Castles built on law

Slapper, G. (2000) 'Castles built on law', *New Law Journal*, vol. 150, no. 6941, p. 924.

As court room soundbites go, the one coined by an English judge in a case in 1604 has been mimicked more often than most. He said: 'The house of everyone is to him as his castle and fortress.'[20]

This principle has come to be the cherished credo of millions of citizens. Yet today, many people are puzzled by a legal system which prosecutes a householder for murder in circumstances where he has used lethal force against a burglar at night [...].

Case decisions do not always look consistent. Certainly, two Crown Court decisions made since the infamous case of the Norfolk farmer, Tony Martin,[21] have confused many lay observers of the legal process. The Martin case was followed by a Peterborough Crown Court case in which a burglar who was beaten with a baseball bat was said by a judge to have got what he deserved. David Summers, 21, suffered multiple injuries after Lee Gapper, 20, and George Goodayle attacked him when he broke into their flat. Not only were the flat owners not prosecuted, but, sentencing the burglar, Judge Hugh Mayor said: 'I am making no allowance for reduction in sentence for any hurt you may have received in a failed attempt of a citizen to arrest you. You brought that on yourself and I have no sympathy for those who receive hurt while committing a crime.'[22]

Not long after this came a case at Cambridge Crown Court in which a farmer who shot an intruder on his land walked free from court when a judge directed a jury to acquit on a charge of unlawful wounding.[23] Brian Ward, 48, had fired a shot that shattered the hand of an 18-year old poacher. Mr Ward said he had only fired a warning shot and did not know the poacher was within range. Judge Jonathan Teare said that Mr Ward's behaviour was 'extremely stupid' but accepted that the farmer did not realise the teenager was within range.

Clearly, in both these cases, unlike the Tony Martin case, the self-defensive violence resulted in harm other than death. The principles governing the extent of permissible force used could be seen as depending on the outcome of the violence.

The law in this area comes as a surprise to some. In 1996, the Court of Appeal decided that a trespasser engaged in criminal activities is owed a duty of care by a person defending his property, and can claim compensation for injuries suffered if the force used against him exceeds 'reasonable limits'.[24]

[20] Semayne's case (1604) 5 Co Rep at 91b.
[21] Tony Martin was sentenced to life imprisonment after being convicted of the murder of a trespasser, The Times, April, 2000.
[22] The Independent, May 5, 2000.
[23] The Times, June 9, 2000.
[24] *Revill v Newberry* [1996] 1 All ER 291, CA.

The case arose from an incident in which Ted Newberry, an 82-year-old from Ilkeston, Derbyshire, shot a 12-bore gun at a young intruder, Mark Revill, who was trying to break into Mr Newberry's shed. Mr Newberry was prosecuted on charges of wounding, but was acquitted by a jury. Then, in a civil case, Mr Newberry was ordered to pay £4,000 damages to Revill, who had served a four-month jail sentence for offences including attempted burglary of the shed. The Court of Appeal held that the duty imposed by Parliament on occupiers of land to trespassers, even burglars who intrude in the middle of the night, meant that nobody could be treated as an 'outlaw' and thus fair game.

This is a far cry from how the law used to be applied. Between 1300 and 1348 homicide was the third most common offence prosecuted in England but there were frequent acquittals where householders had killed housebreakers.

It is clear that a person may make a pre-emptive strike. 'A man about to be attacked,' said Lord Griffiths in one case, 'does not have to wait for his assailant to strike the first blow or fire the first shot.'[25] Neither does he, or she, have to retreat before using force. The force must be 'necessary', but it is left to juries to decide if an assailant could have been evaded rather than attacked.

Force used against an attacker must be 'reasonable in the circumstances', and it is in relation to this phrase that the greatest confusion has arisen. One line of judicial pronouncements, concluding in the 1996 House of Lords' decision in the case of Private Lee Clegg[26], states that the test of whether the force was reasonable is objective. Thus if the prosecution shows that, in fact, the force used was excessive, then the defence fails. However, as Lord Morris said in a case in 1971, 'a person defending himself cannot weigh to a nicety the exact measure of his necessary defensive action'.[27]

In confirming that it was proper for Ted Newberry to have to compensate Mark Revill for peppering him with pellets, the Court of Appeal's rationale was partly based upon the notion that our society will not condone the personal, subjective determination of what offenders deserve. It is not difficult to see that down that road lies a Mad Max society. That will be scant comfort for the terrified house occupant who at night, and with the police 45 minutes away, hears someone breaking in through the back door. It can be agreed that a better legal framework would be one in which a self-defender who used excessive force, where the use of some force would have been reasonable, would, if death resulted, be guilty of manslaughter rather than murder.[28] The social problems, though, of burglary on an endemic scale, thousands of desperate, alienated offenders, and an ever-expanding prison system, will clearly not be solved by precision-engineering of legal formulae.

[25] *Beckford v R* [1988] AC 130 at 144.
[26] [1995] 1 AC 482.
[27] *Palmer v The Queen* [1971] AC 814, at 832.
[28] This was recommended by the House of Lords Select Committee on Murder and Life Imprisonment, July, 1989.