AN CHÚIRT UACHTARACH
THE SUPREME COURT

[2024] IESC 44
Record No: S:AP:IE:2023:000047

Charleton J.
O'Malley J.
Hogan J.
Murray J.
Donnelly J.

Between/

The People (at the suit of the Director of Public Prosecutions)

Respondent

AND

Mark Crawford

Appellant

Judgment of Ms. Justice Donnelly delivered on this 14th day of October, 2024

Introduction

1. This judgment addresses the source (common law or statutory) of the defence of self-defence (the lawful use of force) to a charge of murder. Thus, the central issue in the appeal is whether the law as laid down by this Court in the case of *The People (AG) v Dwyer* [1972] IR 416 or the provisions of s. 18 of the Non-Fatal Offences Against the Person Act, 1997 apply when a person defending a charge of murder claims to have been acting in self-defence. For the reasons set out in this judgment, I conclude that the provisions of s. 18 of the Non-Fatal Offences Against the Person Act, 1997 ("the 1997 Act") apply to both fatal and non-fatal offences where the defence claims lawful use of force. For the reasons set out in the judgment, I also conclude however, that the appellant's appeal ought to be dismissed because his claim that he had an honest belief in the necessity to use the force that he used has already been rejected by the jury in his trial.

Background

2. Mr. Mark Crawford ("the appellant") was convicted of murder contrary to common law and as provided by s. 4 of the Criminal Justice Act, 1964 ("the 1964 Act") by a jury at the Central Criminal Court on 10 September 2020. On 2 October 2020, he was sentenced to the mandatory penalty of life imprisonment following that conviction. He appealed his conviction to the Court of Appeal, which on 31 March 2023, dismissed the appeal on all grounds.

3. The appellant raised the defence of self-defence (of himself) at his trial and that issue was left to the jury. The appellant submits that the trial judge misdirected the jury by pointing them towards a wholly objective assessment of the degree of force used; the jury had to consider whether the force used was reasonable in the circumstances *as they existed* rather than the circumstances as the appellant *perceived them* to be.

4. The defence was raised in the context of the appellant's *perceived threat* of an attack rather than an actual attack. The appellant contends that this perception of a threat caused him to stab the victim six times while both were present in a public house. The appellant claimed that the force he used in defence of himself was reasonable force in the circumstances *as he perceived* those circumstances to be. The charge of the trial judge to the jury was, he claimed, that the jury had to consider whether the amount of force used was reasonable and proportionate in the circumstances as they existed and, if the force was not reasonable and proportionate, they must go on to consider if the force the accused used was no more force than he honestly believed to be necessary in self-defence. If the accused had that honest belief, he was entitled to a partial defence to the charge of murder; meaning that he was not guilty of murder but guilty of manslaughter. The trial judge also said that if the jury was of the view that the prosecution had disproved the defence of self-defence they could only convict of murder if they were satisfied that he had the intention to kill or cause serious injury. The trial judge's charge is discussed in detail below.

5. The appellant's appeal is based upon the argument that the charge given by the judge to the jury, which was based upon the decision in *The People (AG) v Dwyer* [1972] IR 416 ("*Dwyer*"), was incorrect and that if the correct charge – in accordance with the law as the appellant considers it to be – had been given to the jury he would have had the opportunity to have been fully acquitted of both murder and manslaughter.

6. In this judgment, the phrases 'self-defence', 'lawful use of force' and 'legitimate defence' appear. At a literal level 'self-defence' is the defence of an individual by that individual. On many occasions however, lawyers and judges use 'self-defence' as a shorthand for any defence which raises the question of the lawful use of force. Such force may have been used not merely in defence of self but in purported defence of others, to protect the individual's property or the property of others, or to prevent crime or a breach of the peace. The Law Reform Commission in a consultation paper (LRC CP 41 -2006) has used the term 'legitimate defence' to encapsulate these issues.

The Proceedings Before the Central Criminal Court

Facts

7. According to the evidence given at trial, the appellant and Mr. Patrick O'Connor spent a significant portion of 7 July 2018 in each other's company at Fitzgerald's Bar, Sexton Street, Limerick. At approximately 11.30pm, there was an interaction between the appellant and the victim, during which the appellant came to fatally stab Mr. O'Connor. Six stab wounds were inflicted by the appellant to the neck, chest, back and arms of Mr. O'Connor; the fatal wounds being those to the neck and the chest. The appellant then fled the scene. There was a dispute at trial as to the nature of the interaction between the deceased and the accused. The defence characterised the event as a fight over money owed by the accused to the deceased and that characterisation being disputed by the DPP who said that the evidence demonstrated that this was a one-sided attack on the deceased by the

appellant. The appellant's contention was that as a result of the dispute he "honestly, genuinely, perhaps mistakenly, believed that he was under threat of an imminent attack". The full buildup to the reason as to why the appellant and the deceased were in the public house and their interactions there is laid out in the Court of Appeal judgment (Edwards J.) [2023] IECA 87 at paras 4-33 thereof.

The Issue at Trial on the* Dwyer *Test for Self-Defence

8. Prior to the speeches of counsel to the jury, the defence raised an issue in the absence of the jury, as to the subjective/objective elements in the defence of self-defence. The DPP, who went first in the argument before the trial judge, relied upon the long-standing authority of *Dwyer*, which sets out the common law defence of self-defence in cases of homicide and contended that there has been no change to the law as stated in that case. The DPP argued that prior to *Dwyer* if a person used more force than was objectively necessary the defence of self-defence was not available. The law as established by *Dwyer* recognises a partial defence of self-defence which, where successfully invoked, allows a conviction of manslaughter to be returned instead of a verdict of murder. In cases of homicide, if a person knowingly uses excessive force (assessed by objective standards) leading to a fatality, then regardless of whether the threat they are responding to is merely a perceived one or is real, they cannot avail of the defence. If however, a person mistakenly uses excessive force (assessed objectively), genuinely believing it to have been necessary to use such force in order to defend against a threat, whether that threat is real or perceived, they are still acting unlawfully but, because they held an honest belief that such force as was used was necessary, they must be regarded as having the intention to commit a lawful homicide or to lawfully to inflict serious injury, and therefore not to have the specific *mens rea* required for murder. In those circumstances the appropriate verdict is manslaughter. The honesty of their belief as to the necessity to use such force as was in fact used, falls to be tested

subjectively, although as will be discussed later, there is an issue as to whether *Dwyer* required that belief to be assessed on the basis of a reasonableness standard.

9. Counsel for the appellant argued before the trial judge that, while *Dwyer* makes clear that in assessing whether self-defence provides a full defence to a charge of murder the amount of force used is to be objectively assessed, what *Dwyer* does *not* make clear is whether force is to be so assessed with reference to the circumstances as they actually were *or* with reference, as the appellant submits must be the case, to the circumstances as the accused person believed them to be. It was submitted to the trial judge that where, as in the appellant's contention, there was the perceived threat of an attack, rather than an actual attack, the difference between the circumstances objectively viewed and as an accused subjectively perceived them takes on a far greater significance.

10. At the trial court, on appeal to the Court of Appeal and on appeal to this Court, counsel for the appellant referred to developments in the law that followed *Dwyer*. Counsel pointed to the present statutory position in respect of the use of non-fatal force in self-defence as provided for in ss. 18, 19 and 20 of the 1997 Act and in respect of the use of force, both fatal and non-fatal, in defence of a dwelling as provided for in s. 2 of the Criminal Law (Defence and the Dwelling) Act, 2011 ("the 2011 Act"), as well as case law in which self-defence in those contexts received some judicial consideration.

The Trial Judge's Ruling

11. The trial judge rejected the submission that her charge should include the instruction that the appellant ought to be able to avail of self-defence if he acted as a reasonable person would in the circumstances perceived by him which would mean a subjective test being applied with respect to the circumstances perceived by him, but then an objective test is to be applied with respect to how the accused reacted. This ruling is fully set out at para 53 of the Court of Appeal judgment. The trial judge rejected the submission by the appellant

that the common law should now reflect what is contained in the provisions of the 1997 Act in terms of the defence of self-defence. She interpreted the decision in *People (DPP) v Barnes* [2006] IECCA 165, [2007] 3 IR 130 ("*Barnes*"), upon which the appellant relies, as indicating that the existing common law position still held in respect of lethal force and also rejected the submission that the dicta of O'Donnell J. (as he then was) in *People (DPP) v Farrell* [2014] IECCA 42 ("*Farrell*") had altered the common law.

The Appeal to the Court of Appeal

The Grounds of Appeal

12. The appellant appealed against his conviction on two grounds and the relevant parts of those grounds were as follows:

"1. The charge of the trial judge was unsatisfactory in all the circumstances including that:

a) the trial judge erred in law in her instruction to the jury on self-defence, and in particular on the subjective elements to be considered by the jury in determining whether the prosecution had proved that the killing of the victim by the accused was not carried out in self-defence;

b) the trial judge erred in directing the jury that whereas they had to apply a wholly subjective test in considering whether the accused believed he was under threat to his life or person, they then had to apply a wholly objective test in considering whether the degree of force used by the accused, in response to any attack or threat he perceived he was under, was reasonable in the circumstances; and

c) …

2. In all the circumstances the verdict of the jury was unsafe and unsatisfactory."

The Court of Appeal Judgment

13. Addressing grounds (1a) and (1b) together, the Court of Appeal reviewed the legislative provisions, the case law and also two academic articles, namely "What Is The Test For Self

Defence In Fatal Cases" (2015) 33(14) *Irish Law Times* 212; and "A Critical Review of the Court of Appeal Interpretation of Self-Defence in the Non-Fatal Offences Against the Person Act 1997" (2018) 28(3) *Irish Criminal Law Journal* 58. In those articles, Dr David Prendergast, an Assistant Professor in the School of Law at Trinity College Dublin, casts doubt on suggestions in some of the judgments to date concerning self-defence in the *non-fatal context* that the test to be applied to acts of self-defence in that context is subjective at all stages.

14. Edwards J., delivering the judgment for the Court, opined, without so deciding, that with respect to non-fatal offences Dr Prendergast may be correct in his view that an element of objective assessment remains at the core of self-defence. Edwards J. said however that the position was nuanced. He stated that in non-fatal cases:

> "The test therefore is not whether the accused reasonably believed that the force used by him or her was necessary in the circumstances as he/she believed them to be. It is whether the objective observer would regard the amount of force actually used as having been reasonable, in the circumstances as the accused believed them to be. For the purpose of making that assessment, s. 1(2) of the Act of 1997 is engaged to the following extent. It is engaged with respect to the accused's asserted belief as to the circumstances obtaining, i.e. in considering whether he or she honestly held the asserted belief, even if it is as to a mistake of fact. What s. 18(1) requires is the identification of the circumstances which the accused genuinely believed to obtain at the time, not the circumstances that he might reasonably or justifiably have believed to obtain at the time. As Prendergast puts it, 'a mistake of fact only has to be sincere; it does not have to be sincere and reasonable in helping to exculpate the defendant.'."

15. Noting that a similar scheme to that under the 1997 Act was adopted in the context of s. 2 of the 2011 Act, Edwards J. said, "arguably, and without deciding it definitively, under

both of the statutory schemes mentioned the proportionality of force used in response to a threat is to be assessed objectively but there is a subjective element that the assessment as (*sic*) to be conducted with reference to the circumstances as the accused person believed them to be rather than in the circumstances as they actually were."

16. The appellant argued that to the extent there was a patchwork of defences depending on whether the offence was a non-fatal or a fatal one, this approach was wrong. The Court of Appeal, having considered the ruling of the trial judge, held however that the trial judge had correctly dealt with the issue. Edwards J. acknowledged that although "the position may be anomalous *qua* that under the two statutory schemes previously mentioned, it seems (…) that counsel for the DPP is right in saying that there is no authority to support the submission advanced by counsel for the appellant. The approach taken by the Oireachtas in legislation enacted later than the common law rules at issue here is simply of no assistance in interpreting the *Dwyer* jurisprudence in which those rules were promulgated".

17. The Court of Appeal noted that Walsh and Butler JJ. in *Dwyer* had emphasised the wording of s. 4 of the 1964 Act. It followed that in order to convict an accused of murder the prosecution must prove that the killing was unlawful, and it must prove beyond reasonable doubt that the accused had the requisite specific intention for murder. The judgment, at paras 59-61, cited at length from the judgments in *Dwyer* and those judgments will be addressed later.

18. The Court of Appeal was satisfied that the dicta from the judgments in *Dwyer*, as previously interpreted, remained the law. The Court held that:

> "insofar as a question may arise in a fatal case as to whether the quantum of force used was reasonable or not, that issue will fall to be judged according to the circumstances as they actually were, not according to the circumstances as the accused perceived them to be. An asserted claim by the accused that he or she had used no more force than they

genuinely believed to be necessary falls to be subjectively tested, for the reasons stated by Walsh J. and Butler J. in their respective judgements (sic). In that event, what is being tested is the genuineness of the mistaken belief being asserted. The Court said this did not involve a consideration of the reasonable of the quantum of force used in self-defence in light of circumstances as they were perceived to be by the accused".

19. Having come to a decision on the first ground of appeal, the Court of Appeal found it unnecessary to examine the second ground of appeal on the safety of the verdict of the jury.

The Appeal to the Supreme Court

20. Leave to appeal to this Court was granted on 26 July 2023 ([2023] IESCDET 102).

The determination identified two issues to be addressed:

a) On what basis must the unlawful nature of the killing be assessed where a defence of self-defence is raised?

b) What are the nature and extent of 'the circumstances' that must be taken into account when a person, in the exercise of self-defence, uses more force that is reasonably necessary in 'the circumstances'?

21. After the hearing of the appeal, the Court sought further submissions on the Non-Fatal Offences Against the Person Act, 1997 and specifically whether s. 22, which abolishes any defence available under the common law in respect of the use of force for the purposes mentioned in the 1997 Act, had the effect of applying the statutory defence of lawful use of force to a charge of murder or manslaughter. As I conclude that s. 22 has indeed abolished the common law defence in respect of the lawful use of force even in homicide cases, by necessity, the judgment also addresses the ingredients of the defence as set out in s. 18 of the 1997 Act as applied to this set of facts.

22. As will be explained in this judgment, I find the law on lawful use of force applicable to murder trials is now contained in the Non-Fatal Offences Against the Person Act 1997 because:

a) The offence of homicide (murder or manslaughter) requires there to be an unlawful killing in the form of an assault. By creating a sole statutory defence of lawful use of force to any crime of assault the offence of homicide cannot be committed where there is no such unlawful killing by virtue of a successful invocation of lawful use of force, **and**

b) Section 22 has, in any event, abolished the common law defence of lawful use of force.

23. For the purposes of explaining that reasoning and also to explain why this appeal ought to be dismissed, it is necessary to examine in some detail the legal history of homicide offences and self-defence and also the legal directions given by this judge to the jury and the factual decisions made by the jury at the appellant's trial and how they interact with the law on self-defence under the 1997 Act.

<u>The Development of the Crime of Homicide</u>

24. Both murder and manslaughter evolved from the earlier common law concept of homicide. The killing of another person – homicide – was, according to *Blackstone's Commentaries on the Laws of England* (Vol. IV, Ed Cavendish, p 140), either justifiable (where there is no share of guilt at all), excusable (where there is very little) or felonious (which is the highest crime against nature a person can commit). Murder and manslaughter were considered felonious homicides at common law as was self-murder (which is no longer a criminal offence).

The Offence of Murder

25. Murder is an offence at common law. The *mens rea* or the mental/intention element required for murder is now provided for in s. 4 of the 1964 Act as follows:

(1) Where a person kills another unlawfully the killing shall not be murder unless the accused person intended to kill, or cause serious injury to, some person, whether the person actually killed or not.

(2) The accused person shall be presumed to have intended the natural and probable consequences of his conduct; but this presumption may be rebutted.

26. Historically, the offence of murder could only be committed with malice aforethought; a concept which had, over the centuries, moved from express malice in the sense of intention to incorporating implied and constructive malice. The *mens rea* for murder, as the Law Reform Commission in its 2001 *Consultation Paper, Homicide: The Mental Element in Murder* (LRC CP 17 – 2-001 para 1.09) noted, had varied with "the underlying conceptions and objectives of the criminal justice system". As the Consultation Paper states, it was the decision of the House of Lords in *DPP v Smith* [1961] AC 290, which appeared to reintroduce constructive malice - a *mens rea* for murder thought to have been abolished by the English Homicide Act 1957 - that lead to legislative intervention in both Ireland and England.

27. It is against that backdrop of renewed focus on intention and the then relatively new provisions of the 1964 Act, that *Dwyer* came to be decided. The 1964 Act made no explicit mention of the defence of lawful use of force as it applied to murder, manslaughter or any other offence. At the time of the *Dwyer* decision, the judges looked to the common law in order to identify the ingredients of the existing law on the lawful use of force. It was not until the 1997 Act that the common law defence concerning lawful use of force, in cases of non-fatal offences at least, was abolished.

The Offence of Manslaughter

28. The common law offence of manslaughter is the offence of unlawful killing, an offence which arises in a specific set of circumstances. Thus, not every criminal offence which

causes death may amount to manslaughter. For example, a person could be guilty of the offence of dangerous driving causing death contrary to s. 53(2)(a) of the Road Traffic Act, 1961, but a far higher degree of negligence would be required to be found guilty of manslaughter through criminal negligence (i.e. gross negligence).

29. As regards the offence of manslaughter, the authors of *Charleton & McDermott's Criminal Law and Evidence* (2nd edn, Bloomsbury Professional 2020) stated at para 10.93:

"Manslaughter occurs where the accused kills the victim in one of the following circumstances:

(1) intending to kill or cause serious injury while lacking self-control through an act of provocation;

(2) being in a situation where the accused is entitled to use force against the victim but uses more force than was objectively necessary but no more than he honestly believed to be necessary;

(3) killing the victim in a state short of insanity but suffering from a mental disorder such as to diminish substantially his or her responsibility for the act, under s 6 of the Criminal Law (Insanity) Act 2006;

(4) where the death of the victim is caused by a criminally negligent act or omission in circumstances where any reasonable person would have realised the danger of their action or failure to act;

(5) by an assault the purpose of which was to cause more than trivial hurt;

(6) by a criminal and dangerous act."

30. Those types of manslaughter are generally divided into two categories, voluntary and involuntary manslaughter. The first three in the list above are said to be intentional killings where, through some extenuating circumstances, the courts do not classify them as murder. The final three are where culpable killings occur but they do not have the state of mind sufficient to warrant a conviction for murder. Significantly, the authors of *Charleton &McDermott's Criminal Law* accept that assault manslaughter is really an aspect of criminal and dangerous act manslaughter but has an independent existence because it is a category easy to define. To the extent that the authors of *Charleton & McDermott's Criminal Law* refer at no (2) to the partial defence to a charge of murder, I view that as a description of the circumstances where manslaughter may be found to exist as distinct from a separate categorisation of the offence of manslaughter. The partial defence arises from an assault-manslaughter where unreasonable force was used in honest self-defence and where there was no intention to kill or cause serious harm.

31. It is also of significance that the defence of lawful use of force applies to criminal and dangerous act manslaughter and has no relevance to criminal negligence manslaughter. This issue is addressed later.

Homicide as Unlawful Killing

32. Historically, the common law set such a high price on the life of a person that, even in the case of self-defence, the common law "always intends some misbehaviour in the person who takes it away, unless by the command or express permission of the law" (see *Blackstone's Commentaries on the Laws of England*, p 146). Excusable homicide could be by misadventure or *se defendendo* (upon a principle of self-preservation). This type of excusable manslaughter was distinguishable from a justifiable homicide where the aim was to prevent a capital crime. Excusable homicide dealt with the situation of assault or sudden quarrel where a person is entitled to protect themselves from an assault. Blackstone records

however that the penalties for such killings were gradually reduced to such an extent that "where the death has notoriously happened by misadventure or in self-defence, the judges will usually permit (if not direct) a general verdict or acquittal". Ultimately, murder and manslaughter offences only occurred where there had been *an unlawful killing*. The use of that terminology in relevant Irish case law will be commented upon.

The Lawful Use of Force

Self-defence at Common Law

33. McAuley and McCutcheon describe in *Criminal Liability* (2nd edn, Round Hall Press 2022) how in the early common law period, in certain situations a person who was convicted of homicide on the principle of absolute liability might be granted a pardon by the King; that pardon procedure was formally recognised by the Statute of Gloucester 1278. The defence of self-defence developed in the common law but nonetheless in many situations some sort of penalty might have been payable even when the person had acted in self-defence. In time, the fact that self-defence could amount to a full defence to murder and manslaughter became accepted and was recognised by statute. Eventually this provision was to be found in the consolidation statute The Offences Against the Person (Ireland) Act, 1829 (10 Geo. 4. C 34) (a similar statute having been passed for England and Wales the previous year) which provided "as to Homicide not felonious" (according to its marginal note) in situations including killing in self-defence.

34. That Act was superseded by the Offences Against the Person Act, 1861 which, at s. 7, reenacted the earlier provisions of the 1828 and 1829 Acts that "no punishment or forfeiture shall be incurred by any person who shall kill another by misfortune or in his own defence, or in any other manner without felony". This time the marginal note said, "excusable homicide". Section 7 was repealed by s. 16 of the Criminal Law Act, 1997, which commenced on 22 July 1997. Section 3 of that Act abolished the distinction between

felonies and misdemeanours; subject to the provisions of that Act, the law and practice was to be that applicable in relation to misdemeanour. That raises an intriguing question as to the law in relation to an allegation of homicide since that time: Did the repeal of that section mean that a person who killed in self-defence as recognised by the common law was, in fact, liable to punishment? As I find that the 1997 Act provides for a statutory defence of lawful use of force for manslaughter then, apart from the interregnum between 22 July 1997 and the commencement of the Non-Fatal Offences Against the Person Act, 1997 on 19 August 1997, no further difficulty arises.

35. The common law developed the parameters of the defence of lawful use of force over the centuries and by the early 19th century, Archbold, in *Criminal Proceeding, Evidence and Practice* (see 2nd edn, 1825) also restated the position at common law which distinguished between justifiable homicide and excusable homicide. Justifiable homicide was of three kinds; of relevance, is that which dealt with a homicide committed in prevention of a forcible and atrocious crime, for example, if a person is attempting to kill or murder another, the slayer of that person is to be acquitted and discharged. Excusable homicide was of two kinds, one being misadventure and the other is homicide *se defendendo* "where a man kills another upon a sudden encounter merely in his own defence, or in defence of his wife, child, parent, or servant, and not from any vindictive feeling". The difference between justifiable homicide and excusable homicide was important in terms of how the lawfulness of the self-defence may be assessed, an example being the situation where in resisting a felonious attack there was no requirement to retreat but one could stand one's ground (see *Russell on Crime*, 11th Ed, 1958 at p 493, which retained much of the historical matter on homicide prior to the Homicide Act, 1957 in the UK). It is noteworthy that the language of the certified point of law in *Dwyer* referred to "unlawful and felonious" when describing the attack against that appellant and it was to such an attack that Walsh J. specifically

addressed his views. As stated above, the distinction between felonies and misdemeanours was abolished in this jurisdiction by s. 3 of the Criminal Law Act, 1997.

Self-defence and Manslaughter

36. An important Irish decision is that of *People (Attorney General) v Keatley* [1954] IR 12 ("*Keatley*") in which the accused was charged with, and convicted of, manslaughter. The deceased had engaged in a fight with the brother of the accused. The accused, coming to his brother's defence, struck the deceased from behind who fell to the ground thereby receiving an injury to his head which proved fatal. In his charge to the jury, the trial judge described the blow as an assault and informed the jury that the assault was an unlawful act. The trial judge further directed that it was only if his brother had been subjected to a felonious attack that the defence of his brother would have been justified as the principle of self defence did not extend to cases of misdemeanour and that an assault was a misdemeanour.

37. Maguire CJ., giving judgment for the Court of Criminal Appeal, acknowledged that in the circumstances where there was no intention to kill and that the death could not be held to be the natural and probable consequence of the blow struck by the accused, no homicidal intention could be imputed to the accused. Maguire CJ. stated: "The death was, accordingly, unintended both in fact and in law, and criminal responsibility only arises if it was caused by an unlawful act. The blow struck by the applicant was, at least, a contributing cause of death, and a conviction for manslaughter could be sustainable if that blow was unlawful." (emphasis added).

38. Maguire CJ., citing *Russell on Crime,* held that the correct charge of the trial judge should have been "[t]he use of force is lawful for the necessary defence of self and others or of property; but the justification is limited by the necessity of the occasion and the use of unnecessary force is an assault". He pointed out that the limitation in older textbooks which

had limited the defence to those with whom the person was in a special relationship was not repeated in *Russell on Crime*. He favoured a broader view which was supported by the incorporation of "other" in that sentence. The defence was not available for acts of revenge and any blow struck that was not necessary for defence was an assault and battery. A person is entitled to strike a blow in defence without having to wait to be struck but the use of force must be necessary and no more force than necessary must be used. Maguire CJ. also quoted from *Salmond on Torts* (10th edn 1945) a passage which says that "every man has the right to defend any man by reasonable force against unlawful force".

39. *Keatley* addressed the specific offence of manslaughter that being the offence at issue in the appeal. The Court of Criminal Appeal in that case laid emphasis on the fact that such an offence could only arise if it had been caused by an unlawful act. The unlawful nature of the killing is, pursuant to the clear wording of s. 4 of the 1964 Act, a vital component of the offence of murder. When this Court came to address legitimate defence in *Dwyer*, it did not refer to *Keatley* but did refer to *The People (AG) v Quinn* [1965] IR 366, a case in which the Law Reform Commission suggest that this Court likely adopted a similar view to that taken in *Keatley*. Thus, in so far as an unlawful killing is concerned, at common law, the defence of self or others was addressed in precisely the same manner.

The Decision in *The People (AG) v Dwyer*

40. That appellant was convicted of murder. Following the dismissal by the Court of Criminal Appeal of his appeal, the Attorney General granted a certificate to the appellant enabling him to take the appeal to the Supreme Court. The wording of the certified point used language reflecting the principle laid down by the High Court of Australia in *R v Howe* (1958) 100 CLR 448 ("*R v Howe*"), that manslaughter was the proper verdict where an accused person killed while defending himself by way of self-defence from an attack by force and where he used more force than was reasonably necessary but no more than was

necessary for his protection or what might reasonably be regarded by him to be necessary in the circumstances. The certified point of law was premised on a person being subjected to a violent and felonious attack.

41. Two judgments were delivered in the Supreme Court, those of Walsh and Butler JJ. Ó Dálaigh CJ. agreed with the judgment of Butler J. and Budd J. agreed with the judgment of Walsh J. Fitzgerald J. said that in view of the opinions expressed by his colleagues he was "prepared to say that the question referred to the Court by the Attorney General should be answered in the affirmative". As is well known by those who practice or study criminal law, the judgments of Walsh and Butler JJ. differ in approach although they reach the same answer to the question posed. Thus, for a case which has stood as the law on lawful use of force in homicide cases, it is a curious feature that no single judgment can be said to encapsulate entirely the rationale for why the partial defence leading to a conviction for manslaughter may be relied upon by a person who acts with the intention of defending themselves but uses more force than is reasonably necessary in the circumstances.

42. While both judgments focussed on the intention in s. 4 of the 1964 Act, Walsh J., as the authors of *Charleton & McDermott's Criminal Law* note at para 17.45, "reasoned that [s. 4] had changed the mental element for murder and had made the test of establishing this element entirely subjective. The belief of the accused was the determinative test as to intent. People who act honestly towards a lawful end, namely self-defence, cannot intend the criminal act of murder. An intentional assault is committed when the force used is not justified objectively and, in accordance with the assault-manslaughter principle, the crime involved in such a death is manslaughter and not murder".

43. Butler J. relied more heavily on the proposition in *R v Howe*, that a person whose plea of self-defence fails only by reason of the amount of force he used being objectively unreasonable, lacks the full degree of culpability associated with murder. Butler J. was of

the view that the English decisions, which ostensibly did not follow *R v Howe*, were not far from the *ratio decidendi* of *R v Howe* while Walsh J. distinguished the approach of the English judges on the basis that their law did not follow the same subjective assessment of the mental element in murder defences as in this jurisdiction. Butler J. was of the view that where an accused is attacked and uses disproportionate force, his intention in so acting is not *primarily* to kill or cause serious injury, but to defend himself.

44. It is noteworthy that Walsh J. said: "A homicide is not unlawful if committed in the execution or advancement of justice, or in reasonable self-defence of person or property, or in order to prevent the commission of an atrocious crime or by misadventure. In the case of such self-defence, the homicide is justifiable and is therefore not lawful". I have underlined those words because the use of the word homicide indicates that it is *neither murder nor manslaughter* if the act is committed *in reasonable self-defence* of person or property.

45. Walsh J. then stated in an important passage:

> "If the prosecution has not satisfied the jury beyond reasonable doubt that the accused had not believed on reasonable grounds that his life was in danger and that the force used by him was reasonably necessary for his protection, the accused must be acquitted of any charge of unlawful homicide. To put it another way, but without suggesting that there is any reduction in the burden of proof on the prosecution, the homicide is not unlawful if the accused believed on reasonable grounds that his life was in danger and that the force used by him was reasonably necessary for his protection."

46. The test for full self-defence in a fatal case requires a standard of reasonableness to be met. The subjective part of this test is that the accused must believe his life is in danger. Butler J. phrased the test slightly differently. Having referred to the malice aforethought or *mens rea* required for murder, Butler J. said in a much quoted passage:

"A person is entitled to protect himself from unlawful attack. If in doing so he uses no more force than is reasonably necessary, he is acting lawfully and commits no crime even though he killed his assailant. If he uses more force that may objectively be considered necessary, his act is unlawful and, if he kills, killing is unlawful. His intention, however, falls to be tested subjectively and it would appear logical to conclude that, if his intention of doing the unlawful act was primarily to defend himself, he should not be held to have the necessary intention to kill or cause serious injury. The result of this view would be that the killing, though unlawful, would be manslaughter only."

47. It is appropriate to mention here that McAuley and McCutcheon criticise the *Dwyer* partial defence rule because they say that it confuses the essentially objective question of the proper limits of defensive force with the subjective question of *mens rea* (at p 946). They also have criticisms of the 1997 Act on the basis that it goes beyond the common law which had traditionally only allowed reasonable force in the fact of an *unlawful* attack. It must be observed that these criticisms are at a level of policy, but those policy arguments have been rejected by this Court in *Dwyer* and the legislature in the 1997 Act.

48. For present purposes, it is noteworthy that Butler J. held that far from petrifying the law and preventing its development on the line of *R v Howe*, the 1964 Act pointed the way to the development by its insistence on the intention to kill or cause serious bodily injury as an essential ingredient in the crime of murder and by providing that the presumption that an accused person intended the natural and probable consequences of his act may be rebutted. Ultimately, Butler J. held that it was for the jury to find what was the intention of the accused at the time of the killing. It was not in every trial for murder in which the plea of self-defence is raised that an accused person must, at worst, be convicted of manslaughter. The evidence of the words and acts of the accused and the surrounding

circumstances before and after the killing may satisfy the jury that the primary intention of the accused was not to defend himself. Where self-defence is open on the evidence as an answer to the charge of murder, the jury must be satisfied that the intention was not to defend before convicting of that charge and the accused is entitled to have left to the jury to consider whether, even if they find he used more force than was reasonably necessary to defend himself, he nonetheless used no more than he honestly believed to be necessary in the circumstances. If so, they should be directed to find him guilty of manslaughter.

49. Therefore, following *Dwyer* while a verdict of guilty of manslaughter may be based upon an objectively excessive use or force in self-defence, no such finding of guilty of murder may be made unless the jury are satisfied that the accused was not acting genuinely in self-defence but had the intention to kill or cause serious injury as required by s. 4 of the 1964 Act.

Relevant case-law post *Dwyer*

50. The appellant laid particular emphasis on the cases of *Barnes*, *Farrell* and *The People (DPP) v Clarke* [1994] 3 IR 289 and others for the purpose of demonstrating that the understanding of *Dwyer* had changed over time and that the common law was developing. As I conclude that the 1997 Act applies to fatal offences it is unnecessary to address most of these submissions now. The exception is the case of *Barnes* where two aspects arise: the comments of Hardiman J. relating to the applicability of the 1997 Act and his interpretation of s. 18 of said Act.

51. The appellant drew specific attention to that part of *Barnes* where Hardiman J. had referred to the anomaly in the law by virtue of the 1997 Act in that one reverted to the common law for one defence. The appellant submitted however that the court in *Barnes* did not seek to draw any distinction between the components of self-defence in fatal and non-fatal contexts. In *Barnes*, the Court of Criminal Appeal addressed the matter of lawful force

employed by a homeowner against a burglar. In delivering judgment for the Court, Hardiman J. recognised that burglary is an act of aggression and that a homeowner has a right to use retaliatory force to end the threat posed by the burglar and to either drive the burglar off their property or immobilise/detain them. Assessing the permissible quantum of force which can legally be used in such a scenario, the Court held, *inter alia*, that while it is impossible to lay down a formula by which to calculate a permissible degree of force, it would be unjust to lay down a test which was wholly objective or judged the conduct of a victim of burglary on the standards of the hypothetical reasonable man. Referring to how a victim of a burglary is likely to be shocked, surprised or terrified, the Court (Hardiman J.) held that holding the person to an objective standard would be profoundly unjust. He went on to say at paras 69-70:

> "Equally, however, it cannot be left to every person himself to lay down for himself how much force he or she is entitled to use. There must be both a subjective and an objective component in the assessment of the degree of force proper to be used by the victim of a burglar. **There is, in our opinion, a very useful analogy here to be drawn with a statutory criteria for the use of non-lethal force**." (emphasis in appellant submissions).

52. Commenting on the framework established in s. 18 of the 1997 Act, Hardiman J. concluded that all burglars are inherent aggressors, and continued: "… But even apart from that it would be observed that the statutory formula itself partakes of both a subjective element - force 'such as is reasonable in the circumstances as he or she perceives them to be' and an objective element - the provisions of s. 1(2) of the 1997 Act which require a court or jury to have regard to the presence or absence of reasonable grounds for the belief that the level of force used was no more than was reasonably necessary in the circumstances". I would observe that this particular identification of the subjective and objective elements of the s.

18 defence conflicts with that posited by Edwards J. in the Court of Appeal set out at para 14 and 15 above in which he says the test "is whether the objective observer would regard the amount of force actually used as having been reasonable, in the circumstances as the accused believed them to be". In my view the subjective/objective elements of the test as set out by Edwards J. is to be preferred as I will explain later in this judgment.

53. The DPP rejects that this case, or any other, shows support for the proposition that the objective standard used in the 1997 Act and the 2011 Act could apply to offences involving homicide. The DPP submits that in the passages cited from *Barnes*, it is clear that Hardiman J. is confining the statutory test in the 1997 Act to the use of non-lethal force.

The Non-Fatal Offences Against the Person Act, 1997

54. The 1997 Act followed the Law Reform Commission's 1994 *Report on Non-Fatal Offences Against the Person Act* (LRC 45 – 1994). As the Law Reform Commission acknowledged in its 2006 *Consultation Paper on Legitimate Defence* (LRC CP 41 – 2006), the Commission recommended a statutory provision regarding use of defensive force modelled on a draft Criminal Law Bill proposed by the Law Commission of England and Wales. Of significance is that the Law Commission's draft bill was intended to cover both non-fatal and fatal cases and no restriction to non-fatal offences was added to the wording on the relevant provisions regarding lawful use of force in the Law Reform Commission's recommendations.

55. Apart from creating new offences of a non-fatal kind, the Non-Fatal Offences Against the Person Act, 1997, provides for the 'justifiable use of force' at sections 18, 19, and at s. 20 defines "use of force". The relevant provisions are as follows:

"*Interpretation*

1 – (2) For the purposes of sections 17, 18 and 19 it is immaterial whether a belief is justified or not if it is honestly held but the presence or absence of reasonable grounds

for the belief is a matter to which the court or the jury is to have regard, in conjunction with any other relevant matters, in considering whether the person honestly held the belief.

…

Justifiable use of force; protection of person or property, prevention of crime, etc.

18.— (1) The use of force by a person for any of the following purposes, if only such as is reasonable in the circumstances as he or she believes them to be, does not constitute an offence—

(a) to protect himself or herself or a member of the family of that person or another from injury, assault or detention caused by a criminal act; or

(b) to protect himself or herself or (with the authority of that other) another from trespass to the person; or

(c) to protect his or her property from appropriation, destruction or damage caused by a criminal act or from trespass or infringement; or

(d) to protect property belonging to another from appropriation, destruction or damage caused by a criminal act or (with the authority of that other) from trespass or infringement; or

(e) to prevent crime or a breach of the peace.

(2) “use of force” in subsection (1) is defined and extended by section 20.

(3) For the purposes of this section an act is "criminal" notwithstanding that the person doing the act—

(a) if charged with an offence in respect of it, would be acquitted on the ground that—

(i) he or she acted under duress,

(ii) his or her act was involuntary,

(iii) he or she was in a state of intoxication, or

(iv) he or she was insane so as not to be responsible according to law for the act,

or

(b) was a person to whom section 52(1) of the Children Act 2001 applied.

[Substituted by Criminal Law (Defence and the Dwelling) Act 2011]

(4) The references in subsection (1) to protecting a person and property from anything include protecting the person or property from its continuing; and the reference to preventing crime or a breach of the peace shall be similarly construed.

(5) For the purposes of this section the question whether the act against which force is used is of a kind mentioned in any of the paragraphs (a) to (e) of subsection (1) shall be determined according to the circumstances as the person using the force believes them to be.

(6) Notwithstanding subsection (1), a person who believes circumstances to exist which would justify or excuse the use of force under that subsection has no defence if he or she knows that the force is used against a member of the Garda Síochána acting in the course of the member's duty or a person so assisting such member, unless he or she believes the force to be immediately necessary to prevent harm to himself or herself or another.

(7) The defence provided by this section does not apply to a person who causes conduct or a state of affairs with a view to using force to resist or terminate it:

But the defence may apply although the occasion for the use of force arises only because the person does something he or she may lawfully do, knowing that such an occasion will arise.

(8) Property shall be treated for the purposes of subsection (1) (c) and (d) as belonging to any person—

(a) having the custody or control of it;

(b) having in it any proprietary right or interest (not being an equitable interest arising only from an agreement to transfer or grant an interest); or

(c) having a charge on it;

and where property is subject to a trust, the persons to whom it belongs shall be treated as including any person having a right to enforce the trust.

Property of a corporation sole shall be treated for the purposes of the aforesaid provisions as belonging to the corporation notwithstanding a vacancy in the corporation.

(9) In subsection (3) "intoxication" means being under the intoxicating influence of any alcoholic drink, drug, solvent or any other substance or combination of substances.

[Inserted (13.01.2012) by Criminal Law (Defence and the Dwelling) Act 2011]

Justifiable use of force in effecting or assisting lawful arrest.

19.— (1) The use of force by a person in effecting or assisting in a lawful arrest, if only such as is reasonable in the circumstances as he or she believes them to be, does not constitute an offence.

(2) “use of force” in subsection (1) is defined and extended by section 20.

(3) For the purposes of this section the question as to whether the arrest is lawful shall be determined according to the circumstances as the person using the force believed them to be.

Meaning of “use of force” and related provisions.

20.— (1) For the purposes of sections 18 and 19—

(a) a person uses force in relation to another person or property not only when he or she applies force to, but also where he or she causes an impact on, the body of that person or that property;

(b) a person shall be treated as using force in relation to another person if—

(i) he or she threatens that person with its use, or

(ii) he or she detains that person without actually using it; and

(c) a person shall be treated as using force in relation to property if he or she threatens a person with its use in relation to property.

(2) Sections 18 and 19 shall apply in relation to acts immediately preparatory to the use of force as they apply in relation to acts in which force is used.

(3) A threat of force may be reasonable although the actual use of force may not be.

(4) The fact that a person had an opportunity to retreat before using force shall be taken into account, in conjunction with other relevant evidence, in determining whether the use of force was reasonable."

56. As can be seen, s. 18(1) of the 1997 Act provides that the use of force by a person for the purpose of, *inter alia*, protecting himself or a member of the family of that person or another from injury, assault or detention caused by a criminal act, does not constitute an offence only if the force "is reasonable in the circumstances as he or she believes them to be". Significantly, s. 18(5) provides that the question whether *the act against which force is used* is of the kind mentioned in the sub-paragraphs to subs. 1, "shall be determined according to the circumstances as the person using the force believes them to be".

57. The Law Reform Commission in its *Consultation Paper on Legitimate Defence* refers to s. 18(3) which deals with situations where there is an incapacity of the initial actor i.e. the person apparently committing the assault against which the defender seeks to protect

themself. Thus, for the purposes of the section, an act involves a "crime" or is "criminal" if the person who commits it would be acquitted if for example, they are a child under 7 years old or they were insane, so as not to be responsible according to law for the act. Section 18(5) provides that the question whether the act against which force is used is of a kind mentioned in any of the paragraphs (a) to (e) of subsection (1) (set out in the appendix to this judgment) shall be determined *according to the circumstances as the person using the force believes them to be*.

Criminal Law (Defence and the Dwelling) Act 2011

58. The 2011 Act is directed towards the use of force in lawful defence of persons or property while the person is in their dwelling or is a lawful occupant in a dwelling. The 2011 Act does not require the person to retreat before the use of force. Similar to the 1997 Act, the belief does not have to be reasonable, but it must be honestly held. The relevant provisions are:

"*Justifiable use of force, etc*

2.— (1) Notwithstanding the generality of any other enactment or rule of law and subject to subsections (2) and (3), it shall not be an offence for a person who is in his or her dwelling, or for a person who is a lawful occupant in a dwelling, to use force against another person or the property of another person where—

(a) he or she believes the other person has entered or is entering the dwelling as a trespasser for the purpose of committing a criminal act, and

(b) the force used is only such as is reasonable in the circumstances as he or she believes them to be—

(i) to protect himself or herself or another person present in the dwelling from injury, assault, detention or death caused by a criminal act,

(ii) to protect his or her property or the property of another person from appropriation, destruction or damage caused by a criminal act, or

(iii) to prevent the commission of a crime or to effect, or assist in effecting, a lawful arrest.

(2) Subsection (1) shall not apply where the person uses force against—

(a) a member of the Garda Síochána acting in the course of his or her duty,

(b) a person assisting a member of the Garda Síochána acting in the course of his or her duty, or

(c) a person lawfully performing a function authorised by or under any enactment.

(3) Subsection (1) shall not apply where the person using the force engages in conduct or causes a state of affairs for the purpose of using that force to resist or terminate an act of another person acting in response to that conduct or state of affairs, but subsection (1) may apply, if the occasion for the use of force arises only because the person using the force concerned does something he or she may lawfully do, knowing that such an occasion will arise.

(4) It is immaterial whether a belief is justified or not if it is honestly held but in considering whether the person using the force honestly held the belief, the court or the jury, as the case may be, shall have regard to the presence or absence of reasonable grounds for the person so believing and all other relevant circumstances.

(5) It is immaterial whether the person using the force had a safe and practicable opportunity to retreat from the dwelling before using the force concerned.

(6) (a) A person shall be regarded as using force in relation to another person if he or she—

(i) applies force in relation to or causes an impact on the body of that other person,

(ii) threatens to apply force in relation to or cause an impact on the body of that other person, or

(iii) detains that other person.

(b) A person shall be regarded as using force in relation to property belonging to another person if he or she—

(i) applies force to that property,

(ii) causes an impact on that property, or

(iii) threatens to apply force to or cause an impact on that property.

(7) The use of force shall not exclude the use of force causing death.

(8) An act is criminal notwithstanding that the person doing the act—

(a) if charged with an offence in respect of it, would be acquitted on the ground that—

(i) he or she acted under duress,

(ii) his or her act was involuntary,

(iii) he or she was in a state of intoxication, or

(iv) he or she was insane so as not to be responsible according to law for the act,

or

(b) was a person to whom section 52 (1) of the Children Act 2001 applied.

(9) The references in subsection (1)(b) to protecting a person or property from a criminal act include references to protecting the person or property from the continuation of the act, and the reference to preventing the commission of a crime or to effecting, or assisting in effecting, a lawful arrest shall be similarly construed.

(10) In this section—

"intoxication" means being under the intoxicating influence of any alcoholic drink, drug, solvent or any other substance or combination of substances;

"property" means …."

Common Law and Statutory Defence: Example of an Anomaly if Separate Tests Exist

59. The appellant provides a hypothetical scenario in which the consequences of applying disparate standards to the permissible use of force comes into stark relief. Where a person who incorrectly believes themselves to be under imminent threat responds with force which is *objectively reasonable in the circumstances as the person believed them to be, but which is not objectively reasonable in the circumstances as they were*, and gravely injures another person, their actions would be assessed differently based on the impact of those injuries. For example, if the injuries led to that person being in a coma for the rest of their lifetime, the accused's actions may be deemed lawful. In contrast, if the injuries lead to death, the accused will be found to have employed unlawful force despite there being no difference in the circumstances or the perception of the circumstances or the level of force used between the two above scenarios. The appellant ultimately submits that the application of subjectivity to the second limb of the test brings cohesion/coherence to Irish criminal law on self-defence.

60. It is in fact not difficult to imagine such a scenario, a person might be at work in their office building late at night but, because of serious violent crimes that have taken place in offices in that location, are fearful for their safety. They hear sounds to which they are unaccustomed and repeatedly call out to the person to identify themselves. The noise does not stop, the person rings security but gets no answer and, in fear takes a gun from their drawer (which they lawfully possess) and having called out to the person to go away and that they have a gun, when the door is nonetheless opened, they shoot in fear of their safety as the person is entering. The person entering turns out to be a cleaner working with headphones on while listening to loud music. On a trial for intentionally or recklessly causing serious harm contrary to s. 4, the person is acquitted based on the subjective and

objective elements of the self-defence provisions of the 1997 Act. The cleaner later dies from their injuries and the person is prosecuted for manslaughter on the basis that, although they intended to cause serious harm at a minimum, they had done so with an honest belief they were acting in self-defence and were entitled to a verdict of manslaughter on the basis that the force used was excessive in the circumstances as they actually were i.e. a cleaner going about their work.

61. When asked to respond to this type of scenario in written submissions, the DPP submitted that the legal and ethical problems arising from potential long-term survival of a victim are wider than this scenario and would not be resolved by adopting a single test in fatal and non-fatal cases. The DPP cites *Dunne v The Director of Public Prosecution* [2016] IESC 24, [2017] 3 IR 1. In that case a prosecution was taken for murder after the victim died in circumstances where the accused had already pleaded guilty and was sentenced for the offence of attempted murder.

62. The DPP submitted that the family of a victim left in a permanently unresponsive state may feel equally aggrieved that a different standard of self-defence applies than if their relative had died. She submitted that resolution of all the legal and ethical issues arising from the fact that a person in a coma is, as a matter of law, still alive regardless of their quality of life or prospects of recovery is perhaps beyond the scope of the present discussion. Counsel submitted that the victim's legal status as living is decisive in this scenario, and that the law relating to murder should never be altered or influenced based on subjective assessments of the quality of the victim's life. With respect to that submission by the DPP, the question raised by the Court was not directed towards a subjective assessment of the quality of a victim's life, instead it was directed towards the anomaly of a different outcome based upon a different means of assessing self-defence which may be created in those circumstances.

63. Furthermore, the DPP refers to the case of *Cosgrave v Director of Public Prosecutions*

[2012] IESC 24, [2012] 3 IR 666 in which it was held that the circumstances in which a sequential prosecution would be allowed will depend primarily on whether the second case is based on the same set of facts as the first; but, in my view, by definition the second prosecution is based on the new and different fact of the subsequent death. The DPP submits this is necessarily a fact specific enquiry in each case and it cannot be excluded that there may be facts in a subsequent manslaughter prosecution (for instance which demonstrate some wider criminal (gross) negligence) which may have little or no relevance to a s. 4 prosecution. At least some aspect of criminal (gross) negligence would, however, have been considered in the s. 4 prosecution as it incorporates recklessness.

64. It seems to me that there would be an anomaly in the law, as Hardiman J. indicated, if the tests are different for the infliction of non-fatal and fatal offences. A defence of lawful use of force could be successful in a non-fatal case but if the person died subsequently of their injuries, then the same defence may not necessarily be successful in defence of a manslaughter charge. I also refer to the example given by Hogan J. in his judgment in this case of a person defending themselves against two attackers killing one and seriously injuring the other. It would not be possible to justify two separate verdicts on the culpability of the person arising from their 'guilty mind'. Both causing serious harm and manslaughter carry the possibility of a sentence of life imprisonment, but the liability to serve a sentence because of the same conduct would be solely result dependent and would not appear to be based upon any difference in intention or criminal negligence, although this is subject to what is said below regarding gross negligence manslaughter. Anomalies exist in various aspects of the common law and the mere fact of an anomaly does not permit the courts to change the law, but it may be relevant to ascertaining whether the common law or the statutory law truly impose such an anomaly.

The 1997 Act and the Defence of Lawful Use of Force

65. While there has been doubt about whether the 1997 Act applies to non-fatal offences only, as Edwards J pointed out in the Court of Appeal there has also been considerable debate about how the defence of lawful use of force is to be defined.

66. The appellant cites *The People (DPP) v Quinn* [2015] IECA 308 ("*Quinn*") in which self-defence in the context of the 1997 Act was considered. In the *Quinn* case, the accused stabbed an individual causing serious harm, and subsequently stabbed four other people who sought to assist his initial victim. The accused in *Quinn* maintained that the trial judge's charge failed to adequately instruct the jury on the fact that the objective component of self-defence in non-fatal cases was only relevant to an assessment of the honesty of the accused's belief that they used a reasonable quantum of force. The Court of Appeal in *Quinn* found s. 18 of the 1997 Act to mean that both limbs of the test, i.e. the reasonableness of using force in the circumstances and the quantum of force used, should be assessed subjectively. The appellant then cited from *The People (DPP) v O'Brien* [2016] IECA 146 ("*O'Brien"*) which agreed that in respect of both limbs, "the test is at all stages a subjective one".

67. The Court of Appeal in this case, took the view, correctly, that s. 18 of the 1997 Act provided for a defence of the lawful use of force that was partly subjective and partly objective. In particular, the Court viewed the second limb of the test, namely the degree of force, as requiring an objective consideration in the light of the circumstances as the accused believed them to be. In the earlier cases of *Quinn* and *O'Brien* there was a focus on s. 1(2) which required the presence or absence of the reasonable grounds to be considered when attempting to reach the conclusion that the accused's belief was honest. In *Barnes* this was seen as incorporating an objective element and this may have fed into the decision of the Court of Appeal in *O'Brien*. I do not think it is correct to say that the first limb of the test is partly objective, it is the entirely subjective honest view of the

accused that is to be assessed as to whether he believed that the use of force was required (see s. 1(2) discussed in the following paragraph). Importantly however, the judge/jury is required to look at the presence or absence or reasonable grounds for the purpose of assessing that subjective test. The second part of the test, namely, the assessment of the degree of force used, is for the reasons, set out below, to be assessed objectively, but that assessment is made through considering the circumstances as the accused perceived them to be.

68. Looking at the relevant provisions of the 1997 Act, s. 18(1) first draws attention to the use of force by a person for the purpose of one of the subsections if only such is reasonable in the circumstances as he or she believes them to be. When used in statutes or at common law the word 'reasonable' connotes an objective element. The use of the word 'believes' connotes a subjective element. Section 1(2) copper-fastens that the belief element is the subjective honest belief of the individual that the use of force is required that must be considered. Of great significance, s. 1(2) provides however that 'the presence or absence of reasonable grounds for the belief is a matter to which the court or the jury is to have regard, in conjunction with any other relevant matters, in considering whether the person honestly held the belief'. Therefore, the jury must look at all the circumstances in assessing whether the person asserting the defence actually had an honest defence. I will address later the other safeguards against wholly unmeritorious or spurious claims of entitlement to the defence of lawful use of force.

69. Significantly, the person claiming entitlement to the defence must have acted reasonably in the circumstances as the accused believed them to be. Section 18(1) does not provide that it is the accused who gets to decide what is reasonable; the accused has already had their subjective state of mind catered for in that they can use force even if they are (honestly) mistaken about the necessity to use it. Nonetheless, there is a requirement to only use such

force as is reasonable in those circumstances. For example, a person is entitled to use force to save their life from a child under the age of 7 years who is attacking them, but they are not entitled to use more force than is reasonable in those circumstances.

70. Section 18(1) refers to "such force as is reasonable…". Therefore, the degree of force used must be *reasonable*; a word, as I have said, that incorporates objectivity. If a person is being attacked by someone wielding a soft toy and wants it to stop, it is not reasonable to swing a baseball bat at that person's head. In effect, the statute provides that the force used must be proportionate to the threat perceived by the accused. Extreme reaction to a threat, even when that threat is analysed from the subjective perspective of the accused, is not the lawful use of force. The law recognises however that "[d]etached reflection cannot be demanded in the presence of an uplifted knife" (Holmes J. in *Brown v US* (1921) 256 US 335, 343). There is no requirement to measure with laser precision the degree of force because what is reasonable will take into account that even a reasonable person may have had little time to think or reflect on the precise form the defence should take. With reference to similar terms in the 2011 Act, there will be no "profound injustice" to a householder as Hardiman J. feared in *Barnes*, because the reasonable person will be the reasonable shocked and scared householder faced with a home invasion.

71. Therefore, in so far as the Court of Appeal in *O'Brien* said that in respect of both limbs i.e. decision to use force and degree of force used "the test is at all stages a subjective one" and that "[i]t does not matter whether or not the use of force at all, or the use of such force as was in fact used, was justified", this is incorrect. Prendergast, Blake and Hanly have made that point as have the authors of Campbell et al, *Criminal Law in Ireland Cases and Commentaries* (2nd edn, Clarus Press 2021). This is also consistent with the view of Charleton J. in *The People (DPP) v Heffernan* [2017] IESC 5, [2017] 1 IR 82, a case dealing with the defence of diminished responsibility, where he also opined generally in respect of

self-defence that "the objective standard is dominant" although I do not view this as an entirely accurate description of the defence of lawful use of force in the 1997 Act. It is more accurate to say that the overall test is partly subjective and partly objective.

72. An accused must be acquitted if they *honestly believed* that they were using force for one of the purposes set out in s. 18(1) (a) to (e), and if the degree of force used was *objectively reasonable* in the circumstances that the accused believed existed. It is important to clarify however that overall s. 18(1) and s. 1(2) when read together require a focus on the subjective belief of the accused as to the overall necessity to use the force that they actually used. Thus, while 'reasonable' connotes an objective test, the entire test is underpinned by the requirement that the accused must have an honest belief that the circumstances necessitated the use of the force to which they actually resorted. It could never be objectively reasonable for a person to use force in self-defence if the person using the force did not themselves believe that the force used was necessary for self-defence.

Similarities between the 1997 Act defence of lawful use of force and the law stated in *Keatley*

73. *Charleton & McDermott's Criminal Law* identifies the principles of self-defence adopted by *Keatley* as involving two elements: "a necessity for the use of force and a necessary proportion between the degree of force used, or threatened, and the reply to the accused. It may be that the accused makes a genuine, though unreasonable, mistake by believing himself to be under attack. Against this is not a purely objective test as it would seem that the quantum of force used must still be objectively reasonable, measured by what the accused thought the circumstances to be" (para 17.19). The authors point out that similar reasoning was found by the Court of Appeal of England and Wales in the case of *R v Gladstone Williams* (1984) 78 Cr. App. R. 276 ("*Gladstone Williams*"). That reasoning has been criticised by some English commentators because they claim the decision

logically renders the defence a wholly subjective one and completely abandons the objective test. The authors says however that both objective elements of necessity to use force and proportion in its use are fundamental to the judgments in *Dwyer*. They point out that under the 1997 Act there is an express obligation to enter into the mind of the accused and test those elements from the situation the accused was facing. I agree with the authors of *Charleton & McDermott's Criminal Law* that *Keatley* is not a purely objective test as the force used must be reasonable measured by *what the accused thought the circumstances to be* and in my view *Gladstone Williams* ought not to be viewed as providing for an entirely subjective test; the use of force must be reasonable in the circumstances as the person perceived them to be.

74. The case of *Gladstone Williams* was an important decision of the Court of Appeal in England and Wales. Williams had been charged with assault occasioning actual bodily harm to V. His defence was that he was preventing V from assaulting X. It appears however that V may have been lawfully arresting X. The jury were instructed that if V was acting lawfully in arresting X, then Williams only had a defence if he *believed on reasonable grounds* that V was acting unlawfully. The Court of Appeal held that was a misdirection. On the basis of the law as expressed in *DPP v Morgan* [1976] AC 182 ("*DPP v Morgan*") by the House of Lords and *R v Kimber* (1983) 77 Cr. App. R. 225, the Court held that the common law position was that "a person may use such force as is reasonable in the circumstances as he believed them to be in the defence of himself or any other person". That formula had been recommended as the basis for statutory reform by the Criminal Law Revision Committee, but in *Gladstone Williams* the Court of Appeal declared it was already the common law.

75. There has been an increasing focus on an accused's subjective intention at common law and in statute law. Prior to *Gladstone Williams*, in *DPP v Morgan,* the House of Lords held

that it was the subjective view of the accused's belief that a woman was consenting to intercourse that had to be assessed. Thus, a man was entitled to be acquitted of rape if he genuinely believed the woman to be consenting even though there were no reasonable grounds for so believing. In this jurisdiction s. 2 of the Criminal Law (Rape) Act, 1981 also places emphasis on the subjective nature of the belief but the jury may have regard to the presence or absence of reasonable grounds for such belief, in conjunction with other relevant matters, in considering whether he so believed. Thus, the focus is on whether the person actually believed in the existence of consent, but the jury can look to whether there are reasonable grounds when seeking to establish the genuine nature of that belief. That, in essence is the same provision for assessing the honest belief of the person who claimed to have believed they needed to use force for the purposes specified in the Non-Fatal Offences Against the Person Act, 1997 and in the Criminal Law (Defence and the Dwelling) Act, 2011.

76. Some have queried whether there should be higher standard of conduct required in cases of lethal force. The Law Reform Commission in its 2006 *Consultative Paper on Legitimate Defence*, engages in a deep consideration of the legitimate defence and the definition of "lethal defensive force". In the view of the Commission lethal defensive force should only include the situation where there is an intention to use lethal force, arguing that a higher standard of conduct should be expected of those who intentionally apply lethal force than those who intentionally apply force but do not intend to kill. The Commission characterises the decision in *Keatley* as one in which the stricter rules governing lethal defensive force did not apply because there was no intent to cause death and where no such oblique intent could be implied. They submit that where there is no intent to use lethal force that the law should be governed by the same rules as apply to non-fatal legitimate defence. That, in my view would lend even more incoherence to the defence of lawful use of force. It would

require a jury to be instructed on two different rules on self-defence because they may not find that the accused actually possessed the required intention to use lethal force. As will be discussed later, the Commission also suggests that it is arguable that the 1997 Act already applies to fatal cases.

77. As I find that to be the case, then much of the 2006 Report is either no longer relevant or will fall to be determined at some later stage. For example, the Law Reform Commissions raises an issue about the right to defend against a mistaken attacker i.e. a person who is using lawful force based upon their mistaken view of the factual situation. It is possible that this theoretical possibility may be resolved by viewing the mistaken attacker's action through the prism of trespass to the body and not merely through an assault lens. The act would amount *prima facie* to a trespass allowing the person to respond in that moment. All of these matters may have to be dealt with if or when they arise. For present purposes, in any case where the 1997 Act is applicable it must be interpreted in a manner which is coherent and relevant to the facts raised.

The Appellant's Formulation of the Correct Common Law Position

78. At the hearing of the appeal, counsel for the appellant naturally focussed on seeking a new understanding of the common law that would incorporate consideration of the circumstances as the accused perceived them to be. Counsel for the appellant argued that the *Dwyer* decision, when analysed carefully, was unclear as to self-defence and the assessment of the use of force in the subjective circumstances as an accused perceives those circumstances. This may have been because the judgment was confined to the specific circumstances where there was an acknowledged "violent and felonious attack".

79. At the hearing, counsel for the appellant proposed the following common law test:

a) Once the defence is properly raised, it is for the prosecution to negative it beyond a reasonable doubt (there is no disagreement on this);

b) The issue for the jury is whether the accused person genuinely held the belief in the circumstances as they perceived them to be that it was necessary to use force to defend themselves (or others);

c) If the foregoing is answered positively, the next issue for the jury is whether the force used was no more than objectively reasonably necessary in the circumstances as the accused perceived them to be;

If that is answered positively, then the accused is entitled to a full acquittal on the charge of murder, that is to say, that the issue of the partial defence resulting in a manslaughter conviction would not arise.

Has the Common Law Defence been overtaken by the Statutory Defence?

80. I will now address the issue of whether the defences in the 1997 Act now apply to fatal offences as well as non-fatal offences. If the 1997 Act does apply, then s. 18 is the legal provision through which this appeal must be adjudicated. In starting from this point, arguments about whether the common law had developed since *Dwyer*, a possibility that Dr Conor Hanly supported in "Objectivity and Perception in Self-Defence" (2023) 33(4) *Irish Criminal Law Journal* 86, are no longer relevant.

Law Reform Commission and Academic Commentary

81. Many academics and the Law Reform Commission have queried whether the statutory defence of lawful use of force now applied to homicide offences. It is noteworthy that the Law Reform Commission in its *Consultation Paper on Legitimate Defence* recognised that "the somewhat ambiguous language" in sections 18-20 of the 1997 Act allowed an argument that it was sufficiently broad to govern the legitimate defence in cases of homicide. They acknowledged that the provisions of the 1997 Act do not expressly draw a distinction between fatal and non-fatal uses of defensive force and also said that the source of confusion may have been the previous recommended model of the Criminal Law Bill in

England and Wales, which was intended to apply to both fatal and non-fatal offence alike. The Law Reform Commission noted that if the 1997 Act does apply to homicide, then the common law rules as articulated in *Keatley* and *Dwyer* have been abolished and commented that such a position does not appear to have arisen directly for determination by the appellate courts (the Law Reform Commission was aware of *Barnes* but did not seem to think the issue had arisen directly). They did note that the courts seemed to have assumed that the common law plea recognised in *Dwyer* continued to apply. It is fair to say that the Law Reform Commission at least anticipated that a challenge such as the present one would be made.

82. It must also be noted that the authors of the 1999 edition of *Charleton &McDermott's Criminal Law & Evidence* were also of the view that "[a]rguably the 1997 Act also applies to homicide. Assault, or defence from assault, is a component of homicide and the Act, save by its title does not so distinguish its application". They raise the interesting issue of whether this would remove the partial defence leading to a conviction for manslaughter where a person genuinely believed that they were using no more force than necessary but in fact used more than objectively reasonable. They suggest that this may come down to a situation of whether the judgment of Butler J. is to be preferred with its focus on intent which would not permit a person whose intent is to defend themselves to be convicted of murder whereas Walsh J. focuses on the situation of reasonableness and thus the end result could be a conviction for murder if the degree of force used was unreasonable in an objective sense. McAuley and McCutcheon also queried if the 1997 Act defence of lawful use of force applied to fatal offences.

Indicators of a Changed Legal Position

83. There are a number of factors which support the contention that by 1997 the Oireachtas were set on changing the legal landscape as to the lawful use of force across all areas of the

criminal law. For example, the decision in *Dwyer* was premised on the lawful use of force in response to a felonious attack. The language in *Dwyer* echoed the description in the founding texts on the common law which refer to justified homicide where defence to a felonious attack was an inherently lawful activity. Given that the Oireachtas has chosen to abolish the distinction between felonies and misdemeanours there can never be a felonious attack on another individual. It is interesting to note, that the Law Reform Commission in its 2006 *Consultation Paper on Legitimate Defence* had a concern that the power to use lethal force to effect an arrest had "inadvertently" been abolished by s. 3 of the Criminal Law Act, 1997 because the power only applied to suspected felons and not misdemeanants. That would no longer be an issue as the Non-Fatal Offences Against the Person Act, 1997 applies to fatal offences.

84. Leaving aside the question of s. 22 and the abolition of common law defences, there is another change of great significance to self-defence and offences of homicide brought about by the Non-Fatal Offences Against the Person Act, 1997. In the first place, the 1997 Act fundamentally altered the law in relation to assault offences. As McKechnie J. stated in *People (DPP) v Brown* [2018] IESC 67, [2019] 2 IR 1, "the law on assault prior to 1997 was governed by a mixture of the common law and the Offences Against the Person Act 1861". He went on to say: "The old law on non-fatal offences against the person, though not being entirely washed away, was reformed by the 1997 Act…".

85. The enactment of the 1997 Act created new offences of assault and also new defences to assault. More relevantly, the Act created a specific statutory defence of lawful use of force. Not only was there a new way of thinking about the act that the victim of the impugned acts may have been engaged in (was it an offence, even if no longer felonious?), but the nature of the activity of the person who inflicted the violence would come to be assessed differently if an assault charge was proffered.

86. I have referred to the requirement that there must be an unlawful killing for a conviction of manslaughter. This is apparent from both the older and newer textbooks on English criminal law and the later Irish textbooks. This is also the position in *Keatley* as I have discussed above. Maguire CJ. held that it was a misdirection to direct the jury that the act of the appellant was an assault "… as every blow that is struck is not necessarily unlawful, and a so-called 'assault' that proves to have been justifiable or excusable cannot strictly be called unlawful" (emphasis added). Most importantly, it is also apparent from the text of s. 4 of the 1964 Act that no offence can be murder unless there is an *unlawful* killing carried out with the intention to kill or cause serious injury. Section 4 was a restatement of the common law position that there had to be an unlawful killing but changed or at the very least clarified the position as to what the necessary intention was for such an unlawful killing to amount to murder. Although not strictly relevant to a discussion of Irish law, I note that the authors of Smith, Hogan and Ormerod's *Criminal Law*, (15th edn, Oxford University Press 2018) state with respect to murder: "The requirement that the killing is unlawful is an important element of the offence" (para 12.1.5).

87. It is also apposite to return to the quote from the authors of *Charleton & McDermott's Criminal Law* referred to above, in which they glean from the judgment of Walsh J. that "an intentional assault is committed when the force used is not justified objectively and, in accordance with the assault-manslaughter principle, the crime involved in such a death is manslaughter and not murder" (emphasis added). If assault-manslaughter principles informed the existence of a partial defence where the person was acting with an honest belief in the amount of force to be used and thus did not have the required intention for murder, that situation must change if the very principle on which an assault-manslaughter is founded has been changed. In other words, if the offence of manslaughter, as charged, is based upon the fact that an assault has been committed which has led to the death, then

such an offence of manslaughter cannot be said to be committed (other perhaps than through criminal negligence which is discussed further below) if there has been no assault in the actions which lead to the death. A different situation would arise where criminal negligence manslaughter is alleged. Criminal negligence manslaughter could never amount to murder as the intent would not be established.

88. As is apparent from the foregoing the change in the law brought about by the 1997 Act to the offences of assault and defences thereto is highly significant. The start of the enquiry into any count of homicide – murder or manslaughter - is whether there is an unlawful killing, and that will arise where there has been a criminal act either through an assault or through criminal negligence. In my view, such an approach is consistent with the position as set out in s. 4 of the 1964 Act, which makes the unlawful killing the first part of the building-block upon which the offence of murder is constructed. Where unlawful killing is established, the next part of the enquiry is whether the person intended to kill or cause serious injury; such an enquiry is not needed in a charge based upon criminal negligence where no such specific intent occurs. Looked at from that perspective, the provisions of the 1997 Act must form the basis for the assessment of that unlawful killing. This is a necessary implication because the 1997 Act changed the most fundamental aspect of homicide where the unlawful killing is based upon an assault, thus defining what is an assault is central to that analysis. On that basis alone it makes perfect sense that s. 22 would abolish any other common law defence. I will now turn to that issue.

Does s. 22 of the 1997 Act Abolish the Common Law Defences for Fatal Offences?

89. At the end of the hearing of the appeal, the Court sought further submissions on whether the common law defence of self-defence had been abolished by s. 22 of the 1997 Act, even when applied to charges alleging homicide. Section 22 of the 1997 Act provides:

"22.− (1) The provisions of this Act have effect subject to an enactment or rule of law providing a defence, or providing lawful authority, justification or excuse for an act or omission.

(2) Notwithstanding subsection (1) any defence available under the common law in respect of the use of force within the meaning of section 18 or 19, or an act immediately preparatory to the use of force, for the purposes mentioned in section 18(1) or 19(1) is hereby abolished."

90. The appellant, unsurprisingly, referred to the plain meaning of the words used in the relevant subsection and submitted there was no ambiguity. The DPP, on the other hand, submitted that the 1997 Act, properly interpreted, could not be construed as overruling the test established in *Dwyer*.

91. The DPP submitted that the following principles apply to the interpretation of the 1997 Act:

i) Words and phrases should be given their ordinary dictionary meaning unless it was contrary to the express intention or declared purpose of the statute;

ii) In order to establish the intention of the Oireachtas and purpose of the legislation, the long title and general scheme of the Act could be looked at;

iii) Equally, where the Oireachtas has used broad language intended to be used in a more limited context, the Act as a whole and long title could be looked at to limit the interpretation of that broad provisions within the context of the Act;

iv) General phrases used in legislation must usually be construed as being limited to the actual objects of the Act;

v) A later statutory provision will only amend an earlier provision where they are addressing the same or a single subject matter;

vi) Individual sections and words in an Act should be given a schematic interpretation, and must be interpreted within the overall context and purpose of the legislation, and within the broader context of the rule of law;

vii) The Oireachtas is presumed to be familiar with decisions of the courts, and where words are given a clear judicial interpretation, it should be presumed that this is the meaning given in any later statute;

viii) It is further presumed that the Oireachtas does not change the law accidentally, or by implication, and will not change fundamental principles, infringed rights or depart from the general system of law, without clearly expressing its intention to do so;

92. In recent years, this Court has addressed the issue of statutory interpretation in a number of important judgments (see especially *People (DPP) v AC* [2021] IESC 74, [2022] 2 IR 49 and *Heather Hill Management Company v An Bord Pleanála* [2022] IESC 43, [2022] 2 ILRM 313). In the case of *A, B and C v The Minister for Foreign Affairs and Trade* [2023] [2023] IESC 10, 1 ILRM 335, Murray J. said that the cases on statutory interpretation including *Heather Hill Management Company CLG and anor v An Bord Pleanála*:

> "have put beyond doubt that language, context and purpose are potentially in play in *every* exercise in statutory interpretation, none ever operating to the complete exclusion of the other. The starting point in the construction of a statute is the language used in the provision under consideration, but the words used in that section must still be construed having regard to the relationship of the provision in question to the statute as a whole, the location of the statute in the legal context in which it was enacted, and the connection between those words, the whole Act, that context, and the discernible objective of the statute. The court must thus ascertain the meaning of the section by reference to its language, place, function and context, the plain and ordinary meaning

of the language being the predominant factor in identifying the effect of the provision but the others always being potentially relevant to elucidating, expanding, contracting or contextualising the apparent meaning of those words".

93. It is appropriate to look first at the structure of the 1997 Act. After s. 1, the interpretation section, the Act creates a series of offences between s. 2 and s. 17. Sections 2, 3 and 4 create the offences of assault, assault causing harm and causing serious harm respectively. Section 3A, a recent insertion into the Act, creates the offence of non-fatal strangulation or non-fatal suffocation and the other new insertion, s. 4A, creates the offence of non-fatal strangulation or non-fatal suffocation causing serious harm.

94. The DPP says it is of significance that the rest of the offences created are all non-fatal offences. I am not sure that this is so significant that it can justify an interpretation which would exclude express language in the Act which may indicate that the Act has implications for the offences of murder and manslaughter. It can be observed for instance that the common law offences of manslaughter and murder were not created by this Act nor were they abolished by it, but that is not to say that they cannot have been affected by the Act.

95. Sections 18-22 deal generally with defences and will be discussed further below. The remaining sections deal with miscellaneous matters such as consent by minors over 16 to medical treatment, the abolition of the common law rule in respect of immunity of teachers in respect of corporal punishment of students and the provision of evidence by way of certificates from medical practitioners. Section 23 which deals with consent by a minor over 16 years to surgical, medical and dental treatment which, in the absence of consent, would constitute a trespass to the person (rather than an assault). Other provisions go on to make consequential changes to the law such as to the Extradition Act to cater for the new offences.

96. Section 28 states that "the following common law offences are hereby abolished" and then lists certain offences which include assault and battery. The abolition of those common law offences by the Oireachtas caused much litigation and subsequent legislation before culminating in the decision in *Grealis & Corbett v DPP* [2001] IESC 50, [2001] 3 IR 144. There are certain similarities between the issue arising there in terms of what was a clear abolition of offences and the absence of clear wording addresses the transitional arrangements. The Supreme Court held that the 1997 Act was clear and unambiguous and must be read as abolishing, *inter alia,* the common law offence of assault and battery and contained no saving or transitional provisions in respect of common law offences. Keane CJ., who dissented in part on a separate issue, said: "The only construction of which it is capable is that the common law offences to which it applies are abolished from the coming into force of the section. They cease to exist in law with all the consequences that flow from their abolition spelled out in the many authorities to which I have referred. Counsel in the present case have been unable to put forward any construction of the provision in question which displaces the plain and unambiguous meaning of the words the draughtsman has used".

97. The DPP argues that the 1997 Act only refers to non-fatal matters but, for completeness, I note that there is a mention of manslaughter in s. 29 of the 1997 Act. The section amends, *inter alia*, s. 9 of the Criminal Law Act, 1997 to now provide that a person indicted for murder, could, where the evidence so warrants, be convicted for "manslaughter or causing serious harm with intent to do so". The previous section had referred to manslaughter or causing grievous bodily harm. It is slightly curious that the Act did not just replace "grievous bodily harm" with "causing serious harm with intent to do so" but instead repeated manslaughter. This is not decisive of any issue in this case but, it demonstrates that the Oireachtas were aware that the 1997 Act would have consequences for indictments

for murder because they had to cater, at a minimum, for the situation of the abolition of the offence of causing grievous bodily harm and its replacement by a new statutory offence.

98. Returning to the section on defences, s. 18 states clearly on its face that "[t]he use of force by a person for any of the purposes [set out in the subsection], if only such as is reasonable in the circumstances as he or she believes them to be, does not constitute an offence" (emphasis added). Section 20 explains "for the purposes of sections 18 and 19" the meaning of the use of force and when a person shall be treated as using force. The phrase "use of force" in s. 18 or in s. 20 has no express limitation in either of those section to the non-fatal use of force.

99. The DPP submits that when s. 19, which deals with the use of force in effecting or assisting lawful arrest, refers to use of force it is "in the clearly non-fatal context of the use of force to effect an arrest". That submission, in my view, lacks coherence. If a person uses reasonable force in the circumstances as they believe them to be to effect or assist in a lawful arrest, but that force led to a death perhaps because of some type of "eggshell skull situation", it is inconceivable that the defence at s. 19 would be unavailable merely because the force used had caused the fatality. The DPP extends this argument to say that because s. 22 refers to the use of force within the meaning of section 18 or 19, it must have been intended not to have any wider application outside the non-fatal context of the 1997 Act. That argument is also unconvincing because s. 19 does not have any such express limitation.

100. Before moving from s. 19 however, it is worth noting that the section deals with a very specific area of what may be termed public defence i.e. dealing with the use of force to effect arrests and prevent crime. Section 19(3) specifically provides for a subjective test in relation to the question of whether the arrest is lawful which must be "determined according to the circumstances as the person using the force believed them to be". That contrasts

with s. 19(1) which says the use of force in effecting a lawful arrest "is only such as is reasonable in the circumstances as he or she believes them to be". In my view that is a clear difference between the partially objective sub-section (1) and the wholly subjective assessment of subsection (3) of the section.

101. Turning then to s. 22, the first subsection preserves existing defences and rules of law which otherwise apply. An excellent example of the reason for this provision is provided by s. 21 of the 1997 which inserts into s. 6 of the Criminal Damage Act, 1991 the defence of protection of self or another or protection of one's own or another's property. Already provided for in s. 6(2)(a) of the Criminal Damage Act is the situation where someone had a lawful excuse for causing the damage where he believed that the person entitled to consent or authorise the damage had consented or would consent if they knew the circumstances. Section 22(1) expressly preserves that situation and others like it.

102. Section 22(2) expressly does the opposite for the common law defence of use of force. The subsection says that notwithstanding subsection (1), any defence at common law in respect of the use of force within the meaning of s. 18 or 19 for the purposes mentioned therein is hereby abolished. On the face of it this provision is also clear and not ambiguous. Any common law defence in respect of the use of force is abolished provided that the use of force is within the meaning of s. 18 or 19 for the purposes mentioned therein. Section 18 or 19 (or 20) did not limit the use of force in any express terms to non-fatal offences or to the offences created (or referred to in) the Act as they could have done. Similarly, s. 22(2) did not provide, but could have so provided, that the abolition of the common law defence only related to offences created by (or referred to in) the Act. Thus, on the plain and ordinary meaning of the relevant sections of the Act, there is nothing limiting the lawful use of force defence to only non-fatal situations and there is nothing which restricts the abolition of the common law defence of lawful use of force to non-fatal cases.

103. The DPP submits that it is clear from the short title, the long title and the general scheme of the 1997 Act that the Act was limited in its effect to non-fatal offences only and I have referred to the types of offences above. The DPP asserts that it would be entirely contrary to the intent and general scheme of the Act to apply the defences any further. The DPP submissions refer to various cases on statutory interpretation including those that had been brought to its attention by the Court. The DPP relied upon *Attorney General (Fahy) v Bruen (No.2)* [1937] IR 125 for the proposition that ordinary grammatical meaning of words in statutes should be used unless it was "contrary to, or inconsistent with, any expressed intention, or any declared purpose of the statute, or if it would involve any absurdity, repugnant or inconsistency in its different provisions". The DPP emphasises that where a word or phrase has been given a clear judicial interpretation it should be given the same meaning where it was used in any subsequent legislation. I do not find any particular assistance from that as we are not talking about particular phrases - like *bona fide traveller* - that in the legal sphere had been given a specific meaning.

104. In so far as the short title of an Act is to be used as a guide to statutory interpretation, Bennion, Bailey and Norbury on *Statutory Interpretation* (4th edn, Butterworths 2002) says it is "unlikely to be a reliable guide to explain the legislative intention since all it can do is indicate the main subject matter of an Act." Its function, as they point out, is to provide a brief label by which an Act may be referred to. The authors go on to point to cases in which the short title has been alluded to by judges as being at least confirmatory of one or other of the opposing constructions. I do not think that the short title is of any great assistance beyond identifying the main subject of the Act here.

105. The use of the long title of an Act in interpretation of statutes has been addressed by this Court on a number of occasions. The long title of the 1997 Act is: "An Act to revise the law relating to the main non-fatal offences against the person and to provide for

connected matters". The DPP submits that this demonstrates that the Act is only concerned with non-fatal matters. Counsel referred to *People (DPP) v Quilligan* [1986] IR 495. The issue there was whether the arrest provisions of s. 30 of the Offences Against the State Act, 1939 could apply to the arrest of a person for a scheduled offence even when no political or subversive motive was or could be attributed to the arrested person. The long title of the Act referred to the acts and conduct calculated to undermine public order and the authority of the State. This Court unanimously found that s. 30 could apply to "ordinary offences". Henchy J. having referred to the long title said that it did not follow from the statutory scheme that the Act drew a clear line between subversive and ordinary offences partly by saying that all criminal offences are, in one degree or another, offences against the State. Griffin J. rejected the submission that the long title could be considered for the purpose of the construction of the section. The long title could not be used to modify or limit the interpretation of plain and unambiguous language (citing *Minster for Industry and Commerce v Hales* [1967] IR 50 ("*Hales*"), where Henchy J said he could not look at the long title of the Act where the language was clear and unambiguous). McCarthy J. cited English case law that the long title "is the plainest of all guides to the general objectives of a statute". He said it was a question of giving a schematic interpretation where such is the plain intent of the statute. He agreed with Walsh J. however that the arrest under s. 30 was lawful and that there was no requirement that a scheduled offence had to be shown to be "subversive" as distinct from "ordinary". As the wording of s. 30 was clear the long title could not be used.

106. Dodd, in *Statutory Interpretation in Ireland* (Bloomsbury Professional 2008), suggests that s. 5 of the Interpretation Act 2005, by placing emphasis on ascertaining the plain intention of the legislature from the Act as a whole in situations not limited to ambiguity, arguably extends the position in Ireland as stated by Griffin J. The importance of

establishing the true intention of the Oireachtas was stressed by Charleton J. in *Bederev v Ireland* [2016] IESC 34, [2016] 3 IR 1 who had looked at the long title to the Misuse of Drugs Act, 1977. Murray J. in *Heather Hill* had, in the earlier part of his judgment, referred to the long title of the relevant 2011 Act which had inserted the relevant provisions of s. 50 B of the Planning and Development Act, 2000 in his attempt to discern the true intent of the legislature. In my view as the law now stands a court should look at the long title of the Act as part of the interpretation of the words in their context within the statute viewed as a whole.

107. Returning to the long title of the 1997 Act, it does not support the view that the Act cannot be tied to homicide offences. The link between assault and homicide has been extensively addressed above. The nature of the unlawful killing which is an integral part of the offence of murder, is an assault manslaughter (as a criminal and dangerous act). A conviction for assault manslaughter based upon an assault by the killer who did not possess the intention to kill or cause serious injury can *only* arise when the assault is one that is contrary to the 1997 Act. Within the ordinary meaning of the word 'connected', are these homicide offences a 'connected matter' to the non-fatal offence of assault? It seems to me that homicide offences must be considered connected within the ordinary meaning of that word. The fact that the defence of lawful use of force would apply in such a situation also specifically connects the defence provisions in s. 22 of the 1997 Act to the offence of manslaughter. Moreover, the contents of the Act demonstrate that it is not solely applicable to non-fatal offences against the person, e.g. there is a reference to criminal damage which is an offence against property only. Indeed, this strengthens the view that the defence provisions of the 1997 Act apply to offences which go beyond non-fatal offences against the person.

108. The DPP relies specifically on the presumption against accidental alteration of the law or radical implicit alteration of the law as described in *Maxwell on Interpretation of Statutes* (11th edn, London 1962) cited by Charleton J. in *Bederev v Ireland*. The same statement from Maxwell was also approved by Henchy J. in *Hales*. Murray J. in *Heather Hill* cites that passage and opines that the principle is sometimes now applied beyond its proper limits. Murray J. says that one would expect that every statute "changes" the law and the limitations of language are such that it often happens that it can be said that a law lacks clarity. There can be no presumption against alterations to the general law that somebody may describe as significantly departing from pre-existing legal assumptions. Murray J. points out that the presumption is that "imprecise language will not be interpreted so as to impose significant changes to the pre-existing law particularly "where the change is contrary to the actual objects of the Act". In his view, instances of this happening was easily spotted and gives as the example the position in *Hales* itself.

109. Applying that to the 1997 Act, the starting point is that the language of sections 18, 19 and 22 is not imprecise. It is explicitly stated that the use of force for the purposes set out in s. 18 if only such as is reasonable in the circumstances as the person believes them to be does not constitute an offence. This is not limited, as the DPP agrees, by any express words, to offences under the Act or indeed only to non-fatal offences. Section 19 contains no limitation either. Section 22 makes specific provision for the abolition of the common law defence of lawful use of force. Again, this abolition is not limited to offences within the Act or to non-fatal offences more generally. It cannot be said that the objects of the Act require a limitation because the objects of the Act are not confined by the long title and are not otherwise clearly limited to non-fatal offences.

110. On the contrary, there is a clear connection between homicide offences and the offences set out in the Act. Assault manslaughter is a well-recognised species of manslaughter. The

common law offence of assault and battery was abolished by s. 28 of the 1997 Act. A person cannot be convicted of assault manslaughter on the basis of the common law offence of assault since the coming into effect of the 1997 Act. The basis for the assault must be an assault within the meaning of s. 2 or s. 3 of that Act. Therefore, any defence of lawful use of force in a manslaughter charge would have to address these defences. Once the defence in s. 18 must apply to manslaughter, this defeats the DPP's contention that the 1997 Act only applies to non-fatal offences. It is difficult to see how it could only apply to manslaughter and not murder because the wording is clear in s. 22 the common law defence of use of force is abolished.

111. Therefore, the common law defence of self-defence has been abolished even for fatal offences. I also agree with the judgment of Hogan J. which reaches the same conclusion. As a matter of statutory interpretation and not because of an evolution of the common law, the lawful use of force is to be judged in accordance with the provisions of the 1997 Act.

112. Further matters now require to be addressed. First, what about the partial defence to murder which reduces the charge to manslaughter where the accused honestly but mistakenly used more force than was reasonably necessary in the circumstances as he believed them to be? Second, what about the fear of 'undeserved acquittals'? Finally, what about the liability of an honest but unreasonable accused?

Does the Partial Defence reducing Murder to Manslaughter continue?

113. In using the defence when charged with a non-fatal offence, it is clear from the above that a person who *honestly believes* they are entitled to use force to defend themselves but uses *unreasonable force* in their defence, is not entitled to an acquittal based upon a claim of self-defence. In the absence of any other defence being accepted by the jury, that accused must then be found guilty of the non-fatal offence. Is that the same where the person is facing a homicide charge?

114. In my view, that position also applies where a person is facing a manslaughter charge. That offence is based upon an assault, inflicting a non-trivial injury, which leads to a death. The rejection of the defence of lawful use of force means that the assault has been established and if that assault has led to the death, then the offence has been established.

115. To be convicted of murder, however, the accused must also have had the intention to kill or to cause serious injury. That is a subjective statutory intention as required by s. 4 of the 1964 Act. That was the very issue which the judges in *Dwyer* were faced with. I do not think the position with regard to intention has changed simply because the ingredients for a) the assessment of the circumstances in which the accused may use force has changed or b) the fact that the assessment of the degree of force has changed to whether the force was objectively reasonable in the circumstances as perceived by the accused.

116. It is in these circumstances that it is appropriate to return to what Butler J. said in *Dwyer* about subjective intention. It is acknowledged that Butler J. said this in the context of "[a] person being entitled to protect himself from unlawful attack". In the present circumstances, there is no unlawful attack, only a perception of an impending unlawful attack. Nonetheless it must be acknowledged that the policy position is that if such a person uses reasonable force, they ought not to face any legal consequences and thus the law is viewing the misguided person as a person who, if acting honestly and reasonably, is not criminal. The issue for the offence of murder is whether an honest person, who believed they needed to use force and believed the force they were using was required for their defence (but it was not), has in fact the intention to kill or cause serious injury. As Butler J. said "[i]f he uses more force than may objectively be considered necessary, his act is unlawful and, if he kills, the killing is unlawful. His intention, however, falls to be tested subjectively and it would appear logical to conclude that, if his intention in doing the unlawful act was primarily to defend himself, he should not be held to have the necessary

intention to kill or cause serious injury". Therefore, where an individual's intention is to defend themselves, that is the overriding intention, and it does not justify a finding that they had the full guilty mind/criminal intent for the offence of murder.

117. McAuley and McCutcheon criticise the approach to *mens rea* in *Dwyer* which resulted in the partial verdict being available. This is however the approach that the courts in this jurisdiction have long taken and it has never been amended by the Oireachtas. The 1997 Act does not require a different approach to how the *mens rea* for murder ought to be assessed. It may well be however that a person who is found guilty of manslaughter because they used excessive force in honest self-defence to manslaughter may have their culpability reflected in the sentence imposed where the available sentencing parameters include life imprisonment.

118. In those circumstances the honest accused who believes that they are required to use the degree of force used, but that degree of force was not objectively reasonable in the circumstances perceived has killed unlawfully but cannot be said to have the necessary *mens rea* for the killing to amount to murder. A conviction for manslaughter ought to be returned.

Undeserved Acquittals?

119. The first thing to say about the fear of 'undeserved acquittals' is that any acquittal by a jury properly directed and acting within their oath/affirmative ought not to be viewed as undeserved. This is an application of the law. If the Oireachtas wishes to change the law, this can be done by amending the legislative/common law provisions. It is important to set out however that within the legislation there are many safeguards to protect against those who are *not entitled* to the defence. In the first place, the claim of 'honest belief' is to be tested by the presence or absence of reasonable grounds for it having regard to all the circumstances (s. 1(2)). Second, the degree of force is to be assessed on an objectively

reasonable basis which would not permit extreme or disproportionate force to form the basis for an acquittal. Third, a person cannot create the circumstances which gives rise to the need to use force with a view to using force to resist or terminate it although the defence of lawful use of force may apply if the person claiming the defence was doing something lawful (s. 18(7)). Fourth, s. 18(6) provides that the defence does not apply where the person knows they are using force against a member of the Garda Síochána except where they believe it is immediately necessary to prevent harm to themselves or another.

120. Moreover, in a murder trial, where a jury is of the view that the accused honestly, but unreasonably, believed that circumstances existed where they were justified in using force, a question arises as to whether they could be found guilty of manslaughter because of their criminal negligence. I will address this now.

Criminal Negligence Manslaughter

121. As discussed above, where there is culpable misadventure leading to the death of another person, the person who causes the death is guilty of manslaughter. Criminal negligence is really serious negligence which any reasonable person engaging in conduct would realise that the result of their actions or their failure to act would put another person in serious danger of being gravely hurt. It is important to underline that criminal negligence manslaughter is an entirely different form of manslaughter than assault manslaughter. It is usually used in situations where a person has been grossly negligent in carrying out what is usually a lawful activity e.g. grossly negligent driving leading to a fatality or a work place fatality where there was gross negligence in securing safety ropes for example. It could also apply where a person who was cleaning a firearm but negligently failed to ensure it was unloaded accidentally caused it to discharge leading to a fatality.

122. Returning to *Dwyer*, Walsh J. accepted that the "question of negligence might possibly arise if he honestly believed what he did to be necessary but that was a belief resulting from

a grossly negligent over-assessment of the situation". Thus, he was confirming that, if a person kills because they have honestly, but through criminal negligence, considered themselves to be in a position that required the use of force, they would be criminally liable for manslaughter even if the force they use would be reasonable in the circumstances that they perceived them to be. In such a situation a jury would have to assess whether the failure to take action to verify the true circumstances was a matter that amounted to a serious failure to act which a reasonable person would have known that failure to so act would put another person in serious danger of being gravely hurt in circumstances where there was, in actual fact, no need to place them at such risk.

123. Before one can state that position as the law since the 1997 Act, it is necessary to address s. 18(1) which provides that the *use of force* such is reasonable in the circumstances that the person believes them to be does *not constitute an offence*. On first view, it may appear that no offence could arise from the use of force which is legally permitted when reasonable in the circumstances as the accused honestly believed them to be. I do not however consider that to be correct. The lawful use of force in those circumstances is a response to the crime of assault manslaughter. The lawful use of force is not the focus of the offence of gross/criminal negligence manslaughter. The focus is on whether the act or omission in failing to assess the circumstances leading to the belief that force was necessary was so grossly negligence that actions taken as a result of that gross negligence which cause a fatality amount to the offence of criminally negligent manslaughter.

124. Although the use of force may have been a direct cause of the death, it is not the use of force that amounts to the offence because the offence, in this hypothetical situation, is not being prosecuted as an assault manslaughter. Instead, the offence is predicated upon the reckless taking of the decision to use force where the outcome of that use of force is to cause the death that amounts to the offence of manslaughter. Thus, it is not the lawful use

of force that amounts to an offence, instead the offence arises from the grossly negligent actions/omission in coming to the unreasonable conclusion that force was required, because in the criminal negligence context the lawful use of force is merely a factor in the chain that led to the death.

125. For the avoidance of doubt, it is only where a death arises as a result of a criminally negligent honest but unreasonable belief in the necessity to use force that a criminal offence occurs. There is no criminal negligence common law offence of causing harm to another person. The 1997 Act does not have any impact on the common law categorisations of the offence of manslaughter.

The Appellant's Claim of Lawful Use of Force and the Jury's Verdict

126. The appellant's test is set out at para 78 above. That test, while similar does not reflect entirely the objective elements that remain for consideration in the test that must be applied in any homicide offence under the terms of s. 18 of the 1997 Act. The important issue for this appellant in this appeal is whether his appeal ought to be allowed (and presumably remitted) on the basis that the incorrect test was applied which wrongly resulted in an incorrect verdict of guilty of murder. It is appropriate to return to the facts of this case and in particular to the jury decision. The jury were given a full charge on the defence of self-defence on which, save for an issue raised below at para 134, no requisition was raised by either party.

127. The trial judge specifically told the jury that the law recognised that force may be used by a person against another person when it is necessary to protect oneself from an unlawful attack. Significantly however, she turned to a wholly subjective test in telling the jury how they must assess whether the accused was acting in self-defence when he used force. The trial judge said:

"The person asserting that he has acted in self-defence must have honestly believed that it was necessary to have struck the blow to protect himself. What you are considering in this regard is not what a reasonable person would have believed, so again not you or me or the man in the street; it is what the accused himself believed, what Mark Crawford believed. In determining whether an accused honestly believed that it was necessary to strike a blow to protect himself, regard should be had to the presence or absence of reasonable grounds for that belief so that you can measure what is asserted to be an honest belief, but ultimately the question you have to address in this regard is whether the accused had an honest belief that it was necessary to use force to repel an attack on himself".

128. In so directing the jury, the judge adopted the entirely subjective test almost word for word from s. 18 and s. 1(2) of the 1997 Act for the assessment of the *necessity* to use force. This is in contrast to the statement of Walsh J. in *Dwyer* that self-defence is based upon an accused who believed *on reasonable grounds* that his life was in danger and that the force used was reasonably necessary in self-defence. It must be said that this understanding of *this part of the test* appears to have been accepted by Hardiman J. in *Barnes* and also by O'Donnell J. in *Farrell*. It also accords more clearly with the later emphasis by Walsh J. on the subjective belief of the accused who is acting in self-defence which may reduce murder to manslaughter even though the defence is excessive.

129. It is also striking that the trial judge told the jury that "if you are of the view that he was under threat and he honestly perceived that he was under threat, then you must go on to consider in light of the threat which he honestly perceived to be under whether his response to that threat was reasonable and proportionate". The trial judge also directed the jury that the prosecution had suggested that even if the accused honestly believed he was under threat, alternatives were available, and that action existed which he could have taken in

terms of removing himself from the imminent threat. That direction, it must be said, was quite close to the type of assessment that the appellant is calling for here. She later went on to say that:

> "…what the law recognises, and it only recognises this in murder cases, is that if you are of the view, having determined already that the accused honestly believed that he was under threat, if you are of the view that the force used by him was not reasonable and not proportionate to the threat that he was under, but nonetheless he perceived it to be necessary for him to do what he did, well, he isn't entitled to avail of the entire defence of self-defence which would lead to an acquittal on a charge of murder, however, nonetheless the law should recognise human frailty and the situation that a person was in, it being an honest belief that he was under threat…"

and in those circumstances he was entitled to a verdict of manslaughter. The underlined words would appear to go back to the issue of actual threat.

130. The jury asked questions, those of relevance concerned intention, unlawful act and excessive force. In response to this, counsel for the appellant asked that the subjective nature of the first part of the *Dwyer* test be emphasised. The trial judge then recharged the jury in relation to self-defence. She repeated that the first question was whether he had the honest belief in the necessity to use force to protect himself. She said "[w]hat you are considering in this regard is not what a reasonable person would have believed. It is what the accused himself believed". She said they could look "at the circumstances surrounding the incident of the stabbing"; that was directed towards assessing his belief. In discussing use of force however, the trial judge specifically said that:

> "if you are of the view that he was under threat, and that he honestly believed that he was under threat and acted because of that belief, then you must go on to consider whether in light of the threat which he honestly perceived himself to be under, whether

his response to that threat was reasonable and proportionate. So, to avail of the full defence of self-defence, which would mean that your verdict would be one of not guilty -- it would be a complete acquittal in relation to Mr Crawford -- you then have to look at the amount of force used".

While the judge did go on to say that you assess whether the force was proportionate to the threat to him, she also said: "So what you're looking at in this second part of your determination is whether the force used in the situation was reasonable because if somebody is acting reasonably in light of a threat that they honestly believe is coming to themselves, then the law does not lay any blame on them. The law recognises that you're entitled to act in self-defence if you are under threat". The underlined words in this formulation reflect the very test that the appellant seeks in this appeal. Indeed, it also reflects the test in s. 18 of the 1997 Act. There was no request for a requisition by the prosecution on that aspect of it.

131. The trial judge then said:

"Now, I've told you over and over again in terms of many other things that what you're looking at is Mark Crawford's view of events. It's Mark Crawford's intention. It's whether Mark Crawford honestly believed himself whether he was under threat. But in this portion of the analysis in relation to self-defence and the issue in relation to the force used what you are looking at is whether the reasonable person would have used the force which Mark Crawford used on that occasion. If you are of the view that it was a reasonable force, well, then he is entitled to an entire acquittal in relation to the matter. If you are not of the view that it was reasonable but excessive, well, then another situation arrives. So, if the force was not reasonable, if the reasonable person, if you or I or the reasonable person in the street would have thought that the force used was

excessive, was not the force that they would have used in those circumstances, well, then the force used is obviously excessive".

132. This part of the re-charge is less clear as to whether the degree of force is to be measured by the circumstances as they exist or as the appellant perceived them to be. It seems to me that a jury would understand the entire passage as meaning that it was by reference to the reasonable person that the reasonable force was to be measured, but that force was to be measured in the circumstances as he perceived them to be. As there is some doubt however and as the judge had clearly rejected in her ruling such an approach to the test, that entire passage must be read as telling the jury they must assess the circumstances of reasonableness of the force from the standpoint of the circumstances as they actually were, which would of course, include that there may have been no threat at all.

133. Moreover, the trial judge then went on to say:

"…but that's not the end to the matter. Two situations arise. If an accused person in such a situation only does what he honestly believed to be necessary in the circumstances, even though that does involve him using a degree of force greater than a reasonable man would have considered necessary, then in those circumstances he's made an error of judgment but in a difficult situation not caused by himself because, remember, at this stage you will have already determined that he honestly believed that he was under threat. And the law recognises that people can get things wrong in difficult situations. The law wouldn't excuse him entirely because the force which he has used is unreasonable in the circumstances, but if you're of the view that he used no more force than he honestly believed was necessary, well, then it would be unfair to require that the full rigours of the law would have to be met by him because he honestly believed that he used no more force than was necessary, if that is you're view, having considered it. And therefore, the law says that instead of being convicted of the full

murder charge that there should be a recognition of the difficult situation that a person found themselves in. The law recognises that it is a mistake on his part but because he honestly believed that the force was no more than it was necessary, the law says instead he should be found not guilty of murder but guilty of manslaughter. Now, that's a matter for you to consider. I am not in any way indicating that that is what you should decide, but in attempting to explain it that's the way I've put it to you.

So, if, having already made the decision obviously that Mark Crawford honestly believed that he was acting -- that he was under threat and he was acting under threat, if you decide that the force that he used was unreasonable, but if you decide that he honestly believed that the force was not unreasonable, he made a mistake about the level of force, but he honestly thought it was necessary, well, then the appropriate verdict is one of not guilty of murder but guilty of manslaughter.

However, if you are of the view that he knew he was using excessive force, so nonetheless he is acting under threat, you have decided that he honestly believed he was acting under threat, but you're of the view that he didn't honestly believe that the force he used was necessary, and you're of the view that he knew that the force he used was excessive, well, the law doesn't make any exception for that and the law requires that a verdict of guilty of murder would be returned by you. So they are the three scenarios that arise in relation to defence of self-defence. There's the initial requirement for you to determine that the accused honestly believed that he was acting -- that he was under threat. If you decide that you're of the view that he didn't honestly believe that, well, then the defence of self-defence doesn't arise at all, but if you make the determination that he honestly believed that he was under threat, then there are three scenarios that arise in relation to the force. There is the first scenario, that actually the force he used was reasonable. It's what the reasonable person in that situation would have used, and

if that's the case then it's justified force and he should not be found guilty of anything. If you move onto, okay, the force wasn't reasonable, it's excessive force, but what about excessive force? Well, the situation is, if you're of the view that Mr Crawford honestly believed that that force was necessary for him to use, he's made a mistake. It's an honest mistake, but it's a mistake nonetheless. The law excuses him to some degree, and the law says that the appropriate verdict is one of not guilty of murder, guilty of manslaughter. But if you decide that it is -- it was excessive force and he knew it was excessive force, well, in that situation the law requires you to return a verdict of guilty of murder because, while he may have been acting with an honest belief that he was under threat, he knew that the force he used was excessive. So they're the three scenarios in relation to the force and the assessment that you have to make with respect to those."

134. After that recharge, counsel for the appellant made a requisition to say that the judge had not made it sufficiently clear that the final matter they had to deal with was whether it was his honest belief that mattered but that he used excessive force. The trial judge, rightly in my view, refused to recharge on that basis as she had made it clear that it was his own views that were to be considered. Any alleged defect in that regard was correctly not pursued by the appellant on appeal.

135. Turning to that recharge, first, it is striking that the judge repeatedly highlighted the subjective nature of the belief of the accused in this case. She specifically said that the first question to look at was whether this accused "had an honest belief that it was necessary to use force to repel a threat of an attack on himself". That she said was the first question. She then told them about looking at the circumstances surrounding the incident. This, as appears from the direction, was not because they had to establish whether he had reasonable grounds for his belief but was towards *assessing* whether he had *the honest belief.* That was not the issue raised in this appeal, though nonetheless, it may be indicative of how the

law on self-defence is being applied by trial judges without any objection by the prosecution. It is certainly how judges must now address juries so that they are compliant with the first limb of the provisions on lawful use of force in s. 18 of the 1997 Act.

136. The issue in this appeal is the charge as to *the degree of force* used; the appellant argued that it was an incorrect charge to tell the jury to have regard to the circumstances as they were and not as the appellant perceived them when assessing whether the force used was reasonable and proportionate to the threat faced. Even taking the view that the judge did make that clear in her charge, there is a major problem for the appellant's appeal (as distinct from any problem with his argument) in that the jury were specifically directed to have regard to his genuine belief in the necessity for the use of force under the final part of the test, i.e. whether the verdict should be not guilty of murder but guilty of manslaughter. In this case, the jury were specifically told that *if the appellant honestly believed* that the degree of force he used was necessary to defend himself, they should return a verdict of manslaughter. It was only if the appellant knew it was excessive that they should find him guilty of murder (provided he had the requisite intent for murder). That final question (as per the *Dwyer* formulation and continuing after the enactment of the 1997 Act) is directed towards the accused's belief in the necessity to use force and thus is directed to circumstances as the accused believed them to be. If he had such an honest belief, but the force used was objectively speaking excessive, then the appropriate verdict was manslaughter. Even if the force used is being assessed objectively speaking as to the circumstances as they existed and is thereby said to be excessive, the person acting genuinely and honestly in self-defence (which can only be in the circumstances as he perceived them) is entitled to a verdict of manslaughter.

137. Therefore, I am satisfied that on the basis of the provisions regarding lawful use of force in s. 18(1), the appellant must fail in his appeal. A jury has rejected that he had an honest,

but mistaken, belief that the force used was necessary in the circumstances as he perceived them. Thus, even if the jury had been charged in accordance with the test in s. 18(1), he would have been found guilty of murder because the jury rejected a crucial aspect of the test. This jury was satisfied that he did not hold an honest belief that he had to use the force that he actually used. As indicated above, the appellant is not entitled to posit a defence under s. 18(1) that only assesses his subjective view on the need to apply force but the test must include both subjective and objective elements of the quantum of force actually used. The appellant's claim to a defence to murder under s. 18(1) of the 1997 Act has demonstrably been rejected by the jury who did not accept that he had any such subjective belief.

138. On that basis I would dismiss the appeal.

The Charge to the Jury

139. I will now attempt to give some assistance to judges who are required to charge juries on a charge of murder where the lawful use of force is raised as a defence. This is not a script to which judges ought slavishly to adhere. Each case will turn on its own facts and attention to those details may be necessary in a charge. It is also quite likely than in many, if not most cases, no issue of criminal negligence manslaughter will arise for consideration. Therefore, unless that has been specifically raised by the prosecution, the charge should make no reference to that offence. Judges must also adapt this charge to take into account the structure of their own charge, for example they may well have dealt with questions of causation, of intention at an earlier stage. Furthermore, the specific situation of the owner/occupier who acts during a home invasion will require directions which take into account all aspects of the 2011 Act.

140. A sample charge, assuming a male accused, may be as follows:

"Members of the Jury, the evidence in the trial raises the possibility of the defence of self-defence [*or defence of others/property as the case may be*]. That evidence is to be found in [*the evidence of X and Y, the evidence in the memo of interviews…*], etc.

Section 18(1) of the Non-Fatal Offences Against the Person Act, 1997 states that "the use of force…

[Judge to quote only those sub-sections a, b, c, etc that are relevant]

The law also says that "it is immaterial whether a belief…"

The law on self-defence amounts to common sense. If a person honestly believes that they need to protect themselves from an attack they are entitled to use force to defend themselves. In defending themselves however the person must only use such force as is reasonable. That means not only must the force be reasonable in the mind of the accused at that time, but it must be the force that reasonable members of the community who find themselves in those circumstances would use. In other words, not only must the person be acting in honest self-defence, but the amount of force used must be a proportionate response to the circumstances as perceived by the accused. For example, a person who honestly believes that they are entitled to use force to stop a child repeatedly hitting them with some sort of soft toy that is not really inflicting injury is not entitled to a complete acquittal if they unreasonably take out a baseball bat and hit the child repeatedly over the head.

When considering the issue of self-defence, you must bear in mind that the onus rests on the prosecution at all times to establish that the defence of self-defence has been negatived; in other words, to establish in fact that no defence of self-defence arises on the evidence before you. Drilling down into the defence you may wish to consider the following:

1) Was the accused, in using force against [*name of the deceased*], acting in defence of himself [*or another person or property etc. as the case may be*]? In making that determination you must look at the decision to use force from the accused's perspective.

   The question you must ask yourself is did he have an honest belief that the circumstances existed that permitted him to use force to defend himself? In assessing whether he did so honestly believe, you must take into account whether there is a presence or an absence of reasonable grounds for his belief and also all the relevant facts of this case such as his opportunity to retreat [*or other, as the case may be*]. You must bear in mind that at this time you are judging whether, from the accused's perspective he had this honest belief. Therefore, even if it was unjustified the important issue here is whether he honestly had that belief.

   The relevant facts according to the accused are….

   The relevant facts according to the prosecution are…

If you are satisfied beyond a reasonable doubt that he did not have that honest belief, then he is not entitled to avail of the defence of self-defence, and provided you are satisfied that he had the intention to kill or cause serious injury then you must convict him of murder [*provided all other defences are excluded*].

If you are <u>not satisfied</u> beyond reasonable doubt that he had the intention to kill or cause serious injury, then you must convict him of manslaughter [*provided you are satisfied beyond reasonable doubt that no other defence applies*] because he was not acting in self-defence but was engaged in an assault of the accused.

1) If you find that he did have that honest belief, then you are required to make an assessment of whether the force he used in so defending himself was reasonable force. When looking at the issue of whether the force he used was reasonable, you must assess that from the point of view of the reasonable person and what the reasonable person would do in the circumstances that the accused honestly believed existed? Therefore, you do not merely focus on what the accused thought was reasonable but you must consider what a reasonable person would do if they had the same belief in the need to use force that this accused had. You must of course bear in mind that if you do not accept that the accused thought this force was reasonable then he is not entitled to rely on the defence of lawful use of force. Only force that is reasonable in the mind of the accused and in the view of a reasonable person in the circumstances that the accused believed them to be is an acceptable defence to the lawful use of force. You must bear in mind also that in considering what is reasonable it does not require an exact measurement of the amount of force because if any of us was faced with what we believe is a threatening circumstance we might not have time to measure our response precisely. Nonetheless extreme or disproportionate force to a particular set of circumstances would not be reasonable. You must assess whether the reasonable person in the circumstances would have used that force.

   If you consider that a reasonable person would have used the degree of force in the circumstances that the accused genuinely believed was reasonable to use, then, the accused is entitled to an acquittal on the basis of the law on self-defence (or lawful use of force). [*Note for judges if the issue of criminal negligence has been raised then you could say the following*: "*subject to what I will say about criminal negligence"*]

If having found that the force the accused used was not what a reasonable person would have used in those particular circumstances as the accused thought them to be, but you find that the accused had an honest belief that it was necessary to use the force that he did in fact use, then the correct verdict is one of not guilty of murder but guilty of manslaughter. This is because you would be finding that the reason for the accused acting with that degree of force was to defend himself and not for the purpose of killing or seriously injuring another. He would be acting unlawfully because he used more force than reasonably necessary but was honestly acting in his own defence. Whether he was so acting honestly is a matter for you to decide having regard to all the evidence.

Potential Charge on Criminal Negligence only if applicable

If, however, you are of the view that the accused's belief in the necessity to use force was honestly held but was a belief that was unreasonably held, you must then go on to consider whether he was acting criminally negligently in coming to that view. Criminal negligence is really serious negligence such that any reasonable person engaging in that conduct, or in omitting to act, would realise that the result of their actions, or their failure to act, would put another person in serious danger of being gravely hurt. You are being asked here to consider whether the accused's honest conclusion that he was under attack which required him to use force was in fact a leap that no reasonable person would have made in those particular circumstances where the outcome of such a leap was that another person would be in serious danger of being seriously hurt. If you come to the view that the accused was criminally negligent in coming to the view that he was entitled to use the force to defend himself, then you ought to find him not guilty of murder but guilty of manslaughter.

You must remember that the onus of proof remains on the prosecution and the standard of proof is beyond reasonable doubt. Thus, for example, as I have said in relation to the issue of an honest belief you can only reject that if you are satisfied beyond reasonable doubt that he did not have such an honest belief. You could only convict of criminally negligent manslaughter if you are satisfied beyond reasonable doubt that in assessing the circumstances no reasonable person would have engaged in the conduct or would have omitted to act by making further enquiries where there was a serious danger of another person being seriously hurt."

141. It may be suitable to give to the jury a route to verdict. Again, this is a matter for consideration in each trial and it is important to bear in mind that there may be a number of means of instructing the jury. Each route to verdict must take into account the myriad of issues that are for determination by the jury in the specific trial. For example, the trial judge may choose to deal with the issue of causation first e.g. has the act of the accused caused the death and second whether in committing that act the accused intended to kill or cause serious harm to the deceased. This route to verdict (and the charge directions above) must be adjusted to take into account the overall methodology used by the trial judge who may wish to give a route to verdict which incorporates all issues on which the jury are required to make decisions. Subject to that here is a sample route to verdict:

"Bearing in mind the onus remains on the prosecution to prove beyond a reasonable doubt that each element of the claim to self-defence must be rejected:

1. Did the accused honestly believe that he had to use force for the purpose of protecting himself from an [assault] by [the deceased]?

   If no, then the defence of self-defence is no longer available to the accused and you must go on to consider:

   a) Any other defence;

b) If all other defences are rejected, then if you have found that in striking the deceased that the accused intended to kill or cause him serious injury you must convict him of murder;

c) If he did not have that intention, but his act amounted to an assault you must convict him of manslaughter.

If yes, then,

2. Was the force used by the accused in killing the deceased *reasonably* necessary in the circumstances as he saw them.

Is yes, you must acquit him of murder and manslaughter.

If no, but the force used by the accused was the amount of force that he genuinely believed was necessary for his defence then you must acquit him of murder and convict him of manslaughter.

If you find beyond reasonable doubt that the accused was not acting in self-defence when he applied the force but instead was acting with the intention to kill or cause serious injury then you must convict him of murder.

Conclusion

142. Where there is an unlawful killing carried out by a person with the intention to kill or cause serious injury, it amounts to murder. In a murder charge, the unlawful killing arises where a person has killed another through a criminal and dangerous act i.e. an assault manslaughter.

143. The Non-Fatal Offences Against the Person Act, 1997, abolished the common law offences of assault and battery and created new offences of assault, assault causing harm and causing serious harm. It provided for the defence of lawful use of force and abolished any defence available at common law in respect of the use of force.

144. For the reasons set out in this judgment, I have concluded that the defence of lawful use of force as provided for in s. 18 of the 1997 Act applies to a person who is facing a charge of homicide.

145. The defence under s. 18 is partly subjective and partly objective. It is available as a complete defence where a person has an honest belief that the circumstances necessitate the use of force and uses such force as is objectively as well as subjectively reasonable in the circumstances that the accused believed them to be. The belief may be unreasonably held but it must be an honest belief. In assessing whether the accused had such a belief the court or jury must have regard to whether there is the presence or absence of reasonable grounds for that belief in conjunction with any other relevant matters, but the issue remains whether the accused genuinely held that belief. Extreme or disproportionate force may not be used by an accused because it is only such force as is objectively reasonable in the circumstances perceived by the accused that is lawful.

146. In a charge of murder, if the accused honestly believed he had to use lethal force to defend himself, but the use of lethal force was unreasonable even in the circumstances that the accused believed them to be, then the correct verdict is not one of murder but one of manslaughter. This is because, based on the reasoning in *Dwyer*, the accused did not have the subjective intention required to be convicted of murder because their primary intention was self-defence.

147. In a charge of murder or manslaughter, if the person's belief that the circumstances required use of force was an unreasonable belief, that person may not be entitled to a full acquittal even if they used objectively reasonable force in accordance with their belief in the necessity to use force. In an appropriate case, it may be necessary to ask the jury to assess whether the accused acted in a criminally negligent i.e. grossly negligent, manner in coming to the unreasonable conclusion. If the accused was criminally negligent in reaching

their conclusion that use of force was required and used that force resulting in the death of another, then the appropriate verdict is guilty of manslaughter.

148. The jury found this appellant guilty of murder. The partial defence, established in *Dwyer*, which would have reduced the charge of murder to a conviction for manslaughter on the basis of excessive force being used by him in circumstances where he honestly believed in the necessity to use force had been left to the jury. The jury rejected that partial defence and in doing so they rejected that he had any such honest belief. In those circumstances, even if the new test that the appellant proposed in this appeal had been applied or indeed the test taken from the 1997 Act applied, a jury has already rejected his entitlement to any such defence.

149. In all the circumstances, this appeal ought to be dismissed.