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SELF-DEFENCE IN SOUTH AUSTRALIA: A SUBJECTIVE DILEMMA

INTRODUCTION

SECTION 15 of the *Criminal Law Consolidation Act* 1935 (SA), dealing with the use of force in self-defence, defence of another, defence of property, criminal trespass and lawful arrest, came into operation in South Australia on the 12th December 1991. Prior to that time, the common law was the source of the law on self-defence, in particular, the principles laid down by the High Court in *Zecevic v DPP(Vic)*.[1]

Section 15 reads as follows:

> 15(1) Subject to subsection (2) -
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> (a) a person does not commit an offence by using force against another if that person genuinely believes that the force is necessary and reasonable-
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> (i) to defend himself, herself or another; or
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> (ii) to prevent or terminate the unlawful imprisonment of himself, herself or another; and
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> (b) a person does not commit an offence if that person, without intending to cause death or being reckless as to whether death is caused, uses force against another genuinely

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1 (1987) 162 CLR 645 (hereinafter *Zecevic*).

believing that the force is necessary and reasonable-

(i) to protect property from unlawful appropriation, destruction, damage or interference;

(ii) to prevent criminal trespass to any land or premises, or to remove from any land or premises a person who is committing a criminal trespass; or

(iii) to effect or assist in the lawful arrest of an offender or alleged offender or a person unlawfully at large.

(2) Where-

(a) a person causes death by using force against another genuinely believing that the force is necessary and reasonable for a purpose stated in subsection (1);

(b) that person's belief as to the nature or extent of the necessary force is grossly unreasonable (judged by reference to the circumstances as he or she genuinely believed them to be); and

(c) that person, if acting for a purpose stated in subsection (1)(b) does not intend to cause death and is not reckless as to whether death is caused,

that person may not be convicted of murder but may if he or she acted with criminal negligence be convicted of manslaughter.

The section, in part, is a radical departure from the common law of England and Australia. In another part it restores the defence of "excessive" self-defence which had been abolished by the High Court in *Zecevic*. To put s15 in context, it is necessary to examine briefly the position at common law both in Australia and in England.

In Australia, the common law prior to *Zecevic*, as declared by the High Court in *R v Howe*[2] and *R v Viro*,[3] was that, in assaults falling short of

2 (1958) 100 CLR 448.

3 (1978) 141 CLR 88, esp at 146-147, per Mason J (as he then was).

murder, the plea of self-defence was available if the force used in self-defence was reasonable. If the force used was not objectively reasonable, then the plea of self-defence would fail. Murder, however, was treated differently. If an accused was found to have reasonably believed that he or she was acting in self-defence, but went beyond the force that was reasonably required, murder would be reduced to manslaughter. This category of homicide was termed "excessive defence" manslaughter.

In *Zecevic* the High Court did away with excessive defence manslaughter, in the interests of making the law on self-defence clear. This meant that if an accused believed that they were acting in self-defence, but in fact were not objectively justified in using lethal force, they were liable to be convicted of murder. A plea of self-defence in answer to any charge, including murder, would only succeed if an accused was found to have believed on reasonable grounds that it was necessary to do what they did. The defence would not succeed if an accused did not believe that the force applied was necessary, or there were no reasonable grounds for the belief.[4]

In England, the common law does not recognise the category of excessive defence manslaughter.[5] A plea of self-defence will succeed if the force used was objectively reasonable. If it was, or if there is a reasonable doubt, the accused will be entitled to an acquittal. If the force used is found not to be objectively reasonable, conviction for murder will follow unless some other factor such as provocation is present. Thus no distinction is made between murder and lesser offences.

While the force used must be objectively reasonable, that factor is to be judged with reference to the facts as they were believed by the accused to be. The Privy Council in *Beckford v R*[6] defined the test to be applied for self-defence as: "[A] person may use such force as is reasonable in the circumstances as he honestly believes them to be in the defence of himself or another."[7] Thus in England, while there is no category of "excessive defence" manslaughter, the test for self-defence in any offence is subjective to the extent that it assesses the reasonableness of the force used in the light of the circumstances as the accused honestly believed them to be. However, there is an objective element as well. That person must act

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4 See *Zecevic* esp at 661, per Wilson, Dawson and Toohey JJ: "The question to be asked in the end is quite simple. It is whether the accused believed upon reasonable grounds that it was necessary in self-defence to do what he did".

5 *Palmer v R* [1971] 1 All ER 1077.

6 (1987) [1988] 1 AC 130.

7 At 145.

reasonably as regards the quantum of force used in the circumstances as they are honestly believed to be.

So, prior to the introduction of s15 in South Australia, self-defence was available as a defence to a charge of any offence, including murder, if the the actions of an accused were objectively reasonable. If an accused overstepped the mark and killed someone when to do so was not objectively reasonable, the defence of self-defence would fail.[8]

SECTION 15 AND SELF-DEFENCE IN GENERAL

Section 15(1)(a) provides that no offence is committed if there is a genuine belief that the force used is "necessary" and "reasonable". Clearly, this is an *entirely* subjective test. The requirement in *Zecevic* that such a belief be on reasonable grounds is absent. As Cox J said in *Hirschausen v Brady*: "The general test under s15 looks not so much to what is necessary and reasonable but to the defendant's belief on the subject."[9] The test for a fact finder has two limbs. First, the accused must genuinely believe that it was "necessary "to use force in a particular situation, and secondly the accused must genuinely believe that the *amount* or extent of force used was "reasonable".[10]

Of course, an accused does not have to prove the genuine belief to which s15 refers. The prosecution must prove beyond a reasonable doubt that the accused did not possess such a genuine belief.[11] If a fact finder finds that there is a reasonable possibility that an accused did hold such a genuine belief, then that accused is entitled to a complete acquittal, at least where that accused has not killed anyone.

Where death has resulted however, subsection (2) comes into effect and the test becomes partly objective. If the belief formed by an accused is found by the fact finder to be "grossly unreasonable", the accused may be convicted of manslaughter if found to have acted with "criminal negligence".

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8 For an analysis of the law of self defence both before and after *Zecevic* see Yeo, "Self Defence: From *Viro* to *Zecevic*" (1988) 4 *Aust Bar Review* 251.

9 (1993) 169 LSJS 159 at 163.

10 In *R v Whitham* (1977) 17 SASR 188 Bray CJ, thought that in self defence there were two requirements - a belief as regards the initial occasion for self defence and a belief in the necessity for the force actually used (at 193).

11 *Slater v South Australian Police* (1993) (Unreported, SA Supreme Court, Prior J, 5 May 1993.

Clearly, the assessment of whether the belief was grossly unreasonable is decided upon an objective view of the facts. However, that question must be decided by reference to the circumstances as an accused genuinely believed them to be. So there is a strong subjective flavour to the objective assessment of what was "grossly" unreasonable.

So, in a situation falling short of death, s15 permits violent behaviour, no matter how extreme or unreasonable, provided there is a genuine belief that the force used is necessary and reasonable.

However, should someone be killed, and the requirement of a genuine belief on both limbs is satisfied (otherwise the accused would be guilty of murder), s15(2)(b) provides that the belief as to the quantum of force should be scrutinised. If it is found that the belief was genuinely held, but grossly unreasonable, the accused is liable to be convicted of manslaughter if found to have acted with "criminal negligence".

Section 15 is far more forgiving of violent behaviour in excessive self-defence than the common law of England as found in *Beckford*, which, in turn, is far more generous than Australian common law as declared in *Zecevic*.

Indeed, s15 excuses all violent behaviour falling short of the death of the victim if it is accompanied by a genuine belief that the violence is necessary and reasonable in self-defence. Even upon death being caused, the law will not intervene if an accused makes an unreasonable assessment as to the quantum of force which the situation requires based on the facts as they are genuinely believed to be. Section 15 requires that the assessment be "grossly" unreasonable and, in addition, that an accused must have acted with "criminal negligence."

The three approaches are thus markedly different. *Zecevic* provides that a plea of self-defence to any charge from murder downwards will succeed only if the force used was objectively reasonable. *Beckford* too provides that the force used must be objectively reasonable, but judged on the circumstances as the accused honestly believed them to be. Section 15 provides that the force used need only be subjectively reasonable. If it is, no offence is committed. However, if death has resulted, and the force used was in fact "grossly" unreasonable and accompanied by "criminal negligence", an accused "may" be convicted of manslaughter, but not of murder.

SITUATIONS OTHER THAN SELF-DEFENCE AND DEFENCE OF ANOTHER

Section 15(1)(a) appears to be a complete code as regards the use of force in cases of self-defence, defence of another and the prevention of unlawful imprisonment. This subsection covers the field as regards those topics.

What though of the remaining categories as dealt with in s15(1)(b)? This subsection, like s15(1)(a), is curiously worded. Both provide that *no offence is committed* in certain situations as opposed to providing a *defence*. Thus, s15(1)(b) provides that no offence is committed in the circumstances which follow *provided* that there is no intention to kill or recklessness as to whether death is caused. It follows that if there *is* an intention to cause death that behaviour is not protected by, nor is it relevant to, s15(1)(b). If the conduct is outside the scope of s15, it also follows that the common law will apply to a charge of murder or attempted murder where an accused is found to have intended to kill in using force to defend property, prevent trespass or effect an arrest.

Protection of Property

Let us suppose that an accused was charged for conduct similar to that in the case of *R v McKay*.[12] That is, supposing a poultry farmer, who has had a number of thefts of chickens hears an alarm early one morning, and confronts the thief with a rifle. The thief flees carrying a chicken, and the farmer aims and fires with the avowed intention of killing the thief, and succeeding in doing so. Supposing also that the farmer, a rugged individual, possesses a genuine belief as to both the necessity for and the extent of the force.

Because of the intention to kill to protect property, the farmer would be afforded no protection by s15(1)(b). If that were so, common law principles would apply to the case. Unless provocation could be argued,[13] the farmer would be liable to be convicted of murder. Indeed, even if the thief survived, the farmer still has no protection from s15 as the force was applied with the intent to cause death. The farmer would be liable to be charged with attempted murder, again to be decided on common law principles.

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12 [1957] VR 560.

13 In the circumstances perhaps it could be pleaded on the basis of a loss of self-control when confronting the person responsible for a number of thefts over a long period of time.

Most trial judges would shudder at the thought of directing a jury on the operation of s15 in the circumstances outlined above. The jury would need to be directed first on the operation of s15 and the subjective test as to both the necessity for and proportion of force, and then, on the operation of the partially objective test set out in s15(2) as to whether the conduct was grossly unreasonable and "criminally negligent". They would then be told that if however they were satisfied that the accused intended to kill, they must apply an entirely different test - this being the test at common law as to whether the force used was objectively justifiable. This of course raises the common law relevant to the particular case. Is it justifiable for a police officer to intentionally kill a fleeing bank robber? Can a property owner intentionally kill a fleeing thief? Can a prison officer intentionally kill an escaping convicted murderer?[14]

Section 15(1)(b) will only operate in the case of someone not intending to kill, and not being reckless as to whether death is caused. If, for example, the farmer fired at the thief, killing the thief, but intending only to wound the thief in the legs (that is, to cause grievous bodily harm) and not foreseeing that death was probable or likely[15] then s15(2) would operate. If, however, the thief did not die as a result of being shot in the legs and the requisite genuine belief was present with respect to the necessity for and quantum of force, outright acquittal must follow.

It is noteworthy that s15(1)(b) proscribes an intention to cause death or recklessness as to whether death is caused. This is of course a departure from the mental element required for murder, that is, an unlawful intention to cause death *or* grievous bodily harm, or foresight that death or grievous bodily harm is probable or likely.[16]

It follows that an assault on another for one of the purposes prescribed in s15(1)(b) would be protected by the section if it was done with the intention to cause grievous bodily harm or foresight that grievous bodily harm would probably result. Should death result, and provided that the accused did not foresee that death would probably be caused (recklessness as to death), outright acquittal would follow provided the decision as to the quantum of force was not grossly unreasonable and criminally negligent. The worst

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14 See Lanham, "Killing the Fleeing Offender" [1977] 1 *Crim LJ* 16; "Self Defence, Prevention of Crime, Arrest and the Duty to Retreat" [1979] 3 *Crim LJ* 188.

15 This is the test for "reckless" murder at common law: *R v Crabbe* (1985) 156 CLR 464.

16 *R v Hallett* [1969] SASR 141; *Pemble v R* (1971) 124 CLR 107: *R v Crabbe*.

result possible for an accused would be a conviction for manslaughter pursuant to s15(2).

For s15 to operate in this way is wrong in principle. The law should not sanction the intentional infliction of grievous bodily harm to protect property at the whim of say, a private security guard or police officer, without subjecting the conduct to objective scrutiny In an increasingly violent society, the failure to do so sends the wrong message to the police and to the numerous gun carrying private security people seen in our (crowded) streets.

The Effecting of Lawful Arrests

Section 15(1)(b)(iii) deals with the arrest of an "offender" or a person "unlawfully at large". A person who has just escaped from a prison or who is attempting to escape from prison would come within the category of "offender" described. Within the last twelve years in this State, corrections officers have fired on and wounded prisoners attempting to escape from the Yatala Labour Prison. If a corrections officer fired upon and killed or wounded an escaping prisoner intending to kill them or being reckless as to whether death resulted then, as argued above, no protection would be afforded by s15 regardless of any genuine belief held by the officer.

Section 86 of the *Correctional Services Act* 1982 (SA) provides that corrections officers and police employed in a correctional institution may, in the discharge of their duties, use such force "as is reasonably necessary in the circumstances of the particular case". A corrections officer who intentionally or recklessly killed, or wounded with intent to kill, for example, a dangerous and violent escaping criminal, would have their actions assessed by reference to the entirely objective test in s86. If, however, there was no such intention or recklessness and death resulted, then on normal principles of statutory interpretation, s15 (being enacted after s86 and in addition dealing specifically with effecting an arrest) would apply.

A similar analysis would apply to members of the police force who kill or attempt to kill persons attempting to escape from custody. In the same way, an armed security guard would be afforded no protection by s15 if they intentionally or recklessly killed a thief solely to protect cash or property in the possession of the guard. In such cases, the common law would apply.

The result of this operation of the section is unnecessary complication. A jury, as the sole judge of the intention of the actor, would require direction

on the operation of s15, with its subjective standard, and the operation of the common law (or s86 of the *Correctional Services Act*) with its objective standard, as the law to be applied in the situation would depend on whether there was an intention to kill or not.

SECTION 15(2) - WHAT IS MEANT BY THE TERMS "GROSSLY UNREASONABLE" AND "CRIMINAL NEGLIGENCE"?

So far, it has been argued that s15 is a complete code as regards self-defence and defence of another, but that the common law still has relevance when it comes to intentional or reckless killings or attempts to kill in the course of protecting property, preventing trespass, and making arrests. It has also been argued that s15 is far more forgiving of violent behaviour than the common law of England which is, in turn, more generous than the common law of Australia as found in *Zecevic*.

It remains to discuss the operation of s15(2) which, once a killing has occurred, requires a fact finder to decide firstly whether the genuine belief of an accused was "grossly unreasonable" and secondly, if so, whether it was accompanied by "criminal negligence." Neither term is defined in the *Criminal Law Consolidation Act* 1935 (SA). The words "grossly unreasonable" are qualified by the words "criminal negligence", and an understanding of the latter is therefore essential to an understanding of the former. So what does the term "criminal negligence" mean and in what context does it operate?

When confronted with the term in the context of a homicide, judges will inevitably treat it as a term of art and look to the decided cases for its meaning. The term is indeed one of art when dealing with manslaughter by criminal negligence.

The High Court in *R v Wilson*[17] approved the definition of criminal negligence in *R v Nydam* which is as follows:

> In order to establish manslaughter by criminal negligence, it is sufficient if the prosecution shows that the act which caused the death was done by the accused consciously and voluntarily, without any intention of causing death or grievous bodily harm but in circumstances which involved such a great falling short of the standard of care which a

17 (1992) 174 CLR 313.

> reasonable man would have exercised and which involved such a high risk that death or grievous bodily harm would follow that the doing of the act merited criminal punishment.[18]

The definition clearly is referring to conduct which occurs without any intention of causing death or grievous bodily harm. As regards s15(1)(b) this would not be inappropriate, as that subsection only envisages homicide caused without any intention to kill. However, s15(2) also applies to conduct described in s15(1)(a), which undoubtedly envisages an individual killing another with the intention of so doing. The definition of "criminal negligence" in the context of manslaughter lies uncomfortably with the notion of an intention to kill.

It will be argued below that reference in s15 to "criminal negligence" is not concerned with a category of negligent manslaughter, nor is it a requirement that one must act in a "negligent" manner as it is defined in *Nydam*.

Let us take the hypothetical example of a householder who mistakes the child next door for a burglar, and deliberately shoots and kills the child. If this action on the part of the householder is seen as one transaction, the householder could be described as "negligent" - even grossly or criminally negligent. A reasonable person would have first switched on a light or called out to the dimly perceived figure standing in the darkness. But if the transaction is treated as having two limbs (the belief that a self-defence situation has arisen and the belief that lethal force is necessary) then any negligence is associated with the first limb only. An individual is unlikely to be seen to have formed a reasonable belief on the first limb if care was not taken to ensure that the "burglar" was not an innocent party. Once an individual *did* form a belief (however unreasonable) that a burglar was present, lethal force might well be deemed to be a reasonable response in the situation the individual genuinely believed existed.

Section 15(2) would not treat the hypothetical example above as one transaction. It breaks down action into two limbs as follows:

> (2) Where-
>
> (a) a person causes death by using force against another genuinely believing that the force is [1] necessary and [2] reasonable.

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18 [1977] VR 430 at 445.

It then scrutinises the nature and extent of the force used, rather than the decision as to the necessity to use force:

> (b) that person's belief as to the nature or extent of the necessary force is grossly unreasonable (judged by reference to the circumstances as [they are believed to be]).

So, s15(2) is not concerned to scrutinise the circumstances under which an accused initially decides that a situation requiring force has arisen. It scrutinises *only* the decision as to the amount of force that is required in the light of the circumstances as they are genuinely believed to be. This is the key to an understanding of s15(2).

If someone is negligent, even grossly so, in deciding that a self-defence situation has arisen, that negligence will not affect criminal responsibility pursuant to s15(2). This is because the section demands that the reasonableness of the force used be judged by the circumstances as they are genuinely believed by the actor to be. So, if the actor, however unreasonably or negligently, genuinely believes that they are in imminent danger of death, and kills the person thought to be the source of the imminent danger, how could that response be seen as unreasonable, let alone grossly so? In the hypothetical case of the householder, even if the householder had acted in a criminally negligent manner in forming a genuine belief, an outright acquittal must follow. This is a curious result if s15(2) is concerned with manslaughter by criminal negligence. In the hypothetical situation outlined, grossly negligent behaviour which results in death escapes conviction for manslaughter. This result simply does not fit a characterisation of s15(2) as dealing with manslaughter by criminal negligence.

The focus of s15(2) is the *force used* by the actor. The scrutiny of that force is in two parts. First, it must be decided if the force used was "grossly" unreasonable. If it was not, in the circumstances as an accused believed them to be, outright acquittal must follow. But, if the force used was grossly unreasonable, the issue of whether the accused acted with criminal negligence is addressed.

It is only when the force used is disproportionate (and grossly unreasonably so) to the perceived threat that an accused may be convicted of manslaughter. This in reality means that the "negligence" of the accused in forming a certain perception is not the focus. An accused may be grossly negligent in assessing the situation, but if the response is proportionate to

that grossly unreasonable assessment no liability attaches. Conviction or acquittal depends upon whether the accused assesses the correct *response* to the situation perceived. Whether that perception is right or wrong is immaterial for the purposes of s15(2). It is the *response* which an accused must get right. Therefore, the conduct of an accused in deciding that a threat exists in the first place is not relevant when deciding if an accused acted with criminal negligence.

Another hypothetical example may illustrate the point. Supposing that an accused *correctly* assesses that he or she is about to be slapped in the face, and forms a genuine (and accurate) belief that a self-defence situation has arisen. There is no negligence involved in making that decision. Supposing then that the (legally sane) accused decides, perhaps owing to a personality disorder, that it is reasonable to shoot dead the attacker to prevent the slap in the face. Without more, such as knowledge that the slap indicates serious or deadly force is imminent, as for example in a domestic violence situation, this is a grossly unreasonable belief. But has the accused acted "negligently" in the strict sense? It is thought not. The reason the accused made such a judgement owes nothing to "negligence" but to the personality, background and attitude to human life of the particular accused. In fact, there was no lack of foresight on the accused's part, no failure to appreciate that what was done was dangerous - the accused made a deliberate decision to kill. If that is "negligent" it is equally sensible to describe all acts of deliberate murder as "negligent." So, in this hypothetical example, must such an accused be acquitted outright?

If indeed the section is concerned with "negligence" in the strict sense, the accused who deliberately kills to avoid a slap in the face must be acquitted if found to have the required genuine belief, because no negligence is involved. This would mean that the section would forgive such an accused, but might punish the chicken farmer who unintentionally but negligently kills a chicken thief after shooting the thief in the legs. In effect, the more unreasonable and deliberate the killing was, the greater would be the chance of an acquittal.

Such a result could not be the object of s15(2). In fact, the inference to be drawn from the section requiring an objective test on the second limb *only* - the amount of force used - is that s15(2) simply seeks to restore the offence of "excessive defence" manslaughter abolished by the High Court in *Zecevic*. The philosophy behind s15(2) is that those who kill while using excessive force in self-defence or who, without intending to kill, kill while

using excessive force in situations other than self-defence, will be convicted of manslaughter only.

Why then is there a requirement that an accused must have acted with "criminal negligence" before a conviction for manslaughter can result? To be sensible, the section must be interpreted as requiring the term "criminal negligence" to relate *only* to the nature and extent of the force applied. The term "criminal negligence" must be read in a restricted way. It must be read not as a term of art in negligent manslaughter, but as a guide to how "gross" the "grossly unreasonable" belief of an accused must be. It must be so "grossly unreasonable" as to deserve the label "criminal", a conviction for manslaughter and the corresponding punishment.

Prior to *Zecevic*, a conviction for manslaughter resulted if there was a reasonable belief in the necessity to use force, but the quantum of force used was objectively unreasonable.[19] Section 15 also seeks to confine any conviction for such behaviour to manslaughter, but requires that objectively the belief be so "grossly" unreasonable that, as in the last part of the definition of criminal negligence in *Nydam*, "the doing of the act merited criminal punishment".[20] Section 15 is a curious hybrid of an excessive defence manslaughter which borrows the notion of a criminal *standard* from manslaughter by criminal negligence.

SOME THOUGHTS ON SECTION 15 AND THE ENTIRELY SUBJECTIVE TEST

It appears then that s15(2) creates a variety of excessive defence manslaughter which is similar to the position as it was in *Viro*, although it goes a great deal further in excusing excessive self-defence. In doing so s15 easily outstrips *Viro* in complexity. Ironically, s15 throws out the law in *Zecevic* which was declared by the High Court in response to the perceived complications of *Viro*, and the resultant confusion for judges and juries alike.[21] The law as set out in s15 will not be easily understood by juries or for that matter by lawyers and judges.

The test of excessive self-defence in *Viro* was comparatively simple, simple that is when compared to s15. If a jury was satisfied beyond reasonable doubt that more force was used than was reasonably necessary, it would be instructed to convict of manslaughter (provided the accused had the required

19 *R v Viro* (1978) 141 CLR 88 at 146-147.
20 *Nydam* at 445.
21 Yeo, "Self Defence: From *Viro* to *Zecevic*" (1988) 4 *Aust Bar Review* 251.

reasonable belief in the necessity to use force).[22] Section 15 goes much further. It does not require the belief of the accused in the necessity to use force to be reasonable, and as to the force used, only draws the line at "grossly" unreasonable use of force.

Section 15 should simply require that the force used be reasonable (judged by the circumstances as the actor believed them to be) full stop. Adding a requirement that conduct be "grossly" unreasonable is not necessary. Conduct is either reasonable or not, and if the jury finds the conduct reasonable, or is in doubt, an accused must be acquitted. The additional requirement of acting with "criminal negligence", using as it does a term of art in manslaughter, can only cause confusion.

How successful then is s15 in codifying a law on the use of force? It is difficult to interpret and unduly complex. It is seen to be so by judges and lawyers in South Australia.[23] The first question that must be asked is why it was considered necessary to make the law on self-defence and related matters so complicated. Section 46 of the *Criminal Code* 1924 (Tas) stands in stark contrast[24] - and it mirrors the common law of England as found in *Beckford*. As Wells J remarked in *Morgan v Coleman*:

> The law relating to self-defence ought always to be stated in a form that can be readily understood by men and women in the street, in the home, in the jury box, and in courts of summary jurisdiction. All that should be called for in its application is an understanding of human nature, fairness and commonsense.[25]

The second major area of concern is why the test of gross unreasonableness is applied only in cases when someone has been killed? Why does not s15(2) have application in *every* situation when grossly unreasonable force is applied regardless of whether or not someone is killed?

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22 *Viro* at 146-147.

23 Recent examples involve a Supreme Court Justice (Matheson J) in a murder trial referring to s15 as "that terrible section" while another, (Legoe J) also in a murder trial asked the Crown Prosecutor whether the drafter of the legislation had consulted anyone before including the term "criminal negligence" in the section.

24 Section 46 provides that "a person is justified in using, in the defence of himself or another person such force as, in the circumstances as he believes them to be, it is reasonable to use."

25 (1981) 27 SASR 334 at 336.

Supposing someone genuinely, but grossly unreasonably, believing that force is necessary in self-defence and, moreover, that lethal force is required, shoots an innocent person dead. Such a person, if acting with "criminal negligence", must be convicted of manslaughter. But, supposing that same person, with the same genuine but grossly unreasonable beliefs, shoots and wounds someone with intent to kill them. The victim is left a quadriplegic and paralysed for life. On those facts, an accused must be acquitted outright.

Is there any difference in the moral blameworthiness? Surely it is good law and good sense to judge the decision as to the quantum of force on the facts as the accused believed them to be, but then demand that given those facts, the force used be reasonable, regardless of whether the accused succeeds in killing someone or not?

SECTION 15 AND THE INTOXICATED OR DERANGED ACCUSED

There are a number of problems associated with an entirely unqualified subjective approach in the law of self-defence. It is necessary to draw on a number of examples to illustrate them.

Supposing that a person has ingested alcohol or drugs to the point that they are grossly affected, but still able to form an intention, albeit a drunken one. At common law, a person is answerable sober for what they do while drunk, provided that they are capable of forming the necessary mens rea and are otherwise acting voluntarily.

Supposing that that person forms a genuine but grossly unreasonable belief, one that would not have been formed whilst sober, that it was necessary and reasonable in self-defence to discharge a shotgun at an innocent party. What if the blast is so severe that the victim is crippled for life and several other people in the vicinity are severely wounded? If the prosecution could not disprove the genuineness of the belief, that is, if there was a reasonable possibility that the accused held that belief, they would be entitled to an outright acquittal.

In all likelihood, the intoxication of the accused would make the task of disproving the genuineness of the belief more difficult. In this respect, the grossly irresponsible drunken accused is in a better position than the grossly irresponsible sober accused.

The next issue is the behaviour of a person who, while not legally insane, nevertheless has a personality disorder which will affect judgement. Supposing that person entertains the completely bizarre notion that they will arm themselves with a firearm and ride on trains to prevent muggings. During the course of the journey, that person sees some young men approach a commuter and ask for money. Because of the personality disorder, the person forms a genuine but mistaken and grossly unreasonable belief that there is a robbery in progress, and that it is necessary and reasonable in defence of the "victim" to open fire on the young men.[26]

If the young men are left crippled for life but not dead, s15 states that the person firing the shots cannot be guilty of any offence, provided there is a reasonable possibility that they held a genuine belief in the necessity and reasonableness of the violence offered.

This failure to address the conduct of the intoxicated and those with bizarre or disordered thought processes in mounting grossly unreasonable attacks which fall short of actual homicide is one of the weaknesses of this legislation. In effect, the grossly irresponsible and unreasonable and the borderline (but not criminally) insane are permitted by the legislation to set their own standards of violent behaviour.

As McSherry points out when discussing proposed reforms to the law in Victoria on self-defence and provocation:

> On a practical level, without some form of objective limitation such as reasonable belief, it would seem that an accused who is excessively fearful or apprehensive would be able to react violently towards others with perfect impunity.[27]

That is not to say that there should not be a subjective test on the first limb - the belief that an act of self-defence is called for. Some might argue that this might lead to spurious self-defence claims. That argument was addressed

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26 This is a similar situation to the celebrated United States case of Bernhard Goetz, the so called "subway vigilante". Goetz shot and wounded four young men after one asked him for money during the course of a train journey on the New York subway. See Fletcher, *A Crime of Self Defence: Bernhard Goetz and the Law on Trial* (Collier Macmillan, New York 1988).

27 McSherry "Self Defence and Provocation" (1992) 66 *LIJ* 151.

and dismissed by the Privy Council in *Beckford*.[28] As long ago as 1981, the Full Court of the South Australian Supreme Court in *Morgan v Coleman* defined the test as to the *necessity* to use force as being entirely subjective. However, the test of objective reasonableness was applied to the decision as regards *quantum* of force. Wells J defined the test as follows:

> A person who, according to the circumstances as he understands them, *genuinely believes* that he is threatened with an attack, is not obliged to wait until the attack begins. A person so threatened may use *reasonable* measures to make the situation safe.[29]

This test (while probably at odds with the High Court decision in *Viro* which required a *reasonable* belief that an attack was threatened[30]) is in fact the same as that in *Beckford* and the same as s46 of the Tasmanian *Criminal Code*. The test advocated by Wells J is grounded in common sense and is easily understood by the ordinary citizen.

However McSherry is correct in saying that "some form of objective limitation" is required. Common sense demands that after the point that a person genuinely believes that an attack is threatened, the quantum of force must be objectively reasonable in the circumstances as that person believes them to be if a plea of self-defence is to succeed. That requirement should exist in *all* cases where force is used, not just when death is the result. If the force is not objectively reasonable, a plea of self-defence should not be available to *any* offence charged, whether death results or not.

Would a Bernhard Goetz still be protected if the objective standard was applied only to the quantum of force? To open fire without warning in such circumstances simply does not amount to the reasonable use of force, and a fact finder would be likely to agree with that conclusion, particularly in view of the risk of death to others in the vicinity. Wild West style "shoot outs" by armed citizens, or by armed security guards or the police should not be sanctioned by our laws except where the resort to lethal force was objectively reasonable.

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28 *Beckford* at 145, where Lord Griffiths remarked that the abandoning of the objective standard of belief had not led to the success of spurious self defence claims.

29 *Morgan v Coleman* at 337 (emphasis added).

30 See *R v Train* (1985) 18 A Crim R 353, where McGarvie J (at 355) was of the view that the test as stated by Wells J was more favourable to the accused than that which the law [as set out in *Viro*] prescribes.

CONCLUSIONS

The return to "excessive defence" manslaughter, and thus to the doctrine espoused by *Howe* and *Viro* is to be welcomed. This approach is preferable to the one in *Zecevic* which would allow a conviction for murder of someone who genuinely believed himself or herself to be acting in self-defence but who overstepped the mark in the proportion of force reasonably required in the circumstances.

Unfortunately, this has been done at the cost of simplicity and the wording of s15 of the *Criminal Law Consolidation Act* is destined to create many headaches for judges, counsel and juries. The reference to "criminal negligence" for example is confusing and unnecessary. To convict someone of manslaughter it should only be necessary to find that the belief as to the quantum of force was simply "unreasonable" given that the circumstances are to be assessed as the accused genuinely (if unreasonably) believed them to be.

How then *should* the issue of the use of force in the circumstances envisaged by s15 have been tackled by the legislature? The approach of the Model Criminal Code would have been a better option.[31] Clause 313 of the Code follows the *Beckford* lead and s46 of the Tasmanian Code by excusing the application of force if it is in the belief that it is necessary in self-defence, but requiring that the response be "reasonable" in the circumstances as perceived by the person concerned. As pointed out in the commentary accompanying the Code, the test as to necessity is subjective, but the test as to proportion is objective.

So, under the Code, a plea of self-defence would fail if the force ultimately used was not a reasonable response judged on the circumstances as perceived by an accused. This is a provision that is easily understood, and a provides a subjective/objective test that is fair. It is virtually identical to the test formulated by Wells J in *Morgan v Coleman*.[32] Compared to s15, it is a model of simplicity and brevity. However, it ought to go further and provide that in a situation where the force applied was lethal and not a reasonable response, then, provided that the accused had a genuine belief as to the necessity to use force, a conviction for manslaughter rather than murder will result.

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31 Aust, Criminal Law Officers Committee of the Standing Committees of Attorneys General, *Final Report on a Model Criminal Code* (1992).

32 *Morgan v Coleman* at 336.

It is concluded, finally, that s15 ought to be amended to reduce its complexity and to abolish its entirely subjective test. It is too complicated and obscurely worded to be classed as a good piece of legislation on self-defence. It was enacted supposedly as a result of widespread community dissatisfaction with the existing law on self-defence, much of it owing to urban myth and ignorance of the law.[33] There is far greater justification for community dissatisfaction if s15 remains in its current form. It is submitted that it places too much emphasis on the right of an individual to apply force, and neglects to protect those who are in danger of being killed or injured on the whim of an individual who might be excessively fearful or aggressive, intoxicated or deranged, or suffer from a combination of such states. In short, there is no place for a totally subjective law of self-defence.

POSTSCRIPT

After this article was written, the trial of *R v Gillman*[34] was conducted before Matheson J in the South Australian Supreme Court. The accused was charged with murder but was convicted of manslaughter by a jury. At the trial self-defence was in issue. Matheson J directed the jury on the meaning of the term "criminal negligence" as follows:

> What constitutes criminal negligence? What, ladies and gentlemen, is here in issue, is negligence of a very high degree, showing such a disregard for the life and safety of others, as to amount to a crime against the State and deserving of punishment.[35]

Upon conviction the accused appealed, one of the grounds being that his Honour had misdirected the jury on the issue of "criminal negligence". Mohr J (Nyland and DeBelle JJ concurring) delivered the judgement of the Court of Criminal Appeal on August 24 1994.[36] The Court set aside the verdict of the jury and substituted a verdict of acquittal. This acquittal

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33 See SA, Parl (HA), *Report of the Select Committee on Self Defence* (1990). The report refers to a petition of 40,000 signatures on the topic of self defence and defence of property being presented to the State Parliament. The "urban myth" referred to circulated prior to the presentation of the petition, the story being that the State police had charged an elderly woman with assault when she had attacked a burglar in her own home. The tale was entirely spurious. SA, Parl, *Debates* (10 April 1991) at 4274.

34 Unreported, SA Supreme Court, Matheson J, 24 May 1994.

35 *Gillman* at p42 of the trial transcript.

36 Unreported, SA Court of Criminal Appeal, Mohr, Nyland and De Belle JJ, 24 August 1994.

appears to have been based almost entirely on the facts of the case, and a reasonable doubt as to the possible involvement of a third person in the killing. The Court did, however, examine the provisions of s15.

It is clear from the facts of the case that one of the main issues at the trial was that of self-defence.[37] Yet Mohr J makes the observation that once the Crown have failed to disprove that there was a reasonable possibility of a "genuine belief" on the part of the accused that their actions in the context of self-defence were genuinely believed to be necessary and reasonable, then: "the jury must be instructed to turn their attention to a consideration of subsection 2(b) *and* (c)."[38] With respect, this cannot be correct. Subsection 2(c) is not relevant when self-defence is the issue. It arises for consideration only when the accused was acting *other* than in self-defence, that is for a purpose stated in subsection 1(b): protecting property, preventing criminal trespass or effecting an arrest.

What is also apparent is that the Court has failed completely to recognise the way that subsections 2(a) and 2(b) operate to fill the gap as regards excessive self-defence left by *Zecevic*, by restoring the common law position (or close to it) as exemplified by *Viro* and *Howe*. Mohr J, when discussing both sub sections, found it "difficult" to reconcile a finding by the jury on the one hand that there was a reasonable possibility that the accused had the required genuine belief, with a finding on the other hand that such a belief was, even on the facts as the accused believed them to be, grossly unreasonable. His Honour went on to say:

> The only way I can rationalise the two subsections is that subsection 2(a) is speaking of a genuine belief, so found by the jury to, at least, be a reasonable possibility and in subsection 2(b) of a belief that self-defence was called for (sic) went beyond reasonable and necessary force to such a degree that the force was, objectively viewed by the jury "grossly unreasonable". To put such an interpretation on the two subsections offends against common sense and could only serve to confuse the jury.[39]

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37 The prosecution case was that the accused had struck a blow or blows to the head of the deceased with an iron bar, intentionally, and with intention to kill, and that death resulted. The accused did not give evidence, but, according to the Crown case had allegedly told the police that he had been attacked by the deceased who struck him with an iron bar and kicked him. He had wrestled the iron bar from the deceased and struck the deceased with it.

38 *Gillman* (Court of Criminal Appeal) at 10 (Emphasis added).

39 *Gillman* (Court of Criminal Appeal) at 11.

His Honour has, with respect, correctly interpreted the operation of subsection 2(a) and 2(b). However, such an interpretation does not, as his Honour asserts, offend against common sense. It appears that what his Honour finds repugnant to common sense is the notion that a jury can on the one hand find that a belief was genuinely held, and then on the other find that such a belief was, objectively, grossly unreasonable. The two findings are not logically incompatible. A wholly unreasonable belief may nevertheless be sincerely held. A misguided accused may genuinely believe that the force used was necessary and reasonable and yet be wholly unreasonable in holding such a belief.

Indeed, at common law and prior to the decision in *Zecevic*, a jury was obliged to conduct a very similar analysis of the facts. If an accused was found to have reasonably believed that they were acting in self-defence, but went beyond the force that was reasonably required, believing that the force used *was* reasonable, then what would otherwise have been murder was reduced to manslaughter.[40] It would not matter that such a belief as to the amount of force used was not based on reasonable grounds. It would be enough that the belief was held.[41] Thus, a jury would be directed that if there was a genuine belief on an accused's part that (wholly unreasonable) force was necessary, then the accused was guilty of manslaughter, not murder.

The judgement goes on to declare that the concept of "criminal negligence" must be assessed - and then fails to assess it. Mohr J had this to say of the direction on "criminal negligence" given to the jury by Matheson J:

> [T]hat direction fell short of what was required. ... Although "negligence" in everyday life is in common usage, as a matter of law it has a specific meaning. That legal concept should have been spelt out to the jury in some detail. ... To do less was to leave the risk that some other concept of negligence may have been used in coming to their decision.[42]

Having said that, the judgement then makes no attempt to explain what in fact is "required" and what the term "criminal negligence" means in the context of s15. Indeed, the Court appears to say that the section is so

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40 *R v Howe*; *R v Viro*.
41 *Viro* at 143, per Mason J.
42 *Gillman* (Court of Criminal Appeal) at 12 of the transcript.

obscurely worded as to make interpretation impossible. After the passage quoted immediately above, the judgement comes to an abrupt end:

> In my opinion the Section as drafted is completely unworkable and should be repealed and either redrafted in a way to make it clear what is intended or repealed to allow the common law principles set out in s(2)(a) to operate. I do not criticise the way in which the learned trial Judge attempted to rationalise the Section as, in my opinion, he faced an impossible task except for the criticism of his direction on "criminal negligence".[43]

This is confusing. Just what "common law principles" are set out in subsection 2(a) is not clear. It might be that the reference is meant to be to the *whole* of subsection (2). It appears that *Gillman* fulfils the prediction made in this article that s15, because of its unduly complicated structure, is destined to cause problems for judges and jurors alike. That the section has caused so many problems in interpretation for a full Supreme Court indicates that, in its present form, its days must be numbered.

43 As above.