THE ELEMENT OF BELIEF IN SELF-DEFENCE

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Summary

The High Court case of Zecevic v. D.P.P has confirmed that the existence of the threat occasion in the law of self-defence is to be measured by the accused's honest and reasonable belief. This is against the view, recently expressed by the English courts and the Privy Council, that such a belief need only be honest. In the same case, the High Court decided that whether the force applied to counteract the threat was necessary is likewise to be assessed according to the accused's honest and reasonable belief. This is again contrary to the position taken by the English courts which apply the test of a reasonable person's belief. This article argues in support of the positions taken in Zecevic. It also explores how the defences of duress and necessity could be brought into line with these recent developments in the law of self-defence.

Self-defence at common law has been the subject of recent scrutiny by both courts and law reform bodies. One major issue is whether the accused's belief as to the nature of the danger confronting him (the threat occasion) need only be honest or must it also be reasonable. After some hesitation, the English courts appear finally to have accepted the view of numerous law reform commissions that the accused's belief need only be honest or genuine. However, the Australian courts continue to insist that the belief must be both honest as well as reasonable. This article will argue in favour of the Australian position.

Another aspect of self-defence, also pertaining to belief, has likewise been the subject of recent scrutiny although to a far lesser extent than that given to the belief concerning the threat occasion. This is the belief as to the degree of force thought necessary to repel the perceived attack.[1]

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[1] Judges are not always so clear in treating the belief concerning the threat occasion apart from the belief as to necessary force. For example, see ground 1(a) of the appeal in *Beckford* v. *R* [1987] 3 W.L.R. 611, at 613; *Zecevic* v. *D.P.P.* (1987) 71 A.L.R. 641, per Mason C.J., at 644. However, the preponderence of judicial authorities do make such a division.

The English courts maintain that the test is what a reasonable person would believe to be reasonably necessary force. By contrast, the Australian courts express the test in terms of what the accused believed on reasonable grounds to be reasonably necessary force. The difference between the two approaches might not be immediately apparent since both subscribe to the objective element of reasonableness. The Australian approach, however, lends itself to greater subjectivity since it is the accused's belief which is assessed as opposed to that of the reasonable person. Again, this article will argue in favour of the Australian position.

The discussion of these two aspects of belief in self-defence will be followed by an examination of the possible impact that the current Australian law might have on the analogous defences of duress and necessity. It will be proposed that, in so far as these defences will allow it, the element of belief both as to the threat occasion and the degree of force should be expressed in the same manner as in the law of self-defence.

I. Belief concerning the Threat Occasion

Three kinds of threat occasions are possible for the purposes of self-defence. These are (1) an actual occasion, (2) an honestly albeit unreasonably believed occasion and (3) a reasonably believed one. The first exists as a matter of objectively demonstrable fact. The second, like the third, is the product of the accused's mind and is accordingly not really concerned with whether a threat occasion does actually exist or not. It especially presents itself in cases where the accused has mistakenly believed in the existence of a threat occasion or the seriousness of such an occasion. The difference between the second and third kinds of occasion is that the second involves an entirely subjective perception by the accused that he is being threatened while the third is limited by an objective test of reasonableness. Neither English nor Australian law requires there to be an actual threat occasion for the defence to succeed. The choice is rather between the second and third kinds of threat occasions. We shall deal with each in turn.

An honest but unreasonable belief

Prior to the House of Lords decision in *D.P.P* v. *Morgan*,[2] there existed strong *dicta* in English cases that the law of self-defence requires the accused's belief as to the threat occasion to be honest as well as reasonable.[3] *Morgan* decided that at common law an honest belief by an accused, however unreasonable it might be, in his victim's consent to sexual intercourse prevented the accused from having the *men rea*

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[2] [1976] A.C. 182.

[3] For example, *R.* v. *Rose* (1884) 15 Cox C.C. 540; *Owens* v. *H.M. Advocate* 1946 J.C. 119; *R.* v. *Chisam* (1963) 47 Cr. App. R. 130 and *R.* v. *Fennell* [1971] 1 Q.B. 428.

needed to be proven for the offence of rape. It is noteworthy that all the Law Lords who considered the point maintained the requirement of reasonable belief so far as self-defence was concerned.[4] Subsequent cases confined the *Morgan* decision to the context of rape.[5] Then came the English Divisional Court case of *Albert* v. *Lavin*.[6] The court upheld the appellant's conviction of assaulting a police officer acting in the execution of his duty when he honestly but unreasonably refused to believe that the person arresting him was a police officer. *Albert* was apparently the first actual decision that self-defence requires the belief concerning the threat occasion to be reasonable.[7]

Just when it was thought that the issue was beyond question, two decisions of the English Court of Appeal in quick succession cast doubt on the longstanding *dicta* that for self-defence the accused's belief concerning the threat occasion had to be reasonable. In *R.* v. *Kimber*, the court applied the *Morgan* decision to a case of indecent assault, declaring that the decision was not confined to rape but was of much wider significance.[8] Six months later, in *R.* v. *Williams (Gladstone)*, the Court of Appeal again applied the *Morgan* decision this time to assault occasioning actual bodily harm.[9] Lord Lane C.J. expressly disapproved of the case of *Albert*, preferring the view that:—

> In a case of self-defence, . . . [i]f the defendant's alleged belief [as to the threat occasion] was mistaken and if the mistake was an unreasonable one, that may be a powerful reason for coming to the conclusion that the belief was not honestly held and should be rejected. Even if the jury come to the conclusion that the mistake was an unreasonable one, if the defendant may genuinely have been labouring under it, he is entitled to rely upon it.[10]

The above passage recently received the unanimous approval of the Privy Council in *Beckford* v. *R.*, a murder case on appeal from Jamaica.[11] Having held that the law of self-defence was the same in Jamaica as in England, the Privy Council ruled that in *Williams (Gladstone)*, the *Morgan* decision was carried to its "logical conclusion."[12] The Council further noted that

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[4] *Supra* note 2, per Lord Hailsam, at 213-214; Lord Simon, at 219-220 and Lord Edmund-Davies, at 233.

[5] For example, see *R.* v. *Barrett and Barrett* (1980) 72 Cr. App. R. 212; *R.* v. *Phekoo* [1981] 1 W.L.R. 1117.

[6] [1981] 2 W.L.R. 1070.

[7] This decision and the other judicial authorities against extending *Morgan* to self-defence received scathing comment from academics around this time. For example, see D. Cowley, "The Retreat from Morgan" [1982] *Criminal Law Review* 198; A. T. H. Smith, "Rethinking the Defence of Mistake" (1982) 2 *Oxford Journal of Legal Studies* 429.

[8] [1983] 1 W.L.R. 1118.

[9] (1983) 78 Cr. App. R. 276.

[10] *Ibid*, at 281.

[11] *Supra* note 1. *Williams (Gladstone)* was also approved of by the English Court of Appeal in *R* v. *Asbury* [1986] Crim.L.R. 258 and in *R.* v. *Fisher* [1987] Crim.L.R. 334.

[12] *Ibid*, per Lord Griffiths, delivering the judgment of the Council, at 618. For a further discussion of the English cases and *Beckford*, see N. J. Reville, "Self-Defence: Courting Sober but Unreasonable Mistakes of Fact" (1988) 52 *Journal of Criminal Law* 84.

this conclusion had the support of recent English law reform commissions[13] as well as distinguished criminal lawyers.[14]

A close analysis of *Kimber, Williams (Gladstone)* and *Beckford* reveals that the judicial preference for an honest belief is the result of a three-stage process of reasoning.[15] These are:—

(1) There is a real difference between the definitional elements of an offence and defence elements. If a particular mental state of an accused forms part of the definition of an offence a subjective test is applied. On the other hand, a mental state belonging to a defence warrants an objective test.

(2) In respect of offences of violence (such as assault and murder), an accused's belief as to the lawfulness or unlawfulness of his conduct is part of the definition of these offences. It follows from (1) above that such a belief need only be subjective, that is, honest.

(3) Applying (1) and (2) to self-defence, an accused may believe (mistakenly perhaps) that he is being attacked and is therefore lawfully entitled to defend himself. Since his belief pertains to the lawfulness of his conduct, that belief need only be honest.

As to the first stage of reasoning, the English courts (and, as we shall see later, the Australian courts) have maintained the division contained therein despite suggestions from various commentators that this division is a purely formal one arising from historical accident and consequently of no material significance.[16] The judicial insistence for drawing a distinction between offence and defence elements is succintly described in the following comment:—

> [I]f the mistake is made about a definitional element, it need not be reasonable since it negates the violation of a prohibitory norm, whereas if it relates to a matter of justification or excuse, it must be reasonable. An unreasonable mistake is by definition culpable,

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[13] It cited the Criminal Law Revision Committee's Fourteenth Report on *Offences Against the Person*, Cmnd. 7844 (1980) and the Law Commission's Report No. 143 on the *Codification of the Criminal Law* (1985). In Australia, the Tasmanian *Criminal Code* was amended in 1987 to specify a subjective belief, the amended s. 46 reading: "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." The subjective belief was proposed by the South Australian Criminal Law and Penal Methods Reform Committee in its Fourth Report on *The Substantive Criminal Law* (1977).

[14] The Privy Council referred to the views of G. Williams in his *Textbook of Criminal Law* (2nd ed., 1983) at 137-138; and to J. C. Smith in *Smith and Hogan, Criminal Law* (5th ed., 1983), at 329-330.

[15] For a similar step-by-step analysis, see P. Alldridge, "Mistake in Criminal Law—Subjectivism Reasserted in the Court of Appeal" (1984) 35 *Northern Ireland Legal Quarterly* 263, at 265.

[16] For example, see P. Dobson, "A Case of Mistake" (1981) 131 *New Law Journal* 692; G. Williams, "Offences and Defences" (1982) 2 *Legal Studies* 233; A. T. H. Smith, "Judicial Law Making in the Criminal Law" (1984) 100 *Law Quarterly Review* 46, at 64.

> and since attribution and culpability are reciprocal, culpability can be attributed to a person who makes an unreasonable mistake.[17]

So far as the second stage of reasoning is concerned, the decisions in *Kimber* and *Williams (Gladstone)* clearly hinged on the view of the Court of Appeal that the element of unlawfulness was a definitional element of the crime of assault.[18] In doing so, they expressly rejected the opinion of the Divisional Court in *Albert* that the word "unlawful" was tautologous and added nothing to the elements of assault.[19] The same approach was taken by the Privy Council in *Beckford.* The following passage from Lord Griffiths' judgment outlines the role of "unlawfulness" in the Privy Council's decision-making process. Furthermore, it presents that role in the context of self-defence, namely, the third stage of reasoning described above:—

> It is because it is an essential element of all crimes of violence that the violence or the threat of violence should be unlawful that self-defence, if raised as an issue in a criminal trial, must be disproved by the prosecution. If the prosecution fail to do so the accused is entitled to be acquitted because the prosecution will have failed to prove an essential element of the crime namely that the violence used by the accused was unlawful.[20]

Support for the view that only an honest belief is necessary under the law of self-defence comes in other forms. One is the argument that to insist on the reasonableness of an accused's belief is to make him criminally liable for a crime of violence when his only fault was negligence, that is, his failure to take sufficient care to ascertain whether he was actually being threatened.[21] This position is incompatible with the law of assault and murder which allow the *mens rea* to be satisfied upon proof of intention or recklessness but not negligence. As Professor Glanville Williams puts it:—

> Murder generally requires an intent to kill (or to do grievous bodily harm); one cannot ordinarily murder by negligence. But if a person kills another in putative self-defence, i.e. under the unreasonable and mistaken belief that he has to do so in self-defence, he is guilty in law of murder. Why should negligence be relevant in one type of case but not in others?[22]

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[17] A. T. H. Smith, "Rethinking the Defence of Mistake" (1982) 2 *Oxford Journal of Legal Studies* 429, at 433 summarising G. Fletcher's discussion of the matter in *Rethinking Criminal Law* (1978) at 691-698. A notable exception is the defence of an honest claim of right which is available at common law in cases of larceny, robbery and certain statutory offences. However, on closer analysis, this might not be a true defence as its effect is to negate dishonesty which is an offence element: see *Walden* v. *Hensler* [1987] 61 A.L.J.R. 646, per Brennan J., at 650; D. O'Connor and P. A. Fairall, *Criminal Defences* (2nd ed., 1988) at 86-87.

[18] See *supra* note 8, at 1121; *supra* note 9, at 276 and 279.

[19] *Supra* note 6, per Hodgson J., at 1083.

[20] *Supra* note 1, at 619.

[21] See Smith and Hogan, *supra* note 14, at 78; Williams, *supra* note 14, at 137-138; Alldridge, *supra* note 15, at 272.

[22] *Supra* note 16, at 242.

It is important to appreciate here that this argument asks us to view negligence (that is, an unreasonable belief) alongside intention and recklessness as part of the definitional element of the offences of assault and murder. Only when we do so can the objection then be raised that negligence is not part of the offence of assault and murder. Put in another way, the argument treats the accused's belief as an offence element in the same way as it considers the *mens rea* of assault and murder as part of these offences. This approach conforms with the three-stage process of reasoning outlined above in that the accused's belief is treated as an integral part of the issue of unlawfulness which is in turn regarded as part of the definitional element of the offence.[23] If the accused's belief is viewed as a *defence* element instead, the question posed by Professor Williams at the end of the immediately preceding quotation can be readily answered. For then negligence will be directly related to self-defence rather than to the offences of assault and murder. But more of this later.

Another argument supporting the honest belief position is that the additional requirement of reasonable belief serves no utilitarian purpose where a person perceives he is about to be attacked.[24] Such a perception is usually accompanied by fear and prompts instant action in defence of himself. Under these circumstances, it is said that a future threat of punishment is most unlikely to deter him. Also, it would be unjust to punish him for failing to take steps to verify his belief. It may be noted in passing that this argument views the utility of reasonable belief purely in terms of the accused with no regard for the plight of his victim.

The final argument in support of honest belief is really a rebuttal of a purported criticism against this position. The criticism is that, without an objective yardstick of reasonableness, juries as finders of fact are prone to being gullible in accepting an accused's assertion that he held an honest belief. In reply, those in favour of honest belief cite a comment by Dixon J. that "a lack of confidence in the ability of a tribunal correctly to estimate evidence of states of mind and the like can never be sufficient ground for excluding from inquiry the most fundamental element in a rational and humane criminal code."[25] In addition, as the Privy Council in *Beckford*

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[23] This is well illustrated in the following comment by Lord Lane C.J. *in Williams (Gladstone), supra* note 9, at 281 and approved of in *Beckford, supra* note 1, at 619: "If the belief was in fact held, its unreasonableness, so far as guilt or innocence is concerned, is neither here nor there. It is irrelevant. Were it otherwise, the defendant would be convicted because he was negligent in failing to recognise . . . that a crime was not being committed . . . In other words the jury should be directed first of all that the prosecution have the burden of proving the unlawfulness of the defendant's actions; secondly, if the defendant may have been labouring under a mistake as to the facts, he must be judged according to his mistaken view of the facts; thirdly, that is so whether the mistake was, on an objective view, a reasonable mistake or not."

[24] See G. Williams, *Textbook of Criminal Law* (1st ed., 1978) at 452; Alldridge, *supra* note 15, at 272. For a similar proposition but in relation to the defence of duress, see the Victorian Law Reform Commission's Report No. 9, *Duress, Necessity and Coercion* (1980), at para. 2.34: "If a person is really in a desperate situation, honestly believing that the threat of danger is real and that person is genuinely unable to resist the threat, it would seem that no policy of the law will deter or discourage." The Commission proposed a test of honest belief as to the threat occasion.

[25] *Thomas* v. *R.* (1937) 59 C.L.R. 279, at 309 and referred to by Cowley, *supra* note 7, at 207-208.

has observed, a form of summing-up incorporating honest belief has been used in England for some years now without resulting in a disquieting number of acquittals.[26]

An honest and reasonable belief

The Australian courts have consistently maintained that under the law of self-defence, the accused must have honestly believed on reasonable grounds that he was being attacked. Although the House of Lords decision in *Morgan* has been adopted by the State appellate courts[27] there has not been a corresponding move as the one in England to extend the decision to self-defence. The Australian courts have, possibly barring a couple of decisions, been content to confine *Morgan* to the context of rape. A significant reason as to why *Morgan* did not have a material impact on the Australian law of self-defence appears to be the presence of the High Court decision in *Viro* v. *The Queen*.[28] Speaking just three years after *Morgan* was decided, Mason J. expressed the law of self-defence in the following manner:—

> [W]here threat of death or grievous bodily harm to the accused is in question and the issue of self-defence arises the task of the jury must be stated as follows:—
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> 1. (a) It is for the jury first to consider whether when the accused killed the deceased the accused reasonably believed that an unlawful attack which threatened him with death or serious bodily harm was being or was about to be made upon him.
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> (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.
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> 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.
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> 3. If the jury is not satisfied beyond a 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 to the danger which he believed he faced.

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[26] *Supra* note 1, at 620.

[27] See *R.* v. *Wozniak and Pendry* (1977) 16 S.A.S.R. 139; *R.* v. *McEwan* [1979] 2 N.S.W.L.R. 926; *R.* v. *Saragozza* [1984] V.R. 187. *Morgan* has yet to receive the approval of the High Court.

[28] (1978) 141 C.L.R. 88.

> 4. If the jury is not satisfied beyond reasonable doubt that more force was used than was reasonably proportionate it should acquit.[29]

Only the first and second propositions are relevant to our present discussion. The third and fourth propositions will be examined under the next Part of this article. The first two propositions clearly require the accused's belief concerning the threat occasion to have been reasonable.

Two State appellate courts after *Viro* reformulated Mason J.'s first proposition in purely subjective terms.[30] While these courts did not expressly refer to *Morgan*, it is likely that the decision would have had some influence on them. This attempt to introduce a test of honest belief was received with mixed feelings in judicial circles.[31] However, the matter has since been laid to rest in the recent case of *Zecevic* v. *D.P.P.* in which seven members of the High Court unanimously decided in favour of an honest and reasonable belief.[32]

An analysis of *Zecevic* discloses that the High Court's preference for an honest and reasonable belief is the result of the following two-stage process of reasoning:—

(1) There is a real difference between the definitional elements of an offence and defence elements. If a particular mental state of an accused forms part of the definition of an offence a subjective test is applied. On the other hand, a mental state belonging to a defence warrants an objective test.[33]

(2) In respect of offences of violence (such as assault and murder), an accused's belief (mistakenly perhaps) as to the existence of a threat occasion justifying his use of violence by way of self-defence is a defence element. It follows from (1) above that such a belief needs to be based on reasonable grounds.

It is to be observed that the first stage of reasoning is shared by the three-stage reasoning process of the English courts discussed earlier. The point of departure lies in the second stage. The High Court in *Zecevic* did not give any significance to the issue of "unlawfulness" as did the

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[29] *Ibid*, at 146-147. Stephen, Aickin, Gibbs JJ. and Barwick C.J. concurred with these four propositions. Jacobs and Murphy JJ. preferred a subjective belief but, for the sake of certainty of the law, ultimately concurred with Mason J.'s propositions. Mason J. stated two further propositions which need not concern us here. These provide for the plea of excessive self-defence which has since been abrogated by the High Court in *Zecevic, supra* note 1.

[30] *Morgan* v. *Colman* [1981] 27 S.A.S.R. 334 and, to a lesser extent, *R.* v. *McManus* [1985] 2 N.S.W.L.R. 448.

[31] For example, it was approved of in *R.* v. *Kincaid* [1983] 33 S.A.S.R. 552 but not followed in *R.* v. *Train* [1985] 18 A. Crim. R. 353 and *R.* v. *Fricker* [1986] 42 S.A.S.R. 436.

[32] *Supra* note 1. *Cf.* P. Byrne, "Self-Defence as an answer to criminal charges" (1988) 62 *Australian Law Journal* 75.

[33] See for example, *Zecevic, ibid*, per Wilson, Dawson and Toohey JJ., at 650. Another instance where the distinction is made is found in the following statement by Gibbs C.J. in *He Kaw Teh* v. *The Queen* (1984-85) 157 C.L.R. 523, at 534: "It is of course clear that if guilty knowledge is an element of the offence, an honest belief, even if unreasonably based, may negative the existence of the guilty knowledge, and thus lead to an acquittal."

English judges. Instead, it relied on the historical development of the law of homicide for its conclusion that the accused's belief concerning the threat occasion had to be reasonable. That development involved a distinction between justifiable and excusable homicide with the former carrying with it a commendation rather than blame while the latter was not entirely without blame. Excusable homicide, unlike justifiable homicide, was not concerned with the execution of justice but with a necessary and reasonable response to the preservation of life and limb. The connection between this historical development and the law of self-defence is made in the following passage of the joint judgment of Wilson, Dawson and Toohey JJ. in *Zecevic*:—

> [T]he history of the matter serves to explain why the requirement of reasonableness, which was a requirement of excusable homicide, has remained part of the law of self-defence. Moreover, it establishes why that requirement ought not to be regarded as a definitional element of the offence in question but as going rather to exculpation.[34]

It is submitted that the High Court was correct in not attaching any weight to the element of "unlawfulness" when deciding whether the accused's belief belonged to the definitional element of assault and murder or whether it was part of the plea of self-defence. As one commentator has said, "since the word "unlawful" might just as well be omitted [from the definition of assault] it is a circular argument to suggest that *because* the word "unlawful" appears in the definition, *it must follow* that a mistake of fact going to the lawfulness of the action must excuse whether on reasonable grounds or not. The issue should be addressed as a matter of principle, not as one to be solved by deduction from posited definitions."[35] We have just seen how the High Court made its decision by examining the historical development of homicide in so far as it affected the law of self-defence. To state simply, as the High Court did, that the requirement of reasonable belief in self-defence originates from such a historical development is not sufficient. It fails to tell us just why the law of homicide required an objective element of reasonableness before a killing could be excused. The High Court could have gone further and exposed the principle underlying that requirement.

The search for this principle begins with the division between offence elements and defence elements. Which side of the division a particular subject matter should fall depends ultimately on value judgments of the community.[36] Let us take as our subject matter a mistaken belief by a person that he is about to be attacked which prompts him into using

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[34] *Id.* See also Mason C.J., *Ibid*, at 645.

[35] Alldridge, *supra* note 15, at 267. See also G. Williams, *Criminal Law, The General Part* (1961), at 29; Fletcher, *supra* note 17, at 738-739 and the Law Commission on the *Codification of the Criminal Law*, *supra* note 13, at 117.

[36] I have relied heavily on K. Campbell, "Offence and Defence" in *Criminal Law and Justice* (I. H. Dennis, ed., 1987) at 73 *et seq.* for this analysis of principle.

force against his putative assailant. Whether that belief should be seen as part of the offence of assault (or murder as the case may be) or as part of self-defence depends on the value judgments operating in such a situation. Assigning the belief to the offence implies that the law considers that force mistakenly applied is, in law, no harm at all.[37] Assigning it to the defence side implies that all use of force is, in law, harm but that its use is excused in this case due to the accused's mistaken belief. The latter assignment must surely be the principle underlying the historical development of excusable homicide. Translated in terms of such homicide, the law views all killings (apart from justifiable homicides) as harmful. However, the law is prepared to excuse such a killing if it was committed under a belief that it was necessary by way of self-defence. Since an accused's mistaken belief is regarded as a defence element, the belief has to be based on reasonable grounds before society will excuse him for the harm committed.

What of the argument put forward by proponents of the honest belief position that to require the belief to be reasonable is tantamount to punishing the accused for negligence? One response is to say that this disquiet has been caused by placing negligence alongside the *mens rea* for the offence. No such disquiet arises if negligence is regarded, as it properly should, in connection with the defence. Under this latter view, the *mens rea* for the offence of say, assault, is established once the prosecution proves that the accused intentionally or recklessly applied force against a person. This establishment of *mens rea* is not subject to the further question of whether the use of force was lawful or unlawful. A harm against which society seeks to protect has been committed, namely, the non-accidental infliction of force against another. Consequently, the accused will be guilty of assault unless he can be excused on the ground of his mistaken belief. This places the belief in the realm of self-defence where it is quite appropriate for the law to impose a requirement of due care accompanying such a belief.[38]

Even if we ignored the division between offence and defence elements as some commentators would have us do,[39] it cannot be asserted with any real confidence that an accused operating under a mistaken but unreasonable belief is free from culpability. If the accused is so out of touch with the reality of the situation, if he lacks the judgment of normal people, should he not have taken more care in verifying the correctness of his belief?[40] This obligation to exercise due diligence is further justified

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[37] *Cf.* Fletcher, *supra* note 17, at 703.

[38] As Williams himself concedes in *supra* note 16, at 242, "there is no illogicality in saying that although the main enactment requires *mens rea*, a defence (an exception to the offence) is not available to a person who negligently arrived at a mistaken belief in the existence of the facts necessary to found the defence."

[39] *Supra* note 16.

[40] As Fletcher, *supra* note 17, at 712 puts it, "The normative theory of attribution takes the interaction of the actor with his surroundings to lie at the core of assessing personal culpability . . . Culpability for inadvertence turns on the actor's failure to respond to circumstances that signal danger."

because the accused is aware that he is invading an interest generally protected by the law. In reply, proponents of the honest belief position might point to the fact that the accused believes that his act, being justified, is innocent and that it would therefore be unjust to punish him. But surely the criminal law can be "just" even when it punishes people who believe in their innocence.[41] Furthermore, if we delve deeper into the accused's belief, we may find that it is the result of his being unnaturally apprehensive or cowardly. To say that a person is unusually apprehensive or cowardly is to regard his conduct as tending to be deficient in some ways. It is certainly not to say that he has no choice but to act in a certain way so that he ought to be excused.[42]

Then there is the argument that insistence on reasonable grounds for the accused's belief does not serve any utilitarian function. It is said that a person who perceives that he is about to be attacked will not be influenced by the threat of future punishment into becoming more circumspect in his use of force. However, this might be true only in so long as we view the relevant time frame as the precise moment of the criminal incident. If a broader time frame were adopted, we would view the accused's belief in a threat occasion within its surrounding context.[43] Matters such as what the putative assailant said or did in the minutes or even hours leading up to the criminal incident would then become very significant. So would the accused's conduct prior to the incident. The exception to *Williams (Gladstone)* made recently by the English Court of Appeal in *R.* v. *O'Grady*[44] might be seen as a manifestation of this broader approach. In *O'Grady*, it was held that while a sober person who mistakenly believed (however unreasonably) that he was under attack could rely on self-defence, a person who makes a similar mistake because he was drunk cannot.[45] Underlying this decision is the assumption that the accused would not have made the mistake had he not started drinking at an earlier point in time. There may also have been at play the assumption that the accused's drunkenness made him less fearful of the threat of punishment than if he had been sober. An evaluation of the accused's belief in this manner therefore permits an assessment of whether the accused could be expected to exercise circumspection and restraint taking into account all the circumstances leading to and surrounding the criminal incident. Even if we concede for the sake of discussion that the threat of future punishment does little to deter impulsive crimes, we cannot dismiss the role of the law in supporting and reinforcing a code of social

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[41] See C. Wells, "Swatting the Subjectivist Bug" [1982] *Criminal Law Review* 209, at 213.

[42] See S. H. Kadish, "Excusing Crimes" (1987) 75 *California Law Review* 257, at 275-276.

[43] As has been done in relation to provocative conduct in the law of provocation. See generally, M. Kelman, "Interpretative Construction in Substantive Criminal Law" (1981) 33 *Stanford Law Review* 591. *Cf.* the South Australian Committee, *supra* note 13, at paras. 12.1-12.2.

[44] [1987] 3 W.L.R. 321.

[45] For a critical comment of the case, see H. P. Milgate, "Intoxication, Mistake and the Public Interest" (1987) 46 *Cambridge Law Journal* 381.

behaviour which deprecates failing to take due care to verify one's belief in the need to injure others.[46]

Shifting our focus away from the accused and onto the victim yields another utilitarian purpose of reasonable belief. Take the case of a person who is unnaturally apprehensive or cowardly which leads him to honestly but unreasonably believe that he is being attacked. Without the limitation of reasonable belief, such a person can react violently towards others with impunity.[47] And he can do so time and again if that is his inclination. One American judge has presented the problem thus:—

> To completely exonerate such an individual, no matter how aberrational or bizarre his thought patterns, would allow citizens to set their own standards for the permissible use of force. It would also allow a legally competent defendant suffering from delusions to kill or perform acts of violence with impunity, contrary to fundamental principles of justice and criminal law.[48]

Should not the criminal law provide societal protection from such a person? It might be said in reply that in such a case the unreasonableness of his belief may be a powerful reason for the jury reaching the conclusion that the belief was not honestly held.[49] But what if there is clear evidence that the accused, being unusually apprehensive or cowardly, did actually harbour an honest belief? Unable to regard the reasonableness of the belief as an essential element of self-defence, the jury will have no option but to acquit him.

There is yet another reply to the injustice perceived to be created by insisting on reasonable belief over and above an honest one. It is that the law does not assume a completely objective quality when making reasonableness part of its assessment of the accused's belief. In *Helmhout* v. *R.*, the Federal Court expanded upon Mason J.'s first proposition in *Viro* in the following terms:—

> The test of whether an accused's belief was reasonable is not whether an unlawful attack was being made or was about to be made upon him [that is, an actual attack], nor even whether the hypothetical reasonable man in the accused's position would have believed that an unlawful attack was being or was about to be made on him. The test is whether the accused himself might reasonably have believed in all the circumstances in which he found himself that an unlawful attack was being or was about to be made upon him.[50]

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[46] For a related comment in the context of provocation, see A. J. Ashworth, "The Doctrine of Provocation" (1976) 36 *Cambridge Law Journal* 292, at 311.

[47] See Kadish, *supra* note 42, at 274-278. *Contra.* The Law Commission's Working Paper No. 55 on *Defences of General Application* (1974), at 9 (on the defence of duress): "[I]n regard to the existence of the threat, it seems to us that a test of reasonableness, however framed, would serve only to penalise those of less than average understanding or judgment . . ."

[48] *People* v. *Goetz* (1986) 506 N.Y.S. 2d 18, per Wachtler C.J., at 27.

[49] *Williams (Gladstone), supra* note 9, at 281.

[50] (1980) 49 F.L.R. 1, per Smithers, Brennan and Deane J.J., at 4.

Under this test, it is possible for an accused to form a belief which differs from that which the reasonable person would have contemplated in the same circumstances.[51] This is because the jury is required to begin with who this particular accused is, taking into account his personal characteristics. Only when the jury has a picture of the particular accused can it proceed to determine whether such a person could have had reasonable grounds for believing what he honestly believed.[52] These personal characteristics will include "all facts within the accused's knowledge and all matters of belief in the existence of facts from which the accused man draws the inference that an attack is being made or is imminent."[53] It will also include any excitement, affront and distress that the accused might have experienced.[54] In this regard the High Court in *Zecevic* has held that the jury should be instructed to give "proper weight to the predicament of the accused which may have afforded little, if any, opportunity for calm deliberation or detached reflection."[55] Just how far the courts will be prepared to recognise other personal characteristics remains to be seen. Presumably, they will take into account age, sex, physical disabilities, religious beliefs, ethnicity and such of the accused's characteristics as might affect the gravity of the threat to him. However, it is likely that the courts will not recognise attributes such as unnatural apprehension, unusual cowardice and extraordinary excitability.[56] The point to note here, however, is that the law does temper any harshness stemming from a purely objective assessment with a process of individualization. The law does this by *not* asking whether it was a reasonable belief generally but by asking whether it was a reasonable belief *for this particular accused* to hold.

Any remaining reservations that the requirement of reasonable belief fails to achieve compassion and justice could be allayed by making an

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[51] See *Kincaid, supra* note 31, per Dox J., at 556. Admittedly, what a reasonable person would have believed would play a significant role. The matter is well expressed by the Canadian Supreme Court in *R.* v. *Baxter* (1976) 27 C.C.C. (2d) 96. Martin J.A. said, at 108-109: "The accused's subjective belief that he was in imminent danger of death or grievous bodily harm and that his action was necessary in self-defence was, however, required to be based on reasonable grounds. In deciding whether the accused's belief was based upon reasonable grounds the jury would of necessity draw comparisons with what a reasonable person in the accused's situation might believe with respect to the extent and the imminence of the danger by which he was threatened, and the force necessary to defend himself against the apprehended danger." His Honour was discussing s. 34(2)(b) of the Canadian *Criminal Code* (s. 34 being one of the major provisions on self-defence).

[52] This two-stage approach rebuts the view that there is no material difference between a reasonable person's belief and an accused's reasonable belief; see D. Lanham, "Death of a Qualified Defence?" (1988) 104 *Law Quarterly Review* 239, at 243.

[53] *R.* v. *Wills* [1983] 2 V.R. 201, per Lush J., at 210.

[54] *Ibid*, at 211.

[55] *Supra* note , per Wilson, Dawson and Toohey J.J., at 653.

[56] This will bring self-defence into line with the law of provocation as laid down in *D.P.P.* v. *Camplin* and approved of in *R.* v. *Dutton* (1979) 21 S.A.S.R. 356; *R.* v. *Croft* [1981] 1 N.S.W.L.R. 126 and *R.* v. *O'Neill* [1982] V.R. 150. My preferred view is for the defence of provocation to be fully subjectivised: see S. M. H. Yeo, "Provoking the 'Ordinary' Ethnic Person: A Juror's Predicament" (1987) 11 *Criminal Law Journal* 96. Should the law develop thus, it need not follow that self-defence should likewise lose its objective requirements. For one thing, while self-defence completely exonerates the accused of criminal liability, provocation only reduces the charge against him.

honest but unreasonable belief a powerful mitigating factor at the sentencing stage.[57] This is now possible even for murder in New South Wales and Victoria since recent legislative amendments have removed the mandatory punishment for that offence.[58] Some might consider that a difference in punishment alone does not adequately separate the "standard" murderer from a person who has killed upon an honest but unreasonable belief that he was threatened.[59] The solution might be for the courts or legislature to recognise a defence of honest but unreasonable mistake concerning the threat occasion which reduces a charge of murder to one of manslaughter.[60]

Finally, there is the contention by proponents of the honest belief position that juries are not prone to being gullible in accepting an accused's assertion that he held an honest belief. They point to the absence of a disquieting number of acquittals in cases where a formula of honest but unreasonable belief has been used. This is a welcome result for it reveals the ability of juries to properly handle such purely subjective concepts as honest belief, intention and recklessness. Those in favour of reasonable belief in self-defence do not take issue with this result. Their insistence on the reasonableness of the belief is not because they distrust juries with a purely subjective test. Rather, they regard the requirement of reasonableness as serving to reflect community values and demands in cases where a person has intentionally or recklessly applied force against another. Overall then, it is submitted that under the law of self-defence the current Australian position of requiring an accused's belief concerning the threat occasion to be honest and reasonable is preferable to the English one of only honest belief.

II. Belief concerning the Force Applied

The debate as to whether a belief need only be honest or must it be reasonable as well is confined to belief concerning the threat occasion. Both sides agree that an objective test is to be applied to the accused's reaction to the threat. This is because there is no controversy over which side of the dividing line between offence and defence elements the use of force falls on. It is clearly a matter which is raised as part of the

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[57] See *Albert, supra* note 6, per Donaldson L.J., at 1084-1085.

[58] *Crimes Act* 1900 (N.S.W.), s. 19; *Crimes Act* 1958 (Vic.), s. 3.

[59] For example, see Alldridge, *supra* note 15, at 272.

[60] It should be observed that this differs from the plea of excessive self-defence which concerned an honest but unreasonable belief as to the proportionality of the force used. Deane J. in his dissenting judgment in *Zecevic, supra* note 1, at 666 advocated just such a proposed defence: "If the defence failed as a complete defence only by reason of the absence of the element of reasonableness of the accused's belief, there is no real basis in principle or justice for the drawing of general distinctions in terms of moral culpability or subjective malice according to whether the reason for the failure was that the accused's perception of an occasion of self-defence was unreasonable or that his belief that the amount of force used was reasonably proportionate to the danger was unreasonable." For a further discussion, see P. Fairall, "The Demise of Excessive Self-Defence Manslaughter in Australia: A Final Obituary?" (1988) 12 *Criminal Law Journal* 28, at 36-38; S. M. H. Yeo, "The Demise of Excessive Self-Defence in Australia" (1988) 37 *International and Comparative Law Quarterly* 348, at 361-363.

defence element. Furthermore, since the use of force involves conduct, it is for the law to lay down a community standard of reasonableness which individuals must subscribe to in order to be excused from criminal liability.[61] However, there appear to be two different ways of expressing the objective test:—

(1) Whether a reasonable person in the accused's position would have believed the force applied by the accused to be reasonably necessary; or

(2) Whether the accused believed on reasonable grounds that the force applied by him was reasonably necessary.

The first is purely objective since it does not pay any regard to the particular accused's personal characteristics. The only measure of individualization is that the reasonable person's reaction is measured against the threat occasion as perceived by the accused. The second is both subjective and objective. Its subjective nature lies in its focus on the particular accused's belief as opposed to what a reasonable person would have believed. The objective requirement is that the accused's belief must be based on reasonable grounds.

In England, the overwhelming preference by the courts as well as law reform bodies is for the first test.[62] For instance, in *Williams (Gladstone)*, the English Court of Appeal held that a person charged with an offence has a defence of self-defence "if he used *such force as is reasonable* in the circumstances as he believed them to be" in the defence of himself or any other person.[63] Though the hypothetical reasonable person is not expressly referred to, he or she is by implication to decide on the reasonableness or otherwise of the force applied by the accused. In practice, it is the jury or, in the case of a summary trial, a magistrate who dons the cloak of the reasonable person. This much was recognised by the English Criminal Law Revision Committee on *Offences against the Person*[64] when it advocated a purely subjective test for belief concerning the threat occasion but a purely objective test to gauge the accused's use of force. In the Committee's words:—

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[61] See Smith and Hogan, *supra* note 14, at 78-79 and 215; G. Williams, *Textbook of Criminal Law*, *supra* note 24, at 456. *Cf.* P. Alldridge, "Duress and the Reasonable Person" (1983) 34 *Northern Ireland Legal Quarterly* 125, at 134-135.

[62] *Cf.* In *Chisam*, *supra* note 3, Lord Parker C.J., at 133, approved the following statement of the law in *Halsbury's Laws of England*, 3rd ed., Vol. 10 (1955), at 723: "Where a forcible and violent felony is attempted upon the person of another, the party assaulted, or his servant, or any other person present, is entitled to repel force by force and, if necessary, to kill the aggressor. There must be a reasonable necessity for the killing, *or at least an honest belief based on reasonable grounds that there is such a necessity.*" Emphasis added. The latest edition of Halsbury's has omitted this passage.

[63] *Supra* note 9, per Lane C.J., at 281, citing the Criminal Law Revision Committee, *supra* note 13, at para. 72. See also *R.* v. *Whyte* [1987] 3 All E.R. 416 which applied *Palmer* v. *The Queen* [1971] A.C. 814 and *R.* v. *Shannon* (1980) 71 Cr. App. R. 192. The Privy Council in *Beckford*, *supra* note 1, at 620, appears to have rejected the submission contained in ground 1(b) of the appeal that an accused "may use such force as on reasonable grounds he thinks necessary in order to resist the attack . . ." It is observed that this is an expression of the second test outlined in the main text above. See also *O'Grady*, *supra* note 44, at 324.

[64] *Supra* note 13.

> [M]ost of us support a subjective test as to whether the defendant believed that he was under attack but an objective test as to the defendant's reaction to the threat. The defendant should be judged on the facts as he believed them to be, but subject to that it should be for the jury or magistrate to decide whether in their opinion the defendant's reaction to the threat, actual or imagined, was a reasonable one.[65]

This test also appears to have been part of the Australian law of self-defence prior to the recent High Court decision in *Zecevic*. For instance, in the Victorian Full Court case of *R.* v. *Rainey*, the proper question to ask concerning the degree of force used was held to be: "Would a reasonable person in the defendant's situation have regarded what he did as out of all proportion to the danger to be guarded against?"[66] Likewise, it may be observed that Mason J.'s third and fourth propositions in *Viro* speak of whether the jury was satisfied that more force was used than was reasonably proportionate to the perceived threat.[67]

A definite shift in favour of the second test has, however, occurred in *Zecevic* so as to create yet another difference between the Australian law of self-defence and its English counterpart. According to Wilson, Dawson and Toohey JJ., the test is "whether the accused believed upon reasonable grounds that it was necessary in self-defence to do what he did."[68] Mason J. expressed a similar opinion when he said that self-defence was limited to "action taken by an accused in defending himself which he reasonably believed or believed on reasonable grounds to be necessary . . ."[69] The remaining judges likewise pronounced the law in these terms.[70]

There are several reasons why this second test is to be preferred over the first. Its emphasis on the accused's belief ensures that, in the

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[65] *Ibid*, at para. 283. Subsequently the Law Commission on the *Codification of the Criminal Law*, *supra* note 13, at para. 13.37, also recommended a purely objective test in relation to the use of force. In doing so, the Commission observed that its recommendation was in accordance with the C.L.R.C.'s proposal and *Williams (Gladstone)*. See also the Canadian Law Reform Commission's Working Paper 29 on *Criminal Law, The General Part: Liability and Defences* (1982) at 102-103.

[66] [1970] V.R. 650, per Smith J., at 651. See also *R.* v. *Howe* (1958) S.A.S.R. 95, per Mayo J., at 121-122; *The Queen* v. *Howe* (1958) 100 C.L.R. 448 (High Court), per Dixon C.J., at 460.

[67] These have been reproduced in the main text accompanying *supra* note 29. The Tasmanian *Criminal Code* was recently amended to reflect this position; see *supra* note 13.

[68] *Supra* note 1 at 652. These judges did not express their reason for the shift. One might surmise that the greater subjectivity which the new test introduces is a compromise by the judges in view of their abrogating the doctrine of excessive self-defence.

For the view that the High Court in *Zecevic* has altered the existing law in another respect by speaking of reasonable necessity instead of reasonableness alone, see Lanham, *supra* note 52, at 244-245.

[69] *Ibid*, at 644. It appears that Mason J. was confused when he cited his third and fourth propositions in *Viro* as being consistent with this proposition. As noted earlier, those propositions are framed in terms of what the jury, as reasonable people, regard to be reasonably necessary force. Neither is it at all clear, as his Honour suggests, that *Palmer* v. *The Queen* supports this proposition. Indeed, if that decision said anything concerning this issue, it tended to be more in accord with the first test.

[70] *Ibid*, per Brennan J., at 655; per Deane J., at 661 and 667; and per Gaudron J., at 668 and 671. See also *Howe*, *supra* note 65, per Tayor and Menzies JJ., at 465-466 and 469 respectively.

determination of culpability, sufficient account is taken of the personal characteristics of the particular accused. Thus, characteristics such as the accused's age, sex, physical disabilities, religion and ethnicity would be relevant in assessing the reasonableness of the accused's belief in the necessity of the force applied by him or her. It is only fair that such personal attributes should be considered.[71] For instance, a physical defect such as blindness or deafness should surely form part of the assessment of what the accused's response could reasonably be. The other characteristics listed should likewise be relevant although it is unlikely that the law will go further to recognise such characteristics as unusual excitability, unnatural apprehension or cowardice.[72] By contrast, the first test simply speaks of a reasonable person albeit in the accused's position. This is vastly different from regarding the reasonable person, as the law does elsewhere,[73] as sharing the accused's personal characteristics. If the authorities supporting the first test did mean to add this rider, they certainly have failed to make this clear. In any event, even if there was such a clear statement of the test, there would still have remained a material difference between the two tests. The first would require the jury to consider the issue of force from the viewpoint of the reasonable person while the second test would require that consideration to be made, as it were, through the eyes of the accused.[74] The second test is to be preferred for injecting into the law a greater amount of allowance for human error or frailty.

Another reason for preferring the second test is that it simplifies the understanding and application of the law of self-defence. We have noted in the first Part of this article that, under the present Australian law, the accused's belief as to the threat occasion must have been honest and reasonable. Under the second test, the accused's belief as to the necessity of force applied must likewise have been honest and reasonable. Hence, the same formula of honest and reasonable belief is applied throughout the law of self-defence. What this does for comprehension by juries of the complex law of self-defence is obvious. There is also sound logic in bringing these two aspects of the law of self-defence together in this fashion. This is because an accused's reaction to a threat occasion must necessarily be integrally dependant upon his perception of that occasion. While the law of self-defence has developed in a way which distinguishes the issue concerning the threat occasion from the one involving the use of force, they are really very much inter-related. It

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[71] See generally, G. Fletcher. "The Individualization of Excusing Conditions" (1974) 47 *Southern California Law Review* 1269.

[72] This would be in keeping with the defence of provocation; see *supra* note 56 and the accompanying main text.

[73] Notably, the defences of provocation and duress.

[74] We have already noted a similar distinction and the practical significance of that distinction in respect of the belief concerning the threat occasion. See the main text following the quotation from *Helmhout, supra* note 50.

follows that the test used to assess these two issues should be one and the same.

One significant effect that the second test has had on the Australian law of self-defence has been the downplaying of the requirement of proportionate force. So long as the courts applied the first test, the issue of force was resolved by answering the question: "Was the use of force reasonably necessary?".[75] As a major subset of this inquiry, the trial judge would direct the jury to consider whether "the force in fact used by the accused was reasonably proportionate to the danger he believed he faced."[76] If the jury concluded that the force was so proportionate, it would invariably answer the above question in the affirmative. Under the second test, however, the issue of necessary force is resolved by answering the question: "Did the accused honestly and reasonably believe the use of force to be reasonably necessary?".[77] This focus on the accused's belief has made proportionate force only a factor, albeit an important one, to be considered when deciding whether the accused reasonably believed in the necessity of the force applied by him. In *Zecevic*, Wilson, Dawson and Toohey JJ. expressed the matter thus:—

> [I]t will in many cases be appropriate for a jury to be told that, in determining whether the accused believed that his actions were necessary in order to defend himself and whether he held that belief on reasonable grounds, it should consider whether the force used by the accused was proportionate to the threat offered. However, the whole of the circumstances should be considered, of which the degree of force used may be only part.[78]

This is a welcome development in the law of self-defence. It sits well with the current efforts by the High Court in this area to achieve a balance between recognising certain subjective characteristics of the accused on the one hand and maintaining certain objective standards of behaviour demanded by society on the other. Having dealt with the element of belief in self-defence both in relation to the threat occasion and the use of force, we can now usefully examine the effect that the law on these matters, as expressed in *Zecevic*, might have on the analogous defences of duress and necessity.

III. Some Implications for Duress and Necessity

The common law has traditionally distinguished the defences of self-defence, duress and necessity. In self-defence, a person uses force to repel the force directed against him by his attacker. A person acting

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[75] See the authorities cited in *supra* notes 63 and 66.

[76] This is the third proposition in *Viro, supra* note 28 at 147.

[77] See *Zecevic, supra* note 1, per Wilson, Dawson and Toohey JJ., at 652.

[78] *Ibid*, at 653. However, for the suggestion that a proportionality rule is consistent with the justificatory theory underlying self-defence, see S. M. H. Yeo, "Proportionality in Criminal Defences" (1988) 12 *Criminal Law Journal* 211.

under duress is threatened by another with harm into injuring an innocent victim. A person acting out of necessity seeks to escape danger arising from a situation other than the two just mentioned. Despite these differences, the defences all concern persons who have committed a criminal act only because they believed themselves to be under a threat. The presence of the threat, actual or imagined, caused them to react under extreme pressure. This common ground is not affected by the fact that the threat might stem from different sources.[79] Accordingly, issues concerning the threat such as whether there exists a threat occasion and the reaction to that occasion should, as far as possible, be similarly dealt with for all three defences.[80] The ensuing discussion is premised upon such a proposition.

Duress

As in the case of self-defence, the threat occasion for the defence of duress may take three possible forms. These are (1) an actual threat which can be objectively demonstrated to have existed; (2) a person's honest albeit unreasonable belief as to the existence of a threat and (3) a person's honest and reasonable belief that a threat existed. The often quoted definition of the defence by Smith J. in the Victorian Full Court case of *R.* v. *Hurley and Murray* apparently supports the requirement that there must have been an actual threat.[81] The definition states in part that the accused must have committed the act charged "under a threat that death or grievous bodily harm will be inflicted unlawfully upon a human being if the accused fails to do the act and . . . the threat was present and continuing, imminent and impending . . ."[82] However, Smith J. did expressly state that his proposed definition was not intended to be exhaustive and subsequent courts have treated it as such.[83] It can be stated with confidence that judges and commentators examining this issue see the choice as being really between the second and third forms of threat occasions.

As with the law of self-defence and for the same reasons, there has been a strong move by law reform bodies and commentators to incorporate the honest belief position into the law of duress.[84] However,

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[79] The Law Commission's Working Paper No. 55, *supra* note 477, at para. 30. See also *D.P.P.* v. *Lynch* [1975] A.C. 653, per Lord Simon, at 653, and per Lord Kilbrandon, at 701; *R.* v. *Howe and Bannister* [1987] A.C. 417, per Lord Hailsham, at 429, and Lord Mackay, at 453.

[80] Australian courts are becoming more inclined towards this approach. For example, see *R.* v. *Davidson* [1969] V.R. 667, per Menhennitt J., at 671; *R.* v. *Lawrence* [1980] 1 N.S.W.L.R. 122, per Moffitt P., at 136 and per Nagle C.J. at C.L. and Yeldham J., at 163; *R.* v. *Loughnan* [1981] V.R. 443, per Young C.J. and King J., at 449.

[81] [1967] V.R. 526.

[82] *Ibid*, at 543.

[83] See S. M. H. Yeo, "The Threat Element in Duress" (1987) 11 *Criminal Law Journal* 165.

[84] For example, see the Law Commission's Working Paper No. 55, *supra* note 49, at para. 13; the Law Commission's Report No. 83, *Defences of General Application* (1977), at para. 2.27; the Law Commission on *Codification of the Criminal Law*, *supra* note 13, at para. 13.17; the Victorian Law Reform Commission, *supra* note 24, at para. 2.34; the South Australian Committee, *supra* note 13, at para. 12.2; Smith and Hogan, *supra* note 14, at 215.

the English courts have of late steadfastly maintained the honest and reasonable belief position. The leading English authority is the Court of Appeal case of *R.* v. *Graham (Paul).*[85] Having stated that there was no direct authority to which he was bound, Lord Lane C.J. concluded that the correct direction on the defence of duress was as follows:—

> (1) Was the defendant, or may he have been impelled to act as he did because, as a result of what he reasonably believed [the threatener] to have said or done, he had good cause to fear that if he did not so act [the threatener] would kill him or . . . cause him serious physical injury?
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> (2) If so, have the prosecution made the jury sure that a sober person of reasonable firmness, sharing the characteristics of the defendant, would not have responded to whatever he reasonably believed [the threatener] said or did by taking part in the [offence]?[86]

The present discussion is only concerned with the first part of the direction which clearly specifies that the accused must have reasonably believed in the existence of the threat occasion. With the decision in *Williams (Gladstone)* two years later which, as we have seen, revised the law of self-defence on this issue, came renewed efforts to replace the *Graham* test with one of honest belief.[87] However, in the recent case of *The Queen* v. *Howe and Bannister*, the House of Lords has endorsed the position taken in *Graham.*[88] There do not appear to be any Australian decisions which have clearly decided the point.[89] The likelihood, however, is that the Australian courts will opt for the honest and reasonable belief approach in the same way as they have done in relation to self-defence.

The main reason why the English courts have refused to bring this aspect of duress alongside the law of self-defence appears to be because they are firmly of the opinion that, so far as duress is concerned, the accused's belief as to the threat occasion is part of the defence element.[90] That being the case, the courts have not hesitated to impose a requirement of reasonableness on the accused's belief. In addition, the argument that a degree of circumspection ought not to be required of a person under threat may not be as strong here as in the context of self-defence. This is because, unlike self-defence where the attack must be imminent, many fact situations involving duress allow for a considerable time period

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[85] [1982] 1 W.L.R. 294.

[86] *Ibid*, at 300.

[87] For example, see Alldridge, *supra* note 15, at 272.

[88] *Supra* note 79, per Lord Mackay, at 458-459.

[89] *Cf.* In *Lawrence, supra* note 80, Nagle C.J. and Yeldham J., at 165, found no fault with the trial judge's direction that the jury should consider, *inter alia*, such questions as "Were the threats genuine? Were they regarded as genuine by an ordinary man of ordinary human resistance?" In *R.* v. *Palazoff* (1986) 43 S.A.S.R. 99, Cox J. at 109 referred with approval to *Graham (Paul)* but in respect of another issue.

[90] For example, see *Graham (Paul), supra* note 85, at 300; *Howe and Bannister, ibid*, per Lord Hailsham, at 428 and per Lord Bridge, at 436. This is likewise the judicial opinion in Australia; for example, see *R.* v. *Brown* (1986) 43 S.A.S.R. 33, per Zelling J., at 53-55.

between the making of the threat and the carrying out of the crime demanded of the accused by his or her threatener.[91] The honest and reasonable belief position can be further supported on the ground that the element of reasonableness draws the necessary limits beyond which society will be loathe to excuse a person from criminal wrongdoing. A good example would be a person who kills an innocent victim as a result of "[v]ague fears conjured up by an over-imaginative coward".[92] If compassion dictates that such a person should avoid the full rigours of the law, his honest belief could be adequately reflected at the sentencing stage. Finally, it is to be observed that the law does allow for a strong measure of individualization since the test is what the accused reasonably believed as opposed to what a reasonable person in the accused's position might have believed. Thus, the reasonableness of the accused's belief concerning the existence of a threat very much depends on who the particular accused is.

We turn next to the reaction of an accused to the threat occasion under the defence of duress. The courts, both in England and Australia, have expressed this reaction in terms of *yielding* to the threat rather than focussing on the criminal act committed by the accused. Furthermore, an objective yardstick in the form of a person of reasonable firmness is to be applied. Thus, in the recent case of *R.* v. *Brown*, the South Australian Full Court drew from a number of Australian decisions to hold the test to be as follows:—

> There is an objective test in the law of duress in that the threat must not only have overborne the will of the accused thereby causing him to do what he did, but must be such that a person of ordinary firmness of mind and will might have yielded to the threat in the way in which the accused did.[93]

The courts have also held that this person of ordinary firmness is "a person of the same age and sex and background and other personal characteristics (except perhaps strength of mind) as the [accused]."[94]

Reverting to our discussion of the accused's reaction to the threat occasion under the law of self-defence, it is recalled that the High Court in *Zecevic* stated the law in terms of whether the accused believed on

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[91] Due to the availability of this time period, the defence requires the accused to have taken any reasonable opportunity to escape from his threatener. See Yeo, *supra* note 83, at 170-174. See also the South Australian Committee, *supra* note 13, at para. 12.1-12.2.

[92] A. T. H. Smith, "The Defence of Duress" (1982) 45 *Modern Law Review* 464, at p. 465, expressing agreement with the decision in *Graham (Paul)*.

[93] *Supra* note 90, per King C.J., at 38-39, citing as authority in support of this statement of the law *Hurley and Murray, supra* note 81; *R.* v. *Dawson* [1978] V.R. 536; *Lawrence, supra* note 80. See also the second part of Lord Lane C.J.'s direction in *Graham (Paul)*, reproduced in the main text accompanying note 86. For the view that the test should be purely subjective, see *Goddard* v. *Osborne* [1978] 18 S.A.S.R. 481, per Bright J., at 484 and the South Australian Committee, *supra* note 13, at paras. 12.3.2 and 12.5.

[94] *Palazoff, supra* note 91, per Cox J., at 109. See also *Lawrence, supra* note 82, per Moffitt P., at 143. See also *Graham (Paul), supra* note 87, at 300. *Cf.* Williams, *supra* note 14, at 632-633.

reasonable grounds that the force was necessary. This was in preference to the position, existing under English law, of whether a reasonable person might have regarded the force to be necessary. The difference between these two positions is that there is greater subjectivity in the one subscribed to in *Zecevic* since it is premised upon the accused's perception of the force rather than on the reasonable person's perception. It is submitted that, in the light of *Zecevic*, a similar change can and should be made to the current law of duress. This change could be partially accomplished by replacing the "person of ordinary firmness" test with one which requires the jury to decide whether the accused had reasonable grounds for yielding to the threat. Indeed, the English Law Commission on *Defences of General Application* made just such a proposal, the proviso to clause 1(3) of its Criminal Law (Duress) Bill reading as follows:—

> [The defence of duress will not be available unless] in all the circumstances of the case (including what he believed with respect to the matters mentioned in paragraphs (a) to (c)[95] above and any other personal circumstances which are relevant) *he could not reasonably have been expected to resist the threat.*[96]

Similarly, the Victorian Law Reform Commission on *Duress, Necessity and Coercion* recommended that the defence would be available in cases where the jury was of the opinion that "the person threatened could not fairly be expected in all the circumstances to suffer the risk he believed to be impending . . ."[97] This approach properly places the focus on the accused rather than on the reasonable person and is for that reason to be preferred to the current law. However, it is submitted that a further improvement could be made by viewing the accused's reaction to the threat not in terms of his yielding to it but of the criminal act which the threat induced him to commit.[98] The proposed test would then be whether an accused who was threatened in a particular manner might reasonably have reacted in the way he or she did.[99] Stated thus, the emphasis is on the accused's conduct rather than his or her fortitude. The new test would facilitate another modification to the law. In line with what

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[95] These deal with the threat, its immediacy and means of avoiding the threat.

[96] *Supra* note 84, at 58. Emphasis added.

[97] *Supra* note 24, at para. 4.19.

[98] In this connection, it is difficult to appreciate why the Law Commission on *Codification of the Criminal Law*, *supra* note 13, while stating that many cases involving duress or necessity were "hardly different in kind", nevertheless expressed the law as follows:— [For duress,] "the threat is one which in all the circumstances (including any of his personal characteristics that affect its gravity) he could not reasonably be expected *to resist.*" (Clause 45(2)(b) of its Draft Bill.) Emphasis added.)

[For necessity,] "the danger which he believes to exist is such that in all the circumstances (including any of his personal characteristics that affect its gravity) he could not reasonably be expected *to act* otherwise." (Clause 46(2)(b).) Emphasis added.

[99] This was essentially the submission made by senior counsel in *Lynch, supra* note 79, at 657: "One must consider whether an ordinary person in a similar position faced with threats might reasonably be expected to do the same as the accused . . . Was it reasonable in the circumstances for him to do what he did?" This was cited with apparent approval by Nagle C.J. and Yeldham J. in *Lawrence, supra* note 80, at 160.

Zecevic had to say concerning proportionate force,[100] this requirement should likewise be relegated from a separate requirement of law to only an important factor to be considered when assessing whether the accused reacted reasonably.[101]

An adoption of this test of "accused's reasonable reaction" would have the added advantage of simplifying the defence for the benefit of the jury. Both the issues concerning the existence of a threat occasion and the reaction to such an occasion could then be contained in a simple formula such as the one proposed by the Canadian Law Reform Commission:—

> Every one is excused from criminal liability for an offence committed by way of reasonable response to threats of serious and immediate bodily harm to himself or those under his protection . . .[102]

The Commission went on to comment that the words "reasonable response to threats" relate to the accused's own conduct as well as to the nature of the threats.[103] It also said that under the provision "there would be no defence unless it were reasonable for the accused to think himself faced with threats of immediate and serious bodily harm and to react to them as he did."[104]

Necessity

The defence of necessity is the least developed of the defences under consideration.[105] Consequently, any ambiguities in respect of necessity might readily be resolved by reference to the law of self-defence and duress. Turning first to the issue of the existence of a threat occasion, there are again three possible occasions: (1) an actual threat occasion which can be demonstrated objectively to have existed; (2) an occasion honestly believed by the accused to have existed; and (3) an occasion which the accused honestly and reasonably believed to have existed. The few cases on necessity have *dicta* suggesting that the threat must have been real or actual. For instance, in *R.* v. *Loughnan*, the leading Australian authority on necessity, one of the elements of the defence was held to be that "the [accused's] criminal act or acts must have been done only in order to avoid certain consequences which would have inflicted irreparable evil upon the accused or upon others whom he was bound

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[100] See the main text accompanying *supra* note 78.

[101] For a discussion, based on excuse theory, as to why duress should not incorporate a proportionality rule, see Yeo, *supra* note 78, at 219-220.

[102] *Supra* note 65, at 87. The section ends with the proviso, "unless his conduct manifestly endangers life or seriously violates bodily integrity." Debate over this proviso need not concern us here.

[103] *Ibid*, at 89.

[104] *Id.*

[105] The English courts have generally been reluctant to recognise the defence of necessity; see Smith and Hogan, *supra* note 14, at 201-209. On the other hand, the Australian and Canadian courts have been prepared to recognise such a defence.

to protect."[106] However, if the purpose of the defence is to reflect compassion and justice for the accused, it should suffice if the threat occasion was believed by the accused to be real.[107] We shall observe shortly that *Loughnan* itself does contain a statement spelling out the threat occasion in terms of the accused's belief. The choice would then be whether such a belief need only have been honest or must it have been reasonable as well.

As with the defences of self-defence and duress, many law reform bodies and commentators have proposed that the test should be the accused's honest belief alone.[108] The few case authorities on necessity have, however, not gone so far. Where the courts have intimated that an accused's belief as to the existence of a threat occasion (as opposed to an actual occasion) will suffice, they have required such belief to have been both honest and reasonable. Hence in *Loughnan*, when dealing with the element of imminent peril required by the defence, the court held that "the accused must honestly believe on reasonable grounds that he was placed in a situation of imminent peril."[109] It is also noteworthy that this is the position under the Code States. For instance, under the Queensland *Criminal Code*, the main provision on necessity envisages a situation of "sudden and extraordinary emergency" to have actually existed.[110] However, even where such a situation did not exist, the defence is available to an accused so long as he or she committed the criminal act "under an honest and reasonable, but mistaken, belief in the existence of any state of things . . ."[111] It is submitted that this is the correct test for the common law defence of necessity to adopt. The requirement of reasonable belief can be supported on the ground that such a belief is clearly part of the defence of necessity as opposed to an offence element.[112] This requirement also places a limitation on when the defence can be invoked so as to prevent, for example, an unusually cowardly person

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[106] *Supra* note 80, per Young C.J. and King J., at 448. See also in the same case, per Crockett J., at 460. Likewise, in the recent Canadian Supreme Court case of *Perka* v. *The Queen* ((1985) 14 C.C.C. (3d) 385, Dickson J. asked (at 407): "Was the emergency a real one? Did it constitute an immediate threat of the harm purportedly feared?".

[107] See C. Wells, "Necessity and the common law" (1985) 5 *Oxford Journal of Legal Studies* 471, at 474.

[108] For example, see the Law Commissions' Working Paper No. 55, *supra* note 47, at para. 41; the Law Commission on *Codification of the Criminal Law*, *supra* note 13, at 195; the Victorian Commission, *supra* note 24, at para. 3.34; Alldridge, *supra* note 15, at 272.

[109] *Supra* note 80, per Young C.J. and King J., at 448. See also the Canadian Supreme Court case of *Morgentaler* v. *The Queen* (1975), 20 C.C.C. (2d) 449, per Dickson J., at 550. See A. Mewett and M. Manning, *Criminal Law* (2nd ed., 1985), at 351.

[110] The *Criminal Code* 1899 (Qld.), s. 25 of which states: "Subject to the express provisions of this Code relating to acts done upon compulsion or provocation or in self-defence, a person is not criminally responsible for an act or omission done or made under such circumstances of sudden or extraordinary emergency that an ordinary person possessing ordinary power of self-control could not reasonably be expected to act otherwise." See also the *Criminal Code Act Compilation Act* 1913 (W.A.), s. 25.

[111] *Ibid*, s. 24.

[112] It is also because necessity does not negative *mens rea* that the suggestion has been made for the defence to operate in respect of offences of strict liability: see S. Howard, *Strict Liability* (1963), at 207; L. H. Leigh, *Strict and Vicarious Liability* (1982), at 5-6.

from committing criminal acts with impunity. However, the jury will be instructed to take into account other personal characteristics of the accused which bear on the gravity of the threat to him or her. In this connection, it is to be noted that the test is framed in terms of the accused's reasonable belief and not the more objective one of the reasonable person's belief. Should any compassion be given to a person who has acted under an honest but unreasonable belief as to the existence of a threat occasion, it could be done at the sentencing stage.

With regard to the reaction of the accused to the threat occasion, the overwhelming view of both the courts and law reform bodies is that it is to be assessed according to a purely objective test. For the defence of necessity to succeed, a reasonable person must have regarded the conduct of the accused to have been reasonably necessary in the circumstances. When pronouncing such a test, the courts have invariably incorporated a requirement of proportionate force into the law. In *Loughnan*, the Victorian Full Court held that to establish the defence,

> . . . the acts done to avoid the imminent peril must not be out of proportion to the peril to be avoided. Put in another way, the test is: would a reasonable man in the position of the accused have considered that he had any alternative to doing what he did to avoid the peril?[113]

As an example of a similar view expressed by a law reform body, there is the definition of the defence of necessity appearing in the American Model Penal Code:—

> Conduct which the actor believes to be necessary to avoid a harm or evil to himself or another is justifiable, provided that:
>
> a) the harm or evil sought to be avoided by such conduct is greater than that sought to be prevented by the law defining the offence charged . . .[114]

It is submitted that, following the pronouncements by the High Court in *Zecevic*, the reaction to a situation of imminent peril should be measured by the question: "Did the accused honestly and reasonably believe that his reaction to the peril was reasonably necessary?" Indeed, this approach was taken in the Victorian case of *R.* v. *Davidson* which concerned the statutory offence of unlawfully using an instrument to procure a miscarriage.[115] Menhennitt J. was prepared to recognise the defence of

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[113] *Supra* note 80, per Young C.J. and King J., at 448. See also *Perka, supra* note 106, per Dickson J., at 400-401.

[114] Tentative Draft No. 8, Article 3, section 3.02. Likewise, the Law Commission's Working Paper No. 55, *supra* note 47, at para. 43 stated: " . . . we take the view that . . . the jury must find that the harm which the defendant thought he was avoiding was objectively greater than that actually done." See also the Canadian Law Reform Commission, *supra* note 65, at 96 and the *Criminal Code* (Qld.), *supra* note 110, s. 25. The Victorian Commission's proposals, *supra* note 24, at para. 4.19, are ambiguous on this issue.

[115] *Supra* note 80. The offence is specified under s. 65 of the *Crimes Act* 1958 (Vic.).

necessity as an answer to this charge. He held that for the defence to succeed on the facts, "the accused must have honestly believed on reasonable grounds that the act done by him was . . . necessary to preserve the woman from a serious danger to her life or her physical or mental health . . . which continuance of the pregnancy would entail . . ."[116] This revised test differs from the currently existing one in that some subjectivity is introduced into the assessment of the accused's reaction to the perilous situation. It is submitted that this is preferable to a purely objective test since compassion and justice require that those personal characteristics of the accused which affect his or her response to the threat ought to be taken into consideration by the jury. Also in keeping with the law of self-defence as laid down in *Zecevic*, there should no longer be a separate rule of proportionality under the defence of necessity. This would only be regarded as a factor, albeit an important one, in deciding the reasonableness of accused's belief that his or her response was reasonably necessary.[117] Overall, the defence of necessity would be simplified should the courts develop it in the ways suggested here. This is because the assessment of both the threat occasion and the reaction to such an occasion would then be measured by the same formula, namely, the accused's honest and reasonable belief.

Conclusion

The recent High Court decision in *Zecevic* has set the law of self-defence on a course which is radically different from English law in two respects. The first concerns the existence of the threat occasion confronting the accused. The High Court has unanimously held that this is to be assessed according to the accused's honest and reasonable belief. By contrast, the English judges have expressed the test to be an honest belief alone. The second concerns the reaction to the threat occasion, with the High Court ruling that this is to be assessed according to the accused's honest and reasonable belief that the force applied by him or her was necessary. This is to be contrasted with the English approach of whether a reasonable person in the accused's position would have regarded the force to be necessary. The High Court's views on both of these issues can be supported on the grounds of compassion, justice, logic and a deference to community standards of behaviour. The decision in *Zecevic*

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[116] *Ibid*, at 672. *Davidson* was subsequently approved of in *Loughnan* although it appears that the court there failed to appreciate this part of Menhennitt J.'s decision.

[117] Interestingly, this appears to be the position advocated by the Law Commission on Codification of the Criminal Law, *supra* note 13. With the notable absence of any requirement of proportionality, the Commission defined the defence of necessity as follows:—

"46(2). A person does an act out of necessity if—
(a) he does it believing that it is immediately necessary to avoid death or serious injury to himself or another; and
(b) the danger which he believes to exist is such that in all the circumstances (including any of his personal characteristics that affect its gravity) he could not reasonably be expected to act otherwise."

could also be a springboard for altering these issues as they appear in the related defences of duress and necessity.

In conclusion, it is submitted that the following comment appropriately sums up the thinking of the High Court judges in *Zecevic*:—

> The judges have always assumed responsibility for deciding questions of principle relating to criminal liability and guilt, and particularly for setting the standards by which the law expects normal men to act. In all such matters as capacity, sanity, drunkenness, [duress],[118] necessity, provocation, self-defence, the common law, through the judges, accepts and sets the standards of right thinking men of normal firmness and humanity at a level at which people can accept and respect.[119]

This thinking has led the High Court to favour the formula "an accused's honest and reasonable belief" over other possible formulae in testing the existence of the threat occasion and the reaction to such an occasion. This formula enables the necessary balance between individualization and community standards to be struck.

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[118] The word actually used was "coercion" which is a narrow form of duress.

[119] *Lynch, supra* note 79, per Lord Wilberforce, at 684-685.