified in Part II of Schedule 4 which is contained in a medicinal product;

(b) the drugs specified in Schedule 5.

.....

Licences to produce etc. controlled drugs

5. Where any person is authorised by a licence of the Secretary of State issued under this regulation and for the time being in force to produce, supply, offer to supply or have in his possession any controlled drug, it shall not by virtue of section

4(1) or 5(1) of the Act be unlawful for that person to produce, supply, offer to supply or have in his possession that drug in accordance with the terms of the licence and in compliance with any conditions attached to the licence.”

.....

Administration of drugs in Schedules 2, 3, 4 and 5

7. - (1) Any person may administer to another any drug specified in Schedule 5.

(2) A doctor or dentist may administer to a patient any drug specified in Schedule 2, 3 or 4.

Production and supply of drugs in Schedules 2 and 5

8. - (1) Notwithstanding the provisions of section 4(1)(a) of the Act -

(a) a practitioner or pharmacist, acting in his capacity as such, may manufacture or compound any drug specified in Schedule 2 or 5;

(b) a person lawfully conducting a retail pharmacy business and acting in his capacity as such may, at the registered pharmacy at which he carries on that business, manufacture or compound any drug specified in Schedule 2 or 5.

(2) Notwithstanding the provisions of section 4(1)(b) of the Act, any of the following persons, that is to say -

(a) a practitioner;

(b) a pharmacist;

(c) a person lawfully conducting a retail pharmacy business;

(d) the person in charge or acting person in charge of a hospital or nursing home which is wholly or mainly maintained by a public authority out of public funds or by a charity or by voluntary subscriptions;

(e) in the case of such a drug supplied to her by a person responsible for the dispensing and supply of medicines at the hospital or nursing home, the sister or acting sister for the time being in charge of a ward, theatre or other department in such a hospital or nursing home as aforesaid;

.....

may, when acting in his capacity as such, supply or offer to supply any drug specified in Schedule 2 or 5 to any person who

may lawfully have that drug in his possession, except that nothing in this paragraph authorises -

(i) the person in charge or acting person in charge of a hospital or nursing home, having a pharmacist responsible for the dispensing and supply of medicines, to supply or offer to supply any drug; or

(ii) a sister or acting sister for the time being in charge of a ward, theatre or other department to supply any drug otherwise than for administration to a patient in that ward, theatre or department in accordance with the directions of a doctor or dentist.

.....

(4) Notwithstanding the provisions of section 4(1)(b) of the Act, a person who is authorised by a written authority issued by the Secretary of State under and for the purposes of this paragraph and for the time being in force may, at the premises specified in that authority and in compliance with any conditions so specified, supply or offer to supply any drug specified in Schedule 5 to any person who may lawfully have that drug in his possession.

.....

Production and supply of drugs in Schedules 3 and 4

9. - (1) Notwithstanding the provisions of section 4(1)(a) of the Act -

(a) a practitioner or pharmacist, acting in his capacity as such, may manufacture or compound any drug specified in Schedule 3 or 4;

(b) a person lawfully conducting a retail pharmacy business and acting in his capacity as such may, at the registered pharmacy at which he carries on that business, manufacture or compound any drug specified in Schedule 3 or 4;

(c) a person who is authorised by a written authority issued by the Secretary of State under and for the purposes of this sub-paragraph and for the time being in force may, at the premises specified in that authority and in compliance with any conditions so specified, produce any drug specified in Schedule 3 or 4.

(2) Notwithstanding the provisions of section 4(1)(b) of the Act, any of the following persons, that is to say -

(a) a practitioner;

(b) a pharmacist;

(c) a person lawfully conducting a retail pharmacy business;

....

may, when acting in his capacity as such, supply or offer to supply any drug specified in Schedule 3 or 4 to any person who may lawfully have that drug in his possession.

Possession of drugs in Schedules 2, 3 and 4

10. - (1) Notwithstanding the provisions of section 5(1) of the Act -

(a) a person specified in one of sub-paragraphs (a) to (j) of regulation 8(2) may have in his possession any drug specified in Schedule 2;

(b) a person specified in one of sub-paragraphs (a) to (h) of regulation 9(2) may have in his possession any drug specified in Schedule 3 or 4;

(c) a person specified in regulation 9(3)(b) or (c) or (6) may have in his possession any drug specified in Schedule 3,

for the purpose of acting in his capacity as such a person, except that nothing in this paragraph authorises -

(i) a person specified in sub-paragraph (e) of regulation 8(2);

(ii) a person specified in sub-paragraph (c) of regulation 9(3); or

(iii) a person specified in regulation 9(6),

to have in his possession any drug other than such a drug as is mentioned in the paragraph or sub-paragraph in question specifying him.

(2) Notwithstanding the provisions of section 5(1) of the Act, a person may have in his possession any drug specified in Schedule 2, 3 or Part I of Schedule 4 for administration for medical, dental or veterinary purposes in accordance with the directions of a practitioner, except that this paragraph shall not have effect in the case of a person to whom the drug has been supplied by or on the prescription of a doctor if -

(a) that person was then being supplied with any controlled drug by or on the prescription of another doctor and failed to disclose that fact to the first mentioned doctor before the supply by him or on his prescription; or

(b) that or any other person on his behalf made a declaration or statement, which was false in any particular, for the purpose of obtaining the supply or prescription.

.....

Cultivation under licence of cannabis plant

12. Where any person is authorised by a licence of the Secretary of State issued under this regulation and for the time being in force to cultivate plants of the genus Cannabis, it shall not by virtue of section 6 of the Act be unlawful for that person to cultivate any such plant in accordance with the terms of the licence and in compliance with any conditions attached to the licence.

Approval of premises for cannabis smoking for research purposes

13. Section 8 of the Act (which makes it an offence for the occupier of premises to permit certain activities there) shall not have effect in relation to the smoking of cannabis or cannabis resin for the purposes of research on any premises for the time being approved for the purpose under this regulation by the Secretary of State.”

12. In a reply in 1999 to a report dated 4th November 1998 of the House of Lords Select Committee on Science and Technology “Cannabis, the Scientific and Medical Evidence” (9th Report, 1997-98, HL Paper 151, Session 1997-98), the government said that it would welcome clinical trials into the therapeutic uses of cannabis, and was willing to license medical research and trials involving cannabis or the cannabinoids. The reply is printed as appendix 2 to a report of the Select Committee dated 4th March 1999 (2nd Report 1999). In a further report dated 14th March 2001 (2nd Report 2001), the Select Committee recorded the approval of Medical Research Council (“MRC”) awards for two clinical trials, one a three-year study to assess the efficacy of cannabis extract and THC in the treatment of spasticity in sufferers from multiple sclerosis, the other a two-year study to assess their efficacy as post-operative analgesics. The MRC at the same time awarded over £600,000 to fund basic cannabinoid research. To date the licences granted and trials undertaken in relation to sufferers from MS and certain other types of pain have not led to any decision on the question whether or to what extent it might be appropriate to reschedule cannabis or any related product so as to permit any form of medicinal use, by moving it out of schedule 1 into another schedule of the Regulations and by other changes to the legislative scheme.
13. The background to the domestic legislative position outlined above consists in three United Nations Conventions on international co-operation, described in Chapter 1 of the Runciman Report. The first, the Single Convention on Narcotic Drugs 1961, was itself a consolidating measure, and is subject to a protocol added in 1972. The second and third date from respectively 1971 and 1988. The 1961 Convention entitles party states to adopt “special measures of control” and to ban such drugs altogether “except for amounts which may be necessary for medical and scientific research only,

including clinical trials” (article 2.5). The controls include limitations on manufacture, production, cultivation, importation and possession as well as requirement of labelling, keeping records, prescribing and safe custody. Activities contrary to the Convention were to be “punishable offences when committed intentionally” (article 36). Schedule IV to the 1961 Convention lists cannabis and cannabis resin among such drugs.

14. The second convention, the Convention on Psychotropic Drugs 1971, lists substances whose use is to be prohibited by party states “except for scientific and very limited medical purposes by duly authorised persons, in medical or scientific establishments which are directly under the control of their Governments or specifically approved by them” (article 7(a)). The list includes cannabinal (except dronabinol). The very restrictive wording of this Convention prevents states from permitting the listed drugs to be made available on prescription.
15. Under both the 1961 and the 1971 Conventions, any obligation to create punishable offences is subject to each state’s “constitutional limitations”. However, paragraph 8 of Chapter 1 of the Runciman Report indicates that, according to United Nations commentaries, the intention of these Conventions may not have been to cover activities of possession, purchase and cultivation when undertaken for personal use. The Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances 1988 (The Vienna Convention) supplements and strengthens the international scheme in this respect. Inter alia, it requires breaches of the conventions to be made criminal offences, and it requires that each party state establish as a criminal offence the possession, purchase or cultivation of illicit drugs for personal consumption. But it draws a distinction between the nature and severity of the sanctions which should follow from trafficking and from offences related to personal consumption. Sanctions are mandatory in the case of trafficking, but are “subject to [a state’s] constitutional principles and the basic concepts of its legal system” in the case of possession, purchase and cultivation for personal use.
16. Prior to the enactment of the Medicines Act 1968 (enacted following the thalidomide tragedy), there was limited control of only some medicines regarded as dangerous. In previous centuries cannabis and its derivatives were the subject of (largely undocumented) use in a medicinal context, but this appears to have died away by the earlier part of the last century with the advent of new and synthetic drugs. During the 1980s and 1990s there was renewed interest in the potential medical uses of cannabis and its derivatives. The Select Committee’s report of 4th November 1998, to which we have referred, examined the position in some detail. It recorded that “Use of cannabis for medical purposes is sometimes connived at by the medical professions”. It set out statements by, for example, MS sufferers as to its benefit as well as medical evidence which the Committee heard attesting to its analgesic property (chapter 5). In paragraph 5.10 the report referred to some evidence attested to by doctors that cannabis could be of benefit in relation to neuropathic pain, such as the phantom limb pain experienced by as many as 30% of amputees, for which there was no other satisfactory treatment.

17. As to the potential risks of use of cannabis, the Committee observed that “Although cannabis is not in the premier league of dangerous substances, new research tends to suggest that it may be more hazardous to health than might have been thought only a few years ago” (paragraph 4.1). The report examined both the acute (short-term) effects (paragraphs 4.3-4.10) and its chronic (long-term) toxicity (paragraphs 4.13-4.24). It said that the former include slight impairment of psychomotor and cognitive function, important for example for those driving a car or operating a machine, and delusions and hallucinations capable of being misdiagnosed as schizophrenic illness, and that cannabis may also exacerbate the symptoms of those suffering from schizophrenic illness. The Committee concluded that “These relatively rare psychological effects of cannabis are not considered to represent a serious limitation on the potential medical use of the drug, save that patients suffering from schizophrenic illness or other psychoses should be excluded. However, they do constitute an issue for public health. According to the Department of Health, cannabis contributes to the extra cost of acute psychiatric services imposed by drug misuse, although this cannot be separately costed”. With regard to chronic toxicity, the Committee said that “Cannabis can have untoward long-term effect on cognitive performance, i.e. the performance of the brain, particularly in heavy users”. The Committee also identified the consequences of smoking cannabis as the most important long-term risk associated with cannabis use, pointing out that cannabis smoke contains all the toxic chemicals present in tobacco smoke, with greater concentrations of carcinogenic benzantracenes and benzpyrenes, and that regular cannabis smokers suffer from an increased incidence of respiratory disorders, including cough, bronchitis and asthma (paragraphs 4.17 and 4-18). The Committee examined the use of two cannabinoids, legally used as medicines in the United Kingdom. Nabilone is licensed and available on prescription, but little used since the development of other more powerful anti-nausea drugs in the 1980s. However, Dr Notcutt told the Committee of his use of nabilone for intractable pain, giving as many as 50% of the patients some pain relief, but involving for a significant number of patients unpleasant side effects (unpleasant psychoactive effects and drowsiness) and an overall success rate of about 30%. Dronabinol is not licensed in the United Kingdom, but is available for prescription on a named-patient basis, since it was moved to schedule 2 (paragraph 10 above). It has been licensed by the US Food and Drug Administration for the treatment of anorexia associated with AIDs, on the basis of clinical trials showing reduction of nausea, prevention of further weight loss and improved patient’s mood. This was described by one medical witness to the Committee as “the most compelling indication” for cannabis-based medicine.
18. The Committee’s recommendations on the medical use of cannabis started by recognising “that, in all the evidence we have received, there is not enough rigorous scientific evidence to prove conclusively that cannabis itself has, or indeed has not, medical value of any sort” (paragraph 8.1). However, the Committee went on to say that they had “received enough anecdotal evidence to convince us that cannabis almost certainly does have genuine medical applications, especially in treating the painful muscular spasms and other symptoms of MS and in the control of other forms of pain” (paragraph 8.2). The Committee therefore recommended “that clinical trials of cannabis for the treatment of MS and chronic pain be mounted as a matter of urgency” (paragraph 8.3). It added that, recognising the dangers of smoking, it did not

envisage smoking being used to administer any medicine ultimately licensed, and for that reason recommended research into alternative modes of administration.

19. With regard to the Government's repeated statements that, if sufficient evidence in favour of cannabis as a medicine were produced for the Medicines Control Agency ("MCA") to be prepared to licence it, the government would amend the Misuse of Drugs Regulations to permit it to be prescribed, the Committee considered that "The problem with this policy is that it will take several years at least for this to happen" and "In the meantime 85,000 people in this country will continue to suffer the very unpleasant symptoms of MS" (paragraph 8.5).
20. In the upshot the Committee recommended that the Government should at once take steps to transfer cannabis and cannabis resin from Schedule 1 to Schedule 2 of the Misuse of Drugs Regulations, so as to allow doctors to prescribe an appropriate preparation of cannabis, albeit as an unlicensed medicine and on a named-patient basis, and to allow doctors and pharmacists to supply the drug prescribed, with the incidental effect that research without a special licence would also be possible. The Committee said that its principal reason for this recommendation was compassionate, in that illegal medical use of cannabis was quite widespread, yet it exposed patients and in some cases their carers to the distress of criminal proceedings, with the possibility of serious penalties (paragraph 8.11). A secondary reason was the Committee's view that the law appeared to be being enforced inconsistently, and in some cases with a very light hand, bringing Parliament, the Committee thought, into disrepute. A further subsidiary reason was the encouragement of research. The Committee also recommended transferring the cannabinoids remaining in Schedule 1 to Schedule 2, although it did not regard this as a priority because it was not convinced that they had a convincing medical use, and it recognised that the 1971 Convention meant that international agreement would be required (paragraph 8.10 of the report and paragraph 14 above).
21. The government's response to the Committee's report was an immediate rejection of the Committee's recommendation regarding cannabis and cannabis resin. In its explanation in the written reply referred to in paragraph 12 above, the Government referred to the "well-established procedure which prospective medicines have to go through in order to ensure their safety, quality and efficacy" and its view that "it would not be proper to allow cannabis to be prescribed by doctors before those characteristics have been scientifically established", a position which "the report admits has not been reached". The Government said that it "has very great sympathy for those whose conditions are not helped by existing medicine. But it sees no case for setting aside the controls which exist to protect the public and allowing doctors to prescribe, even on a named patient basis, raw cannabis with unknown standards of safety, quality and efficacy". It also expressed itself as "mindful of the implications for the totality of the controls on cannabis of allowing the prescription of raw cannabis before a medicinal form has been developed". As to cannabinoids, it said that, if it became clear that any cannabinoid other than dronabinol had therapeutic potential, it would seek amendment of the 1971 Convention to permit it to be placed in Schedule 2 of the Misuse of Drugs Regulations.

22. The Select Committee in its report in reply dated 4th March 1999 said that the Government's main arguments had been considered in its original report and that it continued to find them unpersuasive, when cannabis was known to be safe in terms of acute toxicity, but using it presented risks from which its current users for medical purposes were unprotected.
23. The Runciman Report in 2000 contained a further comprehensive review of the position and arguments relating to therapeutic use of cannabis. It recommended the transfer of cannabis, cannabis resin, and cannabinal and all its derivatives to Class C in the 1971 Act (a transfer which has since taken place – cf paragraph 7 above), as well as (in common with the Select Committee) a transfer of cannabis and cannabis resin from Schedule 1 to Schedule 2 of the Misuse of Drugs Regulations. The Report's overview reads:

“We have also considered the issue of the therapeutic use of cannabis. We are in no doubt that the therapeutic benefits of cannabis use by people with certain serious illnesses outweigh any potential harm to themselves or to others. We have nothing to add to the detail of the report of the House of Lords Select Committee on Science and Technology. We are particularly surprised that one of the grounds for the Government's summary rejection of its recommendations should be anxiety about the capacity of GPs to withstand pressure for the prescription of cannabis when they have always been able to prescribe heroin for pain without any apparent problem. We do not consider that the relevant International Convention prevents the transfer of cannabis and cannabis resin from Schedule 1 to 2 of the Regulations, thereby allowing its prescription. We recognise that until the current research programme produces a cannabis plant with a standard dose of THC, the main psychoactive ingredient, rules will need to be devised to govern what is to be provided under prescription, and by whom. We do not see that as an insurmountable problem. In the interim, we have recommended a specific defence in the law in the event that a person is charged with possessing, cultivating or supplying cannabis for the relief of certain medical conditions.”

In relation to this defence, the Runciman Report recommended that the burden of proof should rest upon the accused. This would, it suggested, meet this country's international obligations and enable spurious defences to be rejected.

24. The House of Lords Select Committee returned to the topic in its report dated 14th March 2001. Standing by its original report, it welcomed what it saw as “a more encouraging [governmental] attitude towards the licensing of therapeutic preparations of cannabis”, if its quality, safety and efficacy were established. It considered that the treatment of therapeutic users by prosecutors and in court by juries was inconsistent (paragraph 14), that the acquittal by some juries of cannabis users brought the law into disrepute, and that it was undesirable to prosecute genuine therapeutic users who

grow or possess cannabis for their own use (paragraph 18). It expressed concern about what it regarded as an “overly cautious stance” on the part of the MCA, which it considered placed “the requirements of safety and the needs of patients in an unacceptable balance” (paragraphs 29 and 27).

25. The government in a response published in December 2001 emphasised that “the development and peer-review of high-quality clinical trials are processes which cannot be rushed, irrespective of the need, otherwise there is the danger that an inadequate trial design would result in a flawed clinical study”, and it defended both its record in granting research licences and the MCA’s record in relation to product licences. With regard to prosecutions, it observed that their number was small, that every case depended on its circumstances, and that inevitably there would be cases where a false or unsubstantiated claim of a therapeutic need would be made. It went on:

“It is also important to remember that at each stage of the prosecution process, from the initial contact with the Police through to consideration by the courts, the scope for the exercise of discretion exists. While the law can make no distinction on the criminality of the possession of cannabis for recreational or therapeutic reasons, while the efficacy and safety of the latter remain unproved, the Government believes that the criminal justice system does allow for a sympathetic approach to the genuine therapeutic user.”

26. In March 2002 the Report of the Advisory Council on the Misuse of Drugs recommended the reclassification as a Class C drug, effected as from 29th January 2004 as referred to in paragraph 7 above, on the basis that cannabis was “less harmful” than other substances within Class B, while stating explicitly that “Cannabis is not a harmless substance and its use unquestionably risks harm to individual health and to society”. The chairman’s covering letter underlined this, adding that “the Council is anxious that the dangers associated with the use of cannabis preparations are widely known”.

The parties’ cases

27. The hearing of the five appeals started in October 2004 and was adjourned, in circumstances mentioned below, to February 2005. The appellants’ representation at both stages was as follows: Mr Quayle and Mr Wales were represented by Mr Edward Fitzgerald QC (leading Mr Mytton and Mr Cooper respectively); Mr Taylor was represented by Mr Menon, Ms Lee by Mr Eissa and Mr Kenny by Miss Hodson. The Attorney General’s Reference came before us for the first time in February 2005, when the Attorney General was represented by Mr Jonathan Rees and Mr Ditchfield by Mr Sutton.
28. When the appeals first came on before us in October 2004, differences existed in the attitudes of both the Crown and the appellants in the various appeals. We observed

that, while it was open to any appellant to argue whatever points seemed good to him or her, the Crown's attitude on general points of this importance ought to be consistent. We asked whether the matter had received attention at the highest level. It emerged after an adjournment that it had not been considered by the Crown Prosecution Service's Director of Policy, still less by the Attorney General. We were told that it was now desired to refer it to him, and that this would require a significant adjournment. We granted such an adjournment and further made clear that on the resumed hearing we wished to have a detailed exposition of and argument on the statutory scheme relating to control of drugs, which had not at that stage been put before us. When the appeals came back before us in February 2005, the Crown was represented in the cases of *Quayle*, *Wales*, *Taylor*, *Lee* and *Kenny* by fresh leading counsel, Mr Chawla QC, who had not been instructed in October 2004 and who served revised skeleton arguments, including one on the legislative scheme. Mr Chawla led Mr McGonigal in the appeals of *Quayle*, *Wales* and *Kenny* and Miss Hall in the appeals of *Taylor* and *Lee*. On behalf of the Attorney General in *Ditchfield*, Mr Rees, presented submissions supplementing and in some respects expanding those of Mr Chawla although not inconsistent with them.

29. We have when summarising the facts in paragraphs 2 to 6 identified the general nature of the issues raised in each case. To recapitulate, the primary case advanced on behalf of Messrs Quayle, Wales and Kenny is that their cultivation or preparation (and use and possession) of cannabis were all excusable in law since they genuinely and reasonably believed that these activities were necessary to avoid them suffering serious injury or pain, and that the charges against them should have been left to the jury on that basis; alternatively, that, if such activities were only excusable in law if necessary to avoid serious injury (as distinct from pain), the judge should also have left the jury to consider the charges on that basis. In this context, Mr Fitzgerald submits that, on the evidence, it was open to the jury to conclude that pain may involve or lead to psychological injury and/or that the alternative analgesic drugs may themselves cause "serious injury". In the case of *Wales* the judge is further criticised for his direction that the defence of necessity could only be available if the defendant believed that he would (i) imminently and (ii) inevitably suffer serious injury.
30. In the cases of Messrs Taylor and Lee, the contention is that the judge's ruling in each case wrongly prevented the jury considering a defence of necessity, to the effect that they acted as they did in the interests of others towards whom they reasonably regarded themselves as responsible and who they genuinely and reasonably feared would suffer serious pain and/or (if required) serious injury if they did not receive the cannabis being imported or supplied. The successful defence of Mr Ditchfield was to that effect.
31. The appellants and Mr Ditchfield remind us that a trial judge must never usurp the role of the jury. This principle was recently underlined in *Wang* [2005] UKHL 9. Not even in exceptional circumstances can or should a trial judge direct a jury that they must convict. There is no distinction in this respect between offences where the burden would lie solely on the Crown and those where the defence bears a burden. (Here, it was common ground that the burden of disproving any potentially available defence of necessity would rest on the Crown, since it was not suggested that we

could, and we see no basis on which we could, at common law introduce a reverse burden along the lines which the Runciman Committee recommended should be enacted - see paragraph 23 above). However, it remains the law that, if an issue is suggested on which there is in truth *no* evidence which the jury can be asked to consider, a trial judge is not obliged to address the jury on that issue or to leave it to the jury to consider: see per Lord Bingham at paragraph 14 in *Wang*. Likewise, if an issue is suggested based on proposed evidence which cannot possibly constitute any defence in law, a trial judge is entitled to rule that he will not leave any such issue to the jury. These propositions were not challenged before us.

32. The appellants and Mr Ditchfield buttress their submissions by a contention that, if the law does not provide potential defences in the terms which the appellants submit should have been (and which were in the case of *Ditchfield*) left to the jury, this country would be in breach of the European Convention on Human Rights. No declaration of incompatibility is sought. No notice has at any stage been given to the Crown under s.5 of the Human Rights Act 1998 of any claim to any such declaration. Mr Fitzgerald stands on his submission that this was and is unnecessary since (he submits) the court is obliged, if the legislative scheme would otherwise be inconsistent, to interpret or expand the common law defence of necessity to prevent or remove any such inconsistency.
33. The Crown's case before us operates at two levels. At a detailed level, Mr Chawla's submits that, whatever view might be taken regarding the avoidance of serious pain, 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; while the cases of *Taylor* and *Lee* concern persons who could not in reality be regarded as anything other than volunteers, operating maybe for reasons of altruism but also in the context of a commercial enterprise and not in any circumstances where they could reasonably be said to have a responsibility towards those for whose benefit they say they were acting. The Attorney General pursues the further submission that the defence of necessity does not embrace the avoidance of serious pain, and should not be extended (in this context at least) to do so.
34. Both Mr Chawla and the Attorney General also address the issues before the court at a more basic level which focuses on the nature of the statutory scheme and the effect of the contentions pursued by the appellants and Mr Ditchfield. In their submission, the appellants' and Mr Ditchfield's cases involve the proposition that a defence of necessity is available in respect of the medicinal use of cannabis, when Parliament has clearly and precisely regulated the medicinal use of drugs in a way which does not presently embrace cannabis. Mr Chawla does not submit that Parliament has impliedly abrogated the defence of necessity in all circumstances relating to the cultivation, possession, use or supply of cannabis, but he submits that there are strong public policy grounds for not treating it as covering the present conduct involving allegedly medicinal use or purposes.

35. The most basic defence in this area of the law is duress by human threats. The defence is potentially available where, through fear of wrongful violence or threats by another, a person's will is so overborne that he or she, reasonably and proportionately, acts in a way which would otherwise be unlawful in order to avoid a perceived risk of death or serious injury induced by such fear. The defence was recently considered by the House of Lords in *Hasan* [2005] UKHL 22. Lord Bingham said in *Hasan* that "the only criminal defences which have any close affinity with duress are necessity, where the force or compulsion is exerted not by human threats but by extraneous circumstances, and, perhaps, marital coercion under s. 47 of the Criminal Justice Act 1925". Necessity by circumstances is the defence relied on in the present appeals and reference.
36. In *Hasan* Lord Bingham said that it was "unsurprising" that the law in England and elsewhere "should have been developed so as to confine the defence of duress within narrowly defined limits". In this respect, we note in passing that he was also echoing a thought expressed in an early case by Lord Denning MR, who said that the doctrine "must be carefully circumscribed. Else necessity would open the door to many excuses", and by Edmund Davies LJ (*Southwark L.B.C. v. Williams* [1971] Ch. 734, 743H and 744H). Lord Bingham went on to identify certain features of duress, namely that it operates as a complete defence excusing what would otherwise be criminal conduct in relation to an innocent victim, that the onus is on the Crown to disprove duress and that, citing Prof. Sir John Smith QC, "duress is a unique defence in that it is so much more likely than any other to depend on assertions which are peculiarly difficult for the prosecution to investigate or subsequently to disprove". Later, Lord Bingham said that these features "incline me, where policy choices have to be made, towards tightening rather than relaxing the conditions to be met before duress may be successfully relied on"; and cited words of Dickson J in *Perka v. The Queen* [1984] 2 SCR 232, 250:

"If the defence of necessity is to form a valid and consistent part of our criminal law it must, as has been universally recognised, be strictly and scrupulously limited to situations which correspond to its underlying rationale".

37. Lord Bingham also pointed out that "If it appears at trial that a defendant acted in response to a degree of coercion but in circumstances where the strict requirements of duress were not satisfied, it is always open to the judge to adjust his sentence to reflect his assessment of the defendant's true culpability". This point was made in the context of the defence of duress by threats, but may be compared with other earlier judicial statements in *Howe* [1987] AC 417, 433, per Lord Hailsham (in a similar vein in the context of murder), in *Pommell* [1995] 2 CAR 607, 613-4, per Kennedy LJ (in an opposite sense in a case where it was arguable that the defendant was fulfilling the underlying legislative policy) and in *In re A* [2001] Fam 147, 234, per Brooke LJ. At its lowest, in our view, the point made by Lord Bingham points to a need to consider the appropriateness of recognising any suggested defence of necessity in the context in which it is raised.

38. The most important limitations of duress identified by Lord Bingham were these: (1) duress does not, despite the logic of the opposite argument, afford a defence to murder, attempted murder and, perhaps, some forms of treason; (2) the threat relied on must be to cause death or serious injury; (3) the threat must be directed against the defendant or his immediate family or someone close to him – in this regard, although the point was not in issue in *Hasan*, it appeared to Lord Bingham that the Judicial Studies Board’s specimen direction was “if strictly applied, ... consistent with the rationale of the defence exception” in suggesting “that the threat must be directed, if not to the defendant or a member of his immediate family, to a person for whose safety the defendant would reasonably regard himself as responsible”; (4) the relevant tests have been stated largely objectively – thus for example the threat must induce a belief in its efficacy that is reasonable as well as genuine (paragraph 23); (5) the defence is available only where the criminal conduct which it is sought to excuse has been directly caused by the threats relied upon; (6) there must have been no evasive action the defendant could reasonably have been expected to take – an “important limitation” which Lord Bingham considered to have been unduly weakened in recent years, in particular by the decisions in *Hudson and Taylor* [1971] 2 AB 202) and, so far as it purported to follow *Hudson and Taylor* on this point, *Abdul-Hussain* (17 December 1998, [1999] Crim LR 570; and (7) the defendant must not voluntarily have laid himself open to the duress relied upon.
39. In the context of point (6), Lord Bingham emphasised in paragraphs 27 and 28 “the requirement that execution of a threat must be reasonably believed to be imminent and immediate if it is to support a plea of duress”, saying that juries should be directed that “if the retribution threatened is not such as [the defendant] expects to follow immediately or almost immediately on his failure to comply with the threat, there may be little if any room for doubt that he could have taken evasive action”
40. Turning to the defence of necessity where the force or compulsion is exerted not by human threats but by extraneous circumstances, a convenient starting point is the decision in *Martin* [1988] 88 CAR 343. A husband, whilst disqualified, drove his son to work. His explanation was that his son had overslept and was at risk of losing his job if he arrived late, and that his wife had suicidal tendencies and had threatened to commit suicide if he did not do as he did. A court of appeal presided over by the Lord Chief Justice held that, however sceptically one might view that defence, it should have been left to the jury. Simon Brown J, giving the judgment, said:
- “The principles may be summarised thus. First, English law does, in extreme circumstances, recognise a defence of necessity. Most commonly this defence arises as duress, that is pressure upon the accused’s will from the wrongful threats or violence of another. Equally, however, it can arise from other objective dangers threatening the accused or others. Arising thus it is conveniently called “duress of circumstances.”
- Secondly, the defence is available only if, from an objective standpoint, the accused can be said to be acting reasonably and proportionately in order to avoid a threat of death or serious injury.

Thirdly, assuming the defence to be open to the accused on his account of the facts, the issue should be left to the jury, who should be directed to determine these two questions: first, was the accused, or may he have been, impelled to act as he did because as a result of what he reasonably believed to be the situation he had good cause to fear that otherwise death or serious physical injury would result? Second, if so, may a sober person of reasonable firmness, sharing the characteristics of the accused, have responded to that situation by action as the accused acted? If the answer to both those questions was yes, then the jury would acquit: the defence of necessity would have been established.

That the defence is available in cases of reckless driving is established by *Conway (supra)* itself and indeed by an earlier decision of the court in *Willer* (1986) 83 Cr.App.R. 225. *Conway* is authority also for the proposition that the scope of the defence is no wider for reckless driving than for other serious offences. As was pointed out in the judgment, (1988) 88 Cr.App.R. at 164, [1988] 3 All E.R. at 1029h: “reckless driving can kill.”

We see no material distinction between offences of reckless driving and driving whilst disqualified so far as the application of the scope of this defence is concerned. Equally we can see no distinction in principle between various threats of death: it matters not whether the risk of death is by murder or by suicide or, indeed, by accident. One can illustrate the matter by considering a disqualified driver driven by his wife, she suffering a heart attack in remote countryside and he needing instantly to get her to hospital.”

41. In *Pommell* [1995] 2 CAR 607 the court was concerned with a defence to a charge to possession of a loaded shotgun found in bed with the defendant. The defendant said that he had during the night persuaded someone to give him the gun to prevent him shooting some other people who had killed a friend, and that he intended in the morning to give the gun to his brother to hand in to the police. It was held that this proposed defence should have been left to the jury. Kennedy LJ giving the judgment said that “The strength of the argument that a person ought to be permitted to breach the letter of the criminal law in order to prevent a greater evil befalling himself or others has long been recognised, ... but it has, in English law, not given rise to a recognised general defence of necessity, and in relation to the charge of murder, the defence has been specifically held not to exist”. However, he continued, “that does not really deal with the situation where someone commendably infringes a regulation in order to prevent another person from committing what everyone would regard as being a greater evil with a gun”. After referring to *Martin*, Kennedy LJ went on to agree with a commentary on *DPP v. Bell* (1992) RTR 335 in which Prof. Sir John Smith QC said that the defence was not limited to road traffic offences, but on the contrary “being closely related to the defence of duress by threats, appears to be

general, applying to all crimes except murder, attempted murder and some forms of treason”.

42. In *Abdul-Hussain*, Rose LJ giving the judgment of this court referred to *Pommell* in stating the first of eleven propositions, which was that “the defence of duress, whether by threats or from circumstances, is generally available in relation to all substantive crimes, except murder, attempted murder and some forms of treason”. But he went on, in seeking to summarise the legal position, to say as proposition 2 that “The courts have developed the doctrine on a case by case basis, notably during the last 30 years. Its scope remains imprecise”. He also observed as proposition 7 that

“All the circumstances of the peril, including the number, identity and status of those creating it, and the opportunities (if any) which exist to avoid it are relevant, initially for the judge, and, in appropriate cases, for the jury, when assessing whether the defendant’s mind was affected as in 4 above [that is so as to overbear his will]”.

This test is at the least suggestive of a situation which the judge and jury can assess on the basis of objectively ascertainable and available material.

43. The Crown relies before us upon this court’s decision in *Rodger & Rose* [1998] 1 CAR 143. The facts there involved a break-out from Parkhurst Prison which the two defendants sought to excuse on the basis that the Home Secretary had increased their original tariffs and they had become suicidal. The prosecution was prepared to concede that the break-outs were because of contemplated suicide, which would have taken place had the break-outs not occurred. The court in a judgment given by Russell LJ held that no such defence was available. It distinguished all previous cases, including *Martin*, *Conway* and *Pommell* as having one factor not present in *Rodger & Rose*, namely that the feature causative of the defendant committing the offence was in all these cases

“extraneous to the offender himself. In contrast, in these appeals it was solely the suicidal tendencies, the thought processes and the emotions of the offenders themselves which operated as duress. That factor introduces an entirely subjective element not present in the authorities. if these appeals were to succeed it would involve an extension of the law upon this topic as hitherto reflected in authority and would introduce an entirely subjective element divorced from any extraneous influence.

We do not consider that such a development of the law would be justified, nor do we think that such an extension would be in the public interest. If allowed it would amount to a licence to commit crime dependent on the personal characteristics and vulnerability of the offender. As a matter of policy that is

undesirable and in our view it is not the law and should not be the law.”

44. *Rodger & Rose* does not mean that the defence of necessity of circumstances is never available in respect of prison-breach. As long ago as 1500, it was said in argument that a prisoner might justify an escape from a burning gaol which was necessary to save his life “for he is not to be hanged because he did not stay to be burnt” (cf *Southwark L.B.C. v. Williams*, 746B, per Edmund Davies LJ, citing Glanville Williams). On behalf of the appellants and Mr Ditchfield it is submitted that, in so far as it excluded suicide, *Rodger & Rose* can be regarded as a decision based purely on public policy considerations in the particular context of prison sentences. It is also submitted that it only relates to suicide by the defendant him- or herself, and attention is drawn to *Martin* as a case where a threat of suicide by a third party was regarded by this court as capable of giving rise to a potential defence of necessity. It is submitted that, at all events outside the content of prison-breach, there is no logical or satisfactory distinction between action necessary to avoid one’s own and someone else’s suicide.
45. The appellants also rely on this court’s judgment in *Shayler* [2001] EWCA 1977; 1 WLR 2206 (CA); on appeal [2003] 1 AC 247 (HL). In giving the Court of Appeal’s judgment, Lord Woolf CJ said that any definition of the precise limits of the defence of duress and necessity was fraught with difficulty, because its development had been closely related to the particular facts of the different cases which had come before the courts (paragraph 46). But he went on seek to identify the “core ingredients” by reference to inter alia *Martin* and *Abdul-Hussain*. Commenting on Brooke LJ’s distinction in *In re A* between cases of duress by threats or circumstances and cases of real choice (paragraph 52 below), Lord Woolf said: “None the less the distinction between duress of circumstances and necessity has, correctly, been by and large ignored or blurred by the courts”. However, he recognised that *In re F* was another case in which they were treated as different.
46. A number of other points arise from Lord Woolf’s judgment in *Shayler*. *Abdul-Hussain* is cited as making clear that the harm threatened need not be immediate but should be imminent; however, that statement itself needs care in the light of Lord Bingham’s speech in *Hasan*. Second, the question as addressed whether the alleged harm that the defendant seeks to avoid has to involve a danger to life or of serious injury, or whether it can simply be harm greater than the act done which seeks to avoid such harm. Lord Woolf answered that question by citing Smith & Hogan’s statement (9th Ed. p. 247) that “There are some cases where what was in substance a defence of necessity was allowed without identifying a threat to life or serious injury”, coupled with reference to *Gillick* and *In re F*. He then said: “However, any extension of the defence here is slight: protection of the physical and mental well-being of a person from serious harm is still being required”. If this were read as a general acceptance in all circumstances of such harm as sufficient to justify a defence of necessity, it would seem open to question, particularly in the light of Lord Bingham’s approach in *Hasan*.

47. Third, however, the court of appeal concluded that Mr Shayler did not have available to him any potential defence of necessity because

“it is inherent in the defence that it has ingredients which Mr Shayler is not in a position to establish. He cannot identify the action by some external agency which is going to create the imminent (if not immediate) threats to the life and limb of members of the general public as a result of the security service’s alleged abuses and blunders. That is a fundamental ingredient of the defence. Without it, it is impossible to test whether there was sufficient urgency to justify the otherwise unlawful intervention. It is also impossible to apply the proportionality test. Furthermore, if it is possible to identify the members of the public at risk this will only be by hindsight. This creates difficulty over the requirement of responsibility. Mr Shayler’s justification for what he did lacks the required degree of precision. There is no close nexus between his disclosure and the possible injury to members of the public. Putting it simply there was no necessity or duress as those words are ordinarily understood.”

The reference to a need for “action by some external agency” in our view reflects thinking similar to that in *Rodger & Rose*, although that case was not mentioned. The duress or necessity on which a defendant relies must be capable of objective assessment. According to this court’s decision in *Safi (Ali Ahmedi)* [2004] 1 CAR 12 (at p.157) (although this case was not, we note, commented upon in *Hasan*), a reasonable and well-founded belief in a threat or other danger may suffice. But, even assuming that that qualification is to be added, a requirement that the belief be “well-founded” imports a need for it to have been manifested externally and an ability to measure and assess it accordingly.

48. The general reasoning in *Shayler* on the subject of necessity remains open to review in the light of the House of Lords’ treatment of the subject in the same case. Lord Bingham at p.266 A-B thought it “a little unfortunate” that the Court of Appeal had followed the judge and “ventured into this vexed and uncertain territory”, when Mr Shayler had raised no question of necessity or duress of circumstances before the judge. He said:

“I should not for my part be taken to accept all that the Court of Appeal said on these difficult topics, but in my opinion it is unnecessary to explore them in this case.”

Mr Shayler’s only defence was that he had acted in the public and national interest, and Lord Bingham did not think that it was “within measurable distance of affording him a defence of necessity or duress of circumstances”. However, nothing was said specifically casting doubt on the statements in the passage quoted in paragraph 47 above, in which we see much force.

49. In *Philip David Lockwood* [2002] EWCA Crim 60 a court of appeal composed of Mitchell and Keith JJ was concerned with a renewed, non-counsel application for permission to appeal against a conviction on a charge of producing cannabis. The

applicant's only defence was necessity, founded upon his claim (not mentioned in his original interview) to have used the product of the plants medicinally to alleviate various painful symptoms both physical and mental. The applicant complained about inter alia the judge's directions to the jury on that defence, which were to the effect that the prosecution had to satisfy the jury that necessity was not a possibility, and that they could only convict if they rejected what he had to say in evidence. The gist of the complaint is likely to have been directed at the next part of the direction, which included a direction to the jury to consider whether they were sure that he only relied on this defence after he had been told about it after his interview and it had not occurred to him beforehand, followed by a direction that "If you are sure that necessity played no part in this until after the interview, then he is guilty". Be that as it may, Mitchell J in giving judgment said that in the court's judgment the "directions were both clear and correct. Having correctly directed them on necessity, the issue was left to the jury in terms which could not have been made clearer". This judgment was, when shown to HHJ Elgan Edwards DL in *Ditchfield*, decisive in causing him to change his mind and to leave the issue of necessity to the jury. In our view, that was to put too much weight on a slight foundation. The question whether it was appropriate to leave any issue of necessity to the jury at all was never argued or before the court in *Lockwood*.

50. In *Brown* [2003] EWCA Crim 2637 this court (Kay LJ, Silber and Levesen JJ) was concerned with another renewed application (non-counsel, though the transcript refers to it being renewed orally which suggests that the applicant presented it in person) for permission to appeal, following a conviction for producing a Class B drug, cannabis, contrary to s.4(2)(a) of the 1971 Act. The proposed defence was necessity arising from chronic pain. At the start of the trial, the judge had been invited by counsel to rule whether, as a matter of law on the defendant's own factual and medical evidence, there was any defence properly to be left to the jury; and, after his negative ruling, the defendant pleaded guilty and sought to appeal. Levesen J giving the judgment upholding the judge's ruling, said:

"In this case the choice facing the applicant was not severe pain without cannabis or absence of pain with cannabis, rather it was absence of pain with adverse side effects without cannabis, and, on his account, absence of pain with minimal side effects with cannabis. The difference is restricted to the adverse side effects which, however unpleasant, could not sensibly be said to raise a prime facie possibility of serious injury, let alone one such as would overwhelm the will of the defendant.

Quite apart from this point, there has to be material from which a jury could come to a conclusion that they were not sure from an objective stand point that the applicant was not acting reasonably and proportionately. The evidence makes it clear that it was possible for the applicant to control pain by conventional and legal means. These arguments are sufficient to demonstrate that the learned judge was correct to conclude that the evidence, even at its highest, was not sufficient to raise a defence to be left to the jury.

Finally, the Crown argued that in order to provide prima facie evidence of a defence fit to be left to the jury there had to be material from which the jury could conclude 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 the defendant: see *R v Roger* [1998] 1 Cr. App. R. 142, 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.

As Sir Patrick Russell, giving the judgment of the Court made it clear in that case at page 145G:

“If [the defence] is allowed it could amount to a licence to commit crime dependent upon the personal characteristics and vulnerability of the offender. As a matter of policy that is undesirable and in our view it is not the law and should not be the law.”

In the event the learned judge ruled that the evidence was not sufficient to justify leaving the defence to the jury. We agree.”

51. With regard to the references in the authorities to a need for a threat to life or of serious injury, the appellants submit that the avoidance of severe pain should be equated with the avoidance of serious injury, Mr Fitzgerald QC for Mr Quayle and Mr Wales invokes in this connection case-law concerning medical treatment and general considerations of principle. The case-law include *Bourne* [1939] 1 KB 687, *Gillick v. West Norfolk and Wisbech Area H.A.* [1986] 1 AC 142, *In re F (Mental Patient: Sterilisation)* [1990] 2 AC 1 and *In re A*. In *Bourne* Macnaghten J directed the jury that the inclusion of the word “unlawfully”, in the statutory definition of the offence of procuring a miscarriage with intent, made it incumbent on the Crown to prove that the act was not “done in good faith for the purpose only of preserving the life of the mother”, and further that, in considering whether there was any clear line of distinction between danger to health and to life, the jury should take “a reasonable view” of the latter words. He was assisted in his interpretation by an express proviso in a parallel statute (the Infant Life (Preservation) Act 1929) dealing with the situation of children after birth. In *Gillick* the House held that doctors could in certain circumstances be justified in giving contraceptive advice and treatment to under 16 year olds without parental consent (even in exceptional cases those not yet sufficiently mature to give their own consent), where this was justified as necessary in the child's best interests to avoid physical and/or mental suffering. In *In re F* the House held that doctors are, on the ground of necessity, entitled (and may even be under a duty to their patients) to act in the best interests of the lives, physical or mental health of adults unable to give consent to medical treatment, who would otherwise be deprived of the medical care to which they were entitled. In both *Gillick* and *In re F* the issue was whether doctors could act in the best interests of persons for whose treatment they were medically responsible, in circumstances where those persons could not decide for themselves. That is a very different situation from the present.

52. In *Bourne* the issue could also be viewed as involving competing interests of the parent and an as yet unborn child. In *In re A* doctors owing duties to both conjoined twins faced the clinical dilemma that any chance of saving the life of the one (Jodie) over a longer period involved an operation which would positively invade the bodies of both and necessarily end the life of the other (Mary) at once. Brooke LJ's comprehensive discussion described the "species of the genus of necessity which is caused by wrongful threats" in terms tending to equate it with "the newly identified defence of 'duress of circumstances'", which he exemplified by reference to, inter alia, *Martin*. He distinguished both from "cases of pure necessity where the actor's mind is not irresistibly overborne by external pressures" but "the claim is that his or her conduct was not harmful because on a choice between two evils the choice of avoiding the greater harm was justified" (pages 232C–236B). Brooke LJ treated this situation, at least, as one where the law might speak of conduct as justified (compare Lord Bingham's statement in *Hasan* at paragraph 18 that, in the context of duress by threats, the law is concerned with no more than a potential excuse). Robert Walker LJ at p.253H-255E also found in the previous cases concerning duress of circumstances no real assistance or clear principle or analogy applicable to the situation of clinical dilemma faced by the doctors in *re A*. Recognising that, in the absence of parliamentary intervention, the law had to develop on a case by case basis, as indicated by Rose LJ in *Abdul-Hussain*, he concluded that, on the particular facts, where Mary was on the evidence bound to die soon in any event, the doctors' fundamental duty to protect the life of Jodie justified the medical operation to separate the twins, despite its inevitably fatal effect for Mary. This reasoning in our view underlines the danger of Mr Fitzgerald's approach in so far as that seeks to extract from cases from the very different area of medical intervention general principles to be applied across the whole area of duress by threats or necessity by circumstances.
53. In the light of these authorities, we are not persuaded by Mr Fitzgerald's attempts to derive from individual authorities in different areas a coherent over-arching principle applicable in all cases of necessity. Such an attempt appears to us to pay too little attention to the particular context of individual decisions, and not to correspond with the case by case approach suggested by the authorities. However, there is a recognised defence of duress by threats, to which it is clear that the defence of necessity by circumstances bears a close affinity. Save that, in the present cases at least, the offences in question are not readily seen as involving any individual victim, the arguments which Lord Bingham mentioned in *Hasan* in favour of a confined definition appear to us applicable to any defence of necessity by circumstances.

The legislative scheme

54. In our view all the cases before us require to be addressed at a basic level at which we consider that a clear overall answer is to be found to all of them. This arises from the Crown's submissions outlined in paragraph 34 above, as well as to the appellants' acknowledgement that policy considerations may have played at least a background part in *Rodger & Rose*. The defence of necessity suggested by the appellants and Mr Ditchfield would, if it exists in law, enable individuals to undertake otherwise unlawful activities, without medical intervention or prescription, with a view to the use for medicinal purposes of cannabis either by themselves or by others for whom

they say that they assumed responsibility as unqualified medical practitioners. The legislative scheme makes the most careful provision regarding the categorisation of drugs and the production, importation, possession, supply, prescription and use of such drugs for medical or other purposes. Its starting point is that the Secretary of State shall exercise his power to enable doctors (among other qualified professionals) to have, prescribe and supply controlled drugs (see s.7(3) of the 1971 Act and the consequential provisions of the Misuse of Drugs Regulations 2001 dealing with importation set out in paragraph 11 above). But, under s.7(4), the Secretary of State may exclude the operation of s.7(3) in relation to a drug, if of the opinion that it is in the public interest that its production, supply and possession should be wholly or partly unlawful or unlawful except for purposes of research or other special purposes or except under a licence or other authority issued by him. Cannabis, cannabis resin and most cannabinoids are, under SI 2001 No. 3998 and SI 2001 No. 3997, designated as drugs which may only be used for medical or scientific research and as drugs to which s.7(4) of the 1971 Act applies (paragraph 10 above). The effect of that designation is that, whatever benefits might be perceived or suggested for any individual patients, if these particular drugs were available for medical prescription and use (other than research), such individual benefits were and are in the legislator's view outweighed by disbenefits of strength sufficient in the national interest to require a general prohibition.

55. The House of Lords Select Committee and the Runciman Committee in their weighty reports expressed the view that the present legislative regime is inappropriately restrictive, and recommended its relaxation, on grounds summarised in paragraphs 18-20 and 22-24 above, so as to permit with immediate effect the prescription by doctors of cannabis and cannabis resin as an unlicensed medicine on a named-patient basis. Whether to make such a change was a matter for the Secretary of State and Parliament. Neither took up the recommendation for any immediate change in the law. The government in early 1999 issued an unequivocal rejection of any change which would, in its view, short-circuit "the well-established procedure which prospective medicines have to go through in order to ensure their safety, quality and efficacy", and in December 2001 emphasised its view that "the development and peer-review of high-quality trials are processes which cannot be rushed" (paragraphs 21 and 25 above). The actual passage of time since the Select Committee and Runciman Reports will have reinforced the view of those who would have preferred to see those reports accepted and implemented. But the law remains unchanged, and it is the courts' role to give effect to it. There is, we would add, no basis on which we can judge, nor have we been asked to judge, whether there is anything unreasonable about the length of time being taken to complete the trials of cannabis which have been in progress.
56. The necessitous medical use on an individual basis which is at the root of the defences suggested by all the appellants and Mr Ditchfield is in conflict with the purpose and effect of the legislative scheme. First, no such use is permitted under the present legislation, even on doctor's prescription, except in the context of the ongoing trials for medical research purposes. Secondly, the defences involve the proposition that it is lawful for unqualified individuals to prescribe cannabis to themselves as patients or to assume the role of unqualified doctors by obtaining it and prescribing and supplying it to other individual "patients". This is contrary not only to the legislative

scheme, but also to any recommendation for its change made by the Select Committee and Runciman Reports. Further, it would involve obvious risks for the integrity and the prospects of any coherent enforcement of the legislative scheme. A parallel but lawful market in the importation, cultivation, prescription, supply, possession and use of cannabis would have to come into existence, which would not only be subject to no medical safeguards or constraints, but the scope and legitimacy of which would in all likelihood be extremely difficult to ascertain or control. Mr Fitzgerald cited to us Lord Scarman's ringing endorsement in *McLoughlin v. O'Brien* [1983] AC 410, 430B-D of the courts' role in developing, formulating and applying principle, ending with the words:

"By concentrating on principle the judges can keep the legal system clear of policy problems which neither they, nor the forensic process which it is their duty to operate, are equipped to resolve. If principle leads to results which are thought to be socially unacceptable, Parliament can legislate to draw a line or map out a new path."

Accepting every word of that, we consider that in the present context it cuts in the opposite direction to that for which Mr Fitzgerald contends. Neither judges nor juries are well equipped to resolve issues as to when and how far the deliberate policy of clear legislation should give way in a particular case to countervailing individual hardship, or as to what the overall effect of such derogations would be on the whole legislative scheme.

57. We are not concerned with the question whether a defence of duress by threats or of necessity by circumstances may ever be available in relation to offences under the drugs legislation, where the general scheme and policy of the legislation would not be in question. We have no doubt it may. To take an obvious example, if A forces B at gun-point to take into his possession cannabis or to smoke a cannabis joint, there would be no offence, and the defence of duress by threats is regularly suggested, though less regularly accepted by juries, in relation to charges of illegal importation of drugs. We will not either encourage or discount the possibility that there may be occasions when a defence of necessity might also run. A contrived but possible example mooted in argument concerned the patient on an island, in need of a further supply from a chemist of a particular drug licensed for prescription by a doctor to ensure his or her continued health, in circumstances where the only doctor capable of prescribing it had died or was storm-bound on the mainland. If (improbably) no prescription could be obtained in any way, might the chemist be justified in giving out a further supply without a prescription? But, whatever the answer to such an exceptional case, it has nothing to do with the situation before us. We are concerned with sufferers whose conduct contravenes the legislative policy and scheme on a continuing and regular basis, but who maintain nonetheless that this is excusable. Mr Fitzgerald submitted at one point that, in contrast to the evident ill which would (for example) result if prison-breach were held to be excusable (cf *Rodger & Rose*), any ill-effects of cannabis itself or of non-compliance with the statutory prohibitions could be seen as relatively minor compared with the risk of serious injury or pain to an individual defendant; and that it should be left to the jury in any particular case to weigh the potential ill-effects which might result (either generally or to the particular

defendant) from such non-compliance against the potential benefits to the particular defendant; and that the jury should, on that basis, determine whether or not to enforce the statutory prohibition taking account of whatever degree of need a defendant might show impelled him or her to act as he or she did. The jury has a well-established power to return a verdict of not guilty, whatever the law and however clear it may be. But to require the judge to direct the jury that they should weigh in the balance the pros and cons of enforcing the clear policy of a statutory scheme in any particular case is, in our view, a different matter. It would involve a positive invitation to the jury to act contrary to the law and to take over the role of the legislative authorities.

58. There have over recent years been cases in which a defence of medical necessity has been advanced and left to the jury in response to charges involving the cultivation, possession or use of cannabis. We were shown internet printouts of reports relating to six cases where the defence led to acquittals on charges of cultivation or possession for both personal use and supply to others. The first we were shown was in 1998. One of the acquittals was by a magistrate, the others by juries. No legislative step has been taken to remove or prevent any such defence. But we do not consider that the existence of a potential common law defence can be regarded as settled by such cases or as clear in any way which could mean that the policy and scheme of the legislation, or of the most recent statutory instruments, should be viewed as having been conceived, implemented or continued on the basis that such a defence would be potentially available.

The European Convention on Human Rights

59. We come at this point to Mr Fitzgerald's submission that, unless the common law recognises a defence of necessity by circumstances in situations such as those before us, this country would be in potential breach of the European Convention on Human Rights. So, Mr Fitzgerald submits, it is incumbent on the common law to interpret or expand the defence to cover such situations and prevent or remove any such inconsistency. The primary article relied on is article 8, protecting the private life of individual citizens. Mr Fitzgerald submits that the legislative scheme is unjustified and unsustainable, that sufferers from pain have waited long enough for it to be changed and that they are entitled to have a jury determine their guilt or innocence in that light.
60. We find it difficult to see how this argument could, if it has any validity, be of direct application to anyone other than an immediate sufferer. The clients on whose behalf Mr Fitzgerald was presenting the argument (Mr Quayle and Mr Wales) were immediate sufferers. But we can see that, if the argument is valid in relation to immediate sufferers, third parties might, in some circumstances perhaps, be better placed to argue that the common law should recognise a defence of necessity based on their sense of responsibility for such sufferers and on such sufferers' right to protection of their private life.

61. Mr Fitzgerald relied on the decision of the President, Dame Elizabeth Butler-Sloss, in *Venables and Thompson v. News Group Newspapers Ltd.*[2001] Fam. 430. The case involved the trial, albeit on written evidence, of applications for permanent injunctions to protect the claimants' identities and whereabouts from disclosure in the press in exceptional, and well-known, circumstances. In order to preserve the claimants' undoubted rights under articles 2, 3 and 8 of the Convention and taking the view that these prevailed in the circumstances over the press's and public's interest in freedom of information and expression, the President concluded that the common law of confidence could and should be extended so as to justify permanent injunctions against the whole world.
62. Mr Fitzgerald also referred us to the reasoning of the Ontario Court of Appeal which in *Parker* (2000) 75 CRR (2d) 233 held under the Canadian Charter that an absolute prohibition on possession of cannabis without any medical exemption violated the accused's right to liberty in a manner not according with principles of fundamental justice, and declared the prohibition illegal, while suspending the declaration for one year. The accused, Mr Parker, was held entitled to a constitutional exemption from the offence during the period of such suspension for the possession of cannabis for his medical needs. The possession charges against him arose from his cultivation of cannabis to control serious epileptic seizures to which he was prone after suffering severe head injuries while young. The evidence accepted by the trial judge and court of appeal was that he had no effective alternative to control his epilepsy. He had on at least one previous occasion successfully advanced a defence of necessity at common law (see the judgment of the court given by Rosenberg JA at paragraph 26). At one point Parker was apparently also contemplating such a defence to the instant charge, but he did not pursue it and "the only issue at trial was the constitutionality of the prohibition against possession or cultivation of cannabis when the accused claims that he or she requires it for medicinal purposes" (judgment, paragraph 17). The Court of Appeal found it impossible to read a relevant medical exemption into the Canadian legislation and struck down the offending prohibition accordingly (paragraph 198).
63. The Ontario Court's judgment contains a thorough and informative account of the history of the use and prohibition of cannabis, including reference to the House of Lords Select Committee Report of 1999 and a survey of the factual conclusions justified by the evidence given at Parker's trial, which led the Trial judge to find that "The evidence at trial demonstrated that the side effects of marijuana use are almost trivial compared to the side effects of the conventional medicine Parker also uses" (paragraph 145).
64. We are not in the same position as the President in *Venables*. We are not concerned, as she was, with balancing competing interests under the Convention and considering whether the common law could be extended to give effect to our conclusions. The first step in our view is to consider and ascertain the effect of the United Kingdom legislation. If the policy and scheme of United Kingdom legislation conflict with an interest protected under the Convention, and if such legislation cannot be "read down" or qualified, then extending a common law defence so as to prevent the conflict is a different exercise to any which the President undertook.

65. We are also not the same position, evidentially or above all legally, as the Canadian courts. This is apart from obvious distinctions between the terms of, and the role and powers of the Canadian court under, the Canadian Charter compared with those of, and of the English court under, the Human Rights Act 1998 incorporating the European Convention on Human Rights into United Kingdom law. In *Parker* there was evidence and a trial on the issue of incompatibility, which led to a declaration striking down an aspect of the Canadian legislation. The parallel, though less radical, procedure in the United Kingdom would involve a declaration of incompatibility under s.5. On Mr Fitzgerald's argument, however, it would seem that the Canadian court should have started, by considering whether the common law defence of necessity (on which Mr Parker had originally contemplated relying) was or could be made available, because, if it could, then there would be no incompatibility.
66. We have not had put directly before us under s.5 of the 1998 Act any issue as to the compatibility or otherwise of any aspect of the United Kingdom's current drug legislation with the European Convention on Human Rights. We have not been put in a position procedurally in which we could determine any such issue. Nor has it been suggested that the legislation can be read down or qualified, so as to create an exception permitting self-prescription or prescription by persons other than doctors in cases of exceptional pain where cannabis offers the only or the best means of avoiding or alleviating the pain. The suggestion is that, whatever the legislative policy and scheme, we should interpret or extend the common law defence of necessity so as to avoid a suggested inconsistency with article 8.
67. The legislative policy and scheme are clear. We have accepted that this does not mean that a common law defence of duress by threats or necessity by extraneous circumstances can never have a place (paragraph 57 above). But its role cannot be to legitimise conduct contrary to the clear legislative policy and scheme, as would in our view be the effect of the defences suggested in the appeals and reference before us for reasons given in paragraph 56 above. We see no basis in article 8 for altering our conclusions regarding the scope and the inapplicability of the common law defence of necessity by extraneous circumstances in the context of the present appeals and reference.
68. We add only this with regard to the evidence before us. We have been shown a good deal of material, much of it summarised earlier in this judgment. The issues which would be involved in considering the compatibility with the Convention of the United Kingdom's drug legislation if there is no relevant common law defence of necessity are not straightforward. Interference with the right to respect for private life is permissible under article 8(2) if "in accordance with the law and necessary in a democratic society for the prevention of disorder or crime, for the protection of health or morals, or the protection of the rights and freedoms of others". Within the limits indicated in *Taylor (Joseph) v. Lancashire County Council* [2005] EWCA Civ 284, the court's decision would involve an evaluation of the medical and scientific evidence, a weighing of the competing arguments for and against the immediate change recommended by the Select Committee and the Runciman Committee, a greater understanding of the nature and progress of the tests of cannabis which have taken and are taking place, and a recognition that, in certain matters of social, medical

and legislative policy, the elected government of the day and Parliament are entitled to form overall policy views about what is best not just for particular individuals, but for the country as a whole, in relation to which the courts should be cautious before disagreeing.

69. On the material before us, so far as it is appropriate for us to express any view, we would not feel justified in concluding that the present legislative policy and scheme conflict with the Convention. That is so, even if there is no common law defence of medical necessity such as that for which the appellants and Mr Ditchfield contend. We would not feel justified in concluding that either Parliament or the Secretary of State has acted inappropriately or delayed unduly in maintaining the present general policy and scheme up to the present date pending the outcome of and decisions on the basis of tests which are, we are told, still on-going.
70. For these reasons, we do not consider that the submissions based on the European Convention on Human Rights assist the appellants and Mr Ditchfield in these appeals and reference.

The detailed requirements of any defence of necessity

71. Apart from the general considerations addressed in paragraphs 54-58 above, there are also detailed requirements of any defence of necessity which are indicated by the common law authorities and which the present cases in our view lack.
72. *Extraneous circumstances.* Lord Bingham spoke in *Hasan* of the need for “a just and well-founded fear”, while accepting that threats of death or serious injury will suffice. He noted that the relevant requirements had been defined objectively, and went on (with the majority of the House) to apply the same approach when he decided that the defence was not available if the defendant ought reasonably to have foreseen the risk of coercion. It is by “the standards of honest and reasonable men” therefore that the existence or otherwise of such a fear or such threats falls to be decided. We have observed that Lord Bingham did not address or comment on the case of *Safi*, in which this court held that what matters is not whether there was actually a threat of torture, but whether there was a reasonable perception of such a threat. But that still involves an objective test based on external events, conduct or words about which evidence would have to be produced or given. It is also notable that Lord Bingham described the criminal defence which he thought had a close affinity with duress by threats as “necessity by extraneous circumstances”.
73. There is therefore considerable authority pointing towards a need for extraneous circumstances capable of objective scrutiny by judge and jury and as such, it may be added, more likely to be capable of being checked and, where appropriate, met by other evidence. Lord Bingham’s dictum fits in this regard with dicta in *Abdul-Hussain*, the decision in *Rodger & Rose* and Lord Woolf’s dicta in *Shayler* speaking of a “fundamental ingredient” of “some external agency” as well as with the non-counsel decision in *Brown*.

74. The appellants' objection to any such distinction is that it means, for example, that the commission of an offence could be excused if it was to avoid the realisation of a danger of one's wife committing suicide (cf *Martin*), but not if in that case it had been the wife herself who, realising that she would commit suicide unless she drove her son to school, had driven while disqualified (cf *Rodger & Rose*). Likewise, they suggest, the distinction could deny a defence of necessity to a person at risk of serious injury or perhaps pain, but allow it potentially to a parent or carer responsible for the well-being of such a person; and in circumstances like those in *Rodger & Rose*, a compassionate warder with responsibility for the prisoner, could release the prisoner, if he was able to detect the risk of suicide in time; while in cases such as the present, a person in or at risk of serious injury or pain could not himself engage in cultivation, possession or use of cannabis for medical purposes, but a parent or carer responsible for his upkeep could cultivate or obtain and administer cannabis to him or her for such purposes. The appellants suggest that none of these distinctions can stand scrutiny, so that *Rodger & Rose* must be regarded as a special case based on policy considerations.
75. We accept that it is right to remember the context of the decision in *Rodger & Rose*. Any court was, we think, bound to recognise the incongruous penal results and the risk of abuse that would result from recognising a defence of necessitous escape from prison based on danger that the prisoner escaping would commit suicide if he remained in custody. But, on that basis, the suggestion that a prison officer in a situation like that in *Rodger & Rose* might legitimately free a prisoner is we think likely to run into problems at a more basic level of legislative policy, which in our view the cases before us also present (see paragraphs 54-58 above). Nevertheless, although the court in *Rodger & Rose* adverted to considerations of policy when it said that the suggested defence was undesirable, it did so not to justify a particular exception in this context to the defence, but in support of a generally expressed common law exception, based on the undesirability of introducing "an entirely subjective element divorced from any extraneous influence" into the defence. On the authorities (cf. paragraph 73 above), the requirement of an objectively ascertainable extraneous cause has a considerable, and in our view understandable, basis. It rests on the pragmatic consideration that the defence of necessity, which the Crown would carry the onus to disprove, must be confined within narrowly defined limits or it will become an opportunity for almost untriable and certainly peculiarly difficult issues, not to mention abusive defences. On that basis, we consider that the Crown's first narrow point, namely that, for the defence of necessity of circumstances to be potentially available, there must be extraneous circumstances capable of objective scrutiny by judge and jury, is valid.
76. *Pain*. It is, however, submitted on behalf of Messrs. Quayle, Wales and Kenny that any such test is satisfied in all their cases both because of the objectively ascertainable facts giving rise to the pain they suffer actually, or would suffer if they were not to use cannabis, whether from their afflictions or from taking alternative lawful medicaments, and because pain is capable of some degree of objective scrutiny and is not wholly subjective. In addressing this submission, we do not gain any real assistance from cases from other areas of the law, 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. Courts and juries have to work on evidence. 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. It is unlikely that this would lead overall to a more coherent result, or even necessarily to a more just disposition of any individual case. 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. In reaching these conclusions, we recognise that hard cases can be postulated, but these, as Lord Bingham said, can and should commonly be capable of being dealt with in other ways. The nature of the sentences passed in the cases before us is consistent with this.
78. It is also submitted that the present cases involve not merely pain, but a risk of serious physical or psychological injury as a result of pain, or as a result of the alternative medicines which would have to be taken if cannabis was not. We have in the case of *Quayle* already given our reasons for rejecting on the facts Mr Fitzgerald's submission that there was any relevant risk of suicide in that case (paragraph 2(vi) above). In the case of *Wales*, the judge is criticised for failing to explain that serious pain could amount to serious injury because of its psychological consequences, but there does not appear to have been any evidence which could have justified such a case. Mr Wales did describe the pain he suffered as "life-threatening" and the judge reminded the jury of this, although it does not appear to have been Mr Wales's case that there was an actual risk of suicide. His case on the facts was that cannabis helped him cope with the pain, without side effects, while the prescribed medicines had side-effects (stopping him eating) and, on the expert evidence that he called, also involved medical risks such as a general risk of peritonitis. We do not see in the evidence any basis on which a jury could be asked to conclude that Mr Wales faced any imminent risk of serious injury sufficient to justify him taking cannabis on a regular basis. Further, if there was such a case, it was left to the jury. Finally, in the case of *Kenny*, the evidence did not suggest any risk other than that of pain, and the criticism is that that risk should have been left to the jury.
79. *Imminence and immediacy.* We consider that these requirements represent another reason why, even at the detailed level, it is difficult to accept that there could be any successful defence of necessity in the cases of *Quayle*, *Wales* and *Kenny*. Their defences amount to saying that it is open to defendants on a continuous basis to plan for and justify breaches of the law. However, we need not express a view whether that would have alone justified a judge in refusing to leave their defences to a jury. The requirements of imminence and immediacy mean, in any event, in our view that the judge was right to refuse to leave any defence of necessity to the jury in *Taylor* and *Lee*, and that the defence should not have been left to the jury in *Ditchfield*. In each of these three cases, the defendant was taking a deliberately considered course of conduct over a substantial period of time, involving continuous or regular breaches of the law. In each case, the defendant was not the immediate sufferer and had every

opportunity to reflect and to desist. The compassionate grounds which may well have motivated Mr Taylor and Ms Lee and which the jury evidently accepted did motivate Mr Ditchfield cannot avoid the fact that they deliberately chose to act contrary to the law on a continuous basis.

80. We note in passing that the court in *Southwark L.B.C. v. Williams* refused to recognise a defence of necessity raised by squatters in answer to a claim to recover possession of properties owned by the council. The evidence was that there were no homes for the squatters, they had been living in “quite deplorable conditions” and the empty council properties in which they then squatted had been vandalised by the council to make them unfit for habitation, but that they had entered and lived there in an orderly way and repaired them after entry. Nevertheless, the court upheld summary possession orders, “for the sake of law and order”, as Lord Denning put it, and because the circumstances “do not ... constitute the sort of emergency to which the plea [of necessity] applies”, as Edmund Davies LJ said. Megaw LJ agreed with both judgments on this aspect. The case is an old one, and the law has developed, so that we need not consider it further. But the underlying theme, that a continuous and deliberate course of otherwise unlawful self-help is unlikely to give rise to the defence has itself, in our view, continuing relevance.
81. The point made in paragraphs 79-80 may also be viewed in another way. Where there is no imminent or immediate threat or peril, but only a general assertion of an internal motivation to engage in prohibited activities in order to prevent or alleviate pain, it is also difficult to identify any extraneous or objective factors by reference to which a jury could be expected to measure whether the motivation was such as to override the defendant’s will or to force him to act as he did. If the response is that the defendant was not forced, but chose to act as he did, then the considerations mentioned in the previous paragraph apply.

Conclusions

82. It follows both from the general objection identified in paragraphs 54-58 and, independently, from the more detailed points addressed in paragraphs 71-81 read in each case with paragraphs 59-70 above, that none of the defendants in any of the cases before us was in our view able to rely at trial on any facts which could at common law give him or her any defence of necessity. The judicial rulings to that effect in the cases of *Quayle*, *Taylor*, *Lee* and *Kenny* were correct in the result, even though not in every case in their reasoning. The judges in *Wales* and in the *Attorney General’s Reference in Ditchfield* were wrong to leave the defence of necessity to the jury. In the case of *Wales*, the jury anyway convicted, but in the case of *Ditchfield* the jury acquitted. It follows that all the appeals will be dismissed, and the question of law on which this court’s opinion is sought by the Attorney General in the reference will be answered in the negative.