CASE NOTE: *MURRAY V R* [2018] NZSC 15 – THE SUPREME COURT CLOSES THE DOOR ON THE USE OF EXCESSIVE FORCE IN DEFENCE AS A PARTIAL DEFENCE TO MURDER

MITCHELL EAST*

I. INTRODUCTION

In *Murray v R*, dismissing an application for leave to appeal, the Supreme Court dealt with an argument that the trial Judge should have left excessive defence of another to the jury as a partial defence to murder.[1] Although only a leave decision, the Court's treatment of the issue suggests that if excessive defence of another (or excessive self-defence)[2] is to be recognised in New Zealand, this should be effected by the legislature. An analysis of early case law and the legislative framework governing the use of force in defence created by the Crimes Act 1961 provides strong support for this conclusion.

II. *MURRAY*: THE FACTS

On the evening of 2 August 2014, the applicant, Mr Murray, was at his house along with his partner, their three children and the applicant's younger brother. At around 8 pm that evening, the applicant invited some associates, who had been at a party at a neighbouring property, to his house. After which, alcohol was imbibed and cannabis was smoked. Shortly after midnight, the applicant and three of his associates walked to the top of the driveway. Walking down the road towards the applicant and his associates was a group of three people who were members of, or associated with, a gang known as the Head Hunters. For no apparent reason, one of the members of the applicant's group kicked one of the members associated with the Head Hunters in the face as the groups came together.

After the blow to the head was administered, one of the members of the group associated with the Head Hunters ran back to the house that they had just left to get assistance. Apologies were offered in an attempt to defuse the situation, but the applicant's group was told that it had messed with the wrong people. A number of people came up from the house occupied by the members associated with the Head Hunters. A fight ensued. It quickly turned into a street brawl. At some point after the brawl had started, the applicant's brother ventured from the applicant's property and joined the fracas.

Not long after the commencement of the brawl, the applicant returned to his house and retrieved a long-handled billhook. He said he intended to use the billhook to scare away the members of the rival group. However, upon returning to the brawl with the billhook, he saw one of the Head Hunters,

* LLB (Hons) (1st class), University of Otago.

[1] *Murray v R* [2018] NZSC 15 [*Murray* (SC)].

[2] Section 48 of the Crimes Act 1961 deals with both defence of another and self-defence and therefore any reasoning in respect of the former necessarily applies to the latter.

Connor Morris, standing over his brother who had been knocked to the ground. The applicant struck Mr Morris on the back of his head with the billhook and thereby killed him.

The applicant was subsequently charged with murder. At trial, his primary defence was that, in striking the deceased, the applicant was acting in defence of his brother and thus was entitled to an acquittal. There was also an associated issue as to whether he had acted with murderous intent. The applicant was found guilty of murder and his appeal against conviction was dismissed by the Court of Appeal.[3]

At trial, the trial Judge was not invited to, and did not, direct the jury that a verdict of manslaughter should follow if the only basis on which the applicant's defence of another was rejected was that he had used excessive force. In his application for leave to appeal to the Supreme Court, the applicant argued that failure to direct on excessive force in defence of another as a partial defence to murder was an error giving rise to a miscarriage of justice.[4]

III. *Murray*: The Law

The Court began its consideration of the issue by examining overseas case law.[5] It noted that excessive self-defence as a partial defence to murder has been rejected by: (a) the High Court of Australia in *Zecevic v DPP (Vic)*;[6] (b) the Privy Council in *Palmer v The Queen*;[7] (c) the House of Lords in *R v Clegg*;[8] and (d) the Supreme Court of Canada in *R v Faid*.[9] As against that, the Court observed that the partial defence was accepted by the Irish Supreme Court in *People (Attorney-General) v Dwyer*.[10]

Notwithstanding the abundance of overseas authority rejecting the partial defence, the Court said whether "excessive self-defence or defence of another should be recognised as a partial defence falls to be determined in the very particular context of the Crimes Act 1961".[11] Of particular relevance was Part 3 of the Act, which deals with matters of justification and excuse, and includes s 62. That section provides:

> **62 Excess of force**
> Every one authorised by law to use force is criminally responsible for any excess, according to the nature and quality of the act that constitutes the excess.

---

[3] *Murray v R* [2017] NZCA 467.
[4] *Murray* (SC), above n 1, at [4].
[5] At [5].
[6] *Zecevic v DPP (Vic)* (1987) 162 CLR 645.
[7] *Palmer v The Queen* [1971] AC 814 (PC).
[8] *R v Clegg* [1995] 1 AC 482 (HL).
[9] *R v Faid* [1983] 1 SCR 265.
[10] *People (Attorney-General) v Dwyer* [1972] IR 416 (SC).
[11] *Murray*, above n 1, at [6].

The Court opined that s 62 is expressed in "language not indicative of a partial defence".[12] Further, s 48 of the Act, which deals with self-defence and defence of another, was introduced to give effect to the recommendations of the Criminal Law Reform Committee.[13] In its report, the Committee specifically addressed the use of excessive force but did not recommend that it be provided for in s 48.[14] Similarly, the Law Commission had dealt with the issue in the context of domestic violence and did not suggest that such a partial defence be recognised.[15] Instead, it thought that the use of excessive force should be addressed by way of a sentencing discretion for murder.[16] Also inconsistent with recognising the partial defence was the recent abolition of the partial defence of provocation and the fact that murder no longer carries a mandatory sentence of life imprisonment.[17]

As well as overseas authority and the statutory scheme of the Crimes Act pointing against recognising the partial defence, the Court observed that "there is a wealth of New Zealand authority which is inconsistent with the recognition of excessive self-defence as a partial defence".[18] The most recent case to consider, and reject, the existence of the partial defence being *McNaughton v R*.[19]

The Court concluded that, in the abstract, whether excessive defence of another should be recognised as a partial defence was an issue of public or general importance. However, the factors referred to above, which weighed against recognising the partial defence, meant that the prospect of "obtaining reform of the law through judicial development" was "too slight" to justify the grant of leave.[20]

IV. Comment

A. Availability of the partial defence

There appear to be two underlying rationales for the partial defence of excessive self-defence/defence of another:[21]

---

[12] At [6].
[13] See the Crimes Amendment Act 1980, which gave effect to the recommendations of the Criminal Law Reform Committee *Report on Self Defence* (November, 1979).
[14] At 9–10.
[15] Law Commission *Some Criminal Defences with Particular Reference to Battered Defendants* (NZLC R73, 2001) at [69].
[16] At [68].
[17] *Murray* (SC), above n 1, at [6], citing s 4 of the Crimes (Provocation Repeal) Amendment Act 2009; and s 102(1) of the Sentencing Act 2002.
[18] At [7].
[19] *McNaughton v R* [2013] NZCA 657, [2014] 2 NZLR 467.
[20] *Murray* (SC), above n 1, at [8].
[21] Noel C O'Brien "Excessive Self-defence: A Need for Legislation" (1983) 25 Crim LQ 441 at 449–450; and Fiona Leverick *Killing in Self-Defence* (Oxford University Press, Oxford, 2006) at 176. See also ATH Smith "Excessive force in self defence" [1970] NZLJ 490 at 491–492. In order to avoid referring to both excessive self-defence and defence of another, the term "the partial defence" will be adopted throughout the rest of this article.

> (a) *Moral culpability*: the moral culpability of a person who kills in defence of themselves or another and who believes the force was reasonable (although it was not) and who is acting under the pressure of urgency and immediacy, falls short of the moral culpability normally associated with murder.
> (b) *Inconsistent intent*: the belief on the part of the accused that he or she is using reasonable force (although he or she is not) is arguably inconsistent with the mens rea required to establish murder.

Whilst the rationales underlying the partial defence are defensible, whether the partial defence should be recognised in New Zealand depends on its consistency (or otherwise) with our codified system of criminal law.

Under the Crimes Act 1908, s 73 provided legal justification for the use of force against an unprovoked assault:

> **73 Self-defence against unprovoked assault**
> Every one unlawfully assaulted, not having provoked such assault, is justified in repelling force by force, if the force he uses is not meant to cause death or grievous bodily harm, and is no more than is necessary for the purpose of self-defence; and every one so assaulted is justified though he causes death or grievous bodily harm, if he causes it under reasonable apprehension of death or grievous bodily harm from the violence with which the assault was originally made, or with which the assailant pursues his purpose, and if he believes, on reasonable grounds, that he cannot otherwise preserve himself from death or grievous bodily harm.

The first case in New Zealand to consider the use of excessive force in defence was *R v Godbaz*.[22] In *Godbaz*, the defendant was charged with one count of assault so as to cause actual bodily harm and one of common assault. The charges arose out of an altercation with the complainant. On the evidence adduced at trial, it was unclear whether the defendant, or the complainant, administered the first blow. However, the injuries sustained by the complainant were severe.

It seems that the trial Judge directed the jury that a verdict of guilty on the second count should follow if it took the view that the force used by the defendant was excessive.[23] The jury brought in the following verdict: "The jury is of the opinion that the accused is guilty of common assault (second count), as we have not sufficient evidence who struck the first blow."[24] On appeal, the Court of Appeal was concerned with whether this verdict amounted to a conviction for common assault. In the Court of Appeal, Cooper J rationalised the jury's verdict as follows:[25]

> … while there was not sufficient evidence as to who struck the first blow to justify, in their opinion, a finding on the first count, they found him guilty on the second count of a common assault, because they believed that, even if [the complainant] struck the first blow, the [defendant] used some greater degree of force than was necessary to

[22] *R v Godbaz* (1909) 28 NZLR 577 (CA).
[23] See FB Adams (ed) *Criminal Law and Practice in New Zealand* (Sweet & Maxwell (NZ), Wellington, 1964) at 130.
[24] *Godbaz*, above n 22, at 577.
[25] At 578–579 per Cooper J.

> repel the force used by [the complainant]. On that account the jury has excused him on the first count, but convicted him on the second.

The other members of the Court of Appeal took a similar view and held that excessive force in repelling an assault was not protected by self-defence and itself constituted an assault.[26]

The position in *Godbaz* was affirmed later by the Court of Appeal in *R v Brogan*.[27] The facts of *Brogan* are almost identical to those of *Godbaz*. The defendant was charged with assault so as to cause actual bodily harm and common assault arising out of a disagreement with the complainant. Immediately prior to the defendant's attack, the complainant had been the aggressor but, following the defendant's attack, the injuries suffered by complainant were severe. Like in *Godbaz*, the jury was directed that it could find the defendant guilty on the second count (common assault) if it was of the opinion that he had used greater force than was necessary to repel the initial attack by the complainant. The jury returned the following verdict: "We find the [defendant] guilty of common assault under provocation."[28] Again, the Court of Appeal was tasked with determining whether the somewhat ambiguous verdict amounted to a conviction on the common assault charge. Reed J, with whom Skerrett CJ, Adams and Ostler JJ agreed, explained the jury's verdict in this way:[29]

> … the jury, negativing the graver charge, found [the defendant] guilty of common assault, thus holding that the force used was greater than was necessary. The addition of the words "under provocation" is obviously explanatory of their ground for excusing [the defendant] on the first count and convicting him on the second. Provocation is not in itself a defence; the finding, therefore, does not negative an essential ingredient of the offence of assault.

It might be argued that the decisions of *Godbaz* and *Brogan* are consistent with the existence of the partial defence; this because in both cases the use of excessive force by the defendant led to a conviction on the lesser charge. However, a close reading of the cases does not support this inference.

In *Godbaz*, it was unclear on the evidence who struck the first blow. The Court of Appeal noted that, had the jury found the defendant struck the first blow, it would have found him guilty on the first charge.[30] Accordingly, liability on the first charge turned on who struck the first blow in the altercation. However, the question of who struck the first blow was immaterial for the purposes of the second charge.[31] All that the jury was required to consider was whether the force used by the defendant was necessary to repel the attack. It obviously found that the force used by the defendant was, in the circumstances, excessive and thus the defendant lost

[26] At 578 per Williams J, 578 per Edwards J and 579 per Chapman J.
[27] *R v Brogan* [1926] NZLR 635 (CA).
[28] At 635.
[29] At 637.
[30] *Godbaz*, above n 22, at 578 per Williams J.
[31] At 578 per Williams J and 579 per Cooper J.

the protection of self-defence. A guilty verdict on the assault charge was a corollary of such a finding.

Similarly, in *Brogan* the jury found the defendant not guilty in respect of the first charge on the basis that he was "under provocation".[32] So, like in *Godbaz*, the jury in *Brogan* was of the view that the Crown had not proven that the defendant administered the first blow and therefore a not guilty verdict on the first charge followed. However, as in *Godbaz*, it was immaterial in *Brogan* who struck the first blow (or that the defendant was "under provocation") for the purposes of the second charge, as that charge turned on the degree of force used by the defendant. Given the jury found the defendant guilty on the assault charge, it must have been of the view that the force employed by the defendant was excessive and thus he was criminally responsible for such excess.

Therefore, in both *Brogan* and *Godbaz*, liability on the more serious charge hinged on who administered the first blow.[33] Because the Crown could not prove the defendant struck the complainant first, a not guilty verdict on that charge followed. Accordingly, in both cases, the use of excessive force by the defendant in self-defence was not seen as a partial defence justifying assault so as to cause actual bodily harm being reduced to assault.[34]

Viewed in this way, *Godbaz* and *Brogan* are not consistent with the existence of the partial defence. And, although not cited in *Godbaz* or *Brogan*, the reasoning employed in those cases was entirely consistent with s 86(2) of the Crimes Act 1908, which was expressed in the same terms as s 62 of the 1961 Act.

---

[32] *Brogan*, above n 27, at 635. In the context of *Brogan*, it is reasonably clear that "provocation" is being used as shorthand for provoked by way of assault.

[33] What is not clear from the decisions of *Godbaz* and *Brogan* is why this was so. It is open to inference that the Courts considered that, in each case, liability on the more serious charge hinged on who administered the first blow because it demonstrated whether the defendants were initially acting in self-defence. This is because, at the time, pre-emptive force could not be used defensively: see Glanville Williams *Textbook of Criminal Law* (2nd ed, Stevens & Sons, London, 1983) at 503–504; and *R v Terewi* (1985) 1 CRNZ 623 (CA) at 625. Thus, on the rationalisation adopted by the Courts, if the defendants did not strike the first blow, they were afforded the protection of self-defence. However, at some point during the exchange of blows, the force used by each defendant was more than necessary and they became liable for the excess which, on the facts of the cases, was common assault. Whether the explanation of the verdicts in *Godbaz* and *Brogan* by the Courts is correct is open to question. For present purposes, however, it is sufficient to note that the use of excessive force in self-defence was not seen as a partial defence justifying assault so as to cause actual bodily harm being reduced to assault.

[34] See FB Adams, above n 23, at 130 where it is noted that the "proper verdict" should have been a conviction on assault causing actual bodily harm "and this would have been unexceptionable at law: any contrary inference from the decisions would be quite erroneous".

It seems that *Godbaz* and *Brogan* reflected the New Zealand jurisprudence on the use of excessive force in defence until the enactment of the Crimes Act 1961.[35]

As enacted, the Crimes Act 1961 contained the following relevant provisions:

> **20 General rule as to justifications**
> (1) All rules and principles of the common law which render any circumstances a justification or excuse for any act or omission, or a defence to any charge, shall remain in force and apply in respect of a charge of any offence, whether under this Act or under any other enactment, except so far as they are altered by or are inconsistent with this Act or any other enactment.
> (2) The matters provided for in this Part are hereby declared to be justifications or excuses in the case of all charges to which they are applicable.
>
> **48 Self-defence against unprovoked assault**
> (1) Every one unlawfully assaulted, not having provoked the assault, is justified in repelling force by force, if the force he uses—
> (a) Is not meant to cause death or grievous bodily harm; and
> (b) Is no more than is necessary for the purposes of self-defence.
> (2) Every one unlawfully assaulted, not having provoked the assault, is justified in repelling force by force although in doing so he causes death or grievous bodily harm, if—
> (a) He causes it under reasonable apprehension of death or grievous bodily harm from the violence with which the assault was originally made or with which the assailant pursues his purpose; and
> (b) He believes, on reasonable grounds, that he cannot otherwise preserve himself from death or grievous bodily harm.

Also relevant is s 62, which is set out above. As will be apparent from the wording of s 20, the partial defence can be recognised under the Crimes Act 1961 if: (a) it formed part of the common law at the time of enactment; and (b) the existence of such a partial defence is not inconsistent with the Act.[36]

Given the decisions of *Godbaz* and *Brogan*, which preceded the 1961 Act, it is arguable that the partial defence did not form part of the common law when the 1961 Act came into force and thus s 20 did not preserve the partial defence. Further, the statutory scheme of the law of self-defence/defence of another provided for by the 1961 Act, particularly s 48(1)(b) and s 62 (especially if the interpretation of s 62 set out below is adopted), makes it doubtful whether a partial defence could have existed consistently with the Act in 1961. In any event, and as will be explained, subsequent case law and amendments to the Crimes Act 1961 have, in effect, precluded recognition of the partial defence.

---

[35] Of course, the common law of England was, at that time, of prime importance by reason of s 2 of the English Laws Act 1908. However, at the time, the English case law on this point was of limited jurisprudential significance given it was "not certain" that the partial defence existed: see Smith and Hogan *Criminal Law* (Butterworths, London, 1965) at 237.

[36] Simon France (ed) *Adams on Criminal Law – Offences and Defences* (looseleaf ed, Thomson Reuters) at [CA 20.01].

In 1971, further doubt was cast on the existence of the partial defence in New Zealand by the Privy Council's advice in *Palmer v The Queen*.[37] Their Lordships explained why they saw no need for this refinement of the law:[38]

> There are no prescribed words which must be employed in or adopted in a summing up. All that is needed is a clear exposition, in relation to the particular facts of the case, of the conception of necessary self-defence. If there has been no attack then clearly there will have been no need for defence. If there has been attack so that defence is reasonably necessary it will be recognised that a person defending himself cannot weigh to a nicety the exact measure of his necessary defensive action. If a jury thought that in a moment of unexpected anguish a person attacked had only done what he honestly and instinctively thought was necessary that would be most potent evidence that only reasonable defensive action had been taken. A jury will be told that the defence of self-defence, where the evidence makes its raising possible, will only fail if the prosecution show beyond doubt that what the accused did was not by way of self-defence.

Section 48, which governs the law on self-defence/defence of another, was amended by the Crimes Amendment Act 1980. Its enactment followed the recommendation of the Criminal Law Reform Committee for a "simple comprehensive provision" that would require no "abstruse legal thought and no set words or formula to explain it".[39] The Committee also reported on the use of excessive force during self-defence and, in doing so, referred to *Palmer*.[40] It stated that:[41]

> When a jury is satisfied that the force used by the accused was excessive, then his plea of self-defence fails. The degree of excess will no doubt be considered on the question of penalty. However, in a case of murder, there is no flexibility in the statutory penalty. In New Zealand and England, where an accused raises self-defence, but the jury considers that excessive force was used, the defence fails completely.

The current iteration of s 48 reads:

> **48 Self-defence and defence of another**
> Every one is justified in using, in the defence of himself or herself or another, such force as, in the circumstances as he or she believes them to be, it is reasonable to use.

Warren Brookbanks, writing after *Palmer* and the 1980 amendments, supported the rejection of the partial defence as follows:[42]

> … [T]here is nothing in either section 48 or section 62 of the Crimes Act 1961 to suggest that [the partial defence] is available under those provisions. Nor is there anything to suggest that either section is intended to alter the Common Law concerning the use of excessive force.

---

[37] *Palmer*, above n 7.
[38] At 832.
[39] Criminal Law Reform Committee, above n 13, at 8.
[40] At 5 and 10.
[41] At 9–10.
[42] Warren Brookbanks "Compulsion and self-defence" in Neil Cameron and Simon France (eds) *Essays on Criminal Law in New Zealand: Towards Reform?* (1990) 20 VUWLR Monograph 3 95 at 116.

> … New Zealand courts as a matter of consistency and precedent ought to follow the developments of the law in [comparable] jurisdictions … and reject the notion of a qualified self-defence rule. Such an approach has the advantages of simplicity and certainty and eliminates the necessity for "prolix and complicated jury charges" which the legislature in enacting the present section 48 was at pains to avoid.

The conclusion reached by Brookbanks is consistent with the principle underpinning self-defence, which has been articulated as follows:[43]

> … [T]he underlying principle [of self-defence] would seem to be that because a person who repels an unjust attack is upholding the law, and as such is justified, where force used in self-defence is disproportionate to the threat offered, the defender him- or herself acts unlawfully and may forfeit the protection that the law otherwise confers. Such a person is then liable for using an excess of force beyond that which the law allows.

In New Zealand, authority for penalising the use of excessive force is provided for by s 62. If a person is "authorised by law to use force" and he or she uses excessive force, s 62 applies and "the defendant is guilty of whatever offence was involved in the act of excessive force, be it murder or any other".[44] Commentators suggest that s 62 applies:[45]

> … equally to situations where force is "authorised" (eg in arrest, search and other "enforcement" situations) and those in which it is "justified" (eg self-defence) or, presumably, "excused" (eg compulsion/necessity).

This interpretation accords with the legislative history of s 62 and its predecessors. The 1879 Draft Criminal Code, prepared by a Commission chaired by Sir James Fitzjames Stephen, included s 68 which set out:[46]

> Section 68.
> EXCESS
> Every one authorised by law to use force is criminally responsible for any excess, according to the nature and quality of the act which constitutes the excess.

The report produced by the Commission contained the following commentary:[47]

> We take one great principle of the common law to be, that although it sanctions the defence of a man's person, liberty, and property against illegal violence, and permits the use of force to prevent crimes, to preserve the public peace, and to bring offenders to justice, yet all this is subject to the restriction that the force used must be necessary; that is, that the mischief sought to be prevented could not be prevented by less violent means; and that the mischief done by, or which might reasonably be anticipated from the force used is not disproportioned to the injury or mischief which it is intended to prevent. …

---

[43] AP Simester and WJ Brookbanks *Principles of Criminal Law* (5th ed, Thomson Reuters, Wellington, 2019) at [15.1.5].
[44] Simon France, above n 36, at [CA 48.13].
[45] At [CA62.01].
[46] Criminal Code Bill Commission *Report of the Royal Commission Appointed to Consider the Law Relating to Indictable Offences* (HMSO, 1879) (UK). An appendix to the report contained a Draft Code "embodying the suggestions of the Commissioners".
[47] At 11 (emphasis added).

> … *It is also a principle of the common law that all powers, the exercise of which may do harm to others, must be exercised in a reasonable manner, and that if there is excess, the person guilty of such excess is liable for it according to the nature and quality of his act*.

And later in the report:[48]

> The proposition that the force used in defence of person, liberty, or property must be proportioned to the injury or mischief which it is intended to prevent, is in our view one of great importance … .
> …
> The law discourages persons from taking the law into their own hands. Still the law does permit men to defend themselves. … And when violence is used for the purpose of repelling a wrong, the degree of violence must not be disproportioned to the wrong to be prevented, or it is not justified.

As will be apparent, the italicised portion of the quote above reflects the wording of s 68 of the Draft Code and only refers to the use of force derived from a power. The question is whether s 68 was intended to apply only to circumstances where the use of force was authorised by law (in other words, through some statutory or common law power) or whether it extended to circumstances where the use of force was justified. The scope of s 68 can be gleaned from Stephen's almost contemporaneous *Digest of the Criminal Law*.[49] That *Digest* contained the following associated commentary:[50]

> Article 201.
> LAWFUL FORCE
> It is not a crime to inflict bodily harm by way of lawful correction, or by any lawful application of force (other than those hereinbefore mentioned) to the person of another; but if the harm inflicted on such an occasion is excessive the act which inflicts it is unlawful … .
>
> *Illustrations.*
> (1) A, a schoolmaster, beats B, a scholar, for two hours with a thick stick. Such a beating is unlawful.
> (2) A kicks B, a trespasser, out of his house, in order to force him to leave it. B is killed. The kick is an unlawful act.
> …

The phrase "lawful application of force" set out above is broad enough to cover both the use of force authorised by way of statutory or common law power and force justified in particular circumstances. The breadth of the phrase is reinforced by the accompanying illustrations. At the time of publication of the *Digest*, a parent or schoolmaster who had parental authority delegated to him or her was lawfully authorised to use force by way of correction, provided that it was moderate and reasonable.[51] This illustration, therefore, covers the use of excess force where that force was

---

[48] At 44–45.
[49] James Fitzjames Stephen *Russell: A Digest of the Criminal Law (Crimes and Punishments)* (4th ed, Macmillan and Co, London, 1877).
[50] At 138–139 (footnotes omitted).
[51] *R v Hopley* (1860) 2 F & F 202, 175 ER 1024 (Assizes).

authorised by way of statutory or common law power. The second illustration covers the use of excessive force which otherwise would have been justified in the circumstances. Accordingly, although the italicised portion of the quote from the report produced alongside the Draft Criminal Code above only refers to the use of force derived from a power, the *Digest* supports the view that "authorised by law" means "any lawful application of force". On this interpretation, s 68 of the Draft Code was intended to encompass those situations in which the use of force was "justified" (for example, self-defence).

Section 62 of the 1961 Act is in identical terms to s 68 of the Draft Code. On that basis, if the preceding analysis is correct, s 62 of the 1961 Act applies to the use of force in self-defence/defence of another.

Support for this interpretation can be found in the Court of Appeal's decision in *R v Haddon*.[52] In that case, the Court was concerned with defence of a dwelling-house under s 55 of the 1961 Act. That provision sets out that a person is "justified in using such force as is necessary" to prevent a breaking and entering. The Court did not draw any distinction between provisions justifying the use of force and those authorising the use of force for the purposes of s 62. Instead, it said that "[s]ection 55 and all sections authorising the use of force (ss 39 – 60) are subject to s 62".[53] Such an interpretation of s 62 effectively precludes recognition of the partial defence.

Additionally, the view of the Criminal Law Reform Committee that s 48 should operate as a "simple comprehensive provision" is apposite. As noted in in *R v Howard*, judges should be wary of giving s 48 unnecessary embellishment.[54] In light of these considerations, it follows that recognition of a common law partial defence would be inconsistent with the comprehensive nature of s 48. To read in such a partial defence would be to impose an excessive judicial gloss and would undermine the purpose of the legislative amendments effectuated in 1980. Accordingly, the legislative framework created by s 48, as amended, and s 62 points against the recognition of the partial defence.

Also material is s 20 of the 1961 Act, relied on by the Court of Appeal in *McNaughton*, which points against recognising the partial defence. In *McNaughton*, the appellant argued that s 20 allows for the recognition of the partial defence. In support of this submission, the Court of Appeal's statement in *R v Hutchinson* was cited:[55]

> In determining what "rules and principles of the common law" may give rise, if not inconsistent with the Act, to a defence, the principle that the law is always speaking must be borne in mind. That principle was recognised at the time the Act was passed

[52] *R v Haddon* [2007] NZAR 135 (CA).
[53] At [28].
[54] *R v Howard* (2003) 20 CRNZ 319 (CA) at [23].
[55] *R v Hutchinson* [2004] NZAR 303 (CA) at [42].

> by s 5 of the Acts Interpretation Act 1924. It continues to be recognised by the successor to s 5 of the 1924 statute, s 6 of the Interpretation Act 1999. That principle of interpretation suggests that common law defences which would have been recognised in 1961 by s 20 of the Act should not be regarded as frozen in time. Rather, they may be developed having regard to what has happened in other common law jurisdictions, provided always that, in its final form, the rule or principle is not "inconsistent with the Act" or "any other enactment".

However, the Court in *McNaughton* noted that whilst *Hutchinson* undoubtedly reflects the:[56]

> … truism that the common law does not stand still but is constantly evolving to adapt to changing social, economic and cultural conditions. [It] does not stand for the different proposition that in 2013 this Court should recognise a new defence which was not part of our common law in 1961.

Further, and fatally for the appellant in *McNaughton*, s 20 allows for the recognition of common law justifications "…except so far as they are altered by or are inconsistent with this Act or any other enactment". The Court noted that s 5(1) of the 1961 Act states the Act "applies to all offences for which the offender may be … tried in New Zealand". The Court found that:[57]

> The Act was plainly intended to amend and repeal the Crimes Act 1908 and codify all relevant principles. Section 48 is a self-contained definition of the defence of justification. To [recognise the partial defence] would be inconsistent with its scope and meaning.

In sum, the legislative framework created by the Crimes Act 1961, in particular ss 20, 48 and 62, points against the introduction of a partial defence. These sections provide a comprehensive scheme on the law of excessive use of force in defence in New Zealand. Introducing a common law partial defence would be inconsistent with New Zealand's codified system of criminal law. Furthermore, there is nothing in the wording of ss 48 and 62 that indicates either section was intended to alter the common law position prior to codification in 1961 concerning the use of excessive force in defence. The Court in *Murray*, therefore, was correct to conclude that any change should be effectuated by Parliament and not "through judicial development".[58]

Legislative recognition of the partial defence of the kind referred to in *Murray* has occurred in some states of Australia. Following *Zecevic v DPP (Vic)*, South Australia, New South Wales, Western Australia and Victoria re-introduced variations of the partial defence.[59] Such statutory recognition demonstrates the pervasiveness of the view that there exists a significant moral distinction between murder and unlawful killing by way of excessive self-defence/defence of another.

---

[56] *McNaughton*, above n 19, at [69].
[57] at [70].
[58] *Murray*, above n 1, at [8].
[59] Criminal Law Consolidation Act 1935 (SA), s 15(2); Crimes Act 1900 (NSW), s 421; Criminal Code Act Compilation Act 1913 (WA), s 248(3); and Crimes Act 1958 (Vic), s 9AD.

B. Alternatives to the partial defence

It has been said that an advantage of the partial defence is that it prevents the jury being left with an "all or nothing" verdict – either murder or a complete acquittal.[60] However, in New Zealand, it is permissible for the jury to find a defendant guilty of manslaughter where excessive force in self-defence/defence of another is used; this explained by Elias CJ in *Wallace v Abbott*:[61]

> The intent required for murder under s 167(1)(b) is an available inference for the jury on the evidence. If self-defence is eliminated by the jury on the ground of excessive force, then the fact that reasonable force might have been justified does not reduce murder to manslaughter (*Palmer v R*; *R v Clegg*). If the jury rejects both self-defence and the specific intent required for murder, then it may properly convict of manslaughter (s 171 Crimes Act).

The jury's ability to find a defendant guilty of manslaughter in these circumstances allays concerns that without a partial defence, a jury will reach a verdict of a complete acquittal out of sympathy for the defendant.

Furthermore, the fact that a person deployed more force than that used (or threatened) by the other party (or parties) does not automatically exclude the applicability of self-defence/defence of another. Whether the force used in defence was reasonable in the circumstances is quintessentially a jury question. However, the Privy Council in *Palmer* noted that "a person defending himself cannot weigh to a nicety the exact measure of his necessary defensive action".[62] It follows that the inherent leniency in the assessment of reasonable force means a person acting in defence will not be expected to use exactly proportionate force in response to an attack or a perceived threat. The ability to use greater force than that employed (or threatened) by the other party (or parties), but still successfully plead self-defence/defence of another, assuages the need for an independent partial defence.[63]

Finally, in *Daken v R* the Court of Appeal accepted that while the use of excessive force cannot, of itself, provide a defence or justify a reduction in charges, it can be considered during sentencing.[64] In *Daken* the Court opined that the use of excessive self-defence may fall within the second limb of s 102 of the Sentencing Act 2002 so that the imposition of a sentence of life imprisonment would be manifestly unjust.[65] Similarly, in *R v Broughton* the use of excessive force in self-defence was relevant in determining the

---

[60] Law Commission *Battered Defendants: Victims of Domestic Violence Who Offend* (NZLC PP41, August 2000) at [64]; and O'Brien, above n 21, at 453.
[61] *Wallace v Abbott* [2003] NZAR 42 (HC) at [107].
[62] *Palmer*, above n 7, at 832.
[63] Although, the somewhat harsh verdict in *Murray*, above n 1, shows that this factor will not always avail a defendant.
[64] *Daken v R* [2010] NZCA 212 at [68].
[65] At [68].

minimum non-parole period.[66] The reason for allowing the use of excessive force in self-defence/defence of another to be considered in sentencing was succinctly summarised in *R v Kirk*: "A person who kills believing wrongly that the violence is necessary in self-defence is less culpable or blameworthy than a person who kills without that belief."[67]

V. CONCLUSION

The Supreme Court in *Murray* was justified in finding that recognising a partial defence of excessive self-defence/defence of another would be inconsistent with the statutory scheme created by the Crimes Act and would be out of line with most comparable jurisdictions. Although only a leave decision, given the Court's treatment of the issue, it seems that *Murray* closes the door on recognition of the partial defence by the courts. Whether Parliament thinks the partial defence ought to be available, however, is a different matter.

[66] *R v Broughton* [2017] NZHC 671 at [12].
[67] *R v Kirk* [2016] NZHC 1249 at [59].