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# Analysis

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## Unreasonable Mistake in Self-Defence: *Lieser v HM Advocate*

Until recently, there was little doubt over the position of Scots law in relation to an unreasonable mistake in self-defence. As *Owens v HM Advocate*<sup>1</sup> made clear, the defence of self-defence is available only where any mistake made by the accused about the existence of an imminent attack is a reasonable one.<sup>2</sup> The requirement for mistakes to be reasonable remained intact even after *Jamieson v HM Advocate*,<sup>3</sup> where Scots law followed English law in accepting that an honest but unreasonable belief in consent can ground an acquittal on a charge of rape.<sup>4</sup> In *Jamieson*, it was stressed by the court that this principle was not to be extended to defences:<sup>5</sup>

We wish to say that we are not to be taken . . . as casting any doubt on the soundness of the dicta in [*Owens*]. Nor are we to be taken as suggesting that in any other case, where a substantive defence is based on a belief which is mistaken, there need not be reasonable grounds for that belief.

What appeared to be a settled line of authority was, however, unexpectedly called into question by the Full Bench decision of *Drury v HM Advocate*.<sup>6</sup> Although the direct concern of *Drury* was provocation,<sup>7</sup> the court also turned its attention to the relationship between defences and the *mens rea* of murder. According to the then Lord Justice-General (Rodger), the latter was not, as had previously been assumed, a simple intention to kill (or the alternative of wicked recklessness).<sup>8</sup> Rather it was a *wicked* intention to do so, where the term “wickedness” referred to the absence of provocation or any other applicable defence.<sup>9</sup>

1 1946 JC 119.

2 See also Hume, *Commentaries* i, 244; *Crawford v HM Advocate* 1950 JC 67 at 72; *McLean v Jessop* 1989 SCCR 13 at 17; *Jones v HM Advocate* 1990 JC 160 at 172; *Burns v HM Advocate* 1995 JC 154 at 159.

3 1994 JC 88.

4 This is no longer the position in England and Wales: see Sexual Offences Act 2003 s 1(1)(c). It is unlikely to remain the position in Scotland either: see Sexual Offences (Scotland) Bill s 1(1)(b), as introduced 17 June 2008.

5 At 93.

6 2001 SLT 1013.

7 In particular the correct test to be applied in cases of provocation by infidelity. For discussion, see J Chalmers and F Leverick, *Criminal Defences and Pleas in Bar of Trial* (2006) para 10.09.

8 J H A Macdonald, *A Practical Treatise on the Criminal Law of Scotland*, 5<sup>th</sup> edn, by J Walker and D J Stevenson (1948) 89.

9 Para 11.

It did not take long for commentators to point out the potential consequences of this decision for the law relating to mistaken belief in self-defence.<sup>10</sup> If murder requires a wicked intention, then it is open to the accused who believes genuinely, albeit unreasonably, that he is acting in self-defence to argue that his intention lacked the necessary quality of wickedness, and thus he should not be convicted of murder. Indeed, it was feared that the court's analysis of the *mens rea* of murder could open up the way to all sorts of previously unrecognised defences, on the basis that the accused did not act with a wicked intent.<sup>11</sup>

The High Court had the opportunity to revisit its analysis in another Full Bench decision, *Gillon v HM Advocate*,<sup>12</sup> the focus of which was also provocation. But despite the barrage of academic criticism that followed *Drury*,<sup>13</sup> it chose to leave the *Drury* analysis of murder untouched, stating that "we have no reason to disagree with [the Lord Justice-General's] approach to the underlying *mens rea* involved in murder and culpable homicide, as it relates to a plea of provocation".<sup>14</sup>

Against this background, it was only a matter of time before a case arose in which the appellant attempted to argue on the basis of *Drury* that an unreasonable mistake in self-defence should ground an acquittal. That case has now materialised in *Lieser v HM Advocate*.<sup>15</sup>

#### A. LIESER v HM ADVOCATE

The appellant in *Lieser* was convicted of murder, despite arguing at his trial that he acted in self-defence in what he accepted was the mistaken belief that the deceased was about to attack him with a knife. The trial judge had, in line with *Owens*, directed the jury that any such mistake must be a reasonable one. On appeal it was argued that this was a misdirection, given the *mens rea* for murder set out in *Drury* and, in particular, the requirement for "wickedness", even when the accused intended to kill.<sup>16</sup>

The court's response to this argument was swiftly to reject it. In delivering the opinion of the court, Lord Kingarth surveyed the authorities on mistaken belief in self-defence and concluded that there was "binding authority" to the effect that "a person who claims that he acted in self-defence because he believed that he was

10 F Leverick, "Mistake in self-defence after *Drury*" 2002 JR 35; J Chalmers, "Collapsing the structure of criminal law" 2001 SLT (News) 241.

11 M G A Christie, "The coherence of Scots criminal law: some aspects of *Drury v HM Advocate*" 2002 JR 273; V Tadros, "The Scots law of murder", in J Horder (ed), *Homicide Law in Comparative Perspective* (2007) 190-192.

12 2007 JC 24.

13 Aside from those sources already noted (nn 10-11), see V Tadros, *Criminal Responsibility* (2005) 104; P R Ferguson, "Codifying criminal law (1): a critique of Scots criminal law" [2004] Crim LR 49 at 52; C H W Gane, C N Stoddart and J Chalmers, *A Casebook on Scottish Criminal Law*, 3<sup>rd</sup> edn (2001) para 10.21.

14 Para 24. See J Chalmers and F Leverick, "Murder through the looking glass: *Gillon v HM Advocate*" (2007) 11 EdinLR 230.

15 [2008] HCJAC 42, 2008 SLT 866.

16 Para 5.

in imminent danger must have had reasonable grounds for this belief”.<sup>17</sup> As for the impact of *Drury*, there is “nothing in the opinions delivered in that case which casts doubt on those earlier authorities”.<sup>18</sup> It is true, Lord Kingarth stated, that at least four members of the *Drury* court regarded self-defence as “relating to the primary question of whether the accused could be said to have had *mens rea* for murder, in particular whether he could be said to have acted with the necessary wickedness” rather than “falling to be considered separately as ... a defence”.<sup>19</sup> This did not, however, mean that the court in *Drury* “envisaged any alteration to the requirement that any genuine but mistaken belief in violence offered must be based on reasonable grounds”.<sup>20</sup> Rather, the necessary wickedness would be lacking *only* if the accused fulfilled the existing requirements of the defence, which included the requirement that any mistaken belief be a reasonable one.

## B. DISCUSSION

With respect, and contrary to the statement made in *Lieser*, there is plenty in the opinions delivered in *Drury* that “casts doubt on [the] earlier authorities”. It was made quite clear in *Drury* that defences such as self-defence are to be regarded not as substantive defences in their own right, but as factors that operate to negate *mens rea*.<sup>21</sup> If this is so, then the argument made in *Jamieson* that self-defence contains a reasonableness requirement because it is a “substantive defence” no longer applies, as it seems that self-defence is not a substantive defence at all. In *Jamieson*, it was also said that “[t]he reason why, in rape cases, the man’s belief need not be shown to be based on reasonable grounds for his belief to be relevant as a ground of acquittal is because of the particular nature of the *mens rea* which is required to commit the crime”.<sup>22</sup> In *Drury*, Lord Rodger made it clear that the *mens rea* of murder, wicked intention, is to be determined with reference to the accused’s motive:<sup>23</sup>

Saying that the perpetrator “wickedly” intends to kill is just a shorthand way of referring to what Hume (i, 254) describes as the murderer’s “wicked and mischievous purpose”, in contradistinction to “those motives of necessity, duty, or allowable infirmity, which may serve to justify or excuse” the deliberate taking of life.

The accused who kills in the honest but unreasonable belief that he is acting in self-defence has exactly the same motive as the accused whose belief is reasonable. He uses violence with the purpose of repelling what he believes to be an attack upon his person. Lord Kingarth is almost certainly right that the court in *Drury* did not

17 Para 7. The appellant made a similar argument in respect of provocation (at para 5), which was also rejected by the court.

18 Para 11.

19 Para 11.

20 Para 11.

21 For a convincing contrary argument in favour of maintaining a conceptual distinction between offences and defences, see R A Duff, *Answering for Crime: Responsibility and Liability in the Criminal Law* (2007) ch 9.

22 *Jamieson v HM Advocate* 1994 JC 88 at 93.

23 *Drury v HM Advocate* 2001 SLT 1013 at para 11.

envisage any alternation to the law on mistaken belief in self-defence. Nonetheless, the logical conclusion to be drawn from their analysis is that the unreasonably mistaken accused does not act with a wicked purpose and therefore does not have the *mens rea* for murder.<sup>24</sup> The manner in which the court in *Lieser* has escaped this conclusion – by deeming that the accused who intends to kill in the belief that his life is in danger is “wicked” only if his belief is unreasonable – is awkward at best.

That said, regardless of the route by which it arrived there, the court’s decision in *Lieser* is the morally appropriate one. In acting upon an unreasonable belief in an imminent attack, the accused displays a lack of respect and concern for the life or bodily integrity of another.<sup>25</sup> He has killed or injured someone who, in reality, posed no threat whatsoever or gave any reason to suppose he was doing so. As Fletcher put it, to allow unreasonable mistaken belief in self-defence is to “sanction thoughtless, negligent over-reaction” when instead, “the lack of restraint, the indulgence, the failure to discipline one’s reactions . . . are all grounds for blaming the person who claims his wrongdoing is excused”.<sup>26</sup> To permit an unreasonable mistake to ground the defence of self-defence may have the result, for example, of allowing the defence to a racist who shoots a black man, after interpreting his request for money as a potentially lethal threat, based on the honest but unreasonable belief that this particular racial group are uncontrollably violent.<sup>27</sup> Such a provision may even be incompatible with the ECHR.<sup>28</sup>

### C. CONCLUSION

In conclusion, the court in *Lieser* is to be applauded for arriving at the right result. Faced with a similar issue of interpretation, the Court of Appeal in England and Wales chose to reach the more logical conclusion that an unreasonable mistake in the existence of an attack must be capable of establishing the defence of self-defence.<sup>29</sup> While the appeal court’s logic in *Lieser* is open to criticism, the result it has arrived at is the preferable one. Those concerned with the conceptual clarity of the criminal law may simply have to accept that the blurring of the distinction between offences and defences in *Drury* is now firmly entrenched in Scots law, at least in relation to

24 This is not the conclusion reached recently by P W Ferguson in “Reasonable mistakes” 2008 SCL 971, but for criticism of Ferguson’s analysis, see J Chalmers, “*Lieser* and misconceptions” 2008 SCL 1115.

25 Duff, *Answering for Crime* (n 21) 294; F Leverick, *Killing in Self-Defence* (2006) 165-168.

26 G P Fletcher, “The psychotic aggressor: a generation later” (1993) 27 *Israel Law Review* 227 at 241. For the counter-argument, see R Singer, “The resurgence of *mens rea*: II – honest but unreasonable mistake of fact in self defense” (1986-1987) 28 *Boston College Law Review* 459 at 512.

27 See *People v Goetz* 497 NE 2d 41 (1986), discussed at length in G P Fletcher, *A Crime of Self-Defence: Bernard Goetz and the Law on Trial* (1988). For further examples, see C K Y Lee, “Race and self-defense: towards a normative conception of reasonableness” (1996) 81 *Minnesota Law Review* 367.

28 Space restrictions do not permit elaboration of this argument here, but see Leverick, *Killing in Self-Defence* (n 25) ch 10. Cf J C Smith, “The use of force in public or private defence and Article 2” [2002] Crim LR 958.

29 *R v Williams* [1987] 3 All ER 411. See also the Privy Council in *R v Beckford* [1988] AC 130.

murder.<sup>30</sup> In *Gillon* and *Lieser*, the appeal court has had two opportunities to retreat but has chosen to remain faithful to its original analysis.

That said, we may not have heard the last of this issue. Based in part on the academic criticism that followed *Drury*, the Scottish Law Commission announced in 2005 that it intended to examine the defences of self-defence, provocation, necessity and coercion.<sup>31</sup> But since then it has received a reference from the Scottish Ministers inviting it to look at Crown appeals, double jeopardy, bad character evidence and the *Moorov* doctrine.<sup>32</sup> Given that, at the time of writing, only the first of these had resulted in a report,<sup>33</sup> any review of self-defence may be some time in coming.

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## More Heat than Light from *Anwar*

The laws of contempt of court are most often tested by the acts of parties or of the media, but in *Anwar, Respondent*<sup>1</sup> the activities and publications at issue were those of a Scottish solicitor. Aamer Anwar is no ordinary solicitor: his counsel described him as a specialist in human rights law, a campaigner against injustice, and a political activist, in explanation (or perhaps extenuation) of his conduct.

Mr Anwar had been the panel's solicitor when Mohammed Atif Siddique was tried at the High Court in Glasgow on charges under the Terrorism Acts 2000 and 2006. In brief, the charges were for possession of materials for the purpose of terrorism. On 17 September 2007 the jury found Siddique guilty of two charges unanimously, and on two charges by a majority. A few weeks later, in Edinburgh, Siddique was sentenced to imprisonment for a total period of eight years. He has been granted leave to appeal.

Following the return of the jury's verdicts on 17 September, Mr Anwar read a statement outside the court building in the presence of members of the public, journalists and television cameramen. A press release was issued by him contemporaneously. Later that day, Mr Anwar gave a television interview, shown on the BBC's *Newsnight Scotland*.

<sup>30</sup> In *Lord Advocate's Reference (No 1 of 2000)* 2001 JC 143, on the other hand, it was stated that a successful plea of necessity does not negate any "malice" in the *mens rea* of malicious mischief but is to be regarded as a defence in its own right (at para 30).

<sup>31</sup> *Seventh Programme of Law Reform* (Scot Law Com No 198, 2005) para 2.48.

<sup>32</sup> *Annual Report 2007* (Scot Law Com No 211, 2008) 8.

<sup>33</sup> Report on *Crown Appeals* (Scot Law Com No 212, 2008).

<sup>1</sup> [2008] HCJAC 36, 2008 SLT 710.