

April 1967

## Criminal Law--Self-Defense--Justification Needed for Use of Deadly Force

Edward Perry Johnson  
*West Virginia University College of Law*

Follow this and additional works at: <https://researchrepository.wvu.edu/wvlr>



Part of the [Criminal Law Commons](#)

---

### Recommended Citation

Edward P. Johnson, *Criminal Law--Self-Defense--Justification Needed for Use of Deadly Force*, 69 W. Va. L. Rev. (1967).

Available at: <https://researchrepository.wvu.edu/wvlr/vol69/iss3/13>

This Case Comment is brought to you for free and open access by the WVU College of Law at The Research Repository @ WVU. It has been accepted for inclusion in West Virginia Law Review by an authorized editor of The Research Repository @ WVU. For more information, please contact [ian.harmon@mail.wvu.edu](mailto:ian.harmon@mail.wvu.edu).

directors thereof for simple nonfeasance of duty to the corporation or fraud in its management or mismanagement in the disposition of the money or property of the corporation in the absence of an active intent to deceive or defraud the plaintiff.<sup>23</sup>

The duty which the trust theory and the foreseeable injury approach would impose on the directors of a corporation to its creditors has not been looked on with favor by our courts. These theories, even though limited to those cases where "gross negligence" has caused or increased insolvency, pose significant problems with respect to multiplicity of suits and the determination of damages. Therefore, it is felt that the majority of courts, including West Virginia, have justifiably rejected individual actions by corporate creditors against corporate directors when the directors have negligently mismanaged the corporation's affairs.<sup>24</sup>

*Paul R. Rice*

---

**Criminal Law—Self-Defense—Justification Needed  
for Use of Deadly Force**

*D*, alone in her home with her children, heard an intruder at her window. Alarmed, she went across the street and telephoned the sheriff's office, where her husband was employed. After her husband arrived on the scene, he showed her how to use a shotgun, and then returned to his duties. Later, *D* noticed the blind and draperies moving in her T.V. room. She also heard the window being raised slowly. Taking the gun in hand, she arose and fired in the direction of the window. The resulting blast mortally wounded the deceased, who was in the line of fire. Upon trial for murder, *D* relied on self-defense. After conviction for second

---

<sup>23</sup> *Id.* at 545, 17 S.E. at 53.

<sup>24</sup> An equitable creditor's bill may permit the creditors to sue the negligent directors as a class after the corporation has become insolvent and a demand has been made on the stockholders or receiver to take action against the directors and it has been refused. *Ellis v. H. P. Gates Merchantile Co.*, 103 Miss. 560, 60 So. 649 (1913). See generally, 3 FLETCHER, CYCLOPEDIA OF THE LAW OF CORPORATIONS, § 1183 (1965) and Annot., 50 A.L.R. 462, 473 (1927). This is an asset of the corporation and the creditors can sue in the right of the corporation. *Browne v. Hammett*, 133 S.C. 446, 131 S.E. 612 (1926).

degree murder, *D* assigned error. One assignment was based on the court's refusal to set aside the verdict and grant *D* a new trial on the ground that the verdict was contrary to the law and evidence. One specific point of contention concerned whether self-defense was a proper defense for *D* under the circumstances. *Held*; no error. Even if *D* believed that she was in danger of great bodily harm and was attempting to protect herself, she assumed the risk in so doing. *State v. Hamric*, 151 S.E.2d 252 (W.Va. 1966).

This case represents the latest pronouncement on the right to use force for self-defense in West Virginia. Unfortunately, it clouds what previously had been a rather clear question.

In order to understand the court's holding in this case, it is first necessary to consider the problem of reasonable belief as to necessity of force. Today, it is generally held that one free from fault may use nondeadly force to the extent that seems necessary to prevent personal harm. This he may do without yielding.<sup>1</sup>

On the question of the use of deadly force for self-defense, the majority follows the "no retreat" rule. According to this doctrine, an innocent person may stand his ground and use deadly force if this reasonably seems necessary to save himself.<sup>2</sup> West Virginia follows this rule.<sup>3</sup>

However, under the minority or "retreat" rule, an innocent victim of a murderous attack must retreat if a way is safely open to him, rather than resort to deadly force.<sup>4</sup> There are certain exceptions to this rule however, including the situation presented in the instant case, *i.e.*, defense of the habitation.

The right to use force to prevent an unlawful entry of one's habitation has been consistently recognized.<sup>5</sup> In fact, defense of the habitation was the most favored form of self-defense under the early common law. In nearly all modern jurisdictions, the use of deadly force is permitted to defend the habitation if such force reasonably

<sup>1</sup> *People v. Katz*, 263 App. Div. 883, 32 N.Y.S.2d 157 (1942).

<sup>2</sup> *People v. Bush*, 414 Ill. 441, 111 N.E.2d 326 (1953); 40 C.J.S., Homicide § 128 (1944).

<sup>3</sup> *State v. Donahue*, 70 W. Va. 260, 90 S.E. 834 (1916).

<sup>4</sup> *State v. Lee*, 36 Del. 11, 171 Atl. 195 (1933); 40 C.J.S. Homicide § 128 (1944).

<sup>5</sup> *Laney v. U.S.*, 294 Fed. 412 (D.C. Cir. 1923); *State v. Preece*, 116 W. Va. 176, 179 S.E. 524 (1935).

appears necessary to protect the occupants from the commission of a felony or great bodily harm.<sup>6</sup> Therefore, in a case such as the one before us, the right to defend one's self would be essentially the same under both the "retreat" and "no retreat" rules.

As suggested above, when an attack is made upon the dwelling, the law does not require that the danger should be real, that is, that the peril should actually exist, in order to entitle the householder to use deadly force.<sup>7</sup> All that is usually required is that the householder have a reasonable belief that such force is necessary. In determining reasonableness, the jury should consider the situation as it appeared to the accused at the time of the homicide.<sup>8</sup>

In past decisions, the West Virginia court has aligned itself with this prevailing viewpoint. Yet, in the instant case, the statement that if the defendant believed she was in great danger and was protecting herself "from apparent danger, she assumed the risk in so doing"<sup>9</sup> is indeed troublesome. This terse statement, without accompanying explanation, raises a question of the court's intention.

In reviewing the issue of self-defense the court had to determine whether the verdict was supported by the evidence. Since there seemed to be a dispute of facts as to the existence of mitigating circumstances, the issue was properly left to the jury. It seems probable that the court, in deciding that the evidence was sufficient to support the verdict, felt that a guilty verdict, such as was rendered, was a "risk" that the defendant assumed. However, this is not clear from the court's statement.

After the disputed phrase, two West Virginia cases were cited as authority.<sup>10</sup> These are derivatives of the principle first promulgated in *State v. Cain*.<sup>11</sup> In that decision, it was stated that while the actor is the judge of the necessity and reasonableness of deadly force, "he acts at his peril, as the jury must pass upon his action. . . viewing said actions from the prisoner's standpoint at the time of the killing."<sup>12</sup>

---

<sup>6</sup> PERKINS, CRIMINAL LAW, 913 (1957).

<sup>7</sup> *State v. Perkins*, 88 Conn. 360, 91 Atl. 265 (1914).

<sup>8</sup> *Fortune v. Commonwealth*, 133 Va. 669, 112 S.E. 861 (1922).

<sup>9</sup> *State v. Hamric*, 151 S.E.2d 252, 264 (W. Va. 1966).

<sup>10</sup> *State v. DeBoard*, 119 W. Va. 396, 194 S.E. 349 (1938); *State v. Toler*, 129 W. Va. 575, 41 S.E.2d 850 (1946).

<sup>11</sup> *State v. Cain*, 20 W. Va. 679, 707 (1892).

<sup>12</sup> *Ibid.*

The concept that the defendant acts "at his peril" has been continued through many West Virginia cases, each interpreting the phrase as did the court in *Cain*. It seems that the court in the instant case may have translated the phrase "acts at his peril" into "she assumed the risk." Unfortunately, the court did not go on to explain the full implication of its statement, as in *Cain*.

A second appellate review function in similar situations is to determine if the instruction on self defense is properly presented to the jury. Due to this function, the lack of explanation of the phrase "assumed the risk" could easily lead one to believe that this is proper in an instruction to the jury. If viewed in this manner, the phrase could impose a strict liability upon one attempting to use justification as a defense for deadly force. If a defendant mistakenly used deadly force under a reasonable belief of its necessity, he would still be culpable. Thus, if this principle were carried to its logical conclusion, one could envision a whole host of situations where people guilty of no more than a reasonable mistake would be stripped of any defensive claim, permitting their conviction of purposeful crimes.

Hopefully, the court is still adhering to its older and accepted *Cain*-oriented viewpoint. One bright sign is that the instructions given to the jury, while not discussed in the principal case, included a full explanation of justification for deadly force in accord with the accepted majority view.<sup>13</sup> Yet the danger exists that the confusing language embraced in *Hamric* will be misinterpreted and used incorrectly in future decisions. Thus, a clear statement on this question is desirable to clear the air of existing doubts.

*Edward Perry Johnson*

---

<sup>13</sup> Defendant's Instruction No. 16 read, The Court instructs the jury that self defense is not based upon actual necessity; and that if they believe from a preponderance of the evidence to their satisfaction that the defendant believed that she was threatened by the deceased with death or great bodily harm and if they believe that the circumstances were such that a reasonable prudent person would be justified in believing, and if the defendant did believe, that the danger of death or great bodily harm from the deceased was actual or imminent and that such danger could only be averted by taking the life of deceased, then the homicide was justifiable and the defense of self defense is valid and you must find the defendant not guilty. Record, p. 303, State v. Hamric, 151 S.E.2d (W. Va. 1966).