

Law Relating to Self Defence

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People are often concerned that they may face legal proceedings if they use force against an assailant and in so doing cause injury (or death) to that assailant. The law relating to self defence is extremely complex and these pages aim to provide a comprehensive insight into the subject.

We have endeavoured to state the law as it stood on 16 June 2010.

The lawyers' practitioner's text (Archbold 19-41) states:

"It is both good law and good sense that a man who is attacked may defend himself. It is both good law and good sense that he may do, but only do, what is reasonably necessary."

A person may need to avail himself of this legal defence if he faces charges following an incident where he has used force to defend himself, another person, property, or as a result of attempting to prevent a crime. The defence, therefore, goes much further than just "self defence".

The concept of the defence exists both at common law and by statute. At common law the defence has existed for centuries and permits a person to use reasonable force to:

1. defend himself from attack
2. prevent an attack on another person
3. defend his property

In addition to the common law defence, section 3 (1) of the Criminal Law Act 1967 (the statutory defence) provides (*see, also, the Criminal Justice and Immigration Act 2008, below*):

"A person may use such force as is reasonable in the circumstances in the prevention of crime, or in effecting or assisting in the lawful arrest of offenders or suspected offenders or of persons unlawfully at large."

An interesting point of construction arises in connection with the statutory defence where it can be seen that the section refers specifically to the use of force. What is not clear is whether anything less than force may be used. It is submitted that since the common law

permits conduct which amounts to less than force and since section 3 (1) permits the use of reasonable force, anything less than force ought to be permitted.

However, this may not be the position following the Divisional Court's ruling in *Blake [1993] Crim LR 586*. A vicar was one of a group of demonstrators protesting about the use of force by the allied coalition against Iraq. He was charged with causing criminal damage after he used a marker pen to write a Biblical quotation on a concrete pillar next to the Houses of Parliament. He argued that he was carrying out the instructions of God and therefore had a lawful excuse under section 5 (2) (a) of the Criminal Damage Act 1971 and, further, relying on section 5 (2) (b) of that Act, his actions were intended to protect the property of another. His appeal against conviction for causing criminal damage was dismissed. The Court also considered whether his actions may have been justified by section 3(1) of the Criminal Law Act 1967 and held that his conduct was "insufficient to amount to the use of force within the section".

What would have been the position had Blake used a hammer and chisel (i.e. force) to cut the letters into the concrete instead of using a marker pen? To the extent that this case suggests that actions which are less serious than using force might not be excused when the use of actual force might be, a further authority on this point would be welcome.

Self defence: a common law or statutory defence?

There is considerable overlap between the common law and statutory defences (see below). It was held in *Cousins [1982] QB 526* that both defences are available to an accused on the same facts. Section 3 (2) of the Criminal Law Act 1967 provides that the statutory defence should be used in preference to the common law rules in cases where there is overlap.

If the victim strikes an attacker in self defence, he could contend at common law that he was using reasonable force to defend himself. He could also contend that he was using reasonable force to prevent a crime from being committed, namely an assault against himself. This second argument is the statutory defence.

In the statutory defence, a person is permitted to use reasonable force to prevent the commission of a crime, in circumstances where he cannot so avail himself at common law. For example, if a person uses force to prevent another from supplying a controlled drug, he cannot rely on the common law defence and the statutory defence will therefore apply.

A good example of the statutory defence can be seen from *Renouf [1986] 2 All ER 449* where the accused was charged with reckless driving after having forced another vehicle off the road and rammed into it after the occupants of the other car had assaulted him and caused damage to his car. The Court of Appeal held that his actions were intended to assist in the lawful arrest of the occupants of the other car. The question of whether or not the amount of force used was reasonable was a matter to be determined by the jury.

Conversely, there are circumstances where a person cannot rely on the statutory defence: for example, where the perpetrator of the offence he is trying to prevent is below the age of criminal responsibility (*doli incapax*) or is insane or is acting in a state of automatism and for these reasons is not considered capable in law of committing a crime. In these circumstances, since no crime will have been committed, the person will be able to rely only on the common law defence. The House of Lords held in *Jones (Margaret) [2007] 1 AC 136* that the word "crime" in relation to section 3 (1) refers only to a crime under English law and not to a crime that exists only under international law. In this case, the accused was an anti-war protestor who had trespassed and caused damage to military bases in the United Kingdom in protest against the war in Iraq. She sought to rely on the defence under section 3 (1) on the ground that she was attempting

to prevent an international crime of aggression being committed against Iraq. Since aggression is not a criminal offence under English law, the defence failed.

Similarly in *Bayer [2004] 1 WLR 2856* the defence was rejected where the accused attached themselves to tractors to try and prevent the planting of genetically modified maize. They had argued that the maize would cause damage to neighbouring property. The court rejected the defence because as the maize was being planted lawfully they were not acting to prevent a crime.

A defence of "quasi self defence" was noted by the Court of Appeal in *Re A (Children) (Conjoined Twins: Medical Treatment) [2001] 2 WLR 480* which concerned the lawfulness of the medical separation of the conjoined twins Mary and Jodie. The medical evidence was that Mary (who was the weaker of the twins) was, by sharing Jodie's heart, killing Jodie. Lord Justice Ward stated that the availability of such a plea of quasi self defence, modified to meet the quite exceptional circumstances nature had inflicted on the twins, made intervention by the doctors lawful, notwithstanding that no crime had been committed.

See, also, the Criminal Justice and Immigration Act 2008, below.

The wider meaning of "self defence".

If ever there was any doubt as to the authority for using self defence, the words of Lord Parker CJ in *Chisam (1963) 47 Cr App Rep 130* are helpful. His Lordship said:

"... where a forcible and violent felony is attempted upon the person of another, the party assaulted, or his servant, or any other person present, is entitled to repel force by force, and, if necessary, to kill the aggressor".

The authority for self defence, of course, doesn't stop with defending oneself from attack. It is perfectly permissible to use reasonable force to assist another person who is under threat of attack. For example, in *Rose (1883) 15 Cox CC 540* the accused was acquitted of murdering his father, whom he shot dead, whilst the father was launching a murderous attack on the accused's mother.

Similarly, in *Duffy [1967] 1 QB 63* the court held that the accused was justified in using reasonable force in order to defend her sister; not because they were sisters, but because "there is a general liberty as between strangers to prevent a felony".

The court in *Hussey (1924) 18 Cr App Rep 160* held that the defence may also be used in the protection of property. In this case, the accused had fired a gun through a hole in the door which was made by his landlady who was attempting (wrongly) to evict him from his home. The landlady was injured. Lord Hewart CJ said that the accused was in exactly the same position as a man who was defending his home and that such actions could be lawful.

Does a trained person need to warn an attacker before taking steps to defend himself?

There is a common misconception that a person who has received training in combat skills is under a duty to warn his attacker of this expertise prior to him taking any physical steps to defend himself. This is not the case. Such a person is treated the same as an untrained person although it is open to a jury to find that because of his training his actions were not reasonable.

Is the defender under a duty to retreat?

The answer is "no" although it will be compelling evidence for the jury that the defender acted reasonably if he retreated as far as he possibly could before responding physically. However, this has not always been the position.

For example, in the case of *Julien [1969] 1 WLR 839* the court held that retreating was seen as a pre-requisite of establishing the defence of self defence. It was said that the defender must "demonstrate by his actions that he doesn't want to fight". This case was followed by *McInnes [1971] 1 WLR 1600* where the reasonableness of the defender's actions might be looked at in the light of his willingness to "disengage and temporise". However, this is no longer the current position in English law.

The present position is stated in *Bird [1985] 1 WLR 816* where the Court of Appeal said that a demonstration by the defender's conduct that he did not want to fight is the best evidence that he was acting reasonably and in good faith in self defence; but it is no more than that. A person may in some circumstances act lawfully in self defence without temporising, disengaging or withdrawing.

However, if the only reasonable course of action is to retreat, then to stand and fight would likely be seen as using unreasonable force.

The response must be reasonable/proportionate: "reasonable force".

This is the most important aspect of the defence. Despite the suggestion of total objectivity in the word "reasonable", the test of whether the accused acted reasonably is judged by the reactions of the reasonable person, who finds himself in the accused's situation.

In *Palmer [1971] AC 814* (Privy Council) Lord Morris said:

"If there has been an attack so that the defence is reasonably necessary, it will be recognised that a person defending himself cannot weigh to a nicety the exact measure of his necessary defensive action. If a jury thought that in a moment of unexpected anguish a person attacked had only done what he honestly and instinctively thought was necessary that would be most potent evidence that only reasonable defensive action had been taken."

Thus, for example, in *Reed v Wastie [1972] Crim LR 221* Lane J was satisfied that a considerable amount of force was reasonable and justified in circumstances where a violent and abusive driver was obstructing the highway.

In *Cross v Kirkby, The Times, 5 April, 2000*, Mr Cross attempted to disrupt a hunt. Upon seeing his partner being led forcibly away by Mr Kirkby he produced a baseball bat and attacked Mr Kirkby with it. Mr Kirkby managed to gain control of the bat and hit Mr Cross, with considerable force, causing a fracture of the skull. In an action for damages Mr Cross was awarded damages in respect of the fractured skull. Mr Kirkby appealed against the award, arguing that he had acted in self defence and that in any case Mr Cross should not be allowed to rely on his own unlawful conduct. The Court of Appeal allowed his appeal and held that although the medical evidence showed that the blow suffered by Mr Cross was harder than average, that did not displace the conclusion that Mr Kirkby had acted in self defence, which was supported by other evidence.

In the alternative, Mr Cross's case would also fail on the ground that it arose from his own unlawful conduct. The principle *ex turpi causa non oritur actio* ("from a dishonourable cause an action does not arise") means that a claimant is prevented from succeeding in a claim intrinsically related to his own illegal conduct in which the court would be seen to condone such behaviour. It was not necessary for the claimant to rely on or plead his own criminal conduct for the principle to apply, as long as the action was inseparably linked to the unlawful conduct.

These cases acknowledge the fact that whilst a court can take its time to consider the reasonableness of the accused's response, the accused himself has no such luxury and must act instantaneously and, therefore, exact proportionality is not considered necessary. This was confirmed by the Court of Appeal in *Oatridge (1991) 94 Cr App Rep 367* where it was held that one of the matters which needed to be determined by the court was whether the accused's response was "commensurate with the degree of danger created by the attack".

Of course, it follows that a threat of force may be held to be reasonable where actual force would not be: *Cousins [1982] QB 526*.

Guidance as to whether the degree of force used was reasonable in the circumstances of a case can now be found in the Criminal Justice and Immigration Act 2008, section 76 (7) of which provides:

- (a) that a person acting for a legitimate purpose may not be able to weigh to a nicety the exact measure of any necessary action; and
- (b) that evidence of a person's having only done what the person honestly and instinctively thought was necessary for a legitimate purpose constitutes strong evidence that only reasonable action was taken by that person for that purpose.

The "legitimate purpose" referred to in section 76 (7) (a) means the purpose of self-defence or the defence of another person under common law or the prevention of crime or effecting or assisting in the lawful arrest of persons under section 3 (1) of the Criminal Law Act 1967 and section 3 (1) of the Criminal Law Act (Northern Ireland) 1967 which relate to the use of force in the prevention of crime or making an arrest.

The question of proportionality arises in the 2008 Act. Section 76 (6) makes plain that the degree of force used by a person is not to be regarded as having been reasonable in the circumstances as he believed them to be if it was disproportionate in those circumstances.

The Act makes plain in section 76 (8) that the above is not to be read as preventing other matters from being taken into account by a court where they are relevant in deciding the question of whether or not the force used was reasonable in the circumstances. There is, in effect, no material difference between the 2008 Act and the common law in this regard although we now have for the first time a statutory framework for determining what amounts to "reasonable force" for the purposes of the common law of self defence as well as the defences provided by section 3 (1) of the Criminal Law Act 1967 and section 3 (1) of the Criminal Law Act (Northern Ireland) 1967 (see above).

Section 76 has been criticised. Professor Michael Allen, Commissioner at the Criminal Cases Review Commission and formerly Professor of Law at Newcastle Law School has described it as "one of the worst examples of gesture politics resulting in pointless legislation... To the extent that it simply legislates for what case law has already established, it was pointless" (Textbook on Criminal Law, 2009, Oxford University Press).

Householders and Intruders - "Grossly disproportionate" force.

Partly in response to concerns that householders were afraid to tackle intruders in case they were later sued by the intruder, section 329 of the Criminal Justice Act 2003 provides that where a person has been convicted of an imprisonable offence he will only be entitled to sue for trespass to the person (the civil equivalent of an assault) in relation to the same incident where the amount of force used against him was "grossly disproportionate" in the circumstances. It is submitted that the "grossly disproportionate" test is fairer to a person seeking to plead self defence than the test of "reasonable force".

However, with the limited exception of the specific circumstances provided in section 329, the test for self defence remains that of reasonable force.

It is a fact that very few householders have ever been prosecuted for actions resulting from the use of force against intruders.

One recent case which provoked considerable public concern is the case of *Hussain & Hussain [2010] EWCA Crim 94*. In this case, the defendants chased after and beat intruders who had burgled their home where they were subjected to a very serious attack by four armed intruders. The Lord Chief Justice of England and Wales, Lord Judge, stated in relation to the force they used against some of the intruders whom they chased and caught:

"This was not vigilante activity. This was not a planned attack. It did not follow careful or even momentary reflection. Munir Hussain acted under extreme provocation. His involvement in this serious violence was a response to the dreadful and terrifying ordeal, and the emotional anguish which he had undergone. He had used some minor, entirely legitimate, violence towards Walid Salem when he threw the small table at him in his house and so helped set off the chain of events which brought the ordeal of his family to an end. Once he had been violent, his relief that his family and he himself were safe, and his understandable fury at what had happened, combined to make a decent, peaceful man act entirely out of character, in hot blood and, unsurprisingly, without detached reflection. His home had been invaded by a gang of armed men. He and his family were treated with contumely. They were in effect kidnapped in their own home. He feared for their lives. He feared for the honour of his wife and daughter. He did not know what had happened to his youngest son, and feared for what might already have happened. Those fears were amply justified. Thanks to his own efforts, at least in part, all of them were lifted. He might have reacted, as some would, with an overwhelming sense of relief and fatigue, and become incapable of any action. He did not. Nevertheless, it remains the fact that whatever he did in the immediate aftermath was a reaction. In such a fraught situation, provoked beyond endurance, and without contemplating what to do for the best, he reacted against one of the men who was responsible for everything that he and his family had undergone."

As a result, the sentence handed down to Munir Hussain was reduced from 2 years, 6 months' immediate imprisonment to 12 months' imprisonment suspended for 2 years and the sentence of Tokeer Hussain was reduced from 3 years and 3 months' imprisonment to a term of 2 years' imprisonment.

How is the "reasonableness" test assessed - objectively or subjectively?

In *Owino (1996) 2 Cr App Rep 128* the accused assaulted his wife and was charged with an assault occasioning actual bodily harm, contrary to section 47 of the Offences Against the Person Act 1861. His defence was that he had used no more than reasonable force to defend himself. The trial judge directed the jury to the effect that the prosecution had to prove that the accused did not believe that he was using reasonable force. He was convicted. His appeal against conviction was on the basis that the trial judge had not stated that the test of what force was reasonable was to be subjectively assessed. The appeal was dismissed. It was held that a person may only use such force as is (objectively) reasonable in the circumstances as he (subjectively) believes them to be and is not entitled to use the degree of force which he believes to be reasonable. Thus the trial judge had been more favourable to the accused than he needed to be. This case has clarified the uncertainty which may have existed following the decision in

Scarlett [1993] 4 All ER 629 where the Court of Appeal held the test to be unequivocally subjective.

The judgment in *Owino* has made it clear that although the accused is entitled to be judged on the facts as he believed them to be (the subjective element), it is the jury which decides how much force is reasonable (the objective element). To adopt the words of the Court of Appeal, a person "may use such force as is (objectively) reasonable in the circumstances as he believes them to be".

In *Drane [2008] EWCA 1746* the Court of Appeal criticised the trial judge who directed the jury in the following words: "... The first question is 'Was it necessary to do what he in fact did?' If it was not necessary then that is the end of self-defence". This was put in language as to what the objective observer might consider to be necessary without any reference to the accused himself. Quashing the accused's conviction for assault, the Court of Appeal said that this direction failed properly to direct the jury that they must be satisfied that the accused did not act in a way which was justified on the basis of what he himself believed to be the position, thus confirming the part-subjective nature of the defence.

The dual objective/subjective aspect of the defence is replicated in section 76 (3) and (4) of the Criminal Justice and Immigration Act 2008.

It is also reflected in the direction that trial judges provide to juries, as set out in the Judicial Studies Board specimen direction on self defence:

"You must first ask whether the defendant honestly believed that it was necessary to use force to defend himself at all ...

If you are sure that the defendant did not honestly believe that it was necessary to use force to defend himself, he cannot have been acting in lawful self-defence, and you need consider this matter no further. But what if you think that the defendant did honestly believe or may honestly have believed that it was necessary to use force to defend himself?

You must then decide whether the type and amount of force the defendant used was reasonable. Obviously, a person who is under attack may react on the spur of the moment, and he cannot be expected to work out exactly how much force he needs to use to defend himself. On the other hand, if he goes over the top and uses force out of all proportion to the [anticipated] attack on him, or more force than is really necessary to defend himself, the force used would not be reasonable. So you must take into account both the nature of the attack on the defendant and what he then did...".

The accused's characteristics.

Another important question arises in relation to the accused's physical and mental characteristics. If an accused has a physical handicap such that he might not be able to escape a threatened attack which an able-bodied person might be able to escape from can be taken into account by a court when considering the reasonableness of the accused's actions. However, a person's psychiatric condition, which might make him perceive the circumstances as being more dangerous than a person without such a condition cannot be taken into account. Thus, in *Martin (Anthony Edward) [2003] QB 1* the Court of Appeal held that the farmer who had disturbed burglars in his isolated farmhouse and had fired his shotgun at them, killing one and wounding the other, was not entitled to admit as evidence his psychiatric condition that meant that he would have perceived the circumstances as being more dangerous than would a person without such a condition.

This decision is unnecessarily restrictive and worrying. Proper psychiatric evidence may be of crucial importance as to the accused's belief as to the circumstances and the danger. It is also inconsistent with other aspects of the law. For example in *Martin (David Paul)* [2000] 2 Cr App R 42 the Court of Appeal allowed the accused to adduce psychiatric evidence as to his beliefs in respect of the defence of duress. It is also inconsistent with the decision of the Privy Council in *Shaw* [2001] 1 WLR 1519 where it was decided that issues involving the determination of reasonable force should be dealt with by taking into consideration not only the circumstances of the incident but also the danger that the defendant believed existed.

If the accused acts by mistake in using force.

Where the accused believes that he is under attack and acts with reasonable force in self defence to repel the attack, and it turns out that, in fact, he was mistaken and that he was not under attack after all, he will still be entitled to rely upon the defence of self defence, as the court considers the defence from the accused's own viewpoint. In other words, in this regard, the test as to whether the accused was acting in self defence is considered subjectively.

In *Oatridge* (1991) 94 Cr App Rep 367 the accused believed that her partner was about to kill her since he had a history of previously abusing her. The Court of Appeal held that provided the accused had acted under an honest mistake of fact a trial judge should direct a jury on whether her response was commensurate with the attack which she believed she faced.

In *Williams (Gladstone)* [1987] 3 All ER 411 the accused believed that he was witnessing a person being assaulted, whereas in fact, the person was being lawfully arrested. The accused intervened and in so doing attacked the man making the arrest. At his trial, the accused said that he intended only to use lawful force to prevent what he thought was a crime from being committed. The Court of Appeal quashed his conviction holding that he was to be judged on the facts as he honestly believed them to be whether or not that belief was a reasonably held one. As Lord Lane CJ pointed out at p415:

"Even if the jury come to the conclusion that the mistake was an unreasonable one, if the defendant may genuinely have been labouring under it, he is entitled to rely on it".

The decision in *Williams (Gladstone)* has now been placed in statutory form by the enactment of the Criminal Justice and Immigration Act 2008, sections 76 (4), (5) and (6).

The exception to the rule that a mistaken belief need not be reasonably held is in relation to agents of the state. It was held in *Caraher v United Kingdom* (2000) 29 EHRR CD119 that mistakes made by agents of the state must be based on both honest and reasonable grounds so as not to violate the European Convention on Human Rights.

Williams (Gladstone) is a criminal case. In civil cases, any mistake must be both honestly held and reasonable: see, *Ashley & Another v Chief Constable of Sussex Police*, below.

However, if the accused's mistaken belief arises out of his own voluntary intoxication, he will not be permitted to rely on the mistake in his defence. The following case illustrates this position clearly.

In *O'Grady* [1987] 3 WLR 321 the accused had been drinking with the deceased and they returned to his flat where they both fell asleep. The accused was awoken by blows to his head by the deceased, and retaliated with what he considered to be a few mild blows, after which he fell asleep again. When he later awoke, he found the body of the deceased who had died as a result of his blows. At his trial, he claimed that because he was drunk, he had mistaken the amount of force he needed to protect himself from the deceased's

assault. The trial judge directed the jury that the accused was entitled to rely on the defence of self defence, and that he was to be judged on the facts as he believed them to be, but added that he was not entitled to go beyond what was reasonable by way of self defence and the fact that he might have mistakenly exceeded this position because he was drunk, did not afford him a defence. His conviction was upheld on appeal. Lord Lane CJ said that where the mistaken belief as to the amount of force needed to defend himself arose because of self-induced intoxication the defence of mistake would not be available.

Finally, mention should be made to cases where the accused applies force to either a police officer or officer of the court which would be reasonable if that person were not a police officer or officer of the court and the accused honestly believed that that person was not such an officer. In these circumstances, it was held by the Court of Appeal in the civil case of *Blackburn v Bowering* [1994] 3 All ER 380 that provided the accused's belief was honestly held he will be able to avail himself of the defence of self defence even if his belief was unreasonably held.

The threatened harm must be imminent, although the response need not be spontaneous.

The law permits a person to prepare to repel an attack. In *Attorney-General's Reference (No.2 of 1983)* [1984] QB 456 the accused had produced and kept in his shop petrol bombs at a time when there was extensive rioting in the area. The Court of Appeal held that there was evidence on which the jury might have decided that the use of the petrol bombs would have constituted reasonable force in self defence against an attack and, if so, the accused would have had the petrol bombs for "a lawful object". The Court of Appeal emphasised the need for any threat to be imminent. This position was confirmed by Lord Griffiths in *Beckford* [1988] AC 130.

The accused must not have deliberately provoked or created the situation for which he intends to rely on the defence.

The defence of self defence will fail where the accused intentionally provoked the attack so as to kill or otherwise injure, purportedly in self defence. In the Northern Irish case of *Browne* [1973] NI 96 Lowry LCJ stated:

"The need to act must not have been created by conduct of the accused in the immediate context of the incident which was likely or intended to give rise to that need ... Where a police officer is acting lawfully and using only such force as is reasonable in the circumstances in the prevention of crime or in effecting the lawful arrest of offenders or suspected offenders, self defence against him is not an available defence."

In *Malnick* [1989] Crim LR 451 the accused was travelling to see a man whom he believed to be in possession of stolen vehicles belonging to his friend. He understood that this person was violent and, for this reason, took with him a martial arts weapon known as a rice-flail. He was arrested before he reached the other person's property. His claim that since he feared attack he was justified in carrying the rice-flail was rejected on the ground that the danger was of his own making.

The Court of Appeal pointed out in *Rashford (Nicholas)* [2006] Crim LR 547 that a person may still plead self-defence in a case where he killed another during an argument which he himself started, either by provoking it or willingly entering into it, and the other person then retaliated. The mere fact that a defendant went somewhere to exact revenge from the victim did not of itself rule out the possibility that in any violence that ensued self defence was necessarily unavailable as a defence.

The accused aims a blow at X but inadvertently injures Y.

A situation might arise where a person aims a blow at X but misses his intended target and instead injures Y who is an innocent bystander. The law relating to this kind of situation is known as "transferred malice". This is perhaps an unfortunate term since it might suggest that the accused has acted with malice although this is not a requirement for a person to be convicted.

In *Latimer (1886) 17 QBD 359* the accused aimed a blow at his intended target which glanced off him and struck another person who was standing nearby causing her serious injury. The court held that Latimer could be convicted of maliciously wounding the woman on the grounds that his intention was to injure and that it was not relevant that the victim was not his intended target.

The position is, however, different where a person acts with the *mens rea* (guilty mind) of one offence but commits the *actus reus* (physical act) of different offence except in circumstances where the offence in question is one where the *mens rea* can be satisfied with recklessness and the accused was reckless as to the risk of the kind of harm he actually caused. An example of this type of situation can be seen from *Pembliton (1874) LR 2 CCR 119* where the accused, who had been fighting with others in the street, threw a stone at them which missed and instead smashed a window in a nearby public house. His appeal against conviction for maliciously damaging the window was allowed because he had acted with the intention of injuring persons and not with the intention of damaging property. The court observed that had the jury found that Pembliton had been reckless as to the risk of damaging property then his conviction would have been upheld because recklessness was a sufficient *mens rea* for the offence charged.

The consequences of a person's actions were unexplained.

It was held by the Court of Appeal in *Attorney-General's Reference (No.2 of 1983) [1984] QB 456* that it is irrelevant if the consequences of an accused's actions were unexpected. Therefore, if the accused shoots his victim intending to kill him but the bullet misses and instead strikes a box of fireworks nearby which sets off an explosion that kills the victim, it is wholly irrelevant that his victim is killed by the resulting explosion rather than the intended bullet.

Self-defence weapons.

The law does not recognise the concept of a "defensive weapon". You are not permitted to carry an offensive weapon - even to defend yourself. You may, however, provided it constitutes reasonable force, defend yourself with an ordinary everyday object, such as keys, an umbrella or a comb, provided you have them with you for their ordinary everyday purpose.

The consequences of using excessive force - an 'all or nothing' defence.

If the Court finds that the accused has used excessive force then his defence of self defence will fail and he will be guilty of the offence charged. If he has killed the other person, supposedly in "self defence", and has been charged with murder and the Court finds that he has used excessive force, his conviction will not be reduced to manslaughter and he will be guilty of murder, provided the Court is satisfied that he intended to kill or cause serious bodily harm from which the death resulted.

This was seen in the case of *Clegg [1995] 1 All ER 334* where the accused, a soldier on duty in Northern Ireland fired four shots at a car (later known to be stolen) which failed to stop at a checkpoint. The Court accepted that the first three shots were fired either in self defence or in defence of the accused's colleagues, but the fourth, which killed a joyrider in the car, was not so fired on the ground that the car had by then passed the checkpoint by some 50 feet. The House of Lords upheld the accused's conviction for murder. It made no difference that the force had been used in the prevention of crime or arresting an offender or that the accused was a soldier or police officer acting in the course of his duty.

Loss of Control - a partial defence.

On 4th October 2010 a new defence will be introduced into law by section 54 of the Coroners and Justice Act 2009. This defence, abolishing the old defence of provocation, is referred to as a “loss of control” and prioritises the emotion of fear as a justification for killing. As with the old law of provocation, it applies only in circumstances where the accused has killed another person. There are three key elements to this defence:

1. a loss of control;
2. a qualifying trigger; and
3. a requirement that a reasonable person, of the accused's sex and age, with a normal degree of tolerance and self-restraint, finding himself in the circumstances of the accused, would have reacted in the way that the accused acted

If sufficient evidence is adduced to raise an issue with respect to this defence, the jury must assume that the defence is satisfied unless the prosecution proves (beyond reasonable doubt) that it is not (section 54 (5)).

Unlike the law of self-defence which, if successful, provides a complete defence to the charge, this defence, if successful, is only a partial defence and will mean that the accused is not guilty of murder but guilty of manslaughter.

In order for this defence to apply, the accused must have lost their self-control at the time of the killing. The loss of self-control need not be sudden (section 54 (2)) although any delay could be construed as evidence that the accused had not actually lost his self-control but acted out of revenge. The defence will not apply to any killing consequent upon a considered desire for revenge (section 54 (4)).

The “qualifying trigger” noted above is defined in section 55 and includes where the accused’s loss of self-control was attributable:

1. to his fear of serious violence from the deceased either against himself or another identified person – but not against an unidentified group of people (section 55 (3))
2. to a thing or things done or said which constituted circumstances of an extremely grave character and caused the accused to have a justifiable sense of being seriously wronged (section 55 (4))
3. to a combination of the above (section 55 (5))

It can be seen, therefore, that the defence will be available in circumstances where there is fear and where there is anger. This was partly justified by the Law Commission which pointed out that there is evidence that fear and anger are not distinct emotions but are frequently seen together in acts of violence.

The “fear of serious violence” as noted in section 55 (3) could be used in cases of self defence or where the accused kills a person burgling his home. In cases of self defence, the defence could be used even in cases where the defence of self defence could not be used, for example, because the accused’s reaction is deemed to have been disproportionate or where there was no imminent threat from the deceased. This is an important point because it provides a partial defence and thus avoids the “all or nothing” approach of self defence. The qualifying trigger of a fear of serious violence from the deceased will be assessed subjectively. There is no requirement, therefore, that this fear be reasonable: it only needs to be honestly held.

Interrelationship with civil law.

Even in circumstances where the accused has a defence of self defence to a criminal charge, he may still be held liable in the tort of negligence in respect of the same act:

Revill v Newbery [1996] 2 WLR 239. Thus, where an occupier of premises comes across a burglar on his land he cannot act with total disregard to the burglar's safety and the maxim *ex turpi causa non oritur actio* ("from a dishonourable cause an action does not arise") cannot be invoked to provide the occupier with what would amount to a complete defence to the burglar's claim for damages. However, even though such a complete defence may not be available to the occupier, the courts are likely to reduce the amount of the claimant's award on the ground of contributory negligence: *Revill v Newbery* [1996] 2 WLR 239 (where the damages awarded to the claimant were reduced by two-thirds).

A further distinction between the civil and criminal law was recently explained by the House of Lords in *Ashley & Another v Chief Constable of Sussex Police* [2008] UKHL 25. One of the issues for determination was whether a plea of self defence to a civil law claim for tortious assault and battery in a case where the assailant acted in the mistaken belief that he was in imminent danger of being attacked requires that the assailant acted under a mistaken belief that was not only honestly but also reasonably held.

It will be recalled that the Court of Appeal in the criminal case of *Williams (Gladstone)* held that the mistake must be honestly, although not necessarily reasonably, held (see above). In *Ashley*, the House of Lords confirmed the correctness of this decision insofar as it relates to a criminal trial but held that where self defence is at issue in a civil action the position is that "the necessity to take action in response to an attack or imminent attack must be judged on the facts as the defendant honestly believed them to be, whether or not he was mistaken, but, if he made a mistake of fact, he can rely on that fact only if the mistake was a reasonable one for him to have made", per Lord Scott.

The House of Lords rejected the argument that the criteria for self defence in civil law should be the same as for criminal law because "the ends to be served by the two systems are very different". Lord Scott stated that "To hold, in a civil case, that a mistaken and unreasonably held belief by A that he was about to be attacked by B justified a pre-emptive attack in believed self defence by A on B would, in my opinion, constitute a wholly unacceptable striking of the balance. It is one thing to say that if A's mistaken belief was honestly held he should not be punished by the criminal law. It would be quite another to say that A's unreasonably held mistaken belief would be sufficient to justify the law in setting aside B's right not to be subjected to physical violence by A. I would have no hesitation whatever in holding that for civil law purposes an excuse of self defence based on non-existent facts that are honestly but unreasonably believed to exist must fail".