

## NON-FATAL OFFENCES AGAINST THE PERSON (3)

# Self-Defence



By the end of this unit you should be able to [A01]:

- Explain what is meant by self-defence and the difference between public and private defence
- Understand the different types of self-defence, and their scope in the law
- Explain the relationship between mistake and the use of force in self defence



You should also be able to evaluate [A02]:

- The current operation of the law on self-defence and the proposals for reform.
- The amount of force that may be used in self defence
- The role of intoxication and mistake.

## Homework

Given the recent case and sentencing of Munir Hussain, the Conservatives have argued that they will change the law on self-defence. You are going to do some research and discover what they propose (is there anything concrete) and how it will affect the current law. What do you think? Does the law go far enough, or should householders have further rights to defend themselves?

Patrick Mercer MP introduced a Private Member's Bill in 2005 on this, and has written an article, following the initial conviction of Munir Hussain and his brother arguing for changes in the law. The article can be found here:

<http://www.dailymail.co.uk/debate/article-1236211/PATRICK-MERCER-Homeowner-jailed-burglar-attacked-walks-free-Vigilante-No-victim-immoral-justice-system.html>

The head of the CPS, Kier Starmer, the Director of Public Prosecutions, has said that they current law is more than sufficient, and argues his point here:

<http://www.guardian.co.uk/uk/2009/dec/28/starmer-law-change-rejection>

## End of Unit Test

You will complete a DRAG test on consent and self-defence as joint topics, and have one week to revise for this. You will also complete the following past essay question on the topic which we will plan in class first and then write up in timed circumstances:

**Discuss the argument that the justifiable use of force in self-defence depends entirely upon the circumstances in which it is used. [50]**

## Introduction

Look at the following statements – in which do you think you can use self-defence successfully?

Someone walks up to you and hits you in the face so you hit them back

You see someone about to break a shop window so you hit them to stop them

Someone walks up and hits your friend in the face so you hit them back

Someone walks up and you think they are about to hit you so you hit them first

Someone is irritating you so you hit them to shut them up

Someone walks up to you and you think they're going to hit your friend, so you hit them first.

Someone threatens to attack your friend if you do not beat another person up.

You see someone put an item in their pocket and start to walk out of a shop without paying, so you hit them to stop them getting away.

Someone is taunting you so you lose your temper and hit them.

Now read the enclosed leaflet from the CPS on Self defence. What rules on the use of self defence can you work out on the basis of this?

## So, WHY MIGHT I WANT TO USE SELF DEFENCE?

Well, really it covers the situation where force is needed to defend people or prevent crime.

They are defences of **justification** - this means that there was a reason for what you did and any other person would have acted this way. D is arguing that the force was [REDACTED] and therefore there was no offence, as one element of the AR was missing.

It is a **full** defence and is applicable to **any** crime including non-fatal assaults and murder.

We need to balance the right of you to protect yourself, others and your property with overzealous defenders or revenge / vigilante actions. So, [REDACTED] underpins most of this defence.

### Who decides?

The question is left to the [REDACTED] to decide on the basis of the evidence. As with all the other defences, where there is not evidence for the reasonable jury to decide that the defence may have been reasonably possible, then the judge may withdraw it from them.

### Burden of Proof

This is on D to raise some evidence of self defence. It is then up to the prosecution to prove that D did not act in self defence. P must then prove that:

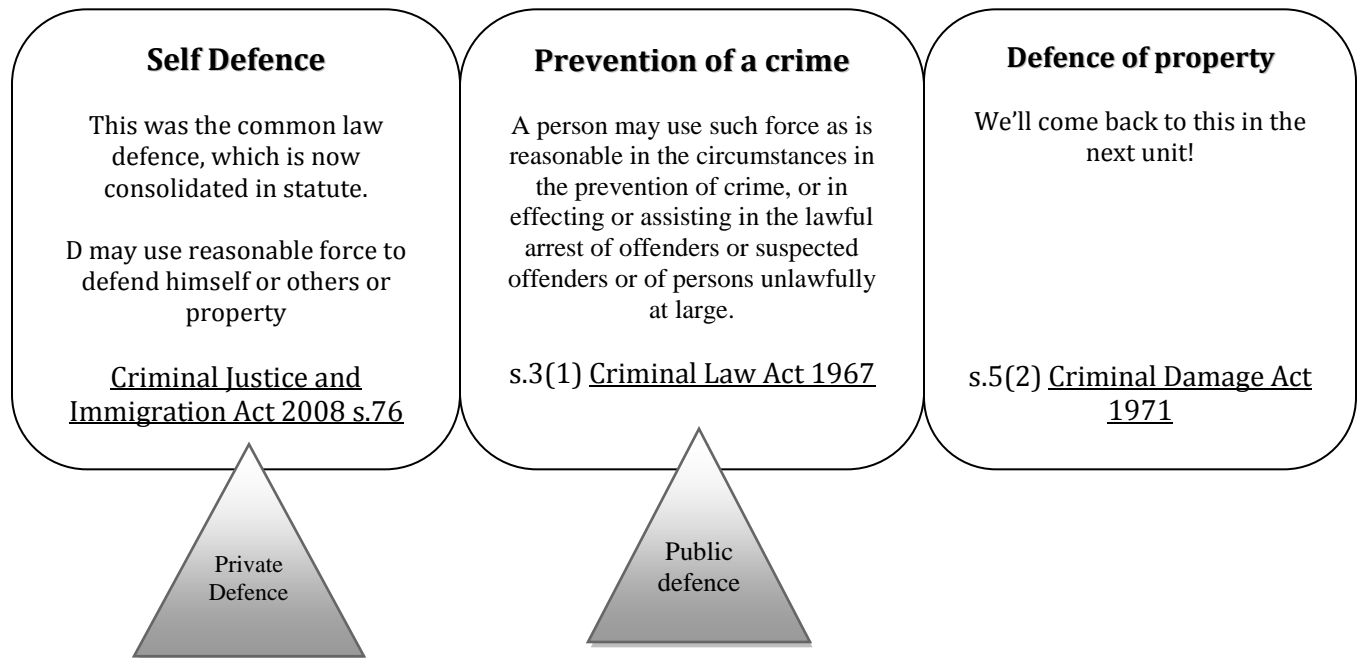
The use of any force was unnecessary;

**OR**

if some force was justifiable, the degree of force used was **unreasonable** in the circumstances

## WHERE DOES THE LAW COME FROM?

Well, actually there are three main situations when D may successfully argue self-defence and they (helpfully!) overlap



So, what's the difference? The facts of *R v Cousins 1982* are below.

D thought that there was a contract out on his life. Armed with a double-barralled shotgun he went round to the house of the father of the man he thought issued the contract. When asked what he intended to do, D replied "I want to see Kelly. I'm going to kill him. I'm going to blow his brains out."

Which would D have a defence under and why?

## SO WHAT DO YOU HAVE TO PROVE TO SUCCESSFULLY ARGUE SELF-DEFENCE?

The use of some force must be **necessary**  
AND  
The actual degree of force used must be **reasonable in the circumstances**

### So, what do we mean by 'Reasonable Force'

D may only use such force as is reasonable in all the circumstances.

**Remember:** this is a question for the jury, who must put themselves into the circumstances as D supposed they were (whether reasonable or not). This means that D might actually have made a mistake! They should therefore be able to take into account D's state of mind.

*Why do you think that this is the test?*

*R v Palmer 1971 PC \*KEY CASE\**

**Facts:**

**Ratio:**

"a person defending himself cannot weigh to a nicety the exact measure of his... 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."

What is the binding ratio in this case?

**A2 Law:**

G153 Criminal Law

This was confirmed in the English Courts in:

*R v Whyte 1987(CA)*

**Facts:**

**Ratio:**

Confirmed *Palmer*. Lane LCJ “in most cases the jury should be reminded that [D’s] state of mind, that is his view of the danger threatening him at the time of the incident, is material. The test of reasonableness is not... a purely objective test.”

There was then a (slight) problem in the following case, where the Court of Appeal suggested (well, the beautifully named Lord Justice Bedlam did) that the test was purely subjective.

*R v Scarlett 1993*

**Facts:**

**Ratio:**

Why would this decision cause problems?

So, the following case comes along, and relies on *Scarlett* in appeal, arguing that he could rely on the defence if he believed, whether reasonably or not, that the amount of force used was reasonable. In other words, it is testing the purely subjective approach of the Court of Appeal in *Scarlett*.

*R v Owino 1996 CA* \*KEY CASE\*

**Facts:**

**Ratio:**

**Student Thinking:**

Can we take into account any physical characteristics which make D perceive a greater danger than exists e.g. size, physical weakness etc.?

**Problem:** What if D suffered from a **psychiatric** condition which made him perceive a greater danger than the average person. Should we allow this to be taken into account in assessing whether or not the force used was reasonable?



*R v Martin 2002 CA*

**Facts:**

**Ratio:**

This approach was confirmed in *R v Canns 2005*, where the CA follow *Martin*. Here D was a schizophrenic. They confirmed that it was a question for the jury, considering **all the circumstances**, albeit not psychiatric.

**Stretch and Challenge!**  
**A/B Students**

Research the case of Tony Martin further (the BBC website has a great low-down on the case, and associated details.) What happened? What did he plead? On what grounds? What was the outcome of the case? Do you agree? Why/why not? There is also a documentary on FROG regarding the incident.

How could you rewrite the law to incorporate the actions of Mr Martin?

What implications would there be for the operation of the current law?

Do you think that the law should consider psychiatric evidence in assessing self defence?

## LEVEL OF FORCE

### 1. WHAT IF YOU USE EXCESSIVE FORCE?

**General Rule:** *"Excessive self-defence is no defence at all."*

X runs at you waving an axe and you shoot them in the leg.

X threatens you with a knife and you pick up a stone and knock it out of their hand.

Someone runs at you waving a giant pencil and you shoot and kill them

X threatens you with a penknife and you split their head open with an axe.

X points a gun at you and you stab them in the arm.

X backs you against a wall and you hit them over the head with a glass.

X threatens you with a knife and you hit them with a spoon.

X punches you in the face, and you punch them in the arm

BUT.... should this excessive force reduce a charge of murder to one of manslaughter?

In other words, D is acknowledging that they went beyond acceptable levels of force, **but** wish to use it as mitigation in liability.

*R v Clegg 1995* \*KEY CASE\* confirming the earlier case of *Palmer*

**Facts:**

**Ratio:**

"There is no halfway house. There is no rule that a D who has used a greater degree of force than was necessary in the circumstances should be found guilty of manslaughter an murder. The defence either succeeds or it fails. If it succeeds, D is acquitted. If it fails, he is guilty of murder." Lloyd LJ

Note: more useless information! There was a retrial ordered in 1999, and Clegg's conviction was quashed because they couldn't prove that he fired the fatal shot.



**2. WHAT IF YOU MAKE A MISTAKE AS TO THE AMOUNT OF FORCE?**

a. What happens if you defend someone who doesn't need defending? Can you still rely on the defence?

*R v (Gladstone) Williams 1987*

**Facts:**

**Ratio:**



b. What about an intoxicated mistake?

*R v O'Grady 1967.... remember!*

**Facts:**

**Ratio:**

*R v O'Connor 1991*

**Facts**

**Ratio:**

What *mistake* did the courts make here?

**A2 Law:**  
G153 Criminal Law

**3. DOES THERE NEED TO BE AN IMMINENT THREAT,**

*Malnik v DPP 1989*

**Facts:**

**Ratio:**

What does this mean?

**4. CAN YOU MAKE A PRE-EMPTIVE STRIKES OR THREAT IN SELF DEFENCE?**

Although it should be imminent, it is not necessary for an attack to be in progress. It is enough that D **apprehends** the attack. D can threaten death or attacks if it will prevent a crime or attack upon themselves.

*R v Beckford 1988 (PC)*

**Facts:**

**Ratio:**

“a man about to be attacked does not have to wait for his assailant to strike the first blow or fire the first shot, circumstances may justify a pre-emptive strike.”

*R v Cousins 1982*

**Facts:**

**Ratio:**

The trial judge said that D could not rely on self-defence, as his life was not in immediate danger. However, CA quashed the conviction, holding that it was reasonable in all the circumstances to make such a threat.

**A2 Law:**  
G153 Criminal Law

Does this cover **preparing** for an attack:

*Attorney-General's Reference (No2 of 1983) 1984*

**Facts:**

D's shop had been attacked by rioters and damaged. He was scared of further attacks and made petrol bombs.

CHARGE: possession of explosive substance, under Explosive Substances Act 1983.

**Ratio:**

How do you reconcile this and *Malnik*? Can you?

## 5. WHAT ABOUT IF YOU ACT OUT OF REVENGE?

*R v Rashford 2005*

**Facts:**

**Ratio:**

CA stated that the fact that D acts out of revenge is not enough of itself to deny self-defence. You have to look at all the circumstances of the case, and whether D honestly believed that it was necessary.

## 6. FINALLY: DO YOU HAVE A DUTY TO RETREAT?

*R v Bird 1985*

**Facts:**

**Ratio:**

Trial judge directed the jury that they should convict, if D had not demonstrated by her actions that she did not want to fight. The CA quashed her conviction, holding that this put too much obligation on D - a reluctance to fight.

## EVALUATION AND REFORM

Take a look at the enclosed article "*The self-defence law does not need unreasonable changes*" Guardian

|   |  |
|---|--|
| Can be taken into account in sentencing   |  |
| The treatment of intoxication is too harsh  |  |
| Murder and manslaughter   |  |
| There is no defence of reasonable force.  |  |
| Battered Wives?   |  |
| Is it really a defence or not?  |  |
| Can you really have a defence which allows a "honest mistake" as to the need for self-defence but also a "reasonable mistake" as to force used? |  |
| Overlaps and inconsistencies with other defences.   |  |

## Reform:

### Three things:

1. Homework – this will give you a good overview of the current debate and areas of reform, as well as how the most senior judge in the land views the topic and its interpretation.

2. Law Commission report on Murder and Manslaughter:

#### ***Excessive Force in Defence***

1.53 We have already mentioned the need for a partial defence when D, fearing serious violence from an aggressor, overreacts by killing the aggressor in order to thwart the feared attack. We are recommending that D's fear of serious violence should be the basis for a partial defence to murder through reform of the provocation defence.<sup>35</sup> This has been almost unanimously approved by consultees."

3. Criminal Justice and Immigration Act 2008 is now in force... so the chances of this being a question on your paper have gone up!

Contained within section 76 are the proposals to change the law... read the section enclosed and answer the questions... - does it actually change anything?

## Criminal Justice and Immigration Act 2008

### *Self-defence etc.*

#### 76 Reasonable force for purposes of self-defence etc.

- (1) This section applies where in proceedings for an offence—  
(a) an issue arises as to whether a person charged with the offence (“D”) is entitled to rely on a defence within subsection (2), and  
(b) the question arises whether the degree of force used by D against a person (“V”) was reasonable in the circumstances.
- (2) The defences are—  
(a) the common law defence of self-defence; and  
(b) the defences provided by section 3(1) of the Criminal Law Act 1967 (c. 58) or section 3(1) of the Criminal Law Act (Northern Ireland) 1967 (c. 18 (N.I.)) (use of force in prevention of crime or making arrest).
- (3) The question whether the degree of force used by D was reasonable in the circumstances is to be decided by reference to the circumstances as D believed them to be, and subsections (4) to (8) also apply in connection with deciding that question.
- (4) If D claims to have held a particular belief as regards the existence of any circumstances—  
(a) the reasonableness or otherwise of that belief is relevant to the question whether D genuinely held it; but  
(b) if it is determined that D did genuinely hold it, D is entitled to rely on it for the purposes of subsection (3), whether or not—  
(i) it was mistaken, or  
(ii) (if it was mistaken) the mistake was a reasonable one to have made.
- (5) But subsection (4)(b) does not enable D to rely on any mistaken belief attributable to intoxication that was voluntarily induced.
- (6) The degree of force used by D is not to be regarded as having been reasonable in the circumstances as D believed them to be if it was disproportionate in those circumstances.
- (7) In deciding the question mentioned in subsection (3) the following considerations are to be taken into account (so far as relevant in the circumstances of the case)—  
(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.
- (8) Subsection (7) is not to be read as preventing other matters from being taken into account where they are relevant to deciding the question mentioned in subsection (3).
- (9) This section is intended to clarify the operation of the existing defences mentioned in subsection (2).
- (10) In this section—  
(a) “legitimate purpose” means—  
(i) the purpose of self-defence under the common law, or  
(ii) the prevention of crime or effecting or assisting in the lawful arrest of persons mentioned in the provisions referred to in subsection (2)(b);  
(b) references to self-defence include acting in defence of another person; and  
(c) references to the degree of force used are to the type and amount of force used.

Does it overrule the common law defence?

When may D argue a defence of self-defence?

When might mistake be a defence?

When might mistake not be a defence?

When might D be acting ‘legitimately’?

## Revision Questions

Can self-defence be used against a charge of murder?

What criticisms have been made regarding the existing law on self-defence?

Why was self-defence rejected by the jury in *Martin*?

What were the facts of *(Gladstone) Williams*?

When can force be used?

What is the effect of a successful plea of self-defence?

Who has the burden of proof?

Do they need to be attacked before they can use self-defence? *Case*

Can you prepare for the possible attack?

Do they have to retreat?

What test is used to determine whether force is reasonable

What happens if D makes a mistake and wrongly thinks that self-defence is necessary? *Case?*

## **Householders and the use of force against intruders**

Joint Public Statement from the Crown Prosecution Service and the Association of Chief Police Officers

### **What is the purpose of this statement?**

It is a rare and frightening prospect to be confronted by an intruder in your own home. The Crown Prosecution Service (CPS) and Chief Constables are responding to public concern over the support offered by the law and confusion about householders defending themselves. We want a criminal justice system that reaches fair decisions, has the confidence of law-abiding citizens and encourages them actively to support the police and prosecutors in the fight against crime.

Wherever possible you should call the police. The following summarises the position when you are faced with an intruder in your home, and provides a brief overview of how the police and CPS will deal with any such events.

### **Does the law protect me? What is 'reasonable force'?**

Anyone can use reasonable force to protect themselves or others, or to carry out an arrest or to prevent crime. You are not expected to make fine judgements over the level of force you use in the heat of the moment. So long as you only do what you honestly and instinctively believe is necessary in the heat of the moment, that would be the strongest evidence of you acting lawfully and in self defence. This is still the case if you use something to hand as a weapon.

As a general rule, the more extreme the circumstances and the fear felt, the more force you can lawfully use in self-defence.

### **Do I have to wait to be attacked?**

No, not if you are in your own home and in fear for yourself or others. In those circumstances the law does not require you to wait to be attacked before using defensive force yourself.

### **What if the intruder dies?**

If you have acted in reasonable self-defence, as described above, and the intruder dies you will still have acted lawfully. Indeed, there are several such cases where the householder has not been prosecuted. However, if, for example having knocked

someone unconscious, you then decided to further hurt or kill them to punish them; or you knew of an intended intruder and set a trap to hurt or to kill them rather than involve the police, you would be acting with very excessive and gratuitous force and could be prosecuted.

### **What if I chase them as they run off?**

This situation is different as you are no longer acting in self-defence and so the same degree of force may not be reasonable. However, you are still allowed to use reasonable force to recover your property and make a citizen's arrest. You should consider your own safety and, for example, whether the police have been called. A rugby tackle or a single blow would probably be reasonable. Acting out of malice and revenge with the intent of inflicting punishment through injury or death would not.

### **Will you believe the intruder rather than me?**

The police weigh all the facts when investigating an incident. This includes the fact that the intruder caused the situation to arise in the first place. We hope that everyone understands that the police have a duty to investigate incidents involving a death or injury. Things are not always as they seem. On occasions people pretend a burglary has taken place to cover up other crimes such as a fight between drug dealers.

### **How would the police and CPS handle the investigation and treat me?**

In considering these cases Chief Constables and the Director of Public Prosecutions (Head of the CPS) are determined that they must be investigated and reviewed as swiftly and as sympathetically as possible. In some cases, for instance where the facts are very clear, or where less serious injuries are involved, the investigation will be concluded very quickly, without any need for arrest. In more complicated cases, such as where a death or serious injury occurs, more detailed enquiries will be necessary. The police may need to conduct a forensic examination and/or obtain your account of events.

To ensure such cases are dealt with as swiftly and sympathetically as possible, the police and CPS will take special measures namely:

An experienced investigator will oversee the case; and if it goes as far as CPS considering the evidence, the case will be prioritised to ensure a senior lawyer makes a quick decision. It is a fact that very few householders have ever been prosecuted for actions resulting from the use of force against intruders.



## Self defence or malicious revenge? Jail for brothers who beat burglar with bat

- Judge: public must not take law into own hands
- Hard to believe justice has been served, says defence

o James Sturcke

• guardian.co.uk, Monday 14 December 2009 22.16 GMT



Munir (left) and Toker Hussain were jailed for 39 and 30 months. Intruders tied up Munir's family and threatened to kill them. Photograph: Handout/PA

A businessman who fought off knife-wielding burglars who were threatening to kill his family was jailed for 30 months in a case that has

reignited the debate on how far householders can go to protect themselves and their property.

Munir Hussain, 53, discovered three masked men in his house when his family returned from their local mosque during Ramadan in September last year.

The burglars tied up and threatened to kill Hussain and his family but a teenage son managed to escape and alert Hussain's brother, Tokeer.

The intruders fled when help arrived at the house in High Wycombe, Buckinghamshire, but the brothers chased and caught one, Walid Salem, a criminal with more than 50 previous convictions. He was then subjected to what Judge John Reddihough described as a "dreadful, violent attack" by the Hussain brothers.

Salem was left with a permanent brain injury after he was struck with a cricket bat so hard that it broke into three pieces. The revenge attack was self-defence that went too far, Reading crown court was told.

The judge said Hussain's family had been subject to a "serious and wicked offence" and praised the bravery of his teenage son who escaped.

"This case is a tragedy for you and your families," the judge told Munir Hussain. "Sadly, I have no doubt that my public duty requires me to impose immediate prison sentences of some length upon you. This is in order to reflect the serious consequences of your violent acts and intent and to make it absolutely clear that, whatever the circumstances, persons cannot take the law into their own hands, or carry out revenge attacks upon a person who has offended them."

The brothers, described as family men at the heart of the local community, were found guilty of causing grievous bodily harm with intent after a trial earlier this year.

Munir Hussain was given a 30-month sentence while his brother was jailed for 39 months after the judge decided he had not been subject to as much provocation as his brother.

Although Salem was the only intruder caught after the incident, his injuries meant he was not fit to plead after being charged with false imprisonment. He was given a two-year supervision order at a court hearing in September.

The court heard that the case had similarities to that of farmer Tony Martin, who shot a teenage intruder, and there was public support in both cases. The law allows for people to use reasonable force to protect themselves or others, or to carry out an arrest or to prevent crime.

## A2 Law:

G153 Criminal Law

However, attacks motivated by malice or out of revenge and intended to cause injury are unlikely to constitute reasonable force, according to advice published by the Association of Chief Police Officers and the Crown Prosecution Service.

"It may be that some members of the public, or media commentators, will assert that Salem deserved what happened to him at the hands of you and the two others involved, and that you should not have been prosecuted and need not be punished," the judge added.

"However, if persons were permitted to ... inflict their own instant and violent punishment on an apprehended offender rather than letting justice take its course, then the rule of law and our system of criminal justice, which are the hallmarks of a civilised society, would collapse."

The court heard that Hussain and his wife and children feared for their lives as their hands were tied behind their backs.

Michael Wolkind, defending, said Hussain was the "real victim" in the case.

"The public surely do not want Munir Hussain to receive imprisonment. I don't seek a medal, I seek justice for him." Hussain, usually a controlled man, had acted in the heat of the moment in "extreme circumstances of stress", he said.

The prosecution said the Hussains were not being convicted for apprehending Salem, but for the "excessive force" they used on him.

Hilary Neville, prosecuting, said: "What started as reasonable self defence by Munir Hussain then turned into excessive force by virtue of a sustained attack by Munir, Tokeer and at least two others."

The court heard sentencing would have an impact on the local economy, with 10 members of staff losing their jobs at Soundsorba, the company run by Munir Hussain, who employs his brother as a technical director. The firm, which produces sound-absorbing material, has an annual turnover of £2.5m. Munir Hussain is a former winner of the Asian businessman of the year award and is head of the Race Equality Council for High Wycombe.

Speaking outside the court, Wolkind said: "The criminal justice system has failed twice. The court was unable to sentence Walid Salem with sufficient harshness, or Munir and Tokeer Hussain with sufficient compassion.

"It's difficult to believe that this outcome reflects the thinking of the public, or the interests of justice."

He said he intended to appeal against the sentence.

A document jointly published by the CPS and Acpo says people are not expected to make fine judgments about what might be reasonable force in the heat of the moment, so long as they only do what they honestly and instinctively believe is necessary.

However, force used after chasing someone who runs off may not be considered to be reasonable. Acting out of malice and revenge with the intent of inflicting punishment through injury or death would not be reasonable, it adds.

## Reasonable force and fatal consequences

### Tony Martin

Norfolk farmer who killed a teenage burglar in his home with an illegally held pump-action shotgun in 1999. Martin pleaded self-defence, but was initially convicted of murder and sentenced to life imprisonment. In October 2001 three appeal court judges accepted fresh evidence that he had been suffering from a paranoid personality disorder. The conviction was quashed and his sentence was reduced to five years for the manslaughter of 16-year-old Fred Barras and wounding his accomplice, Brendon Fearon, 30.

### Niklos Baungartner

Hungarian businessman who tackled and killed an intruder at his Derbyshire home in 1995. The crown prosecution service ruled out action against him. Baungartner had confronted Robert Ingham, 22, in the kitchen and the fight moved into the front garden, where Ingham suffered a neck injury from which he died. Derbyshire police concluded that Ingham's injuries were entirely consistent with Baungartner's version of events.

### Norman Waller

Sentenced to 18 months for affray after killing a gang member he believed to be damaging a neighbour's car in 1992. Waller, 34, of Gateshead, was cleared of murder and two wounding charges, but was found guilty of causing an affray. Terry Malone, 24, died in hospital five days after being stabbed in the chest with a chisel by Waller as the gang surrounded him and his neighbour's son.

### Joe Horn

In 2007 Horn alerted emergency services that he could see two men burgling his neighbour's home in Pasadena, Texas. Despite being told by the dispatcher to stay inside, Horn went outside, and subsequently shot and killed both burglars. Last year a grand jury cleared Horn.

## The self-defence law does not need unreasonable changes

Tory proposals that would allow disproportionate acts of self-defence are tawdry and have rightly been put on hold

- 
- **Issy McCann**
  - guardian.co.uk, Monday 14 June 2010 12.30 BST
- 



Munir Hussain and his brother Tokeer were jailed for attacking a masked intruder but had their sentences changed by the appeal court.  
Photograph: Thames Valley Police/PA

The debate about the law on self-defence is populated with larger-than-life figures. Most notoriously, there's Tony Martin, the Norfolk farmer with the shotgun and the booby-trapped stairs, and there's Munir Hussain, the Asian businessman with the cricket bat, whose family

was tied-up and threatened. It may be that the source of the widespread interest in the issue is not a well-grounded fear of what would happen if we confronted an intruder, but the old Tory romance of the Englishman, whose home is his castle. After all, if the expenses scandal taught us anything, it's that at least one Tory MP did have a moat.

Outside the realms of fiction, and in the corridors of power, the coalition partners are hesitating over the promise, made by the Tories in opposition, to amend the law on self-defence. Detailed plans have been sidelined and the talk now is of altering the law "if necessary" and after "consulting with officials".

The truth is that the Conservative proposal was always a tawdry one: practically useless and theoretically dangerous. You can only be prosecuted for using force in self-defence if your act is not "reasonable". The Tory idea, first put forward by Patrick Mercer in a private member's bill, is to change the standard to "grossly disproportionate".

The amendment would not have affected the outcome of either the Tony Martin or the Munir Hussain case. Neither man was prosecuted because their actions were not reasonable. They were prosecuted because their actions were not in self-defence. They wielded their cricket bats and shotguns against criminals who were already fleeing empty handed.

Only the outcomes of cases where an act of self-defence was considered not reasonable, but also not grossly disproportionate, could be affected by this bill. It's a subtle distinction. The Ministry of Defence document, "Are juries fair?", recently found that 69% percent of jurors in the study were unable to identify the key questions they were being asked to decide in cases involving force used in self-defence. It's hard to believe that slightly altering one of those questions would change the verdicts they came to in most cases.

So the importance of the amendment is largely theoretical. Mercer thinks it would resolve an inconsistency in the law. At the moment, all acts of self-defence that are not reasonable are criminal, but those who suffer them cannot claim civil damages unless the act was "grossly disproportionate". This situation arose ad hoc, after provision was made in the Criminal Justice Act 2003 to avoid the public outcry that would have resulted if burglar Brendon Fearon had claimed damages against Tony Martin.

Nonetheless, and funnily enough, the current state of the law actually makes quite a lot of sense. Civil and criminal law have different purposes. Criminal law is designed to maintain law and order in society, while civil law aims to uphold the rights of individuals and provide redress for those who are wronged. When force of any kind is used against, say, a burglar, many people do not see him (it nearly always is a him) as personally wronged, because he provoked the attack. For example, few people would see someone as wronged when, having punched someone in aggression, he or she gets punched back, even if it is with disproportionate (but not grossly disproportionate) force. If they are correct, then it is right that there is no civil redress unless the force used is actually grossly disproportionate.

But the punch might still properly be seen as a criminal offence, because it constitutes a threat to law and order. The problem with the Tory plan is that it would shift the focus of the law away from whether or not it does. As Carl Gardner points out reasonable means "reasonable in the circumstances as they were understood at the time", so what matters at the moment is not really what the citizen did, but what they thought they were doing. To be reasonable is to do what you feel is necessary.

But the "grossly disproportionate" test focuses on the act itself, permitting disproportionate force that was not proportionate because it was motivated by spite or revenge, as well as the need for self-defence. This would allow citizens to pursue punishment and revenge on the streets, instead of in the court rooms. The amended law would thus send out the message that the law has no monopoly on punishment, and that our legal system may be bypassed at will. That is why it is so strange that it is a cause célèbre for people like Colonel Patrick Mercer, who profess to hold these ancient institutions dear. We should all be glad that his plan appears to be on the back burner.