

Extraordinary Emergencies (s 25)

Legislation

25 Extraordinary emergencies

Subject to the express provisions of this Code relating to acts done upon compulsion or provocation or in self-defence, a person is not criminally responsible for an act or omission done or made under such circumstances of sudden or extraordinary emergency that an ordinary person possessing ordinary power of self-control could not reasonably be expected to act otherwise.

Commentary

Section 25 is said to be a “residual defence” and “is not an overarching provision to which resort may be had irrespective of the possible application of the Code’s more specific provisions in respect of compulsion, provocation or self-defence” – *R v Lacey; ex parte A-G (Qld)* [2009] QCA 274, [39]. If the evidence of the act grounding section 25’s potential application is sufficient to require a defence of compulsion, provocation or self-defence to be left to the jury then the opening words of section 25 exclude its operation – *R v Lacey; ex parte A-G (Qld)* [2009] QCA 274, [36]; following *R v Smith* [2005] 2 Qd R 69, 74.

In *R v Dimitropoulos* [2020] QCA 75 and *Lynch v Commissioner of Police* [2022] QCA 166 defendants unsuccessfully laid claim to s 25 to excuse production of cannabis in order to use it as the allegedly best treatment to alleviate pain. In *Dimitropoulos* at [62] Brown J, with whom Fraser JA and Henry J agreed, reasoned s 25’s reference to emergency, whether sudden or extraordinary, imports a temporal aspect in that an emergency is a circumstance requiring immediate action.

The appellant in *Lynch* urged the Queensland Court of Appeal to follow the Western Australia Court of Appeal’s decision in *Warnakulasuriya v The Queen* (2012) 261 FLR 260, where Hall J considered the apparently self-contradictory prospect of an extraordinary emergency which is not also sudden could be resolved by ascribing a meaning to “emergency” that extends beyond circumstances that are urgent or time imperative. However, the Court in *Lynch* followed *Dimitropoulos*, Beech AJA, with whom Morrison and Bond JJA agreed, reasoning at [116] that the concept of a “sudden emergency” is not necessarily tautologous in that “sudden” may be taken to refer to the manner in which the emergency arose, rather than speaking to the timing of the required response.

The Benchbook authors anticipate it will be unnecessary in most cases to do more than explain that “emergency” carries its ordinary meaning and accordingly the suggested direction does not allude to the aforementioned temporal aspect.

Section 25 can be a defence to a dangerous driving charge – see *R v Sheldon* [2014] QCA 328, [36].

The existence of the emergency may be the product of an honest and reasonable, but mistaken, belief, in which case mistake of fact per s 24 should be left to the jury – see for example *R v Warner* [\[1980\] Qd R 207](#).

Suggested Direction

Our law provides a person is not criminally responsible for an act or omission done or made under such circumstances of sudden or extraordinary emergency that an ordinary person possessing ordinary powers of self-control could not reasonably be expected to act otherwise.

It is not for the defendant to prove this defence of emergency applies in the present case. It is for the prosecution to exclude its application and to do so beyond a reasonable doubt. This the prosecution will do if it excludes any one of the constituent parts of the defence, which I will refer to as elements.

The elements of the defence of emergency which have the effect of excusing a defendant from liability for an act or omission are:

- 1. there existed circumstances of sudden or extreme emergency; and**
- 2. the defendant's act or omission was done or made under those circumstances; and**
- 3. those circumstances were such that an ordinary person possessing ordinary powers of self-control could not reasonably be expected to act otherwise.**

If the prosecution cannot exclude beyond reasonable doubt the possibility that these three elements were all present at the time of the alleged offence

then the defence will apply to excuse the defendant from criminal liability. However, if the prosecution excludes one of more of those elements then the defence will not apply. (Consider providing the jury with Appendix A, which replicates the above paragraph, as an aide memoire.)

The first element requires you to consider whether there may in fact have been circumstances of sudden or extreme emergency [if it is clear that the circumstances at issue are properly described as “sudden” as distinct from “extreme”, or vice versa, it will be sufficient to refer to one rather than both descriptions]. **The word emergency carries its ordinary meaning. The factual circumstances which are here said to potentially constitute circumstances of sudden or extreme emergency are ...** [Here identify the circumstances which prompt the potential application of the defence and what it is about them that is said to be sudden or extreme. Where it is in issue whether the circumstances were present or whether they were sudden or extreme identify the factual issues which the jury must resolve in considering this element].

If you are satisfied beyond reasonable doubt that the circumstances I have mentioned were not present or that, if they were, they were not circumstances of sudden or extraordinary emergency, then the defence will not apply. However, if you think the possibility that there existed circumstances of sudden or extreme emergency has not been excluded beyond a reasonable doubt then it would remain for you to consider the other two elements.

The second element requires you to consider whether the defendant’s act or omission was done or made under the circumstances of sudden or

extreme emergency just discussed in respect of element 1. The requirement that the act or omission was “done or made under” such circumstances requires that the defendant acted as the defendant did because of the stress of those circumstances upon the defendant. If the circumstances just discussed in element 1 were not known to the defendant or if the defendant behaved as the defendant did for reasons unrelated to those circumstances, then it will not have been an act or omission done or made under those circumstances. [If there may have been a mistake by the defendant as to the true state of those circumstances, explain the defence of honest and reasonable mistake of fact per s 24 and its potential application to this defence - see chapter 29 of this Benchbook.] **In the present case ...** [Here identify the factual issues which the jury must resolve in considering this element].

If you are satisfied beyond reasonable doubt that the defendant’s act or omission was not done or made under circumstances of sudden or extreme emergency, then the defence will not apply. However, if you think the possibility that the defendant’s act or omission was done or made under such circumstances has not been excluded beyond a reasonable doubt, then it would remain for you to consider the third element.

The third element requires you to look at the circumstances of sudden or extreme emergency under which you consider the defendant may have acted and ask yourselves: were those circumstances such that an ordinary person possessing ordinary powers of self-control could not reasonably be expected to act otherwise? To exclude this element the prosecution must satisfy you, beyond reasonable doubt that the defendant’s reaction in the

circumstances was outside what you could reasonably expect of an ordinary person with ordinary powers of self-control. A person in a sudden or extraordinary emergency may make what appears in calm hindsight to be a wrong choice but you must look at the situation as it presented itself in the emergency of the moment. The defendant is not expected to be wiser or better than an ordinary reasonable person in the same circumstances; and you will appreciate that a person in an emergency cannot always weigh up and deliberate about what action is best to take. Such a person must act quickly and do the best the person can. In the present case ... [Here identify the factual issues which the jury must resolve in considering this element].

If you are satisfied beyond reasonable doubt that the prosecution has excluded the possibility the circumstances under which the defendant acted were such that an ordinary person possessing ordinary powers of self-control could not reasonably be expected to act otherwise, then the defence will not apply. However, if you think that possibility has not been excluded beyond a reasonable doubt, then, if the prosecution cannot exclude any of the other elements either, the defence will apply to excuse the defendant from criminal responsibility and you must find the defendant not guilty.

Appendix A

R v

Elements of the Defence of Emergency

<p>The elements of the defence of emergency which have the effect of excusing a defendant from liability for an act or omission are:</p>
<p>(1) there existed circumstances of sudden or extreme emergency; and</p>
<p>(2) the defendant’s act or omission was done or made under those circumstances; and</p>
<p>(3) those circumstances were such that an ordinary person possessing ordinary powers of self-control could not be reasonably expected to act otherwise.</p>
<p>If the prosecution cannot exclude beyond reasonable doubt the possibility that these three elements were all present at the time of the alleged offence then the defence will apply to excuse the defendant from criminal liability. However, if the prosecution excludes one of more of those elements then the defence will not apply.</p>