

The Hans Tiede Case and the Spelunkers

How might the necessity defense work in practice? Is it really workable? As an aid in answer to this question, consider the following very real, case:

Hans Tiede was a waiter in East Berlin, with a Polish wife and two children (one of them was named John, after John F. Kennedy). He wanted to go to “the West,” but not surprisingly was denied permission the twelve times he applied. His wife, being Polish, was able to move to West Berlin, took the children with her, and left it to Tiede to find his way there.

Ingrid Ruske was a waitress in East Berlin, divorced with a small daughter, and in love with a West German engineer. They had planned to escape to West Berlin by boarding a Polish cruise ship in Gdansk with fake Western ID’s. Ingrid, somewhat fearful, wanted someone else to try the strategy first. She remembered her former boyfriend, Hans Tiede, who was agreed to play guinea pig.

Hans and Ingrid flew to Gdansk to wait for the engineer to bring them their ID’s. He never came. East German agents had gotten wind of his efforts through their underground network in West Berlin and arrested him when he reentered East Berlin. The would-be fugitives guessed what had happened. What to do now? Their own arrests could not be too far off, since the photographs on the engineer’s fake ID’s would clearly give them away. They couldn’t stay in Poland much longer, since they had no money left. In fact, their only assets were the return tickets to East Berlin, which they had bought merely to avoid arousing suspicion. Hans suggested hijacking the plane to West Berlin. Unfortunately, he had no weapon. As they aimlessly wandered through the streets of Gdansk. Ingrid’s daughter drew their attention to a toy gun in a shop window. It looked real enough, Hans thought. He sold some of his clothing and bought the gun.

They got on the plane, LOT flight 65, quite easily, by putting the gun into the child’s luggage. Airport security in fact searched their bags and found it, but thought nothing of it when they saw it was a toy. The moment of truth came when the pilot announced the plane’s imminent landing at East Berlin’s Schoenefeld Airport. Ingrid began to have second thoughts. Wouldn’t the Gdansk control tower have told the pilot the gun was a toy? Hans brushed aside her reservations, ordered a stewardess at “gunpoint” to take him into the cockpit, stormed into the cockpit, keeping the stewardess with him as a “hostage,” and ordered the crew to take the plane to West Berlin. There were 68 passengers on board the airplane. Everyone reacted calmly. The pilot checked with the East Berlin airport, then with the West Berlin airport and within a few minutes the plane had landed in West Berlin. By this time, Hans’ relationship with the crew was almost cordial. He had told them why he did what he did, had passed around pictures of his wife and children, and by the time the police led him away the captain even flashed a thumbs-up sign. Before the plane took off again, eight other East Germans had decided to stay in West Berlin as well. West Germany, East Germany, Poland, and the United States were all parties to an international agreement to prosecute hijackers. But West German authorities did not welcome the idea of prosecuting the case.

The West German Constitution at the time made all Germans, including East Germans, West German citizens and gave them a “protected right” to enter West Germany. West Germany did not at the time recognize the validity of East German travel restrictions either. In fact, an East German body guard who shot and killed a fleeing East German was regarded under West German law at the time as having committed murder. Since the Americans continued to exercise the power of an occupying force in West Berlin, the West German authorities asked them to convene an American court to try the hijackers. The Americans obliged, setting up a special United States District Court of Berlin, Judge Herbert Stein of the United States District Court of New Jersey presiding.

Ingrid Ruske was never brought to trial. Her part in the hijacking was evidently minor. The only proof of her involvement was a statement she made to an interrogator. The judge ruled that the statement had been improperly obtained and ordered it suppressed. Stripped of its evidence, the prosecution withdrew the charges against her.

The case against Hans Tiede, however, went forward. He was charged with hijacking, taking a hostage, depriving other persons of their liberty, and doing bodily injury to a stewardess.¹

Hans Tiede pleaded not guilty on grounds of necessity. What do you think? Does he have a case?

Tiede's Necessity Defense

Tiede claimed that he was simply asserting his rights under the West German Constitution. Remember: at this time, prior to the collapse of the Berlin Wall and the merger of East and West Germany into a single nation, the West German Constitution did not recognize the border between the two countries nor did it recognize the distinction between “East” and “West” Germans. An East German who successfully escaped from East to West was simply regarded by the West German constitution as a German citizen traveling within his or her own country. Tiede pointed out at his trial that he and Ingrid Ruske were threatened with imminent arrest by East German agents and that the only way for them to avoid arrest was to hijack the plane. Tiede also argued that he had secured not only his own and Ingrid Ruske’s freedom but the freedom of eight other East Germans who seized the opportunity to defect. Remember, the Model Penal Code’s understanding of the necessity defense: “The harm or evil sought to be avoided by [one’s] conduct [must be] greater than that sought to be prevented by the law defining the offense charged.”

Does the Harm Avoided Outweigh the Harm that Tiede Caused?

The prosecution argued that Tiede’s conduct had indeed caused harm. By hijacking the plane he had “endangered the lives and safety of 68 innocent people” aboard Lot flight 165. The pilot had to land on an unfamiliar airport that was not designed for planes of the size of flight 165. He had also caused mortal anguish to the stewardess. And, the prosecution might have argued, had the judge allowed the argument, that if Tiede was not convicted in this case, this might lead countries like East Germany, along with other countries in the Eastern block, to stop adhering to international anti-hijacking agreements. In any event, the prosecution argued that “the harm sought to be prevented by the offense” far outweighed the harm that Tiede had “avoided” by hijacking the plane. What do you think? Would you free Tiede on grounds of necessity? If not, why not?

Voluntarily Assumed Risk?

What about the argument that Tiede had somehow got himself into the predicament of having to flee or be arrested and so was not entirely blameless in bringing about the offense,

¹ The American Judge who presided in the Tiede Case, Judge Herbert J. Stern wrote a book about this case, see Herbert Stern, *Judgment in Berlin*, Universe Books (1984). Leo Katz re-tells the story in his *Bads Acts and Guilty Minds*, p. 36-38.

i.e., the hijacking of the airplane, with which he was charged? If so, he should (perhaps) not be allowed to plead necessity. But is the situation really a situation of Tiede's own making?

A Reasonable Belief?

What about the argument that Tiede's conduct was not really necessary after all because he could have applied one more time for a visa or permission to travel to West Berlin, i.e., he should have exhausted all legal means to get from the one place (the East) to the other? Or (perhaps) he should have waited for the Berlin Wall to come down: another few years and he would have been able to walk across the Potsdamer Platz into West Berlin on his own two legs? But remember Tiede had applied 12 times for permission to leave and had been denied permission in each and every case. And would it be reasonable to expect him to anticipate the fall of the Berlin Wall? After all, most American political scientists, who were European specialists, failed to make this prediction. Did Tiede have a reasonable belief?

Self-defense?

The necessity defense has affinities with a plea of self-defense and like a plea of self-defense, the necessity defense, if successful, relieves the defendant of any and all guilt. But self-defense is circumscribed by a number of conditions. If those conditions are not met, the defense cannot be sustained. A plea of self-defense is appropriate in those circumstances where the defendant reasonably believed that it was necessary to take the action he did in order to avert an immediate and direct threat against his person by another. Note that there are several features of the plea of self-defense that distinguish it from the necessity defense. The threat, for instance, that the defendant sought to avert must be immediate and direct. Thus, a person is justified in defending himself against an immediate and direct attack. If he pushed his attacker down — Unlike the spelunkers, Tiede found himself in a situation where he might plead self-defense. He was threatened with imminent arrest by East German agents. But under the West German constitution the crime for which he was threatened with arrest did not exist. His arrest would then amount to an abduction of sorts or a kidnapping. To avoid being abducted or kidnapped, he hijacked the plane. What's wrong with this defense? Or is it a perfectly good defense?

Duress?

What about duress? Could Tiede argue that he committed the offense — no argument there, no argument over the facts of the case — but he did so as the result of undue pressure and so the court should acquit him on grounds of duress. The Model Penal Code (2.09(1)) states: "It is an affirmative defense that the actor engaged in the conduct . . . because he was coerced to do so by the use of, or the threat to use, unlawful force against his person . . . that a person of reasonable firmness in his situation would have been unable to resist." Isn't that exactly the situation in which Tiede found himself? Wasn't the threat of imminent arrest by East German agents, a "threat to use unlawful force against his person." Remember the West German Constitution. The threat of imminent arrest was a threat to prevent Tiede from travelling to West Berlin which was a "protected right" under the West German Constitution. Put your attorney's hat on: what do you think of this defense? Are you happy with it? What about the Spelunkers? Might they plead duress, too?

The Model Penal Code defines "duress" quite specifically, however: "It is an affirmative defense that the actor engaged in the conduct charged to constitute an offense, because he was coerced to do so by the use of, or threat to use, unlawful force against his person or the person of another, that a person of reasonable firmness in his situation would have been unable to resist." Notice that "duress" does not just mean "being under strain" or "being in a stressful situation." "Duress" requires that the actor be threatened by another person who coerces him to do something against his will. This suggests that Hans Tiede may be on much more solid ground if he were to try this defense than would be the Spelunkers.

Should Tiede Dispute the Facts of His Case?

As his attorney, how would you advise Hans Tiede on this score? Could he argue, for instance, that his conduct was not (not really) a hijacking after all? Remember when he left the plane and was led away across the tarmac the pilot gave him “a thumbs up sign.”

Apparently, by the time the plane landed in West Berlin, Tiede’s relationship with the crew “was almost cordial.” Indeed, “he had told them why he did what he did” and “had passed around pictures of his wife and children.” Perhaps most significantly of all: “it seemed to [Tiede that] *the captain had known all along that he was carrying only a toy gun.*” (emphasis added) For it to be a hijacking, isn’t it necessary for the hijacker to “force” the pilot to take the plane to a place to which he does not want to go. What if you could show, as Tiede’s attorney, that the pilot and crew “went along” with Tiede?

Is Tiede, Strictly Speaking, Even a Hijacker?

And what about the argument that the sort of thing that the hijacking law itself and the international agreements were designed to prevent was not the sort of thing that Tiede did? Would it be a good legal strategy to go back and take a look at the law and the international agreements, to try to find out what those who drafted the laws and agreements had in mind in the first place? Whom were these laws designed to protect and what (exactly) were they designed to prevent? After all, Tiede was not your typical terrorist. And what about his intentions, his motives? Do they make a difference? Would you bring up the fact that Tiede simply wanted to be re-united with his Polish wife and two children? He made no “political” demands, required no ransom. What difference, if any, do these “facts” make in the defense and prosecution of this case?

What was the Verdict?

So what did the jury decide in Hans Tiede’s case? How did they find? Was he “guilty” or “not guilty?” A jury is a strange creature. It is made up of twelve citizens drawn from the general population. It is very rare that the jurors will have had any legal training whatsoever. (Why do we leave such important decisions in the hands of lay-people?) They listen to the facts of the case as presented by lawyers and their witnesses under the supervision of a judge. In Hans Tiede’s case the judge was Judge Herbert Steiner of the United States District Court of New Jersey. The West Germans did not wish to try the case. They reminded the Americans that they were still an occupying force and asked us to convene an American court to try Hans Tiede and Ingrid Ruske. A special United States District Court was set up in West Berlin where the trial was held. The jurors were drawn from the West German population. When the lawyers finished with their presentations, Steiner instructed the jury in the relevant rules of law. So in Hans Tiede’s case the jurors heard about the rules pertaining to hijacking, inflicting bodily injury, the taking of hostages, and depriving persons of their liberty. Then they were sequestered and they deliberated for two days. Their conclusion in each instance had to be unanimous. So what was their verdict?

They found Hans Tiede not guilty of hijacking, not guilty of inflicting bodily injury, not guilty of depriving “other” persons of their liberty, but guilty of taking a hostage. How could they find that necessity justified the first three offenses but not the taking of a hostage? Their verdict appears inconsistent. Do juries have to be consistent? The answer, quite simply, is “no.” What guarantee was there that they would correctly apply the rules given to them by Judge Steiner? “None.” What prevented them from acquitting Hans Tiede on three of the four charges merely on the grounds that he seemed (to them) to be a decent fellow? “Nothing.” A jury’s acquittal is above challenge or reproach. Juries are free to disregard a rule or a law it does not like and to acquit a defendant if it pleases. In about one fifth of all cases a jury acquits a defendant whom a judge would have convicted, usually because the jurors disagree with some aspect of the law under which the defendant is charged.

So, is there anything in the Tiede Case that tempts you to change your mind about the Speluncean Case? Anything? Anything at all? How do you decide?

Are the Spelunkers guilty or not guilty?