Start of page 348.

Home Defence: The Tony Martin Bill - I

FRANCIS BENNION*

Introductory

The story began on the night of 20 August 1999, when the farmer Tony Martin killed a teenage burglar, 16-year old Fred Barras, by shooting him in the back at Martin's remote Norfolk farmhouse. Martin was convicted, and on 21 April 2000 *The Times* published the following letter from me-

> Before Parliament altered it, the common law would have acquitted Mr Tony Martin. I quote Blackstone: 'If any person attempts to break open a house in the night-time, and shall be killed in such attempt, the slayer shall be acquitted and discharged'. Blackstone added that burglary, or nocturnal housebreaking, had always been looked on as a heinous offence; not only because of the abundant terror that it naturally carries with it, but also as it is a forcible invasion and disturbance of that right of habitation which every individual might acquire even in a state of nature. 'And the law of England has so particular and tender regard to the immunity of a man's house that it styles it his castle and will never suffer it to be violated with impunity'. Nowadays the law's tender regard is for villains and burglars.

There was (and still is) considerable public disquiet over Martin's conviction. In January 2004 Andrew Moffat won a BBC Radio Four *Today* programme competition to choose the Bill which listeners would most like to see passed by Parliament. His winning choice was a Bill to protect householders who find themselves confronting burglars. The BBC consulted me about the drafting of this 'People's Bill' and I was interviewed by Dominic Arkwright in the *Today* programme on 10 January. Mr Stephen Pound MP (Labour) had agreed with the BBC to present the winning 'People's Bill' in the House of Commons, but declined when he heard what the People's choice was. Another backbencher, Mr Roger Gale MP (Conservative), then stepped into the breach and decided to present his own Tony Martin Bill. On 12 January 2004 Mr Gale issued a statement about his Bill saying-

> The Bill will seek to redress the perceived imbalance in the law as it stands at present and will redefine the status of the householder. At present the law appears to some to treat the intruder as the victim and the real victim, the householder seeking to protect person or property, as the aggressor. Whether this Bill will make parliamentary headway will depend, of course, upon the progress of other private members bills ahead of it in the queue and whether or not the government is prepared to allow it passage into committee.
>
> It is clearly a sensitive and complex area but there is a strong feeling that at present the legal system favours and protects the criminal in spite of the fact that a person may use 'reasonable force' for protection. Although cases of prosecution of the householder are

* Francis Bennion is a former parliamentary counsel (draftsman of UK Government legislation). His books include *Statutory Interpretation* (Butterworths, 4th edn. 2002) and *Understanding Common Law Legislation* (Oxford University Press, 2001).

> relatively rare there is speculation that others who might wish to protect themselves, their loved ones or their property are deterred from taking reasonable action through fear of finding themselves innocently on the wrong side of the law.
>
> The Bill is to be carefully drafted to avoid becoming a 'vigilante`s charter' but we intend to send out a clear signal that those who deliberately place themselves, through criminal behaviour, outside the law can expect to take the consequences of their actions.

Mr Gale asked me to draft his Bill, which I did.[1]

Nature of the problem

The chief cause of public disquiet over the case of Tony Martin and similar cases is the test of reasonableness in relation to resistance by householders to burglars or other invaders of their home. English common law has moved on from the days of Blackstone and reached a position where the amount of force used, if the householder is not to risk prosecution and conviction, must be proportionate to the threat posed. If an intruder comes at you with a knife, you may use a knife in return. If he is armed only with a baseball bat you would be unwise to use a knife in defending yourself – and discharging a firearm would mean certain trouble with the law. Yet when the adrenalin flows in the trauma of an attack it may be difficult to keep a cool head. Darkness may prevent you seeing whether a burglar is armed, and if so with what kind of weapon. You may panic. How then can you judge accurately what degree of force is proportionate?

The difficulty is that the test is objective not subjective. A jury trying your case will be directed to assess whether in all the circumstances the amount of force you used really was reasonable and proportionate, not whether you genuinely thought it was. The position is fully set out in a Law Commission document on the defence of self-defence[2]-

> 9.1 Self-defence, at common law, provides a complete defence to any charge of fatal or non-fatal violence. A person (D) whose conduct and state of mind falls within

Start of page 349.

> the parameters of the defence does not act unlawfully and so is not guilty of any offence. Conversely, a person whose conduct and/or state of mind does not fall within the defence acts unlawfully and therefore stands to be convicted.
>
> 9.2 The basis of the present common law of self-defence is that D has a complete defence to a charge of assault (of whatever seriousness, including murder) if two requirements are met. The first is that D performs the external element of such an offence in defence of himself or herself, or another, from what he perceives as an actual or imminent unlawful assault. The second is that the steps that he takes are reasonable in the circumstances as D believes them to be. Thus, D is to be judged on the facts as he or she believes them to be.[3] The question of whether the force used was reasonable in those circumstances is, however, an objective one to be answered by the jury. The

[1] I neither asked for nor received any fee for assisting the BBC or Mr Gale.
[2] *Partial Defences to Murder*, Law Commission Consultation Paper No 173, 31 October 2003.
[3] *Gladstone Williams* (1984) 78 Cr App R 276 (CA), where it was held that if a defendant was labouring under a mistake of fact as to the circumstances when he committed an alleged offence, he was to be judged according to his mistaken view of the facts regardless of whether his mistake was reasonable or unreasonable. The reasonableness or otherwise of the defendant's belief was only material to the question of whether the belief was in fact held by the defendant at all. See also, *Beckford* [1988] AC 130 (PC). [Law Commission's footnote.]

> tests were succinctly described in *Orwino*[4] as 'a person may use such force as is (objectively) reasonable in the circumstances as he (subjectively) believes them to be.'
>
> 9.3 If the force used is more than is objectively reasonable in the circumstances as D believed them to be, then D will not be able to successfully use the defence of self-defence. This is so even if D believed that the force deployed *was* reasonable. Thus D may be convicted for what can be characterised as a mistake in his judgment of what the law permits. In this sense, the defence is 'all or nothing'. If successful the verdict will be an acquittal but if not it must be a conviction.

Article 8.1 of the European Convention on Human Rights (enforced by the Human Rights Act 1998) says that everyone has the right to respect for his or her home. This requires the state to give special protection to people in their home, additional to the protection given to individual citizens by the law generally. To meet this, what change could sensibly be made to the self-defence rule? We are used to the test of reasonableness in English law. It does not seem right for the law to say that a defendant should be acquitted where the force used was in objective fact unreasonable and excessive.

The public is also anxious about the fact that there seems to be too great a readiness to prosecute householders who use violence towards intruders. The matter is governed by the Prosecution of Offenders Act 1985, which set up the Crown Prosecution Service as a public service headed by the Director of Public Prosecutions. It is answerable to Parliament through the Attorney General. The Code for Crown Prosecutors, issued under section 10 of the Act, lays down an evidential test and a public interest test for deciding whether or not to prosecute in a particular case. Both tests must be satisfied. Under the evidential test Crown Prosecutors must be satisfied that there is enough evidence to provide a realistic prospect of conviction. Even if there is, a prosecution should not be brought unless it is in the public interest to proceed against the proposed defendant. The Code specifies a number of possible public interest factors which may tell in favour or against prosecuting. None of them deal specifically with the case where a householder is faced with an intruder.

A lesser cause of public concern in these cases is that the law allows an intruder who has been injured by a householder, or has had his property damaged, to bring a civil action in tort. If he is impecunious he may be awarded legal aid to advance his claim. Why should the public purse finance an action brought by the offender in such a case?

No one was able to instruct me as to what exactly the clauses of Mr Gale's Bill should be designed to achieve, so I had to devise the policy myself – an unusual situation for a parliamentary draftsman. All I had to go on was the statement by Mr Gale given above and the following from Andrew Moffat-

> In principle, I believe the [new] law should be designed so that when an intruder/burglar breaks into a private residence (owned/rented/guest of owner, etc), that intruder forfeits his protection under the law. The presumption of innocence should be in favour of the homeowner who should be permitted to take whatever means he considers fit to protect himself/possessions/family and that the offender should not subsequently have any recourse in the Courts to sue his victim.

I will now describe the provisions of the Gale Bill, which were not altered after I had drafted it..

Mr Gale's Bill

---

[4] *Owino* [1995] Crim LR 743, 743, citing *Scarlett* [1993] 4 All ER 629. [Law Commission's footnote.]

The Bill has five clauses. Clause 1, headed *Home defence (criminal liability)*, reads as follows-

> (1) This section applies where a person (A) is in a dwelling and is either-
>
> (a) the occupier of the dwelling, or
>
> (b) present in the dwelling with the licence of the occupier.
>
> (2) Where this section applies, A is not guilty of an offence by reason of any act done by him in relation to the person or property of another person (B) who is in the dwelling, or is attempting to gain entry to the dwelling, if A believes (whether reasonably or not)-
>
> (a) that A is acting-
>
> (i) in self-defence, or
>
> (ii) in defence of another person, or
>
> (iii) to preserve or protect property, or
>
> (iv) to apprehend B or any other suspected wrongdoer, or
>
> (v) otherwise in prevention of crime, and
>
> (b) that B is, or (if he gained entry) would be, a trespasser.

Subsection (1) indicates that the clause applies to a dwelling, which is defined by clause 4 as including (a) any building or part of a building which is occupied as a

Start of page 350.

dwelling; (b) any caravan, houseboat or structure which is occupied as a dwelling; and any yard, garden, garage or outhouse belonging to and occupied with (a) or (b).[5] The subsection calls the person protected A and indicates that A may either be the occupier of the dwelling or a person present in the dwelling with the permission (express or implied) of the occupier.

Subsection (2) calls the intruder B, and indicates that B may either be in the dwelling or attempting to gain entry to it. It says that A is not guilty of an offence by reason of *any act* done by him in relation to B's person or property if A believes certain facts *whether reasonably or not.* These facts are (1) that B is or would be a trespasser, and (2) that A is acting in one of five stated ways.

This would change the law as stated above, namely 'a person may use such force as is (objectively) reasonable in the circumstances as he (subjectively) believes them to be', into 'a person may use *any* force if he (subjectively) believes (1) that B is or would be a trespasser and (2) that (for example) he is acting in self-defence'. This may appear very wide, but it seemed to me that it was the only way in which I could relax the present self-defence rule in the sort of way that was desired. As will be seen in Part II of this article, it came in for heavy criticism in the House of Commons debate on the Bill. Yet to say that A may use any force against B if he genuinely believes he is doing so in self-defence does not mean that A can act outrageously. When Tony Martin fired at the back of the fleeing Fred Barras and killed him he cannot have believed he was doing so in self-defence because in the circumstances there was no prospect that the boy would attack him. Nor I submit did any of the other four grounds of defence apply in the Martin case.

The wording of the last of these grounds, acting 'in prevention of crime', is taken from the Law Commission Consultation Paper previously referred to.[6] A must genuinely believe he is acting for one of these five reasons, but it does not matter if he is mistaken in his belief. As the Law Commission paper says, '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

[5] This is taken from the Family Law Act 1996 s 63(1).

[6] See para 9.10.

unexpected anguish a person attacked had only done what he honestly and instinctively thought was necessary that would be the most potent evidence that only reasonable defensive action had been taken'[7]. The paper also says that a person should not be convicted where 'the acts in question were undertaken in self-defence and may have been an instinctive response to the perceived level of risk . . . it is hard to see why the law affords greater protection to those who kill in response to insults [by virtue of the existing defence of provocation] than to those who do so while protecting their homes'.[8]

Clause 2 of the Gale Bill, headed *Home defence (restriction of prosecutions)* reads-

> Where-
>
> (a) section 1 applies to a person (A) in relation to a dwelling, and
>
> (b) a Crown Prosecutor-
>
> (i) is considering whether the public interest requires him to institute proceedings against A for an offence in relation to another person (B) who was in the dwelling, or was attempting to gain entry to the dwelling, and
>
> (ii) believes that A may have a defence under section 1(2),
>
> the Crown Prosecutor shall take into account the fact that the public interest requires householders to be fully protected by the law against intruders in their home.

The purpose of clause 2 is simply to add to the factors mentioned under the public interest heading in the Code for Crown Prosecutors the one that is at present missing, namely that that the public interest requires householders to be fully protected by the law against intruders in their home. In other words it calls on prosecutors to respect the ancient principle referred to by Sir William Blackstone in the eighteenth century, that an Englishman's home is his castle.

The remaining substantive clause of the Bill, clause 3, says, under the heading *Home defence (civil liability)*-

> (1) This section applies where a person (A) is in a dwelling and is either-
>
> (a) the occupier of the dwelling, or
>
> (b) present in the dwelling with the licence of the occupier.
>
> (2) Where this section applies A is not liable in tort by reason of any act done by him in relation to the person or property of another person (B) who is in the dwelling, or is attempting to gain entry to the dwelling, if A believes (whether reasonably or not)-
>
> (a) that A is acting-
>
> (i) in self-defence, or
>
> (ii) in defence of another person, or
>
> (iii) to preserve or protect property, or
>
> (iv) to apprehend B or any other suspected wrongdoer, or
>
> (v) otherwise in prevention of crime, and
>
> (b) that B is, or (if he gained entry) would be, a trespasser.

This repeats the language of clause 1, this time for the purpose of enacting that where the stated conditions apply the householder is not to be held liable in tort (for example in damages for trespass or negligence) by reason of any act done by him in relation to the person or property of the intruder. The duplication is necessary because the criminal standard of proof operates in the application of clause 1 while the civil standard operates in the application of clause 3.

Part II of the article will describe what happened when the Bill was debated by the House of Commons on 30 April.

---

[7] Para 9.6.

[8] Paras 9.7, 9.8.

2004.003
168 JP 348, 8 May 2004