EXCESSIVE SELF DEFENCE IN HOMICIDE CASES: SOME FUNDAMENTAL PROBLEMS IN AUSTRALIAN LAW

DOROTHY KOVACS*

A. THE AUSTRALIAN LAW TO 1971

Recent developments in the criminal law warrant a feeling of some dissatisfaction in the state of the defence of self-defence. That defence has associations with many offences known to the criminal law, and although its role as a defence to a charge of murder is perhaps its most famous, the self-defence plea is equally a defence to a charge of assault,[1] to offences relating to property damage,[2] and to a charge of unlawful assembly.[3] Moreover, the plea extends beyond the literal defence of oneself to the defence of others.[4] Its conceptual structure has been adapted to the effecting of an arrest,[5] to the prevention of crime,[6] and to the defence of one's property.[7]

In Australia, although it could not be said that the state of the law of self-defence was an occasion for self-congratulation, it did for some thirteen years enjoy a position of relative stability and certainty. The rule had been stated in 1958 by the High Court in a case called *R.* v. *Howe*,[8] where the High Court adapted the reasoning in the Victorian Supreme Court a year before in *R.* v. *McKay*.[9] In those cases the traditional analysis of self-defence into two ingredients was accepted, this analysis being no newcomer to the law, as the same two ingredients were also to be found in the writings of Stephen J. some eighty years earlier.[10] Those two ingredients were necessity and proportion. If one considers these concepts in the context of the law of murder, by necessity it was meant that the accused had acted out of the need to defend himself against the deceased. By proportion, the second ingredient, it was meant that the accused had used a degree of force which was proportionate to the danger in which he stood, or reasonably supposed he stood.

* LL.B. (Melb.), LL.M. (Monash); Lecturer in Law, Monash University.

1 *R.* v. *Duffy* [1966] 1 All E.R. 62 (C.C.A.).
2 *R.* v. *Langford* (1842) Car. and M. 602; 174 E.R. 653.
3 *Semayne's* case (1604) 5 Co. Rep. 91A; 77 E.R. 194.
4 *R.* v. *Duffy* op. cit.
5 *R.* v. *McKay* [1957] V.R. 560.
6 Ibid.
7 Ibid.

The prosecution had the burden of proving that in killing the deceased the accused had not done so by way of self-defence. If the prosecution failed and both necessity and proportion were established then the plea was successful and resulted in the accused being acquitted. So much was clear.

But what should the policy of the law be when it was conceded that the accused had acted in response to a real necessity but had done so with a disproportionate degree of force? In other words, what was the position where the necessity requirement was satisfied but the proportion one was not? One might expect that the rule here would be to say very simply that the absence of an ingredient of the defence would mean that the plea failed. It should be therefore viewed as an instance of that defence failing with the result that the accused would be guilty of murder unless he could invoke some other defence. This approach was undeniably logical. It also had the appeal of being easily comprehensible to juries. Certainly there was no question of acquitting the accused as he, by over-reacting, after all had done something wrong. But, despite the failure to satisfy the proportion rule, one ought to hesitate before holding guilty of murder a man who concededly was prompted to act in self-defence but who had over-reached the acceptable limits of proper force. This situation presented something of a dilemma for the law.

The Full Court of the Victorian Supreme Court had resolved the dilemma with a solution in 1957 in *McKay's* case.[11] Where a plea of self-defence failed for the reason only that in defending himself the accused had gone too far the result would be not murder but manslaughter. How would one formulate a test for distinguishing an appropriate degree of force from an excessive degree? The accused would be regarded as having resorted to excessive force if he had used a degree of force which was greater than that which would be regarded as proportionate by a reasonable man. In other words, the Victorian court had applied an objective test of proportion.

As we have already noted, the Full Bench of the High Court adopted the course taken by the Victorian Court a year later in *Howe's* case.[12] The members of the Full Bench unanimously agreed that if the plea of a self-defence failed for the reason only that the accused had, in defending himself, resorted to excessive force, the result would be manslaughter, not murder. But there unanimity ended. The Court split 3 to 2 on the formula to apply in defining necessity for the purposes of the plea as well as on the tests to use in determining that the force used was excessive so as to result

[8] (1958) 100 C.L.R. 448. Hereafter called *Howe's* case.
[9] [1957] V.R. 560.
[10] J. F. J. Stephen, *Digest of Criminal Law* (1st ed. 1877).
[11] See note 5 supra.
[12] See note 8 supra.

in a manslaughter verdict. The majority on both points was constituted by Dixon C.J. in whose judgment Fullagar and McTiernan JJ. concurred.

Dixon C.J. adopted an objective test of necessity which he expressed in these terms

> "That is to say it is assumed that an attack of a violent and felonious nature, or at least of an unlawful nature, was made or threatened so that the person under attack or threat of attack reasonably feared for his life or the safety of his person from injury, violation or indecent or insulting usage. This would mean that an occasion had arisen entitling the person charged with murder to resort to force to repel force or apprehended force."[13]

The minority judges, Taylor and Menzies JJ. would not subscribe to a formulation of necessity which was as liberal as this one.[14] Indeed, as one writer has remarked, the striking feature of Dixon C.J.'s test of necessity was its surprising breadth.[15] Necessity situations were in no way confined to the necessity to defend one's life and limb. It was enough if the accused reasonably feared for the safety of his person from injury violation or even mere insulting usage. Effectively it would be a very easy matter for a jury to determine, on this test, that necessity had been established. The importance of this feature of the test of necessity is that the basis for the doctrine of excessive force was readily made out, if the proportion requirement should then fail. In short, there would be a fertile ground for verdicts of manslaughter on the Dixonian definition of the self-defence plea. A man who had reacted to a comparatively minor threat would be found to have qualified on necessity grounds. Accordingly, if he then killed his assailant the use of excessive force would mean that he was not guilty of murder but of manslaughter.

The test of necessity adopted by the majority in *R.* v. *Howe* is regarded as an objective one but there is a tacit requirement that the accused himself must have perceived he was threatened otherwise no jury would accept that he was acting in self-defence. But what was the High Court's test of proportion? Here the jury had to consider a number of questions. The first question they had to answer was whether the force used by the accused was proportionate to the danger to be averted in the sense that a reasonable man would have so regarded it. If they answered 'yes' to this question then the plea was completely made out and the accused would be acquitted. If, however, the jury felt that he had used more than a proportionate degree of force then a second question would be asked. Given that the accused had used more force than would have been regarded as appropriate by a reasonable man, had he nevertheless

[13] (1958) 100 C.L.R. 448, 460.
[14] E.g. Menzies J. at p. 471, said that he was confining himself to the situation where the accused feared "serious violence although not necessarily felonious violence".
[15] C. Howard, "Two Problems in Excessive Self Defence" (1968) 84 *L.Q.R.* 343, 349.

subjectively felt that he had responded with a proportionate degree of force? If this question was answered affirmatively then the result would be a manslaughter verdict. If, however, the jury felt that the accused knew he was responding with excessive force then he would be guilty of murder.[16]

This was the formula arrived at by the majority in the High Court in *R.* v. *Howe*. The combination of subjective and objective tests appeared to be complex and offered a joyless prospect for juries engaged in self-defence cases. There was no shortage of critics of particular aspects of the rule. The 'necessity' formulation was criticised by academic writers for potentially extending to situations where the accused was not in any 'danger' at all as that word is commonly understood.[17] The proportion edifice was rejected by Taylor J. in his minority judgment in *Howe's* case on two grounds. Firstly as a matter of precedent the additional question of the subjective views of the accused was not to be found in *R.* v. *McKay* where a purely objective test was applied. Moreover, it seemed illogical to ask under the heading of proportion whether the accused had used no more force than he considered necessary. If it was felt that he knew he was going beyond what the situation required then there would be no real situation of acting in self-defence at all.[18] In other words, the majority in *Howe* had come up with a test of excess force which in effect contradicted the first requirement of the self-defence plea, that is, the existence of the necessity for the accused to defend himself.

Howe's case did not enjoy an unswerving devotion in the years to follow. Five years after *Howe* the Full Court of the Victorian Supreme Court expressed its views on the requirements of the self-defence plea in *R.* v. *Tikos (No. 2)*.[19] Having first stressed that a jury might only bring in a verdict of manslaughter where an occasion for action in self-defence had arisen the Full Court defined such an occasion thus: the occasion must have warranted the accused in acting "with intent to do some kind of grievous bodily harm at the least".[20] The Full Court was at pains to convey by this formula that the accused must be regarded to have been under a genuine need to fend for his life before self-defence could operate as a defence to homicide. Yet the Full Court's concept of necessity was hardly reconcilable with the generous one posited by the majority in *R.* v. *Howe*. *Tikos (No. 2)* effectively enabled the trial judge to withhold self-defence from the jury if he were to come to the view that there was insufficient evidence on which to find the stringent necessity issue satisfied. Moreover, if the judge did instruct the jury on the effect of self-defence then *Tikos*

[16] (1958) 100 C.L.R. 448, 460 to 461.
[17] See note 15 supra.
[18] (1958) 100 C.L.R. 448, 468.
[19] [1963] V.R. 306.
[20] Ibid. 313.

(No. 2) was interpreted in the later case of *Jugovic*[21] as requiring him to direct that they had to find that the accused had believed honestly and on reasonable grounds that at the time he was in danger of serious and unlawful violence at the hands of his attacker.

R. v. *Jugovic*[22] was not a homicide case but one of wounding with intent to murder. The Victorian Supreme Court there held that insofar as *Tikos (No. 2)* could be regarded as necessitating an explicit charge to the jury in these terms it rested on an erroneous interpretation of yet another Victorian decision in *R.* v. *Enright*.[23] Having reviewed the authorities, the Full Court in *Jugovic* determined that *Enright* had in fact only required the trial judge to privately determine that the accused had been faced with serious violence before charging the jury on self-defence. This threshold question having first been privately canvassed by the judge, the jury were to be instructed in terms which did not spell out to them the grave degree of danger of which the judge had satisfied himself. The charge to the jury would omit this direction and would instead contain these three questions only:

(1) whether what the accused did was for the genuine purpose of defending himself against an attack;

(2) whether the accused honestly believed on reasonable grounds that what he did was necessary to protect himself from injury;

(3) whether a reasonable man in the accused's position would not have regarded what he did as being out of all proportion to the danger to be guarded against.[24]

Faced with a direction in *Tikos (No. 2)* which was inconsistent with the necessity concept of *R.* v. *Howe,* the Victorian Full Court therefore, in *Jugovic,* arrived at an uneasy compromise between the two positions. It posited a private review of the threshold question of the need to act in self-defence to be made, on stringent tests by the trial judge before he put the defence to the jury at all. Once he determined that the defence be put, however, he would charge the jury in terms which did not refer to the more onerous criteria on which his own resolution of the threshold question had been made.

So much for the law in Australia. The very liberal test of necessity created by the High Court in *R.* v. *Howe* suffered some insubordinate interpretation at the hands of the Victorian court, certainly, but the law remained settled insofar as whenever the defence of self-defence failed only on a determination that the accused had used excessive force he was guilty of manslaughter, not murder. Only where it was felt that the

[21] *R.* v. *Jugovic* [1971] V.R. 816.
[22] Ibid.
[23] [1961] V.R. 663.
[24] [1971] V.R. 816, 822 ff.

situation did not require the accused to act in self-defence at all would the result be a conviction for murder.

So for many years the Australian courts had a solution to the problem of excessive force in self-defence. But this situation required reassessment in 1971, for in that year the Privy Council decided *Palmer* v. *R.*[25]

B. *PALMER* v. *R.*:[26] TWO INTERPRETATIONS

Palmer was believed to have stolen a quantity of "ganja", an illegal substance. The Crown's case was that he was pursued by a number of people as he tried to escape with the ganja and that he shot one of them, possibly in the belief that they were threatening him. Palmer's own case was that the fatal shot was not fired by him at all. The trial judge, Robotham J., hearing the case in a Jamaican court, allowed for the possibility that on one view of the facts self-defence may have been relevant. Accordingly, he directed the jury as to the effect of self-defence but told them that there were only two verdicts open to them, i.e. guilty of murder or not guilty. An appeal was taken from the Jamaican Court of Appeal to the Privy Council. The Privy Council expressed agreement with the trial judge. They held, in effect, that there was no room for a manslaughter verdict on a plea of self-defence to homicide. Of Robotham J.'s direction to the jury the Privy Council observed,

> "Their Lordships conclude that there is no room for criticisms of the summing up . . . unless there is a rule that in every case where the issue of self-defence is left to the jury they must be directed that if they consider that excessive force was used in defence they should return a verdict of manslaughter. For the reasons which they will set out their Lordships consider that there is no such rule."[27]

Here was an approach to excessive force which was quite unlike that known to the Australian courts for the past 13 years. Their Lordships' "reasons" were broadly of two varieties. One was the state of the authorities. The other was a matter of merit in arriving at a workable and just rule on the effect of excessive force in defending oneself.

The authorities argued before the Privy Council were of two types; some cases where the effect of excessive force was a manslaughter verdict and others where the courts had proceeded on the basis that there was no manslaughter option in a self-defence plea. On examining these authorities the Privy Council concluded that its hands were not tied by either line of authority. It was thus a question of choosing between the two lines of authorities on the basis of merit. The rule in *R.* v. *Howe* was therefore subjected to an exhaustive scrutiny by the Judicial Committee.

[25] [1971] 1 All E.R. 1077.
[26] Ibid.
[27] Ibid. 1082.

It was found wanting. Their Lordships endorsed the criticisms of the majority ruling that had been made by Taylor J. in his minority decision. Moreover, the complexity of the proportion direction with its combinations of subjective and objective tests was felt to be unsuited to application by juries. Having eschewed the Australian approach the objective was to arrive at a rule which was both fair to the accused and intelligible to a jury. The rule which held that there was no room for a manslaughter verdict on a self-defence plea was the one that the Committee approved.

It was clear that there would be no manslaughter verdict on a plea of self-defence. However, unhappily for future courts, it was nowhere in the judgment spelt out what the result would be on a finding of excessive force. Was it to automatically lead to a murder conviction or was there still room for an acquittal notwithstanding the fact that the force was excessive? Herein lies the fundamental ambiguity that persists after the decision in *Palmer*. This ambiguity is the more dangerous, it is submitted, due to the failure of judges and writers to recognise it.

It is this writer's view that there is more than one tenable reading of the decision in *Palmer*. The view that appears to have been taken as to the meaning of that case is one which assumes that the Privy Council tacitly retained the established analysis of the self-defence plea into two distinct and equally important ingredients viz. necessity and proportion. If one assumes this structure is retained then an inability to establish the proportion ingredient would mean that there had been a failure to prove a *sine qua non* of the defence and this would automatically result in the failure of the defence. On this view there would be only one possible consequence of a finding of excessive force—and that is that the accused must inevitably be guilty of murder. This approach we will term the traditionalist approach.

The other possible interpretation of the decision in *Palmer* is that it does away entirely with the traditional analysis of the plea of self-defence. This view proceeds on the basis that the jury will no longer be required to find that two distinct requirements are satisfied. In other words, it rejects the assumption that necessity and proportion are two discrete ingredients which must be established for the defence to succeed. Clearly the need to defend oneself must have been present otherwise it would be meaningless to speak of the accused as acting in self-defence. But it would seem that there would be no requirement of proportion to be satisfied. This reading of *Palmer* is one that has not been arrived at in judgments or in literature because it involves redefining the defence in a fundamental way and there appears to be some lack of awareness that in fact, the Privy Council may have done that in *Palmer's* case. What would be the result if the need to establish a proportion ingredient was removed in this way? On a redefinition of the self-defence plea which

dispenses with a discrete proportion rule, the fact that the accused has resorted to force which one might loosely call excessive might nevertheless not result in the failure of his plea. At least this would not follow automatically from the mere fact of having used excessive force. This second approach to *Palmer's* case, which we have seen involves a redefinition of the whole structure of the self-defence plea will be referred to, prosaically as 'the second interpretation'.

The critical difference between the first interpretation, or the traditionalist approach on the one hand and the second interpretation, on the other, is the role that each view gives to the requirement that the accused should have responded to the danger with a proportionate degree of force. The traditionalist approach regards this as a critical requirement. Failure to satisfy it entails the failure of the whole defence. The second interpretation does the opposite. It dispenses entirely with a separate proportion requirement to be established as a matter of law. Could this second interpretation be the appropriate view to take of the decision in *Palmer?* In other words, could it be that those interpretations of *Palmer* are wrong which involve the accused being guilty of murder as soon as one finds he has used excessive force? Could it be that he might be entitled to an acquittal in those very cases where one is compelled, on the traditionalist approach, to find him guilty of murder?

It is apparent that the distinction is hardly an academic one. Which of the two views then is the appropriate one? As a matter of predilection one might understand the hesitancy of lawyers to depart from an analysis which was as well entrenched and as long unquestioned as the traditionalist approach to the self-defence plea. Indeed, it is submitted, that the unquestioned expectation that this would be incorporated into the reasoning of the Judicial Committee has blinded the profession to the possibility that the traditionalist view did not underlie their decision. And it may be that if the Privy Council was intending to depart from that analysis it may be charged with a failure to emphasise that it was undertaking a fundamental departure from the established two component structure of the plea. Certainly, it is not spelt out in their Lordships' speech explicitly that they sought to abandon the proportion rule. Hence it has generally been assumed, without in any way questioning that assumption, that the traditionalist approach was the one the Judicial Committee subscribed to in *Palmer* v. *R.*

Thus the English Court of Appeal in *R.* v. *McInnes*[28] adopted the decision in *Palmer* v. *R.* as providing ". . . high persuasive authority which we, for our part, unhesitatingly accept that where self-defence fails on the ground that the force used went clearly beyond that which was reasonable in the light of the circumstances as they reasonably appeared to the

[28] [1971] 3 All E.R. 295.

accused is it the law that the inevitable result must be that he can be convicted of manslaughter only and not of murder? . . . [I]f self-defence fails for the reason stated it affords the accused no protection at all".[29] The Court of Appeal thus accepted *Palmer* as settling the law in England (even though that Court is not bound by the decisions of the Privy Council). In doing so Edmund Davies L.J., and Lawton and Forbes JJ. unquestionably applied the traditionalist analysis of the *Palmer* decision. The proportion requirement was critical.

The Victorian Supreme Court in 1973 similarly indicated that it accepted this traditionalist analysis of *Palmer,* again without any apparent awareness that there might be any other way to read that case than as regarding satisfaction of the proportion requirement as critical to the success of the defence. Thus in *Bennett* v. *Dopke*[30] the Victorian Full Court signified its approval of *Palmer's* case and then proceeded to apply that decision by saying that the trial judge had first to determine that there was evidence of an occasion for the defendant to act in defence of himself. Having determined this, the Victorian Court required that there also had to be evidence that the defendant had used no more force than was reasonably necessary before the issue of self-defence was put to the jury. The traditional two component structure of the defence was reiterated in the Victorian Court's view of *Palmer's* case, as it had been in the decision of the Court of Appeal.

It would seem then that those courts which subscribe to *Palmer's* case regard that case as expressing a rule that the effect of excessive force is to cause the failure of the plea. Effectively these courts are assuming that the traditionalist view of *Palmer's* case is the appropriate one with the result that the proportion requirement is insisted upon.

This adherence to the traditionalist approach may or may not be justified. What is disturbing is that courts which are adopting this approach appear to be doing so without any awareness that an alternative reading of *Palmer* is tenable. There has been expressed in these cases, no statement from the bench that indicates any awareness that *Palmer's* case far from clarifying the law of self-defence, contains within it an underlying and fundamental ambiguity.[31]

There appears to be no shortage of exponents of the traditionalist approach to the *Palmer* decision. We are left in no doubt that the result of that approach is to designate the force used as either proportionate or excessive, and in the latter event to find the accused guilty of murder. But we must now examine what is meant by the second interpretation of *Palmer,* an interpretation which has suffered to date the fate of being ignored, or worse, undiscovered. The first indication that the Privy

[29] Ibid. 301.
[30] [1973] V.R. 239.
[31] Cf. the remarks of Winneke C.J. at p. 241 of *Bennett* v. *Dopke.*

Council was not contemplating a traditional necessity and proportion analysis in *Palmer's* case is that at no point in the speech is the language of necessity and proportion actually used. What alternative approach did their Lordships have in mind if we accept for the moment that they eschewed conventional analysis methods in self-defence?

To answer this question we must look to the language of Lord Morris of Borth-y-Gest. It appears that he regarded the self-defence plea as being resolved by the answer to one question rather than two:

> "In its simplest form the question that arises is the question: was the defendant acting in necessary self defence?[32] . . . [T]he defence of self-defence is one which can be and will be readily understood by a jury. It is a straightforward conception. It involves no abstruse legal thought. It requires no set words by way of explanation. No formula need be employed in reference to it."[33]

Two observations may be made of these statements by Lord Morris. First, the rejection of "set formulae and set words" appears to be inconsistent with the conventional practice which indeed does depend on the using of a set formula with set words. A judge who previously had failed to direct the jury in terms of the well-established necessity and proportion formula would, on the traditionalist view of the self-defence plea, have misdirected them. This view cannot be reconciled with these judicial statements in *Palmer* v. *R.* which insists that no set formula is to be applied. The other observation to be made of Lord Morris' statements is that he appears to have postulated a rule which asks one question only, viz. whether the defendant "was acting in necessary self-defence". This is again a different question to that which traditionalists ask, viz. whether the defendant's action was (1) necessary and (2) proportionate to the danger in which he stood.

It would seem then that what *Palmer's* case requires the trial judge to say to the jury if the second interpretation is correct is this. The jury are asked one thing—Did they really believe that the accused was acting in self-defence at the time of the killing? It must be noted that this question, far from rendering the proportion question critical would make it not directly relevant as a question of law. It would be relevant only in a secondary way, in their Lordships' view. Their Lordships said

> "If there has been an attack so that defence is reasonably necessary it will be recognised that a person defending himself cannot weigh to a nicety the exact measure of his necessary defensive action. If a jury thought that in a moment of unexpected anguish a person attacked had only done what he honestly and instinctively thought was necessary that would be most potent evidence that only reasonable defensive action had been taken. A jury will be told that the defence of self-defence

[32] [1971] 1 All E.R. 1077, 1084.
[33] Ibid. 1088.

> where the evidence makes its raising possible will only fail if the prosecution show beyond doubt that what the accused did was not by way of self-defence."[34]

On the assumption that their Lordships were proposing the second interpretation they must be taken here to mean that the sole question for the jury is whether or not the accused acted in self-defence. A factor which might tend to indicate that he was not so acting would be evidence that he had reacted excessively to any danger that was present.

> "If the attack is all over and no sort of peril remains then the employment of force may be by way of revenge or punishment or by way of paying off an old score or may be pure aggression. There may no longer be any link with a necessity of defence."[35]

In other words excessive reaction might indicate that the accused was not in fact defending himself but instigating an attack. But having said that, it still had to be remembered that if the exigencies of the occasion required action by the accused he could not be required to "weigh to a nicety the exact measure of his defensive action". Once it was established that the accused really did act in self-defence rather than under colour of self-defence then the circumstance that he responded with excessive force was not intrinsically important to the result. He would be entitled to be acquitted. The proportion requirement as a separate item of legal proof had thus disappeared and excessive force had lost its intrinsic legal role and become an ingredient in all of the evidence to be considered.

In short, while on the traditionalist view a finding of excessive force meant automatically that self-defence failed, on the second interpretation a jury would be at liberty to acquit a man notwithstanding that in defending himself he had used excessive force. Thus on the first or traditionalist view—if A had punched B and B reacted in fear by shooting A then the jury would find that although the necessity requirement was fulfilled, the proportion one was not, due to B using excessive force. This in turn involves the failure of the plea and B would be guilty of murder. On the second interpretation however, if the jury answered 'Yes' to the question of whether B was really defending himself at the time, then the jury would have regarded the excessive force as merely part of the evidence contributing to the principle question. In other words, on the second interpretation of *Palmer* v. *R.* B would be acquitted.

It is apparent therefore that there will be cases which yield diametrically conflicting results under *Palmer's* case depending on whether one applies the traditionalist analysis or the second interpretation. It becomes a matter of some importance therefore to attempt to arrive at some conclusions as to which rule, given the ambiguity on the face of *Palmer's* case, is the correct one to apply.

[34] Ibid.
[35] Ibid.

C. *PALMER* v. *R:* THE BETTER INTERPRETATION

It is this writer's view that the second interpretation of *Palmer* is the appropriate one, both as a matter of construction of the decision itself and as a matter of policy. It has already been pointed out[36] that the closest scrutiny of the decision discloses no mention of the traditional analysis. There is certainly no explicit adoption of the necessity and proportion structure. Moreover, it has already been said[37] that the traditional structure cannot be reconciled with Lord Morris' insistence that no set formula need be used when instructing a jury on self-defence. It would therefore seem to be an unwarranted inference to draw from *Palmer* that it entrenched a proportion rule and made it so critical to the defence that failure to satisfy it results in the failure of the defence. Indeed, as we have seen, Lord Morris seems to have regarded the excess force aspect as merely an evidentiary matter to be taken into account when assessing the one really important question, viz. whether the defendant had truly acted in self-defence. This development may be a rather dramatic one—but parallel developments have occurred in other areas of the law of homicide, and have generally met with approval. Twenty years ago Victorian judges were already observing (and welcoming) a willingness on the part of the Australian courts to draw "a principle of flexible character by way of generalisation from particular cases".[38] Thus we have already seen the tendency to demote rules of law into evidentiary matters in other aspects of the law of self-defence. The so-called "retreat rule" has been the subject of this experience.[39] Another aspect of the law of self-defence which may be on the verge of a similar shift from particular to general requirements is the notion of defence of others. There have been statements from the bench to the effect that the circle of other people in whose defence the accused may act should not be confined, as it has been in the past, to blood relatives of the accused of clearly designated degree.[40] Similarly in the law of provocation the long established "cooling time" rule has become an evidentiary consideration in determining whether the accused was provoked.[41] The proportion rule moreover, whereby the jury had to find specifically that the accused responded in a way which was not disproportionate to the provocation offered[42] appears to have undergone the same fate very recently in the High Court.[43] Perhaps the time has come for the law of self-defence to experience a similar departure from a distinct proportion requirement in favour of a general consideration of whether the accused was truly acting

[36] See p. 56 ff.
[37] See p. 59 supra.
[38] E.g. Smith J. in *R.* v. *McKay* op. cit. at 572.
[39] See *R.* v. *Howe* supra
[40] E.g. in *R.* v. *Duffy* [1967] 1 Q.B. 63.
[41] *Parker* v. *R.* (1963) 111 C.L.R. 610.
[42] *Da Costa* v. *R.* (1968) 118 C.L.R. 186.
[43] *Johnson* v. *R.* (1976) 11 A.L.R. 23.

in self-defence. Certainly to read *Palmer's* case according to the second interpretation is to read it consistently with a trend in other defences under the criminal law to demote considerations which were erstwhile rules of law into evidentiary phenomena. The jury is then entrusted with the task of evaluating these considerations along with other matters in the evidence.

We have noted considerations of policy which favour the second interpretation of *Palmer's* case to the traditionalist analysis of that decision. One can add to these, the consideration, and it is a major one, that a jury instructed according to the second interpretation will find it somewhat easier to apply. The jury are simply told that

> "[T]he defence of self-defence . . . will only fail if the prosecution show beyond doubt that what the accused did was not by way of self-defence."[44]

The jury must find that it was "reasonably necessary" for the accused to defend himself and also that he had done what he had "honestly and instinctively thought was necessary".[45]

This direction requires of the jury "no abstruse legal thought"[46] unlike the manoeuvres in the dissection of the defence into the two traditional components of necessity and proportion with their concomitant subjective and objective test combination.

It is submitted, moreover, that as well as avoiding the confusion wrought upon juries by the traditionalist view the second interpretation also avoids the hardship caused by that view in cases where the accused reacts genuinely but, due to stress, excessively to the need to defend himself. The only device open to the court to avoid this hardship, on a traditional interpretation of *Palmer,* is to persist in the view, nay, to institutionalise it that "[i]n practice [English] judges and juries take a generous view of the force permissible in self-defence or in the prevention of crime".[47] Indeed this is how a traditionalist interpretation regards the statement by Lord Morris that "[i]t will be recognised that a person defending himself cannot weigh to a nicety the exact measure of his necessary defensive action".[48] However, it is submitted that it is improper for the criminal law to depend entirely on the indulgence and largesse of juries as a substitute for the precise formulation of legal principles.

It is therefore submitted that the second interpretation of *Palmer* is to be preferred, both as a matter of the interpretation of that decision, and in the interests of justice.

Having attempted to arrive at the true meaning of the decision in

[44] *Palmer's* case op. cit. at 1088.
[45] Ibid.
[46] Ibid.
[47] B. Hogan, "The Killing Ground 1964-1973" [1974] *Crim. L.R.* 387, 398.
[48] *Palmer's* case op. cit. at 1088.

Palmer's case the question which remains is what is the status of that case in Australia?

D. *STARE DECISIS* AND THE CHOICE BETWEEN TWO DECISIONS

We have already seen that the Victorian Supreme Court has applied the decision. In *Bennett* v. *Dopke* the Full Court welcomed the decision in this language—"If we may respectfully say so, by those remarks of their Lordships, much of the difficulty, doubt and complexity which has tended to enshroud the concept of self-defence should be dispelled".[49] This welcome by the Victorian Court might well be regarded as overzealous. It demonstrates an unawareness of the fundamental ambiguity inherent in the *Palmer* decision. Moreover, while it might be true to say that the Australian High Court's ruling in *Howe* v. *R.* was "difficult" or "complex" from the point of view of its application by juries it was relatively free from the "doubt" alluded to by the learned members of the Full Court.

Be that as it may, in *Bennett* v. *Dopke* the Full Court stated that *Palmer's* case stated the relevant law of self-defence in Victoria. In doing so the Full Court applied the traditionalist interpretation of *Palmer's* case apparently without being aware that that decision could be read in any other way. The Full Court, surprisingly made no mention at all of the change in the law in Australia if *Palmer's* case was to be preferred to the established approach in *Howe*. However, *Bennett* v. *Dopke* was not a murder trial but an action for damages for assault and battery. Thus the Full Court was not confronted directly with the need to characterise a finding of excessive force as resulting in a verdict of murder, manslaughter or acquittal. Until that situation does arise we cannot be sure of what was meant by the Victorian Full Court when it stated its preference for *Palmer's* case. In the meantime, it appears that the Victorian bar and bench proceed on the basis that *Palmer's* case establishes the rule where self-defence is pleaded in homicide cases in Victoria.[50]

The New South Wales Supreme Court in 1976 in *R.* v. *Viro*,[51] a murder trial, also preferred *Palmer* v. *R.* to *Howe's* case. Viro and some accomplices agreed to rob a man called Rellis of a large amount of money they knew him to be carrying for the purpose of buying heroin. Viro hit Rellis over the head with a jackhandle. Rellis retaliated with a flick knife. Viro produced a steak knife and killed Rellis with the steak knife in the skirmish that followed.

The trial judge had directed the jury in terms which could only be regarded as a direct application of the test proposed by the Privy Council in *Palmer*. He said

[49] [1973] V.R. 239, 241.
[50] Private Communication with Victorian Crown Prosecutor, Mr A. Dixon.
[51] Unreported at the date of writing.

> "It is the law that any person who is attacked with violence may defend himself. If in the course of defending himself against an attack, the man who is his aggressor is killed, then it will be a question for you to determine whether or not what he did was done primarily for that purpose of defending himself against the aggressor and you would have to be satisfied beyond a reasonable doubt that this was not so before you could return a verdict of murder."[52]

Viro had argued that although he had intended to use some force to rob Rellis, Rellis had retaliated with such violence that he had been forced to use the steak knife to defend himself. At the trial the accused was found guilty of murder. He appealed to the Full Court of the New South Wales Court of Criminal Appeal on the ground, *(inter alia),* that the trial judge had failed to direct the jury "in relation to the use of excessive force which could result in a verdict of manslaughter if the jury thought that it was a case of self-defence".[53] The Full Court, comprising Street C.J., Begg and Maxwell JJ., expressed approval of the trial judge's direction, noting that it "conform[ed] with the law as propounded in *Palmer's* case by the Privy Council".[54]

Interestingly the Full Court avoided the practice we have observed in the Victorian Supreme Court and the English Court of Appeal, of assuming that the Privy Council's judgment was to be interpreted according to a traditionalist construction. But the question of excessive force in self-defence, in the view of the court did not really arise on the facts of *Viro.* Indeed, the Full Court were of the view that no case of self-defence could be made out by Viro at all.

The Full Court approved of the trial judge's direction that

> "No question of self-defence can arise in this case unless you take the view that on the facts the man who was killed was attacking these two men, that he was the aggressor, because the thing explains itself. It is only if you are attacked that you are entitled to defend yourself. If you are the attacker you cannot complain if your victim has the temerity to defend himself and if he beats you in a fight it is just too bad. So you see it never arises unless there is material upon which you can say at the point of time this man was stabbed, Rellis was the aggressor. He was attacking him. They had ceased all attack on him and that is the way it is put."[55]

Thus, the case was one where self-defence was irrelevant due to the accused being the aggressor. Accordingly, the New South Wales Court was not confronted directly with the question of the effect of a finding by the jury that the accused had, in defending himself, used excessive force, in terms of a verdict of murder, manslaughter or acquittal.

52 Set out at p. 15 of the Full Court judgment (transcript).
53 At p. 9 of the Full Court judgment (transcript).
54 Ibid. 18.
55 Ibid. 17.

So far we have seen that the courts in Victoria and New South Wales have followed *Palmer* in preference to the High Court decision in *Howe*. The South Australian Supreme Court has not felt similarly constrained. In *R.* v. *Olasiuk*[56] the Full Court of the Supreme Court of South Australia set aside a murder verdict and substituted a conviction for manslaughter. In their judgment the three members of the Full Court were unambivalent in stating their view of the authorities.

> "By excessive self-defence we mean the proposition ennunicated and endorsed by the High Court in *R.* v. *Howe,* that where a plea of self-defence to a charge of murder fails only because the death . . . was occasioned by [excessive force], the crime is reduced to manslaughter. In our view *Howe's* case is binding on the South Australian courts notwithstanding the decision of the Privy Council in *Palmer* v. *The Queen*.[57]

Given the difference in approach between the Supreme Courts of Victoria and New South Wales on the one hand and of South Australia on the other, the question which must now await resolution by the High Court, is the status of *Palmer's* case in Australia on the basis of *stare decisis* principles. We can be sure that by itself the fact that *Palmer* is a Jamaican appeal does not rob that decision of binding effect in the Australian courts. The established rule was reiterated by Street J. in the Supreme Court of New South Wales in *Mayer* v. *Coe* in 1968.[58] He declared that

> "It is thus clear that, in jurisdictions subject to the ultimate appellate authority of the Privy Council, a decision of the Privy Council laying down principles or lines of reasoning directly applicable within the jurisdiction in question will bind the courts of that jurisdiction even though the proceedings in which the Privy Council decision was given originated from another part of the British Commonwealth. The binding nature of a Privy Council decision is not confined to principles of common law. It is binding also on matters arising under statutes where the degree of similarity between the local statute and the statute upon which the Privy Council pronounced is considered to be sufficient to render the Privy Council decision applicable."[59]

It would therefore seem that if we could be certain that the Jamaican law of excessive force in self-defence was the same as the Australian law prior to the Jamaican appeal to the Privy Council then Australian courts might be bound by the Privy Council decision notwithstanding its Jamaican origins. The New South Wales Full Court in *R.* v. *Viro* purported to be applying this principle when it adopted *Palmer's* case in preference to *R.* v. *Howe.*

56 (1973) 6 S.A.S.R. 255.
57 Ibid. 258.
58 [1968] 2 N.S.W.R. 747.
59 Ibid. 752.

> "The question arises as to which decision this Court should follow. The question of the selection of the binding precedent in these circumstances was discussed in *Mayer* v. *Coe,* 88 W.N. Pt. 1, pp. 554-555, and *Ratcliff* v. *Walters,* 89 W.N. Pt. 1, 497, at 503-505. Applying the principles therein enunciated, we have reached the conclusion that this Court should follow the decision of the Privy Council and that henceforth in this State juries should be directed in accordance with *Palmer's* case."[60]

With respect to the learned members of the Full Court, it would seem by no means certain that prior to 1971 the Jamaican law of excessive self-defence corresponded with the rule in *Howe's* case. Neither Robotham J. at the trial of *Palmer* nor the Jamaican Court of Appeal recognised that there was any rule approximating to that in *Howe's* case applicable in Jamaica at that time.

Moreover, it may be that, quite apart from questions of similarity of Jamaican and Australian law of excessive self-defence, the Supreme Courts in New South Wales and Victoria have acted improperly in preferring the Privy Council's rule to the High Court's. The High Court has said, in *Jacob* v. *Utah Construction and Engineering Pty Ltd,*[61] of the practice to be followed by State Supreme Courts faced by a decision of the Privy Council which was later than and different from an Australian High Court decision

> "It is not . . . for a Supreme Court of a State to decide that a decision of *this* Court precisely in point ought now to be decided differently because it appears to the Supreme Court to be inconsistent with the reasoning of the Judicial Committee in a subsequent case."[62]

In other words, the choice between inconsistent authorities of the High Court and the Privy Council was to be made by the High Court.

It would seem that the South Australian Supreme Court in *Olasiuk* was therefore, from the point of view of *stare decisis,* correct in regarding itself as bound by the High Court's decision notwithstanding the Privy Council's later decision in *Palmer.* This would appear to be the appropriate position for State Supreme Courts to take until the High Court itself undertakes to follow *Palmer* in preference to its previous rule in *Howe.*

E. THE FUTURE

Some kind of ruling from the High Court is now needed. Indeed, the High Court has a number of problems to resolve in relation to the law of excessive self-defence. First, what does the rule in *Palmer's* case mean? The Court will have to consider the traditionalist meaning ascribed to

[60] At p. 16 of the Full Court judgment (transcript).
[61] (1968) 116 C.L.R. 200.
[62] Ibid. 207 per Barwick C.J.

Palmer by the English Court of Appeal in *McInnes* and the Victorian Supreme Court in *Bennett* v. *Dopke*. This will need to be compared with the second interpretation, which is favoured by this writer and which necessitates the form of direction to the jury which was made in *R.* v. *Viro*. We must now await a direction from the Court as to which meaning of *Palmer* is to be accepted. Secondly, the High Court will need to determine the status of *Palmer's* case on *stare decisis* principles. This in turn requires an assessment of the Jamaican law prior to the Privy Council appeal. It may be that Jamaica has never professed a *Howe* style rule on excessive self-defence. In that event the High Court would not be bound to follow *Palmer,* and the question then would be what rule it ought to adopt, to resolve the problem of the man who acts in self-defence with excessive force.

It is submitted that if the High Court should regard *Palmer's* case as stating the law of self-defence in preference to the rule in *R.* v. *Howe* that choice will not be arrived at by a sense of constraint to abide by the decisions of the Privy Council. The High Court has recently iterated a heightened sense of independence from Privy Council authority in unequivocal terms. In *Favelle Mort Ltd* v. *Murray*[63] Barwick C.J., referring with disapproval to a decision of the Judicial Committee took this position,

> "In times when this Court's decisions were reviewable by Her Majesty in Council there would have been no question but that whatever we might think to be the true construction of the Act, this Court would have been bound to follow and apply their Lordships' definitive reasons. But no longer may appeals against orders of this Court be entertained . . . saving only in the case of a matter within s. 74 of the Constitution in which this Court has seen fit to grant the appropriate certificate . . . Do the reasons for decision which the Privy Council has already expressed continue to bind this Court . . .? [R]espect is accorded to the decision of the House of Lords and perhaps to a lesser degree, those of the English Court of Appeal. In line with this approach to decisions which do not bind as precedents, no doubt this Court will at least accord a like respect to decisions of the Privy Council to that which it is accustomed to accord to the House of Lords."[64]

While it is true to say that none of Barwick C.J.'s brother judges made statements so strongly rejecting the Privy Council as a source of binding authority in *Favelle Mort Ltd* v. *Murray,* it is equally true to say that legislative and political developments of the last decade have resulted in a rising spirit of independence in the Australian High Court. This mood, combined with genuine uncertainties as to the status of the Jamaican appeal decision in Australia would suggest that the High Court is unlikely

[63] (1976) 8 A.L.R. 649.
[64] Ibid. 657.

to defer to *Palmer's* case solely on the grounds of *stare decisis*. Whichever rule the High Court adopts, it will do so, it is submitted, on the basis that it finds that decision inherently attractive as supplying the better solution to the problem of excessive self-defence in homicide cases.

Thirdly then, which rule should the High Court adopt, given the choice? Before one considers what would be the better rule in the context of defence of one's person against attack it must be remembered that the law of self-defence currently extends beyond this. It is adapted also, to the area of defence of one's property.[65] To apply *Palmer's* case in this context would mean that the jury, confronted with a defendant who was forced to protect his property but did so overzealously would be compelled either to acquit him altogether or hold that he was guilty of murder. It must be feared that in this situation murder verdicts would proliferate: it seems essential, in the province of defence of property, that the option of a manslaughter verdict must be retained and to this extent it would seem preferable to retain *Howe's* case which reserves that option. However, this approach fails to take account of the rather different needs of the law of defence of property from those of the law of self-defence. One must agree with the writer who urged that "criteria are urgently needed to delimit the amount of force permissible in the protection of property".[66] The problem of premeditated preventative measures as opposed to spur of the moment force has become more critical recently because of the general increase in the use of armed security guards, watch dogs, electric fencing and similar devices in the protection of property. It would seem that the question of defence of property should be the subject of special rules setting clear guidelines concerning the amount of force which the law regards as permissible. Certainly the current law, be it *Howe's* case or either of the two versions of *Palmer,* seems ill-equipped to cope with this problem. *Palmer's* case in particular, offering only an acquittal or a murder verdict would seem to be singularly unadaptable to the dilemma of the man who is forced to defend his property but goes too far in doing so. Accordingly, the solution to the problem of excessive force in homicide, whether that be *Howe's* case or *Palmer's* case or some third solution which the High Court might adopt, ought not to be adapted to the realm of protection of property. This area of the law has its special problems necessitating a separate scheme to create guidelines on permissible force in protection of property, and defining the consequences of exceeding those boundaries.

But let us put these cases to one side for the moment and return to our original question for the High Court. As a rule governing the effect of excessive force in the defence of one's person which is to be preferred,

[65] *R.* v. *McKay* op. cit.; *R.* v. *Turner* [1962] V.R. 30.
[66] C. Harlow, "Self Defence: Public Right or Private Privilege" [1974] *Crim. L.R.* 528, 538.

Howe's case or *Palmer's?* Looking first at *R.* v. *Howe,* the complex combination of tests it posits is not without its critics. Their Lordships in *Palmer,* for example, referred to the task of the jury instructed according to *Howe's* case as a "complicated and difficult process".[67] One is forced to agree with this observation. On the other hand, at the moment the only way a jury may find the excessive self-defender guilty of manslaughter rather than murder would be to retain the substance of *Howe's* case. This solution is not unattractive as it avoids both the positions which create problems in *Palmer*—viz., as the man has been forced to defend himself he ought not to be guilty of murder if he misjudges the situation. On the other hand one is uneasy about acquitting the man as it is generally felt, that, by responding with inappropriate force the accused has done something wrong. The manslaughter verdict with its lesser moral stigma and its flexibility in sentencing seems apposite. The benefits of the manslaughter verdict would seem to outweigh the objection to *R.* v. *Howe* which would disapprove of an excessive self-defence rule as a separate aspect of the law of self-defence in the same way as courts have indicated disapproval of discrete rigid requirements to constitute defences in cases recently.[68]

So much for *Howe's* case. It would seem that despite its critics, and despite the eagerness of the Supreme Courts of New South Wales and Victoria to reject its benefits, *Howe's* case still has something to offer in its provision for a manslaughter verdict. What then has *Palmer's* case, in either of its two interpretations, to commend it? The traditionalist view of *Palmer* requires that a jury who concludes that the accused has defended himself excessively should find him guilty of murder. Indeed, the objection to the traditionalist interpretation of *Palmer* is that its effect is to make a murderer of a man who is concededly forced to defend himself but under stress commits an error of judgment. And it must be unacceptable for the law to impose a harsh rule as to the consequences of a finding of excessive force and then to depend on the jury to avoid the excesses of the rule by applying it indulgently. It is urged, therefore, that the traditionalist view of *Palmer,* currently taken by the English Court of Appeal and the Victorian Supreme Court, is one which should not be adopted by the High Court.

The second interpretation of that case, requiring as it does only that the accused genuinely acted in self-defence in order to have him acquitted seems far more acceptable in principle. The fact that he reacted excessively given the need to defend himself would not disturb this result, and after all, a measured reaction in self-defence seems an unduly high standard for the criminal law to set.

[67] At p. 1087.
[68] See p. 61 supra.

However, the adoption of the second alternative also has its problems. The effect of removing a separate proportion test could mean that our hypothetical coward who responds in terror to a punch on the arm with a shot from a gun should be acquitted. But a jury applying the second alternative may prefer to bring in a verdict of murder to acquitting a trigger-happy defender. The option of the manslaughter verdict, currently available under *Howe's* case immediately becomes attractive.

Accordingly, rather than adopt either version of *Palmer's* case this writer is of the view that the substance of *R.* v. *Howe* should be retained in Australia. This would accord with those many cases in which a jury would regard a manslaughter verdict as more appropriate than either an acquittal or a mandatory life sentence for murder. But *Palmer's* case leaves us a valuable lesson in its wake with its quest for criteria of guilt which may be readily comprehended by juries. The High Court in *R.* v. *Howe* failed to achieve such criteria. But the baby ought not to be thrown out with the bathwater. The structure of the plea of self-defence already applied by the High Court should be retained. That is, the ingredients of the plea should be necessity and proportion and the consequence of a finding that the accused defended himself with excessive force should continue to be that he is guilty of manslaughter. It does remain, however, to devise tests of these ingredients which, unlike the esoteric and complex manoeuvres they currently undertake as a result of *R.* v. *Howe* can easily be understood by juries. It is to this task which the High Court must address itself.