# *COMMENT*

# *Private Defence and Public Defence in the Criminal Law and in the Law of Tort—A Comparison*

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On 15 January 1998 James Ashley was shot dead by Police Constable Christopher Sherwood of the Sussex Police Special Operations Unit ('SOU') during an armed raid by the SOU on Ashley's home in Hastings. The armed raid had been authorised by police authorities, and a search warrant had been obtained. The raid was part of police investigation into drug trafficking in Hastings and into the stabbing of a man in a bar in Hastings by an associate of Ashley. At 4.20 am police officers, one of whom was Sherwood, made a forcible entry into Ashley's home. Upon entry Sherwood and another police officer went to the bedroom. Ashley and his girlfriend had been asleep in the bedroom, but she, having been woken by the noise of the police entry, had woken him up and he was out of bed by the time the police entered the bedroom. Ashley was naked and no light was on. Sherwood entered the bedroom with his handgun in the 'aim' position and his finger on the trigger, and he shot Ashley dead with a single bullet to the side of the neck. It was not alleged that Ashley had any weapon in his hand at the time.

Police inquiries into the shooting were started and on 31 March 1999 Sherwood was charged with murder. At his trial on 2 May 2001, following a submission of no case to answer at the close of the prosecution case, Sherwood was, on the direction of Rafferty J, acquitted of murder and manslaughter. Rafferty J told the jury that 'there is no evidence to negative the assertion of self-defence in all the circumstances . . .'. Rafferty J's direction was given on the basis that in a criminal trial for murder the burden was on the prosecution to prove to the requisite standard of proof that the defendant did not act in self-defence. That was the end of the criminal proceedings against PC Sherwood. This is baffling as it difficult to see how shooting a naked man without giving him an opportunity to surrender can be a shooting in self-defence.

The father and son of the deceased brought civil actions as dependants under the Fatal Accidents Act 1976 and for the benefit of the deceased's estate under s. 1(1) of the Law Reform (Miscellaneous Provisions) Act 1934 against the Chief Constable of Sussex Police for damages

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for battery, negligence and false imprisonment in respect of the raid.[1] The Chief Constable admitted liability in negligence and false imprisonment and agreed to pay damages, but resisted the battery claim on the basis that Sherwood had acted in self-defence and applied for that claim to be struck out. The judge held that the burden of proving that Sherwood had not acted in self-defence lay on the claimants and that, given the lack of evidence at the criminal trial to disprove Sherwood's assertion that he acted in self-defence, the claim had no real prospect of success and was to be struck out. This was reversed in the Court of Appeal. The Chief Constable appealed to the House of Lords.[1] It was held (by a 3:2 majority) that the appeal would be dismissed. The majority gave two reasons for the dismissal. First, in criminal law it was enough if the defendant acted with an honest belief that there was an imminent danger that he would be attacked even though that belief was unreasonable. The purpose of the criminal law is to punish criminals and whilst Sherwood had made a serious mistake, he was not a criminal as he honestly believed that he was acting in self-defence when he shot Ashley. Secondly, and in contrast, the function of the civil law of tort is the protection the claimant's rights (here, in effect, Ashley's right not to be shot by Sherwood), and self-defence is available only if the belief was both honestly and reasonably held. The House of Lords made it clear that the same distinction applied to public defence.[2] The claimants had the right to seek a public finding that Ashley had been unlawfully killed even though this would not add to the quantum of damages.[3] This comment explores this distinction by setting out an overview of the criminal law on private and public defence. The overview will include a comparison with the law of tort. Consideration is also given below to whether the criminal law is moving towards the tort position because of decisions such as *R* v *Keane*[4] and whether this move should continue because of the incorporation of Article 2 of the European Convention on Human Rights into English domestic law.

## Private defence (self-defence)—an overview of the criminal law

This defence has two tests:

1. The defendant honestly believed that the victim was making an actual or imminent unlawful assault (of whatever seriousness, including murder) [or a non-criminal but unlawful attack (where the attacker is a child or is insane)] on him or her (or another) and

1 *Ashley* v *Chief Constable of Sussex* [2008] UKHL 25, [2008] 1 AC 962.
2 Ibid. at [44].
3 Lord Scott, however, suggested (at [22]) that Ashley's family might be able to claim 'vindicatory damages', which seem to be damages awarded to acknowledge that Ashley's right to life had been breached (which is guaranteed by Art. 2 of the European Convention on Human Rights and incorporated into domestic law by the Human Rights Act 1998). Normally, nominal damages have this role, but Lord Scott appeared to think that an award of vindicatory damages could be more than merely nominal. Could this be the emergence of a new category of damages?
4 [2010] EWCA Crim 2514, [2011] Crim LR 393.

that force was necessary in the circumstances ( the subjective test); and

2. The force was reasonable in the circumstances as the defendant believed them to be (the objective test).[5]

Thus, the defendant is to be judged on the facts as he honestly believed them to be. The reasonableness of the defendant's response on those facts is a matter for the jury and not for the defendant.[6] The jury can take into account 'agony of the moment' factors, which means that in many confrontations the defendant will not have an opportunity for hindsight or debate, but rather will have to act in an instant. If the defendant does so, but does no more than seems honestly and instinctively to be necessary, that is itself strong evidence that it was reasonable.[7] It is strong evidence but not conclusive evidence.[8] Where the defendant kills using a reasonable or proportionate amount of force, he will be able to choose the complete defence of self-defence, whereas if he uses excessive force, he might be able to use the partial defence of loss of control.[9]

However, self-defence is not necessarily precluded by the fact that the person defending himself was the initial aggressor.[10] In that case there is a requirement that the defendant has a *reasonable apprehension* that he was in an immediate danger.[11] In these circumstances it is not enough that the defendant honestly believes he is in danger of suffering injury if the reason why that danger arises is because the victim is acting in

5 *Beckford* v *R* [1988] AC 130 PC; *R* v *Owino* [1996] 2 Cr App R 128, CA (Crim Div), affirmed by s. 76(3) and (4) of the Criminal Justice and Immigration Act 2008 (CJIA 2008). There is the question of whether the defendant's characteristics can be taken into account when applying the subjective test. In *R* v *Martin (Anthony)* [2002] 1 Cr App R 27, the Court of Appeal held that psychiatric evidence to help the jury to comprehend what the defendant honestly believed was inadmissible. However, the court accepted that evidence of the defendant's physical characteristics would be admissible. This must be right as there will be circumstances (such as a perceived imminent attack by a man) which would not be seen as threatening to a strong young man, but would do so to a slight young woman. It is submitted that evidence of the whole person should be admissible, not just physical characteristics, as they are matters that need to be taken into account when considering the reasonableness of the force used.

6 The jury is deciding a question of both fact and law and the defendant may think that the force used was reasonable, but if the jury disagrees, then he has made a mistake of law, which is not a defence, and he will be guilty.

7 *R* v *Palmer* [1971] AC 814, affirmed by CJIA 2008, s.76(7)(b).

8 However, the defendant cannot rely on a mistaken belief about the circumstances that is attributable to voluntarily induced intoxication: *R* v *O'Grady* [1987] QB 995, CA, affirmed by CJIA 2008, s. 76(5). The subsection also applies to public defence. It has been argued that CJIA 2008 added nothing to the existing law, see I. Dennis, 'A Pointless Exercise' [2008] Crim LR 507.

9 With effect from 4 October 2010, ss 54–56 of the Coroners and Justice Act 2009 abolished the defence of provocation and introduced a new partial defence to murder involving loss of control. If the defendant succeeds in this defence, he will be convicted of manslaughter, thereby giving the judge discretion as to sentence. The upshot is that loss of control has become a defence of excessive self-defence, thus indirectly reversing *R* v *Clegg* [1995] 1 All ER 334, HL.

10 *R* v *Harvey* [2009] EWCA Crim 469.

11 *R* v *Keane* [2010] EWCA Crim 2514, [2011] Crim LR 393. But note that private defence is unavailable where the defendant deliberately provokes an attack with the intention of killing, purportedly in self-defence: *R* v *Browne* [1973] NI 96.

reasonable self-defence. There the defendant should not resist the force unless he has a reasonable apprehension that it is disproportionate. Therefore in this situation the criminal law is closer to the tort position in that the victim's autonomy becomes paramount.

## Public defence—an overview of the criminal law

Section 3 of the Criminal Law Act 1967 provides that:

> (1) 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.
> (2) Subsection (1) above shall replace the rules of the common law on the question when force used for a purpose mentioned in the subsection is justified by that purpose.[12]

It is a subjective test as to whether the defendant believed that force was necessary in the prevention of crime or in effecting or assisting in a lawful arrest, and whether the force used was reasonable is governed by an objective test.[13] Thus, generally, the same tests apply to both private defence and public defence.[14]

The tests have been succinctly described as 'a person may use such force as is (objectively) reasonable in the circumstances as he (subjectively) believes them to be'.[15] These tests were affirmed by the Privy Council in *Shaw* v *R*.[16]

So, generally, for both private defence and public defence, if the jury accepts that the defendant held an honest belief and that, in those mistaken circumstances, his force was reasonable (the prosecution being unable to dispel a reasonable doubt on both elements), then the defendant was acting lawfully for the purposes of the criminal law so there is no *actus reus* and the defendant is entitled to an acquittal.[17]

There will be cases where common law private defence will overlap with public defence. If the defendant defends another person from a murderous attack by the victim, he is acting in private defence, but also he is trying to prevent a crime. It would be a nonsense to ask the defendant whether he was acting in private or public defence. There cannot be two defences governing the same situation, so public defence should be applicable.[18] However, public defence is only available where

12 Section 3 of the Criminal Law Act 1967 states a rule both of civil and criminal law.
13 *R* v *Gladstone Williams* (1984) 78 Cr App R 276, CA.
14 *R* v *Keane* [2010] EWCA Crim 2514.
15 *R* v *Owino* [1995] Crim LR 743 at 743.
16 [2001] UKPC 26, [2002] 1 Cr App R 10.
17 The defendant remains liable in tort unless his mistake was reasonable. When discussing murder, *Smith and Hogan's Criminal Law* maintains that private defence operates to prevent the killing being murder, but if the defendant makes a grossly negligent mistake, he should be guilty of manslaughter (D. Ormerod, *Smith and Hogan's Criminal Law,* 12th edn (Oxford University Press: Oxford, 2008) 364). But how can conduct be justified for the purposes of murder, but at the same time be grossly negligent for the purposes of manslaughter?
18 Ormerod, above n. 17 at 367.

the defendant uses force in the prevention of a crime.[19] If the defendant is using force against someone who is not capable of committing a crime (because he is insane or because he is under the age of criminal responsibility), the defendant must rely on private defence, which requires 'unjust aggression', i.e. that the victim is committing a crime *or* at least an unlawful act, for example, a gun-toting six-year-old.[20]

## Should the same tests apply to private defence and public defence?

The situations faced by private defenders and public defenders are not the same. The private defender has no choice to act and no time to think and as a consequence the criminal law should be more sympathetic to the dilemma he faces by accepting an honest belief in the need for force. In contrast, the public defender decides to intervene and makes the dilemma he faces his own. This seems to point towards requiring a reasonable belief in the need for force, especially where the intervener is a public official such as a police officer who is trained to assess the situation and think before acting. Surely higher standards should be expected of trained police officers than the homeowner who is facing a burglar? In addition, public defence is wider than private defence in that crime may be prevented by recourse to force even where there is no threat to life or limb such as using force in response to an attack on property.[21] This indicates, in respect of public defence, that the criminal law should be the same as the law of tort.[22] That does lead to the question whether English criminal law on private defence and public defence is compliant with Article 2 (right to life)[23] of the European

19 Private citizens only have a power of arrest, without warrant, in respect of indictable offences which limits the number of lawful arrests and the availability of public defence (Police and Criminal Evidence Act 1984, s. 24A). However, police officers and private citizens have at common law the power to arrest a person who is committing an actual or an apprehended breach of the peace. Whilst the breach of the peace is not an offence, the arrest is lawful so public defence applies.

20 In *R* v *Burns* [2010] EWCA Crim 1023, [2010] 1 WLR 2694, the appellant, having agreed to take a prostitute in his car to a secluded area on the understanding that he would return her to where the journey had started, decided to remove her forcibly from the car at that secluded area causing her actual bodily harm. The Court of Appeal upheld his conviction for actual bodily harm holding that the appellant did not act in private defence or public defence and that self-help or recaption of property was not justified because the appellant could have regained exclusive possession of his car by returning the victim to the starting point.

21 M. Watson, 'Self-Defence, Reasonable Force and the Police' (1997) 147 NLJ 1593; J. Rogers 'Have a Go Heroes' (2008) 158 NLJ 318.

22 That said, the main reason why English private defence law is open to moral criticism is that it fails to respect the right to life of the innocent person who is unreasonably mistaken for an attacker.

23 Article 2 states:
1. Everyone's right to life shall be protected by law. No one shall be deprived of his life intentionally save in the execution of a sentence of a court following his conviction of a crime for which this penalty is provided by law.
2. Deprivation of life shall not be regarded as inflicted in contravention of this Article when it results from the use of force which is no more than absolutely necessary:
(a) in defence of any person from unlawful violence;

Convention on Human Rights when these defences are used as a defence to homicide.

## Private defence and public defence and Article 2

In cases of homicide the issue is whether English criminal law on private defence and public defence is inconsistent with Article 2 because judging the defendant on the facts as he honestly, though unreasonably, believed them to be violates the victim's right to life. Article 2(2) allows for killing where that is absolutely necessary for the exhaustive purposes listed in that article.[24] The question is: 'Does an honest belief equate with "absolutely necessary" in Article 2(2)?' It has been argued that it does not, and that to comply with Article 2 the defendant acting in private defence or public defence needs to have a reasonable belief in the need for fatal force, which is the position in the law of tort.[25] Cases decided in the European Court of Human Rights have concerned the vertical effect of Article 2 as they involve killings by state officials (police officers and members of the armed forces),[26] but the issue also relates to the use of fatal force by private citizens (horizontal effect) because Article 2 imposes a positive obligation on the UK to ensure that citizens are protected against its violation.[27]

In *McCann* v *United Kingdom*,[28] *Andronicou* v *Cyprus*,[29] and *Bubbins* v *United Kingdom*,[30] the European Court of Human Rights stated that the belief held by a defendant, who wishes to rely on one of the grounds in Article 2(2) to justify a killing, must be an honest belief, held for *good reason*. This appears to impose an objective test of absolute necessity which if applied in English law would bring criminal law in line with the law of tort. However, in *R (on the application of Bennett)* v *HM Coroner for Inner South London*,[31] Collins J held that the use of fatal force can be absolutely necessary where it is reasonable in the circumstances as honestly perceived by the state official, because an honest but mistaken belief in the need for such force can provide the 'good reason' required by the European Court.[32] Thus, Collins J would not accept the submission that Article 2(2) demanded that an alternative objective test should be applied in the case of state officials. So it appears that *Williams* and

(b) in order to effect a lawful arrest or to prevent the escape of a person lawfully detained;
(c) in action lawfully taken for the purpose of quelling a riot or insurrection.

24 The UK would violate Art. 2(1) if a state official or a private citizen uses fatal force for a reason not covered by Art. 2(2)(a)–(c) (above n. 23). Therefore, fatal force used to protect property or in the prevention of crime (which did not involve unlawful violence or a lawful arrest) would violate Art. 2(1), but is allowed under English law.

25 By A. Ashworth in his commentary to *Andronicou* v *Cyprus* [1998] Crim LR 823 at 825.

26 *McCann* v *United Kingdom* (1995) 21 EHRR 97; *Andronicou* v *Cyprus* (1997) 25 EHRR 491; *Bubbins* v *United Kingdom* (2005) 41 EHRR 458.

27 *Osman* v *United Kingdom* (2000) 29 EHRR 245, *Kilic* v *Turkey* (2001) 33 EHRR 58.

28 (1995) 21 EHRR 97.

29 (1997) 25 EHRR 491.

30 (2005) 41 EHRR 458.

31 [2006] EWHC 196 (Admin), [2006] HRLR 22.

32 Ibid. at [25]. The Court of Appeal upheld the decision [2007] EWCA Civ 617.

*Beckford* approach is consistent with Article 2(2) and there is no need, on human rights grounds, for English criminal law to be in line with the law of tort.

## Conclusion

*Pace* Collins J and the House of Lords in *Ashley*, it is submitted that the criminal law relating to public defenders should be in line with the law of tort because higher standards should be expected of, for example, trained police officers than of the private defender who is facing a burglar. Article 2 of the European Convention on Human Rights seems to demand that, as it does for the private defender who is the initial aggressor. In both situations the defender makes the dilemma his own to face and the victim's right to life should be paramount and that life should only be taken when it is absolutely necessary, which requires a reasonable belief in the need for fatal force. Contrast the homeowner or the small shopkeeper facing a burglar or a robber—in these circumstances, the dilemma facing the private defender is not his own, and absolute necessity is surely satisfied by an honest belief in the need for fatal force, especially where the private defender acts in the agony of the moment.[33]

33 Clause 131 of the Legal Aid, Sentencing and Punishment of Offenders Bill currently before Parliament amends s. 76 of CJIA 2008. The amendments will make the existing legal position clear that private defenders are not under a duty to retreat from an attacker when acting in private defence and that they can use reasonable force to defend themselves and their property. The aim of these changes is that the law relating to private defence and public defence be clearly set out in one place—whether they achieve that aim is doubtful as not all the gaps identified by Dennis, above n. 8, are closed.