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Self-defence, other defences, and subjectivity, Pages 546-550; 620
R v. *Martin (Anthony)* [2002] 2 WLR 1; [2002] 1 CAR 27; [2002] Crim LR 136. *Shaw* v. *R* [2001] 1 WLR 1519; [2002] 1 CAR 10; [2002] 1 CAR 77; [2002] Crim LR 140

A number of recent judicial decisions have contrived to shed darkness on the question, to what extent do (subjective) misjudgements by D affect the availability of a defence?

Duress
With respect to duress, the Court of Appeal has suggested in *R* v. *Martin (David)* [2000] 2 Cr App R 42 that, where D's defence of duress is based on a mistake about the facts that gave rise to duress, the (objective) reasonableness of his response must be assessed on the basis that the facts were as D (subjectively) perceived them to be. In our earlier update on this case [*click here to view*], we observed that the Court's analysis is inconsistent with existing settled authority to the effect that, in duress, D is entitled to rely on a mistake about the facts only if that mistake was reasonably made. In our view, *Martin (David)* is of insufficient authority by itself to alter the pre-existing law and, for the moment, must be regarded as doubtful on this point.

Provocation
With respect to provocation, the House of Lords has ruled in *R* v. *Smith* [2000] 4 All ER 289 that, when assessing his capacity for self-control, the "reasonable man" shares admissible personal characteristics of the defendant such as his severe depression, and not just his age and sex. As we noted in our update on this case [*click here to view*], this is a significant but not definitive move toward subjectivism in provocation. Its detailed implications for the boundaries of provocation--in particular, for what characteristics are admissible--remain to be determined by future cases.

Self-defence
Similar questions have now been raised about the law of self-defence. Traditionally, the rule in self-defence is that the (objective) reasonableness of D's response is to be assessed in the light of the facts as D (subjectively) believed them to be. While that rule is not as such in doubt, it may need refinement. In *R* v. *Martin (Anthony)*, D shot two burglars who had entered his isolated farmhouse at night, killing one burglar and seriously injuring the other. At trial, he was convicted (*inter alia*) of murder. On appeal, D sought to adduce fresh evidence that he was suffering from a paranoid personality disorder exacerbated by depression. One effect of D's condition, apparently, was that he would have perceived a breaking into his house as presenting a greater threat to his safety than would a normal person.

Rejecting the relevance of this evidence to self-defence (while allowing its relevance to diminished responsibility), the Court of Appeal in effect drew a new, three-fold, distinction: between (i) the facts, (ii) the danger presented by those facts, and (iii)

D's response to those facts. When adjudicating a defence of self-defence, the facts must be assumed to be as D saw them. But, the court said, the assessment of the dangerousness of those facts is, like the assessment of D's response, an objective matter. Moreover, when considering whether D's view about the dangerousness of the facts was a reasonable one, personal characteristics such as personality disorders are to be disregarded. The approach taken in *R* v. *Smith* is confined to provocation, and the generosity shown by the Court about duress in *R* v. *Martin (David)* finds no counterpart here.

Anthony Martin's case was decided on 30 October 2001. On 24 May 2001, the Privy Council handed down its advice in *Shaw* v. *R*, a case from Belize in which D shot and killed two men, purportedly in self-defence. D appealed against his conviction for murder, arguing that the trial judge had misdirected by inviting the jury, in effect, to assess the reasonableness of D's self-defence on the basis of the facts as they were, rather than the facts as D believed them to be. In allowing the appeal on this ground, the Privy Council expressed the proper test for self-defence as follows:

> "In the opinion of the Board it was necessary for the trial judge to pose two essential questions (however expressed) for the jury's consideration. (1) Did the appellant honestly believe or may he honestly have believed that it was necessary to defend himself? (2) If so, and taking the circumstances *and the danger* as the appellant honestly believed them to be, was the amount of force which he used reasonable?" [2001] 1 WLR 1519, 1527 (emphasis added).

This model direction is straightforwardly contradicted by the Court of Appeal's judgment in *Martin (Anthony)*.

The Privy Council's advice is, strictly speaking, *obiter* on the issue of perceived dangerousness. (Shaw claimed a mistake about the facts, in that he thought another person had a gun with him.) It is also persuasive rather than authoritative law in England. But it is, we submit, the better view in principle. The distinction drawn by the Court of Appeal is false. For the purposes of self-defence, there is no third category. Consider: what is it for a person to think that the situation is dangerous? It is to think that there is a risk of something harmful happening. That is a belief about the facts. Indeed, no person can ever genuinely act in self-defence unless she thinks, subjectively, that she is in danger. Diane does not act in self-defence when she thinks to herself, say, "Victor has a gun, therefore I shall shoot him." That is never enough warrant. Self-defence requires that she think, "Victor has a gun, so there is a real risk that Victor is about to kill me, therefore I shall shoot him." In other words, action is taken in self-defence only when it is motivated by and responds to a subjectively perceived threat. Not by the facts that give rise to the threat: it must respond to the threat itself.

To see this, let us flip the example around. Suppose that Daphne sees William pointing a gun at her. Not knowing the properties of guns, she fails to perceive any danger. If she then goes ahead and uses a throwing knife to kill William for reasons of her own, she does not act in self-defence. (See, e.g. *Dadson* (1850) 4 Cox CC 358: S&S pp. 135, 538.) If the Court of Appeal in *Martin (Anthony)* is to be believed, what should count here is whether, objectively, she is in danger--which she clearly is. Subjectively, Daphne sees the facts; objectively, the dangerousness of those facts is sufficient to make lethal force a reasonable response: hence, if *Martin (Anthony)* is right, Daphne should be acquitted. We think not.

Anthony Martin, it seems, genuinely thought that his life was in danger. Apparently he was wrong about that, and unreasonably so. But at least since *Beckford* v. *R* [1988] AC 130, a genuine albeit unreasonable belief has been sufficient to underpin self-defence. Acting in fear for one's life and limb is the very gist of self-defence, and that is what happened here. In our view, the analysis of the Court of Appeal cannot be sustained.