



Self Defence

A Short Discussion of the Criminal Defence

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"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 may only do, what is reasonably necessary."



The Jurisprudence of Criminal Law

To completely understand self-defence law it is of paramount importance that one understands some basic knowledge of criminal law.

Elements

Criminal law is mainly, though not entirely, grounded in statute. Each crime enumerated by the statutes has several 'elements' which must be proved before the accused can be found guilty of a crime.

The crime of murder is found in the *Crimes Act 1900* s18. The elements of murder are:

- An act or omission of the accused
- That caused
- The death of the deceased
- Where the act was done
 - With reckless indifference to human life, or
 - With intent to kill, or
 - With intent to cause grievous bodily harm, or
 - During or immediately after the commission of an offence that carries a punishment of gaol for 25 years to life.

Each one of the elements following the black bullet points must be proved and at least one of the elements following the hollow bullet points must be shown. Those familiar with criminal law may note that the black bullet points represent the *actus reus* and that the white bullet points represent the *mens rea*.

Burden of Proof

The criminal law imposes duties on the citizen not to act in a manner contrary to the law, by these means, seemingly contrary to expectations; the person is protected from arbitrary action by the state. The state can only impose penalties based in accordance to the law and criminal procedure.

The principle that a man cannot be found guilty till tried at law and cannot be punished without due process is a fundamental tenant of the criminal justice system. It has been handed down at least as long as the principles of common law and was enumerated in 1215 by the *Magna Carta*.

Further to this protection an accused person enjoys the presumption of innocence. This acts as a safeguard to injustice, the state must satisfy a jury, magistrate or judge that the person is guilty of an offence before they can be punished for that offence. This finding must be made 'beyond a reasonable doubt.' This has been described as the 'golden thread' of English Criminal law.¹ This principle has been confirmed in statute law as well.² The phrase 'reasonable doubt' has not been defined and in fact it has actively been stated that it is improper and dangerous to attempt to define it.

¹ *Woolmington v DPP* [1935] AC 462

² *Evidence Act 1995* (NSW) s141(1)



How this applies to Self-Defence

One would have access to a defence of self-defence if one were charged with a criminal offence and one believed that the act described as the criminal offence were done in defence of one's safety, the safety of another or in the defence of property.

Self defence is almost unique as a defence to criminal action as the defence of self-defence, if successfully raised, would allow a person to be acquitted of the intentional killing of another person.

Self Defence in Criminal Law

We will look now at the specific principles of the defence of self-defence.

The Common Law

In 1978 Mason CJ said of self defence:

1.
 - a) *It is for the jury to first consider whether when the accused killed the deceased the accused believed that an unlawful attack which threatened him with death or serious bodily harm was being or was about to be made*
 - b) *By the expression "reasonably believed" is meant, not what a reasonable man would have believed, but what the accused himself might reasonably believe in all the circumstances in which he found himself*
2. *If the jury is satisfied beyond reasonable doubt that there was no reasonable belief by the accused of such an attack no question of self-defence arises.*
3. *If the jury is satisfied beyond reasonable doubt that there was no such reasonable belief by the accused, it must then consider whether the force in fact used by the accused was reasonably proportionate with the danger he believed he faced.*
4. *If the jury is not satisfied beyond reasonable doubt that more force was used than was reasonably proportionate it should acquit*
5. *If the jury is satisfied beyond reasonable doubt that more force was used, then its verdict should be either manslaughter or murder, that depending upon the answer to the final question to the jury – did the accused believe that the force which he used was reasonably proportionate to the danger he believed he faced?*
6. *If the jury is satisfied beyond a reasonable doubt that the accused did not have such a belief the verdict will be murder. If it is not satisfied beyond reasonable doubt that the accused did not have that belief that verdict will be manslaughter.³*

If that was too verbose or complex then we will put that simple.

³ *R v Viro* (1978) 141 CLR 88



The first requirement is that the person who raises self-defence must believe that they were under attack and that this attack was unlawful. Because of this it would be difficult to raise self-defence to a charge of 'assault police in the execution of their duty.'⁴

The jury will consider if the accused had the belief that he was under unlawful attack and then whether that belief was reasonable. Reasonable, not to the jury, but to person himself in the situation he was in.

If the jury cannot find against the defendants claim of a 'reasonable belief' beyond a reasonable doubt, then the next question must be raised.

The next question is 'Was the force used reasonable or was it excessive?' If these questions are answered in the defendant's favour then the defence of self-defence is made out and the defendant should be acquitted.

To sum up, there are two questions;

- The first is 'was there is reasonable belief that the act was necessary?' and,
- The second is 'was the force use reasonable?'

The word reasonable is used here in each question but they do not mean exactly the same thing in each question. In the first question reasonableness is judged subjectively and in the second it is purely objective.⁵

*Zecevic v Director of Public Prosecution*⁶ is the current leading case for self defence law. In that case the High Court did away with the parts of the *Viro* doctrine which involved deciding whether excessive force should lead to either murder or manslaughter charges. The court stated in that case that self-defence claims either succeed or fail and should they fail the accused is once again dealt with by 'ordinary law.' That is to say, if someone is charged with murder and they are found to have used excessive force, and in the use of that excessive force he or she had intended to kill the other person, then the crime was murder.

FURTHER READING: *The case R v Katarzynski also discusses whether self induced intoxication is relevant to a claim of self-defence. It was found that it is for the first question but not for the second*

Arising under Statute Law

The provisions of self-defence have, since 2002, been added to the *Crimes Act*. These now enumerate the specific times when self defence can be raised. The relevant sections of the *Crimes Act* are quoted below with explanation:

418 Self-defence—when available

(1) A person is not criminally responsible for an offence if the person carries out the conduct constituting the offence in self-defence.

⁴ *Crimes Act 1900* div 3

⁵ *R v Katarzynski* [2002] NSWSC 613

⁶ *(Vic)* (1987) 71 ALR 641



(2) *A person carries out conduct in self-defence if and only if the person believes the conduct is necessary:*

- a) to defend himself or herself or another person, or*
- b) to prevent or terminate the unlawful deprivation of his or her liberty or the liberty of another person, or*
- c) to protect property from unlawful taking, destruction, damage or interference, or*
- d) to prevent criminal trespass to any land or premises or to remove a person committing any such criminal trespass,*
- e) and the conduct is a reasonable response in the circumstances as he or she perceives them.⁷*

This section is quite straight forward and enacts the principles of the common law in a simple and concise form. It outlines the strict times when a defence of self defence is available and it also outlines the subjective nature of the test in subsection (2)(e).

Section 419 notes that the onus of proof lies with the prosecution, beyond a reasonable doubt, that the accused did not perform the act in self defence.

Exceptions under Statute

There are statutory exemptions to self-defence. These relate only to where self defence is claimed for an act where death was inflicted.

Section 420 bars a claim to self defence where the accused killed the deceased to protect property, prevent criminal trespass or remove a person committing criminal trespass. Put simply, one cannot successfully raise this defence where oneself or another are not in personal danger and an act has caused death. A man cannot kill another in protection of his property rights, only in protection of his life and safety or the life and safety of another.

Below is s421:

421 Self-defence—excessive force that inflicts death

(1) This section applies if:

- a. the person uses force that involves the infliction of death, and*
- b. the conduct is not a reasonable response in the circumstances as he or she perceives them,*
- a. but the person believes the conduct is necessary:*
- c. to defend himself or herself or another person, or*

⁷ Crimes Act 1900 s420



d. to prevent or terminate the unlawful deprivation of his or her liberty or the liberty of another person.

(2) The person is not criminally responsible for murder but, on a trial for murder, the person is to be found guilty of manslaughter if the person is otherwise criminally responsible for manslaughter.⁸

This section brings the law back to its pre- *Zecevic* position where a reasonable belief that self-defence is necessary coupled with the use of excessive force will lead to a charge of manslaughter rather than murder.

Section 422 states that the defence is not excluded merely because the conduct defended was lawful or that the person who is carrying out the conduct is not criminally responsible for it.

Self-Defence and Civil Law

There are provisions in the *Civil Liability Act 2002* which are specifically related to self-defence. These sections have force where an attacker who was injured when his victim defended herself tries to sue the victim for damages resulting from his attack.

Section 52 of the *Civil Liability Act 2002*:

52 No civil liability for acts in self-defence

(1) A person does not incur a liability to which this Part applies arising from any conduct of the person carried out in self-defence, but only if the conduct to which the person was responding:

- a) was unlawful, or*
- b) would have been unlawful if the other person carrying out the conduct to which the person responds had not been suffering from a mental illness at the time of the conduct.*

(2) A person carries out conduct in self-defence if and only if the person believes the conduct is necessary:

- a) to defend himself or herself or another person, or*
- b) to prevent or terminate the unlawful deprivation of his or her liberty or the liberty of another person, or*
- c) to protect property from unlawful taking, destruction, damage or interference, or*
- d) to prevent criminal trespass to any land or premises or to remove a person committing any such criminal trespass,*

FURTHER READING: To read about legal myths, some that it is likely that you believe, further reading can be found at the following link: <http://www.snopes.com/legal/lawsuits.asp>

⁸ Crimes Act 1900 s421



e) *and the conduct is a reasonable response in the circumstances as he or she perceives them.*

(3) *This section does not apply if the person uses force that involves the intentional or reckless infliction of death only:*

a) *to protect property, or*

b) *to prevent criminal trespass or to remove a person committing criminal trespass.*⁹

This section states the exceptions to circumstances when civil liability may arise. Basically, if a someone defends themselves against and illegal attack, or deprivation of property rights or liberty. Once again, the protections of self-defence do not arise where the defensive act causes the death recklessly or intentionally of the attacker and is done in response to criminal trespass or in the protection of property.

Section 53 of the aforementioned Act also states that the civil liability protections arise even where the defensive conduct was not reasonable or was excessive. This means that even where the criminal defence fails the defence of self defence will still arise in civil claims. It should be noted that the courts can dispense with this section in exceptional circumstances.

Weapons

This is a small section dealing with the practicalities self-defence with weapons, it does not relate directly to the application of self-defence law.

Blades

While it is possible to claim self defence in the use of blades it should be noted that s11C of the *Summary Offences Act 1988* prohibits the carrying of knives or blades in a public place without reasonable excuse. The Act specifically proscribes the bearing or a knife for self defence as a 'reasonable excuse.'

Guns

The case of *Zecevic* involved the use of firearms in self defence, and it is possible to use fire arms in self defence. However the *Firearms Act 1996* and the *Firearms Regulation 2006* require very stringent requirements for storage and safety, it would seem unlikely, with these laws that a fire arm could practically be used as a weapon of self defence.

Further, the discharging of a fire arms in or near a public place where it is likely to cause injury is also a criminal offence.¹⁰ Though of course the defence of self-defence remains open

⁹ *Civil Liability Act 2002* s52

¹⁰ *Crimes Act 1900* s93G