

CHAPTER 703
GENERAL PRINCIPLES OF JUSTIFICATION

Section

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" **§703-300 Definitions relating to justification.** In this chapter, unless a different meaning is plainly required:

"Believes" means reasonably believes.

"Deadly force" means force which the actor uses with the intent of causing or which the actor knows to create a substantial risk of causing death or serious bodily harm. Intentionally firing a firearm in the direction of another person or in the direction which another person is believed to be constitutes deadly force. A threat to cause death or serious bodily injury, by the production of a weapon or otherwise, so long as the actor's intent is limited to creating an apprehension that the actor will use deadly force if necessary, does not constitute deadly force.

"Dwelling" means any building or structure, though movable or temporary, or a portion thereof, which is for the time being a home or place of lodging.

"Force" means any bodily impact, restraint, or confinement, or the threat thereof.

"Unlawful force" means force which is employed without the consent of the person against whom it is directed and the employment of which constitutes an offense or would constitute an offense except for a defense not amounting to a justification to use the force. Assent constitutes consent, within the meaning of this section, whether or not it otherwise is legally effective, except assent to the infliction of death or serious or substantial bodily injury. [L 1972, c 9, pt of §1; am L 1986, c 314, §5; gen ch 1993]

Revision Note

Definitions rearranged pursuant to §23G-15.

COMMENTARY ON §703-300

This section provides statutory definitions of terms used repeatedly in this chapter; a discussion of the definitions, when needed or appropriate, is found in the commentary on the section employing the defined terms.

SUPPLEMENTAL COMMENTARY ON §703-300

Chapter 703 provides for a defense based on the legal concept of justification. An extended definition of justification is provided in §§703-302 through 309. In most instances, the critical factor in determining whether an actor's conduct is justified is the actor's state of mind or belief respecting facts and circumstances. The legislature changed §300 of the

Proposed Draft by adding the definition of "believes." The definition adopts "the reasonable man standard with respect to justification for the use of force in self-protection, in the protection of property, and in the protection of others. It is your Committee's finding that the requirement that a person's belief be 'reasonable' for these defenses to be available will provide an objective basis by which to gauge whether or not the use of force was justified." Conference Committee Report No. 2 (1972).

Case Notes

Subsection (1) cited: 9 H. App. 115, 826 P.2d 884 (1992).

Substantial evidence of record supported trial court's finding that defendant's use of the knife constituted deadly force. 77 H. 429 (App.), 886 P.2d 766 (1994).

" **§703-301 Justification a defense; civil remedies unaffected.** (1) In any prosecution for an offense, justification, as defined in sections 703-302 through 703-309, is a defense.

(2) The fact that conduct is justifiable under this chapter does not abolish or impair any remedy for such conduct which is available in any civil action. [L 1972, c 9, pt of §1]

COMMENTARY ON §703-301

This section does not attempt to define the defense of justification. An extended definition is given in the sections which follow. Subsection (1) merely establishes that justification is a defense. This places the burden of producing some credible evidence of the existence of justification on the defendant. If the defendant produces such evidence, or if it appears as part of the prosecution's case, the defendant is entitled to have the defense considered by the jury. The prosecution, however, must prove beyond a reasonable doubt, facts which negative the defense.

Subsection (2) preserves civil remedies for conduct which may give rise to a defense of justification. Civil standards of conduct are higher than we propose for criminal liability. For example, unreasonable conduct on the part of the defendant might suffice for civil liability whereas criminal liability will turn on the defendant's own subjective mental state. It therefore seems desirable explicitly to preserve civil remedies.

Prior Hawaii statutory and case law recognized some of the defenses which the Code unites in this chapter under the defense of justification. Reference to such recognition will be made in

the commentary under the sections which follow. There is some language in old Hawaii case law which indicates that the defense of justification is affirmative in nature;[1] to the extent that this language would be followed today, the Code represents a change.

Case Notes

Justification is not an affirmative defense and prosecution has burden of disproving it once evidence of justification has been adduced. 60 H. 259, 588 P.2d 438 (1978).

Defendant's claim of justification, in defense against prosecution for terroristic threatening, was established regardless of whether or not defendant used deadly force. 1 H. App. 167, 616 P.2d 229 (1980).

"Choice of evils" defense applies to violations. 9 H. App. 115, 826 P.2d 884 (1992).

§703-301 Commentary:

1. King v. Bridges, 5 Haw. 467, 472 (1885); Provisional Government v. Caecires, 9 Haw. 522, 533 (1894).

" **§703-302 Choice of evils.** (1) Conduct which the actor believes to be necessary to avoid an imminent harm or evil to the actor or to another is justifiable provided that:

- (a) The harm or evil sought to be avoided by such conduct is greater than that sought to be prevented by the law defining the offense charged;
- (b) Neither the Code nor other law defining the offense provides exceptions or defenses dealing with the specific situation involved; and
- (c) A legislative purpose to exclude the justification claimed does not otherwise plainly appear.

(2) When the actor was reckless or negligent in bringing about the situation requiring a choice of harms or evils or in appraising the necessity for the actor's conduct, the justification afforded by this section is unavailable in a prosecution for any offense for which recklessness or negligence, as the case may be, suffices to establish culpability.

(3) In a prosecution for escape under section 710-1020 or 710-1021, the defense available under this section is limited to an affirmative defense consisting of the following elements:

- (a) The actor receives a threat, express or implied, of death, substantial bodily injury, or forcible sexual attack;
- (b) Complaint to the proper prison authorities is either impossible under the circumstances or there exists a history of futile complaints;
- (c) Under the circumstances there is no time or opportunity to resort to the courts;
- (d) No force or violence is used against prison personnel or other innocent persons; and
- (e) The actor promptly reports to the proper authorities when the actor has attained a position of safety from the immediate threat. [L 1972, c 9, pt of §1; am L 1986, c 314, §6; gen ch 1993]

Revision Note

In subsection (1) (a), "and" deleted pursuant to §23G-15.

COMMENTARY ON §703-302

This section defines what is often called the defense of "necessity." It permits the actor, in certain limited situations, to justify disobedience to criminal law if the harm the actor sought to avert by the actor's disobedience far outweighed the harm sought to be prevented by the law. Necessity has been accepted as a defense at common law in some cases, and has been given statutory recognition in a number of enacted codes.

The section may be used, first, to justify only slightly harmful acts which are necessary to avoid a far greater harm. For instance, a court would hardly wish to punish a person for driving at night without the proper lights when the person did so only to summon help to extinguish a fire. The section also provides a justification for more serious acts. For example, it could be used to justify the taking of life to avoid a far greater loss of life. In a classic case, a ship's crew threw certain passengers overboard to lighten an overloaded boat, which would otherwise have sunk with much greater loss of life. This section would justify the action if all of its conditions are met.

There are numerous reasons supporting the defense of necessity. First, because an individual will probably kill one person, or a few, to avoid the deaths of many others regardless of what the law may say, punishment in such situations would fail to attain its objective of deterrence and would not reflect widely held views about what would be the moral thing to do in

such a situation. Second, the life of every individual is assumed to be of equal value, and therefore a numerical preponderance in lives saved over those sacrificed establishes an ethical and legal justification for the otherwise criminal act. Third, there are numerous safeguards built into §703-302. The danger causing the necessity of choosing between evils must be imminent. Moreover, subsection (2) provides that if the necessity of choosing between harms or evils results from the defendant's recklessness or negligence, the defense is not available in a prosecution of any offense for which recklessness or negligence, as the case may be, suffices for conviction.

It is no defense under this section that the defendant thought compliance with a statute immoral or unwise; the legislative decision to make particular conduct criminal is to be given great weight. However, this defense is probably in accord with normal legislative intentions, because blind obedience is unlikely to be required in the face of an emergency. The whole matter, with all of its ramifications is to be weighed by the court and the jury in the same manner as in any criminal proceeding. If the defendant's conduct was not necessary, if one evil was not greater than the other, if the defendant exceeded the reasonable bounds of intelligence and morality, the defendant may be convicted for the defendant's conduct notwithstanding the defendant's attempts to justify the defendant's actions.

Finally, many commentators have had difficulty with the concept of necessity because of the possibility of unforeseeable changes in the perilous situation. For instance, if a number of passengers are thrown overboard from a ship to save a much larger number of persons, there is really no way for the actors to foresee the exact moment when a rescue ship may arrive. There is always the chance that help will arrive in time to make the emergency action unnecessary. Such objections, however, fail to take account of the fact that other defenses which are predicated on a threat to person or property can take account only of the probability of harm. One can never guarantee that the uplifted knife will be plunged into the victim. "If necessity is not admitted where there is a high degree of probability of disastrous consequences if action is not taken, then it can never be admitted." [1] A person faced with such seeming necessity is and will remain in a personal moral quandary because of the person's uncertainty. Our only point is that the threat of criminal punishment is unneeded here.

There has been no previous statutory provision or case law development in Hawaii on the defense of necessity; this section represents a needed addition to the law.

SUPPLEMENTAL COMMENTARY ON §703-302

The legislature accepted §302 of the Proposed Draft without modification. Subsection (2) provides that the defense of justification based on a choice of evils is unavailable where recklessness or negligence suffices to establish culpability when the actor was reckless or negligent in bringing about the situation requiring a choice of harms or evils or in appraising the necessity for the actor's conduct. However, in light of the legislature's introduction of the "reasonable man standard" in §703-300, it appears that negligence on the actor's part in bringing about the situation or in appraising the necessity for the actor's conduct will be sufficient to eliminate the defense in cases which otherwise require intent, knowledge, or recklessness to establish culpability.

Case Notes

Defense of necessity is available to prisoners escaping from prison. 58 H. 252, 566 P.2d 1378 (1977).

The elements of the choice of evils defense are limited to those enumerated by the express language of this section and common law "considerations" have not been incorporated into the statutory formulation. 90 H. 58, 976 P.2d 372 (1998).

Choice of evils defense could not apply where defendant had dumped marijuana over lanai railing, thereby eliminating any threat of imminent harm to wife from marijuana use as required under subsection (1)(a); thus, no imminent harm was present to justify defendant's physical abuse of wife. 93 H. 63, 996 P.2d 268 (2000).

The exclusivity of the narrow choice of evils defense set forth in subsection (3) is limited to prosecutions for escape from correctional or detention facilities but not to prosecutions for escape from custody that does not implicate an incarceration setting; the generic choice of evils defense set forth in subsection (1) is applicable in a prosecution for escape from non-incarcerational custody. 96 H. 83, 26 P.3d 572 (2001).

A dolphin is not "another" within the meaning of this section. 1 H. App. 19, 613 P.2d 1328 (1980).

"Necessity" or "choice of evils" defense discussed. 9 H. App. 115, 826 P.2d 884 (1992).

Harm committed by defendant resisting an order to stop a motor vehicle under §710-1027(1) by driving away after traffic stop not reasonably designed to actually avoid possible serious physical harm to defendant or passenger under subsection (1)(a). 81 H. 147 (App.), 913 P.2d 558 (1996).

Where case was covered by the defense of defense of others under §703-305 and, possibly, self-defense under §703-304, the choice of evils defense under this section did not apply. 90 H. 175 (App.), 977 P.2d 183 (1999).

Defendant was not entitled to a jury instruction on the "choice of evils" defense where, pursuant to subsection (1)(b), the Hawaii Penal Code provided a defense (self-defense) dealing with the specific situation involved. 91 H. 450 (App.), 984 P.2d 1276 (1999).

The choice of evils defense under this section and the duress defense under §702-231 are not, as a matter of statutory law, inconsistent. 93 H. 399 (App.), 4 P.3d 533 (2000).

The more specific choice of evils affirmative defense for prison escape situations under subsection (3) must be construed in conjunction with the more general choice of evils justification defense under subsection (1); thus, any escape on the part of a prisoner must be conduct which a prisoner believes to be necessary to avoid any imminent harm or evil to the prisoner. 93 H. 399 (App.), 4 P.3d 533 (2000).

Unborn children are not included within the definition of "another" or "person" for purposes of the Hawaii Penal Code; thus, defendant could not justify defendant's physical abuse of girlfriend on grounds that defendant was protecting "another" or a third person, specifically, defendant's unborn child. 101 H. 3 (App.), 61 P.3d 514 (2002).

Trial court erred when it gave its choice of evils instruction as evidence did not support a choice of evils instruction; however, there was no reasonable possibility that the error contributed to defendant's conviction. 105 H. 319 (App.), 97 P.3d 395 (2004).

Trial court did not err in denying defendant's request that in addition to the choice of evils defense under this section, jury be instructed on the justification defenses of use of force in the protection of self and others under §§703-304 and 703-305; defendant's theory of defense was fully and adequately covered by the choice of evils instruction which the trial court gave and under the circumstances of the case, there was no reasonable possibility that the jury, which rejected defendant's choice of evils defense, might have embraced defenses based on §§703-304 and 703-305. 114 H. 507 (App.), 164 P.3d 765 (2007).

§703-302 Commentary:

1. Smith & Hogan, Criminal Law 123 (1965).

" **§703-303 Execution of public duty.** (1) Except as provided in subsection (2), conduct is justifiable when it is required or authorized by:

- (a) The law defining the duties or functions of a public officer or the assistance to be rendered to a public officer in the performance of the public officer's duties;
 - (b) The law governing the execution of legal process;
 - (c) The judgment or order of a competent court or tribunal;
 - (d) The law governing the armed services or the lawful conduct of war; or
 - (e) Any other provision of law imposing a public duty.
- (2) The other sections of this chapter apply to:
- (a) The use of force upon or toward the person of another for any of the purposes dealt with in those sections; and
 - (b) The use of deadly force for any purpose, unless the use of deadly force is otherwise expressly authorized by law or occurs in the lawful conduct of war.
- (3) The justification afforded by subsection (1) applies:
- (a) When the actor believes the actor's conduct to be required or authorized by the judgment or direction of a competent court or tribunal or in the lawful execution of legal process, notwithstanding lack of jurisdiction of the court or defect in the legal process; and
 - (b) When the actor believes the actor's conduct to be required or authorized to assist a public officer in the performance of the officer's duties, notwithstanding that the officer exceeded the officer's legal authority. [L 1972, c 9, pt of §1; gen ch 1993]

Revision Note

In subsection (1) (a) and (b), "or" deleted pursuant to §23G-15.

COMMENTARY ON §703-303

This section broadly sets forth the circumstances in which conduct which would otherwise constitute an offense is justifiable because it is done in the course of public duty. Subsection (1) requires reference to other statutory provisions, as well as to judgments of courts, in order to ascertain what conduct is permissible. For example, if a statutory provision

permits a door to be broken down in the execution of legal process, no offense is committed thereby.

Subsection (2) makes the other provisions of chapter 703 applicable to the use of force against the person for any of the purposes dealt with in chapter 703 and to any use of deadly force other than that expressly authorized by law or occurring in the lawful conduct of war. As will be seen, the sections on the use of force and deadly force against another's person have been worded so as to apply to any actor, including a public official. Subsection (2) therefore assures that this chapter will control such activity in preference to contrary provisions of other statutes.

Subsection (3) permits use of the defense in cases in which the actor believes the actor's conduct is required or authorized, despite some defect either in the authority which appears to demand or authorize it.

The section elaborates previous Hawaii law. Force necessary to acquire entry has previously been permitted by Hawaii law when a public officer was seeking to execute a court order to seize property,[1] to search under a search warrant,[2] or to enter to arrest.[3] As subsection (1)(a) and (b) point out, such prior statutes describe conduct which will be considered as justified under this section.

§703-303 Commentary:

1. H.R.S. §654-3.
2. Id. §803-37.
3. Id. §803-11; see *Hubertson v. Cole*, 1 Haw. 72, 73 (1849).

" **§703-304 Use of force in self-protection.** (1) Subject to the provisions of this section and of section 703-308, the use of force upon or toward another person is justifiable when the actor believes that such force is immediately necessary for the purpose of protecting himself against the use of unlawful force by the other person on the present occasion.

(2) The use of deadly force is justifiable under this section if the actor believes that deadly force is necessary to protect himself against death, serious bodily injury, kidnapping, rape, or forcible sodomy.

(3) Except as otherwise provided in subsections (4) and (5) of this section, a person employing protective force may estimate the necessity thereof under the circumstances as he believes them to be when the force is used without retreating,

surrendering possession, doing any other act which he has no legal duty to do, or abstaining from any lawful action.

(4) The use of force is not justifiable under this section:

- (a) To resist an arrest which the actor knows is being made by a law enforcement officer, although the arrest is unlawful; or
- (b) To resist force used by the occupier or possessor of property or by another person on his behalf, where the actor knows that the person using the force is doing so under a claim of right to protect the property, except that this limitation shall not apply if:
 - (i) The actor is a public officer acting in the performance of his duties or a person lawfully assisting him therein or a person making or assisting in a lawful arrest; or
 - (ii) The actor believes that such force is necessary to protect himself against death or serious bodily injury.

(5) The use of deadly force is not justifiable under this section if:

- (a) The actor, with the intent of causing death or serious bodily injury, provoked the use of force against himself in the same encounter; or
- (b) The actor knows that he can avoid the necessity of using such force with complete safety by retreating or by surrendering possession of a thing to a person asserting a claim of right thereto or by complying with a demand that he abstain from any action which he has no duty to take, except that:
 - (i) The actor is not obliged to retreat from his dwelling or place of work, unless he was the initial aggressor or is assailed in his place of work by another person whose place of work the actor knows it to be; and
 - (ii) A public officer justified in using force in the performance of his duties, or a person justified in using force in his assistance or a person justified in using force in making an arrest or preventing an escape, is not obliged to desist from efforts to perform his duty, effect the arrest, or prevent the escape because of resistance or threatened resistance by or on behalf of the person against whom the action is directed.

(6) The justification afforded by this section extends to the use of confinement as protective force only if the actor

takes all reasonable measures to terminate the confinement as soon as he knows that he safely can, unless the person confined has been arrested on a charge of crime. [L 1972, c 9, pt of §1; ree L 1975, c 163, §3; am L 2001, c 91, §4]

COMMENTARY ON §703-304

This section substantially adopts the Model Penal Code rules on justification of the use of force in self-protection. It has been rewritten and reorganized to make it more easily understandable.

Subsection (1) requires a belief by the actor that the use of protective force is actually necessary, and that unlawful force (defined in §703-300) is to be used by the assailant. He must believe, further, that immediate use of force is required, although the threatened harm to him need not be "imminent," as the rule was sometimes phrased at common law. It is enough that unlawful force is threatened on the present occasion by his assailant. The actor may make his defensive move without waiting for his assailant to load his gun or to summon reinforcements. Finally, the actor must believe that the particular degree of force used by him is necessary. This formulation is not meant to require a precise equation, but it will limit the defense to situations in which a particular scope and degree of retaliation is believed by the actor to be appropriate to the aggression.

Subsections (2) and (5) strictly limit the use of deadly force. Under the circumstances specified in subsection (2), the actor may use deadly force if he believes it is necessary to protect himself against death, serious bodily harm, kidnapping, rape, or forcible sodomy. This formulation has two implications: (a) the actor must believe that deadly force is the only viable means of preventing the specified harm, and (b) the actor must believe that one of the specified harms is threatened on the present occasion. "Deadly force" is defined in §703-300. Its use is further restricted by subsection (5). Deadly force may not be used if the actor provoked his assailant's use of force against himself in the same encounter with the purpose of causing death or serious bodily injury. Of course, if he intends only moderate harm and receives a deadly response, the initial aggressor may respond with deadly force. The use of deadly force is also denied when the actor can avoid using it with complete safety by retreating, by surrendering possession of a thing to a person asserting a claim of right to it, or by complying with a demand that he refrain from taking an action which he has no legal duty to take. In any of these cases, the Code may seem to be opting for cowardice. However,

it should be the strong principle of any criminal code to prevent death wherever possible. To quote the Model Penal Code commentary,

It rests, of course, upon the view that protection of life has such a high place in a proper scheme of social values that the law cannot permit conduct which places life in jeopardy, when the necessity for doing so can be avoided by the sacrifice of the much smaller value that inheres in standing up to an aggression.[1]

However, a duty to retreat or take over evasive action is not imposed in two situations. Subsection (5), subparagraph (b) (i), states that the actor is not required to retreat from his dwelling or his place of work unless he was the initial aggressor or unless he is assailed in his place of work by another person whose place of work he knows it to be. We would not normally expect a man to abandon his home to an aggressor and would allow him to stand his ground, although an exception is made, consistent with paragraph (a), if the actor is the initial aggressor. The exception for an attack in a man's place of work is new with the Model Penal Code. The same principles which permit a man to remain in his home would, for example, permit a shopkeeper to defend himself in his place of business without abandoning it to attackers. Subparagraph (b) (ii), of the same subsection, relates to public officials or persons assisting them using force in the performance of duty. It would be against public interest to require a public officer to abandon his duty if he meets resistance. This Code follows the Model Penal Code in extending the justification to all arrests and performances of duty, even if they are technically unlawful. Throughout chapter 703 the rule is that resistance to unlawful arrest is to be made in court rather than physically.

The Code also specifically requires surrendering possession of a thing when the attacker asserts a claim of right thereto. Where a person offers deadly force unless another surrenders property to him, and claims a right to the property, it is certainly sound policy to save life and litigate the disputed ownership in court. Naturally, however, this rule does not apply in cases of robbery, where the assailant can make no claim of right, and it is the purpose of the Code to permit deadly resistance to robbery if the conditions of subsection (2) are met. Finally, deadly force is impermissible if the actor can avoid using it by complying with a demand that he refrain from any action which he has no duty to take. Again, the policy of saving life seems more insistent than the right of the individual to complete freedom of action.

Subsection (3) states the generally applicable rule that the actor need not retreat or take any other evasive action before

estimating the necessity for the use of force in self-protection.

Subsection (4) sets general limits on the use of self-protective force. Paragraph (a) follows the Model Penal Code in forbidding any use of force to resist an arrest which the actor knows is being made by a peace officer. Resistance to even an unlawful arrest should be made in court. No valid social policy is served by permitting physical resistance to peace officers who are known as such by the actor. If the law were to permit physical resistance, it would in effect be sanctioning unnecessary injury. However, only force for the purpose of resisting an arrest is proscribed. If the officer threatens to use unlawful force after the arrest, the normal self-protection rules would apply. In other words, the actor may resist a "peril greater than arrest." [2] Paragraph (b) is closely related to §703-306 (protection of property) which permits the use of force by the occupier or possessor of property to protect it. The actor may not use force to counter that permissible force, when it is directed at him under a claim of right to protect the property, unless he is a public officer or a person assisting him or a person making or assisting in a lawful arrest, or unless he believes that he must use force to protect himself against death or serious bodily harm. A third Model Penal Code exception, dealing with a right of re-entry or recaption, has been omitted. As explained in the commentary to §703-306, it does not seem wise to deal separately with these matters. This Code treats them under the more general rules relating to protection of property.

Subsection (6) recognizes that confinement may be used as protective force. Because of the continuing nature of confinement, however, the Code requires the actor to terminate the confinement as soon as he knows he can do so safely. He has no such duty if the person is arrested, simply because the legality of a confinement will then be tested by ordinary judicial processes.

Previous Hawaii case law required that the defendant's belief be reasonable. [3] Contrary to subsection (3) of the Code, under the Hawaii cases, the defendant must retreat before he uses any force, except in those circumstances where deadly force is the only way serious felonies against persons can be prevented. [4] In the latter situations, it appears that Hawaii case law, like the Code, would require retreat if it could be accomplished with complete safety. [5] To the extent that Hawaii cases demand "imminent" danger, in the common law sense, [6] the Code represents a change in the law. Finally, the subsection on confinement is an addition to Hawaii law.

Case Notes

Defendant entitled to instruction on self-defense whenever testimony fairly raises the issue, no matter how weak. 59 H. 148, 577 P.2d 793 (1978).

Defendant is entitled to jury instructions on self-defense where there is any evidence in the record to support jury consideration of the issue. 60 H. 504, 591 P.2d 615 (1979).

In self-defense to charge of homicide, admissibility of evidence of deceased's character for violence and aggression. 61 H. 328, 603 P.2d 151 (1979).

Where trial court conspicuously omitted from its self-defense instruction any reference to the use of "force", which was essential to defendant's defense at trial, insofar as defendant expressly disputed whether defendant's use of force constituted "deadly force", and instructed jury that, as a matter of law, defendant employed "deadly force" against victim because death in fact resulted from defendant's use of force, trial court's instruction was not harmless beyond a reasonable doubt. 101 H. 377, 69 P.3d 88 (2003).

Where defendant raised the issue of self-defense, trial court did not err in concluding that prosecution proved that defendant was not acting in self-defense when defendant shot victim. 107 H. 469, 115 P.3d 648 (2005).

Where trial court's jury instruction sufficiently tracked subsection (3) as it informed the jury that the reasonableness of defendant's belief must be viewed from defendant's perspective, appeals court properly determined that the instruction was consistent with the language of this section. 118 H. 452, 193 P.3d 368 (2008).

Jury instruction relating to the defense of the use of force for the protection of other persons pursuant to §703-305 was erroneous as it improperly included elements relating to the defense of the use of force in self-protection under this section; however, error was harmless because there was no evidence in the record to support a finding that, under the circumstances as a person would reasonably believe them to be, defendant was justified in using force in defense of others. 123 H. 205, 231 P.3d 478 (2010).

Jury instruction explaining the subjective portion of an assessment of petitioner's self-defense claim not misleading where jury was instructed to "place [themselves] in the shoes of the [petitioner]" and to assess petitioner's "subjective belief"; reading the instructions as a whole, the omission of specific language from State v. Lubong was not necessary to further explain the subjective portion. 129 H. 206, 297 P.3d 1062 (2013).

Objective portion of the self-defense jury instruction was not erroneous and misleading where jury instruction substituted the term "reasonable person" with "reasonably prudent person"; "reasonably prudent person" and "reasonable person" are interchangeable terms and a reasonable juror would not believe there was a difference between the two terms. 129 H. 206, 297 P.3d 1062 (2013).

The circuit court's self-defense jury instruction was not erroneous; among other things, the jury instruction was based on then-current Hawaii Pattern Jury Instructions-Criminal (HAWJIC) 7.01 with regard to self-defense and petitioner's argument that the instruction should have included language in subsection (3) regarding retreating and other acts, failed. 131 H. 463, 319 P.3d 382 (2014).

Defendant's claim of justification, in defense against prosecution for terroristic threatening, was established regardless of whether or not defendant used deadly force. 1 H. App. 167, 616 P.2d 229 (1980).

Evidence indicated defendant could have retreated safely; attack with baseball bat using sufficient force to break complainant's arm constituted deadly force. 2 H. App. 369, 633 P.2d 547 (1981).

Defendant did not reasonably believe that kicking person on floor was immediately necessary to protect self. 2 H. App. 577, 636 P.2d 1365 (1981).

State failed its burden of introducing substantial evidence disproving defendant's facts or proving facts negating defendant's self-protection justification defense. 9 H. App. 435, 843 P.2d 1389 (1993).

There was substantial evidence to support trial court's conclusion that a reasonable person would not have believed that it was necessary to use deadly force on the particular occasion. 77 H. 429 (App.), 886 P.2d 766 (1994).

Trial court did not err in denying defendant's request that in addition to the choice of evils defense under §703-302, jury be instructed on the justification defenses of use of force in the protection of self and others under this section and §703-305; defendant's theory of defense was fully and adequately covered by the choice of evils instruction which the trial court gave and under the circumstances of the case, there was no reasonable possibility that the jury, which rejected defendant's choice of evils defense, might have embraced defenses based on this section and §703-305. 114 H. 507 (App.), 164 P.3d 765 (2007).

Prosecution's misstatement of law was not harmless error where (1) prosecution misstated the law concerning self-defense by incorrectly imputing a requirement that defendant must have intended to kill the victim in order for the defense of self-

protection to apply, and (2) the trial court did not correct this misstatement by either sustaining defense counsel's objection or curing the misstatement in its jury instructions. Thus, if the jury believed this misstatement, it would have incorrectly concluded that the defense of self-protection was inapplicable since defendant clearly stated that defendant never intended to kill the victim. 120 H. 420 (App.), 209 P.3d 1234 (2009).

Where petitioner was not charged with assault for confining victim to the ground, for which a jury instruction regarding confinement may have been warranted, but rather was charged with murder in the second degree for firing a shotgun at victim resulting in victim's death, and respondent State did not rely at trial on a theory that petitioner unlawfully confined victim, trial court not required, when instructing jury regarding self-defense, to instruct the jury regarding relationship between "confinement" and self-defense pursuant to subsection (6). 129 H. 206, 297 P.3d 1062 (2013).

§703-304 Commentary:

1. M.P.C., Tentative Draft No. 8, comments at 24 (1958).
2. Id. at 19.
3. State v. Clyde, 47 Haw. 345, 388 P.2d 846 (1964).
4. King v. Bridges, 5 Haw. 467 (1885).
5. Id.
6. State v. Clyde, 47 Haw. 345, 388 P.2d 846, 852 (1964); Territory v. Yadao, 35 Haw. 198, 201 (1959).

" §703-305 Use of force for the protection of other persons.

(1) Subject to the provisions of this section and of section 703-310, the use of force upon or toward the person of another is justifiable to protect a third person when:

- (a) Under the circumstances as the actor believes them to be, the person whom the actor seeks to protect would be justified in using such protective force; and
 - (b) The actor believes that the actor's intervention is necessary for the protection of the other person.
- (2) Notwithstanding subsection (1):
- (a) When the actor would be obliged under section 703-304 to retreat, to surrender the possession of a thing, or

- to comply with a demand before using force in self-protection, the actor is not obliged to do so before using force for the protection of another person, unless the actor knows that the actor can thereby secure the complete safety of such other person;
- (b) When the person whom the actor seeks to protect would be obliged under section 703-304 to retreat, to surrender the possession of a thing or to comply with a demand if the person knew that the person could obtain complete safety by so doing, the actor is obliged to try to cause the person to do so before using force in the person's protection if the actor knows that the actor can obtain the other's complete safety in that way; and
 - (c) Neither the actor nor the person whom the actor seeks to protect is obliged to retreat when in the other's dwelling or place of work to any greater extent than in the actor's or the person's own. [L 1972, c 9, pt of §1; gen ch 1993]

Revision Note

In subsection (2) (a), "and" deleted pursuant to §23G-15.

COMMENTARY ON §703-305

This section extends the defense of justification to include the use of physical force to protect another person on the same terms as the defense is available for the use of force in self-protection. The Code follows the Model Penal Code in allowing defense of others regardless of the relationship between the actor and the person being protected. It permits a person to use force to protect another person when the actor believes the other person would have been justified in using force to protect himself and he believes that his intervention is necessary to protect the other person. This formulation covers situations in which the other's infirmity, infancy, or other physical condition makes him especially unable to protect himself or susceptible to injury, even though the actor, in a similar predicament, might not himself have been justified in using force.

Subsection (2) provides certain exceptions and limitations. The actor need not retreat, surrender possession, or comply with a demand unless the actor knows the actor can thereby secure the complete safety of the other person. The actor must try to persuade the other person to retreat, surrender possession, or comply with a demand if the actor knows the actor can obtain the

other's complete safety in that way. Finally, retreat is not required if the action takes place in the other's dwelling or place of business to any greater degree than is required in §703-304.

Hawaii case law shows only bare recognition of this type of justification.[1] The Code provides codification and elaboration.

Case Notes

Jury instruction relating to the defense of the use of force for the protection of other persons pursuant to this section was erroneous as it improperly included elements relating to the defense of the use of force in self-protection under §703-304; however, error was harmless because there was no evidence in the record to support a finding that, under the circumstances as a person would reasonably believe them to be, defendant was justified in using force in defense of others. 123 H. 205, 231 P.3d 478 (2010).

Defendant entitled to consideration of justification defense no matter how weak, unsatisfactory or inconclusive the evidence appeared. 81 H. 142 (App.), 913 P.2d 553 (1996).

Defendant not justified in using protective force against complaining witness where, under circumstances as defendant believed them to be, a reasonable person would not reasonably believe person sought to be protected would be justified in using protective force against complaining witness. 81 H. 142 (App.), 913 P.2d 553 (1996).

Unborn children are not included within the definition of "another" or "person" for purposes of the Hawaii Penal Code; thus, defendant could not justify defendant's physical abuse of girlfriend on grounds that defendant was protecting "another" or a third person, specifically, defendant's unborn child. 101 H. 3 (App.), 61 P.3d 514 (2002).

Trial court did not err in denying defendant's request that in addition to the choice of evils defense under §703-302, jury be instructed on the justification defenses of use of force in the protection of self and others under §703-304 and this section; defendant's theory of defense was fully and adequately covered by the choice of evils instruction which the trial court gave and under the circumstances of the case, there was no reasonable possibility that the jury, which rejected defendant's choice of evils defense, might have embraced defenses based on §703-304 and this section. 114 H. 507 (App.), 164 P.3d 765 (2007).

Although the justification provisions of subsection (2)(b), which addressed the defendant's obligation to attempt to cause the third party to retreat before the defendant uses force, was

not discussed in the jury instructions, by not instructing the jury with regard to that qualification, the trial court effectively gave defendant the benefit of the justification even if defendant would otherwise not have been entitled to rely on it under subsection (2)(b); thus, the trial court's failure to instruct with regard to this section was harmless beyond a reasonable doubt. 120 H. 499 (App.), 210 P.3d 22 (2009).

There was sufficient evidence to support the district court's finding that defendant was not acting to protect defendant's girlfriend where defendant's girlfriend was already the aggressor when defendant dragged victim by the hair to support defendant's conviction of harassment under §711-1106(1)(a). Further, defendant's girlfriend's ex-husband testified that defendant's girlfriend "went for" victim before defendant pulled victim by victim's hair, thus negating defendant's defense-of-others justification defense pursuant to this section. 130 H. 332 (App.), 310 P.3d 1033 (2013).

§703-305 Commentary:

1. The King v. Bridges, 5 Haw. 467, 472 (1885); Territory v. Warren, 35 Haw. 232, 245 (1939); rehearing denied, 35 Haw. 252.

" §703-306 Use of force for the protection of property. (1)

The use of force upon or toward the person of another is justifiable when the actor believes that such force is immediately necessary:

- (a) To prevent the commission of criminal trespass or burglary in a building or upon real property in the actor's possession or in the possession of another person for whose protection the actor acts;
- (b) To prevent unlawful entry upon real property in the actor's possession or in the possession of another person for whose protection the actor acts; or
- (c) To prevent theft, criminal mischief, or any trespassory taking of tangible, movable property in the actor's possession or in the possession of another person for whose protection the actor acts.

(2) The actor may in the circumstances specified in subsection (1) use such force as the actor believes is necessary to protect the threatened property, provided that the actor first requests the person against whom force is used to desist from the person's interference with the property, unless the actor believes that:

- (a) Such a request would be useless;

- (b) It would be dangerous to the actor or another person to make the request; or
 - (c) Substantial harm would be done to the physical condition of the property which is sought to be protected before the request could effectively be made.
- (3) The use of deadly force for the protection of property is justifiable only if:
- (a) The person against whom the force is used is attempting to dispossess the actor of the actor's dwelling otherwise than under a claim of right to its possession; or
 - (b) The person against whom the deadly force is used is attempting to commit felonious property damage, burglary, robbery, or felonious theft and either:
 - (i) Has employed or threatened deadly force against or in the presence of the actor; or
 - (ii) The use of force other than deadly force to prevent the commission of the crime would expose the actor or another person in the actor's presence to substantial danger of serious bodily injury.
- (4) The justification afforded by this section extends to the use of a device for the purpose of protecting property only if:
- (a) The device is not designed to cause or known to create a substantial risk of causing death or serious bodily injury;
 - (b) The use of the particular device to protect the property from entry or trespass is reasonable under the circumstances, as the defendant believes them to be; and
 - (c) The device is one customarily used for such a purpose or reasonable care is taken to make known to probable intruders the fact that it is used.
- (5) The justification afforded by this section extends to the use of confinement as protective force only if the actor takes all reasonable measures to terminate the confinement as soon as the actor knows that the actor can do so with safety to the property, unless the person confined has been arrested on a charge of crime. [L 1972, c 9, pt of §1; gen ch 1993]

Revision Note

In subsections (1) (a) and (2) (a), "or" deleted and in subsection (4) (a), "and" deleted pursuant to §23G-15.

COMMENTARY ON §703-306

This section establishes the rules for the use of force upon or toward the person of another which has as its purpose the protection of property. The standard of justification is the actor's own belief in the necessity of using physical force to prevent certain specified kinds of harm. Force may be used to prevent criminal trespass and burglary, unlawful entry upon real property, theft, criminal mischief, and other trespassory taking of tangible, movable property, so long as in each case the property protected is in the possession of the actor or of one for whose protection the actor is acting. (Note that in any case in which the actor fears bodily injury to the actor or another, §§703-304, 305 would apply rather than §703-306. Thus, robbery may be covered by those sections rather than this, if the robber places the actor in fear of bodily injury or death.)

Subsection (2) permits the actor to use such force as the actor believes is necessary to protect the property, short of deadly force, after making a request to desist from interfering with the property. The request is required because of the high value to be placed upon prevention of human suffering. Infliction of physical force on another cannot be justified if the desired end can be achieved without the danger of injury. A request to desist does not, however, have to be made if the actor believes that it would be useless, dangerous to the actor, or likely to give the wrongdoer time to do substantial harm to the physical condition of the property.

Deadly force is ordinarily not permitted. It may be used if the assailant is attempting to dispossess the actor of the actor's dwelling otherwise than under a claim of right. This recognizes an important tradition in the common law which places a high value on the sanctity of the home and recognizes that a person will take extraordinary means to preserve it. Deadly force may also be used to prevent felonious property damage, burglary, robbery, or felonious theft, if: (1) the person against whom the force is used has employed or threatened deadly force against or in the presence of the actor, or (2) use of force short of deadly force would expose the actor or another person in the actor's presence to the danger of serious bodily injury. Both of these cases are covered, in any event, by the self-defense provisions of §§703-304, 305, but it seems wise to spell them out here in light of the general prohibition on use of deadly force.

Subsection (4) permits the use of certain property protection devices which may cause bodily discomfort or injury, subject to strict limitations. Subsection (5) mirrors a similar subsection in §703-304 and regulates the use of confinement as a protective

force. As in §703-304, use of confinement is permitted, but it must be terminated as soon as possible consistent with safety to the property, unless the person confined has been arrested.

An attempt has been made to simplify the Model Penal Code scheme by omitting a few overly complicated concepts. In addition, the elaborate M.P.C. rules on recaption or re-entry are eliminated. This Code treats re-entry upon property and recaption of property under the same principles as other forms of property defense. As a matter of policy, it does not seem wise to encourage resort to self-help when property has been seized in any circumstances in which self-help would not have been permissible to protect the property from seizure. The M.P.C. rules have not generally been followed in other states.[1]

Hawaii case law is substantially in accord with the Code's position on the use of deadly force.[2] However, Hawaii has permitted the use of devices to accomplish what the defendant could do were the defendant present;[3] on this point the Code, clearly forbidding the use of deadly devices under any circumstances, represents a change from the prior law. Subsection (2), on request, is an important addition to Hawaii law. The subsection on confinement is also new.

§703-306 Commentary:

1. See e.g., N.Y.R.P.L. §§35.20-35.25.

2. Territory v. Warren, 35 Haw. 232, 245, rehearing denied, 35 Haw. 252 (1939).

3. Id.

" **§703-307 Use of force in law enforcement.** (1) Subject to the provisions of this section and of section 703-310, the use of force upon or toward the person of another is justifiable when the actor is making or assisting in making an arrest and the actor believes that such force is immediately necessary to effect a lawful arrest.

(2) The use of force is not justifiable under this section unless:

- (a) The actor makes known the purpose of the arrest or believes that it is otherwise known by or cannot reasonably be made known to the person to be arrested; and
- (b) When the arrest is made under a warrant, the warrant is valid or believed by the actor to be valid.

(3) The use of deadly force is not justifiable under this section unless:

- (a) The arrest is for a felony;
- (b) The person effecting the arrest is authorized to act as a law enforcement officer or is assisting a person whom he believes to be authorized to act as a law enforcement officer;
- (c) The actor believes that the force employed creates no substantial risk of injury to innocent persons; and
- (d) The actor believes that:
 - (i) The crimes for which the arrest is made involved conduct including the use or threatened use of deadly force; or
 - (ii) There is a substantial risk that the person to be arrested will cause death or serious bodily injury if his apprehension is delayed.

(4) The use of force to prevent the escape of an arrested person from custody is justifiable when the force could justifiably have been employed to effect the arrest under which the person is in custody, except that a guard or other person authorized to act as a law enforcement officer is justified in using force which he believes to be immediately necessary to prevent the escape from a detention facility.

(5) A private person who is summoned by a law enforcement officer to assist in effecting an unlawful arrest is justified in using any force which he would be justified in using if the arrest were lawful, provided that he does not believe the arrest is unlawful. A private person who assists another private person in effecting an unlawful arrest, or who, not being summoned, assists a law enforcement officer in effecting an unlawful arrest, is justified in using any force which he would be justified in using if the arrest were lawful, provided that he believes the arrest is lawful, and the arrest would be lawful if the facts were as he believes them to be. [L 1972, c 9, pt of §1; am L 2001, c 91, §4]

Revision Note

In subsection (3) (a) and (b), "and" deleted pursuant to §23G-15.

COMMENTARY ON §703-307

Subsection (1) covers all persons (not just peace officers) making an arrest. Force upon or toward the person of another is justifiable if the actor believes the amount of force the actor is using is immediately necessary to effect the arrest and if

the actor believes that the arrest is lawful. It is immaterial that the arrest is unlawful if the actor believes it to be lawful. The justification also covers a person who is assisting in making an arrest.

Subsection (2) requires an announcement of the purpose of the arrest, unless the actor believes that the purpose is otherwise known (as in cases of hot pursuit) or cannot reasonably be made known. Further, the actor, if acting under a warrant, must either have a valid warrant or believe the warrant to be valid.

Subsection (3) restricts the use of deadly force to felony arrests by peace officers or persons who believe they are assisting peace officers. Even when these requirements are met, the actor must further believe that there is no substantial risk of injury to innocent persons and that the crime for which the arrest is made involved conduct including the use or threatened use of deadly force or that there is a substantial risk that the person to be arrested will cause death or serious bodily injury if the person's apprehension is delayed. It seems advisable to limit the situations in which deadly force can be used by a peace officer while at the same time recognizing that in some cases it is desirable to allow the peace officer to use deadly force in order to avert far greater harm. Note that the restrictions on deadly force to effect an arrest are supplemented by the general provisions on use of force in self-protection which would permit anyone to use deadly force if the person feared death or serious bodily harm to oneself or another. (See §§703-304, 305.)

Subsection (4) recognizes a justification for the use of force to prevent the escape of an arrested person from custody. Deadly force may be used to prevent escape from a jail, prison, or similar institution. When the subject is not incarcerated, the subject's escape may be prevented by force if force could justifiably have been employed to effect the arrest under which the subject is in custody. In addition, the Code contains a substantive crime of escape, and rights to use force to arrest for that crime will frequently arise. The distinction in permissible force is based on the greater social disruption and dismay which may arise from the escape of a person from a prison or a similar institution.

Subsection (5) gives protection to a private person who is assisting in an arrest. A person who assists a peace officer at the peace officer's command is justified, though the arrest be unlawful (and possibly even known by the officer to be unlawful), so long as the actor does not believe the arrest is unlawful. A higher standard is imposed when a private person assists another private person or volunteers aid to a peace officer. Here the person must believe the arrest to be lawful,

and must believe in the existence of facts which would have made the arrest lawful if the facts were as the person believes them to be.

Previous Hawaii law recognized the defense provided by this section. The law required, like the Code, that the peace officer make known the peace officer's purpose to the arrestee, if it is possible to do so under the circumstances.[1] Prior law differs importantly from the Code, however, in that Hawaii statutory and case law permitted the arresting officer to use any force, including deadly force, necessary to effect any arrest.[2] No distinction was drawn between the arrest of a misdemeanor and a felon.[3] There was no requirement that the peace officer use deadly force only when acting in self-defense.[4] Nonetheless, under Hawaii case law, the peace officer could not use more force than was reasonably necessary to effect the arrest.[5] (As in all situations involving the defense of justification, Hawaii law used an objective test to determine the reasonableness of the defendant's belief.[6]) It is likely that a private person under Hawaii law also had the right to use any force necessary to effect the arrest of one who commits a crime in the person's presence.[7] However, there are apparently no Hawaii cases on this point.

It is the position of the Code that certain arrests will not warrant the use of deadly force and that the goal of proper law enforcement is best served by having the circumstances of such arrests clearly stated. The section provides a rational scale of the use of force based on the danger the arrestee represents to society and the immediate circumstances of the arrest, rather than on the simplistic concept that the police, in order to do a successful job, must always be given a carte blanche. Similar considerations are behind subsection (4) of the Code on escape; this subsection considerably narrows and clarifies the circumstances under which deadly force may be used.[8]

SUPPLEMENTAL COMMENTARY ON §703-307

Section 703-307(3) sets forth the very limited circumstances in which deadly force may be used to effect an arrest. Subsection (4) provides the general rule that, in dealing with an attempted escape, an officer may use the same force the officer could have used in effecting the arrest under which the person is or was in custody. As originally proposed, subsection (4) created an exception which provided that the law officer would be justified in using any force, including deadly force, which the officer believes to be immediately necessary to prevent the escape of a person charged with or convicted of a felony. The legislature broadened the exception to allow the

officer to use any force the officer believes to be necessary to prevent the escape of any person from a detention facility, whether charged or convicted of a felony, misdemeanor, or petty misdemeanor. The Conference Committee Report states that: "Your Committee finds that such a determination [whether the potential escapee was charged with or convicted of a felony as opposed to some lesser offense] by a guard or other person authorized to act as a peace officer would be difficult, if not impossible, in an escape situation." Conference Committee Report No. 2 (1972).

§703-307 Commentary:

1. H.R.S. §§803-6, 803-11; *Provisional Government v. Caecires*, 9 Haw. 522, 533 (1894).
2. "In all cases where the person arrested refuses to submit or attempts to escape, such degree of force may be used as is necessary to compel the person to submission." H.R.S. §803-7; *Territory v. Machado*, 30 Haw. 487 (1928).
3. *Territory v. Machado*, supra.
4. Id.
5. *Leong Sam v. Keliihoomalu*, 24 Haw. 477 (1918).
6. Cf. commentary on 304.
7. Cf. H.R.S. §§803-3, 7; see note 2 supra.
8. H.R.S. §803-7, see note 2 supra.

" **§703-308 Use of force to prevent suicide or the commission of a crime.** (1) The use of force upon or toward the person of another is justifiable when the actor believes that such force is immediately necessary to prevent the other person from committing suicide, inflicting serious bodily harm upon oneself, committing or consummating the commission of a crime involving or threatening bodily injury, damage to or loss of property, or breach of the peace, except that:

- (a) Any limitations imposed by the other provisions of this chapter on the justifiable use of force in self-protection, for the protection of others, the protection of property, the effectuation of an arrest, or the prevention of an escape from custody shall

apply notwithstanding the criminality of the conduct against which such force is used; and

- (b) The use of deadly force is not in any event justifiable under this section unless:
 - (i) The actor believes that there is a substantial risk that the person whom the actor seeks to prevent from committing a crime will cause death or serious bodily injury to another unless the commission or the consummation of the crime is prevented and that the use of such force presents no substantial risk of injury to innocent persons; or
 - (ii) The actor believes that the use of such force is necessary to suppress a riot after the rioters have been ordered to disperse and warned, in any particular manner that the law may require, that deadly force will be used if they do not obey.

(2) The justification afforded by this section extends to the use of confinement as preventive force only if the actor takes all reasonable measures to terminate the confinement as soon as the actor knows that the actor safely can, unless the person confined has been arrested on a charge of crime. [L 1972, c 9, pt of §1; gen ch 1993]

COMMENTARY ON §703-308

The purpose of this section is to provide a justification for the use of force to prevent suicide, serious bodily injury, or the commission of a crime. It gives a right to use such force as the actor believes is immediately necessary to prevent suicide or serious bodily injury, or to prevent a crime involving or threatening bodily harm, damage to or loss of property, or a breach of the peace. The right to use force in crime prevention is a concomitant of the right to use force to make an arrest spelled out in §703-307. It is, however, limited by all of the limitations expressed in the preceding sections. Deadly force may not be used except for the purpose of preventing a crime which will cause death or serious bodily injury, under circumstances in which there is no substantial risk of injury to innocent persons. Deadly force may also be used if the actor believes such force is necessary to suppress a riot, following an appropriate warning.

Subsection (2) contains a rule about the use of confinement as preventive force, similar to the rules on the same subject in §§703-304 to 306.

Previous Hawaii case law did not distinguish the defense presented in this section from that in §703-307, on the use of

force in law enforcement.[1] The Code provides clarification on the issue.

§703-308 Commentary:

1. Provisional Government v. Caecires, 9 Haw. 522, 533 (1894).

" **§703-309 Use of force by persons with special responsibility for care, discipline, or safety of others.** The use of force upon or toward the person of another is justifiable under the following circumstances:

- (1) The actor is the parent, guardian, or other person similarly responsible for the general care and supervision of a minor, or a person acting at the request of the parent, guardian, or other responsible person, and:
 - (a) The force is employed with due regard for the age and size of the minor and is reasonably related to the purpose of safeguarding or promoting the welfare of the minor, including the prevention or punishment of the minor's misconduct; provided that there shall be a rebuttable presumption that the following types of force are not justifiable for purposes of this [paragraph]: throwing, kicking, burning, biting, cutting, striking with a closed fist, shaking a minor under three years of age, interfering with breathing, or threatening with a deadly weapon; and
 - (b) The force used does not intentionally, knowingly, recklessly, or negligently create a risk of causing substantial bodily injury, disfigurement, extreme pain or mental distress, or neurological damage.
- (2) The actor is a principal, the principal's agent, a teacher, or a person otherwise entrusted with the care or supervision for a special purpose of a minor, and:
 - (a) The actor believes that the force used is necessary to further that special purpose, including maintenance of reasonable discipline in a school, class, other group, or at activities supervised by the department of education held on or off school property and that the use of force is consistent with the welfare of the minor; and
 - (b) The degree of force, if it had been used by the parent or guardian of the minor, would not be unjustifiable under paragraph (1).

- (3) The actor is the guardian or other person similarly responsible for the general care and supervision of an incompetent person, and:
 - (a) The force is employed with due regard for the age and size of the incompetent person and is reasonably related to the purpose of safeguarding or promoting the welfare of the incompetent person, including the prevention of the incompetent person's misconduct, or, when such incompetent person is in a hospital or other institution for the incompetent person's care and custody, for the maintenance of reasonable discipline in the institution; and
 - (b) The force used is not designed to cause or known to create a risk of causing substantial bodily injury, disfigurement, extreme pain or mental distress, or neurological damage.
- (4) The actor is a doctor or other therapist or a person assisting the doctor or therapist at the doctor's or therapist's direction, and:
 - (a) The force is used for the purpose of administering a recognized form of treatment which the actor believes to be adapted to promoting the physical or mental health of the patient; and
 - (b) The treatment is administered with the consent of the patient, or, if the patient is a minor or an incompetent person, with the consent of the minor's or incompetent person's parent or guardian or other person legally competent to consent in the minor's or incompetent person's behalf, or the treatment is administered in an emergency when the actor believes that no one competent to consent can be consulted and that a reasonable person, wishing to safeguard the welfare of the patient, would consent.
- (5) The actor is a warden or other authorized official of a correctional institution, and:
 - (a) The actor believes that the force used is necessary for the purpose of enforcing the lawful rules or procedures of the institution;
 - (b) The nature or degree of force used is not forbidden by other provisions of the law governing the conduct of correctional institutions; and
 - (c) If deadly force is used, its use is otherwise justifiable under this chapter.

- (6) The actor is a person responsible for the safety of a vessel or an aircraft or a person acting at the direction of the person responsible for the safety of a vessel or an aircraft, and:
 - (a) The actor believes that the force used is necessary to prevent interference with the operation of the vessel or aircraft or obstruction of the execution of a lawful order, unless the actor's belief in the lawfulness of the order is erroneous and the actor's error is due to ignorance or mistake as to the law defining authority; and
 - (b) If deadly force is used, its use is otherwise justifiable under this chapter.
- (7) The actor is a person who is authorized or required by law to maintain order or decorum in a vehicle, train, or other carrier, or in a place where others are assembled, and:
 - (a) The actor believes that the force used is necessary for that purpose; and
 - (b) The force used is not designed to cause or known to create a substantial risk of causing death, bodily injury or extreme mental distress. [L 1972, c 9, pt of §1; am L 1992, c 210, §1; am L 2001, c 94, §1; am L 2013, c 31, §1]

Revision Note

In paragraph (5) (a), "and" deleted pursuant to §23G-15.

COMMENTARY ON §703-309

Subsection (1) justifies the use of force against minors by a parent or other person in loco parentis, subject to two limitations: (1) the force must be employed for safeguarding or promoting the welfare of the minor, and (2) it must not be designed to cause or known to create a substantial risk of death, serious bodily injury, disfigurement, extreme pain or mental distress, or gross degradation. Thus the subsection sets a fairly simple and unexceptionable standard; the right of parents to use force to discipline their children is recognized, subject to clear requirements not to cause permanent injury.

Subsection (2) permits a teacher or other person entrusted with care for a special purpose (e.g., a camp counsellor) to use such force as believed necessary to further that purpose, including the maintenance of discipline, subject to the limitations of subsection (1) relating to death and injury.

This subsection recognizes that a teacher will not ordinarily need to have the full scope of parental authority, but will have certain special needs, such as maintenance of class discipline, which are peculiar to the teaching situation. The intent of the Code in allowing this limited justification is not however, to encourage corporal punishment.

Subsection (3) justifies the use of force by a guardian responsible for the care and supervision of an incompetent person, but only to promote the welfare of the incompetent or to maintain discipline. Force may not, therefore, be used as punishment, as distinct from prevention of misconduct, except for the maintenance of institutional discipline. Force may not cause death, serious bodily injury, or the like, nor may it cause humiliation--a lesser amount of harm than countenanced for children in subsection (1).

Subsection (4) permits the use of force by a doctor or other therapist to administer a recognized form of treatment which the doctor or other therapist believes to be adapted to promoting the physical or mental health of the patient. Ordinarily such treatment would be administered with consent, but it may be administered without consent in an emergency. Under the wording of the section, if consent is in fact denied by the patient or a person competent to give consent, the use of force would no longer be justified.

Subsection (5) justifies force used by a warden or other authorized prison official to enforce prison rules and discipline. The force used must not be in excess of that permitted by statutes relating to prisons, and deadly force may be used only when justified under other sections of this Code.

Subsection (6) permits the use of force by a person responsible for the safety of a vessel or airplane to prevent interference with its operation or obstruction of the execution of a lawful order (unless the person is erroneous in the person's belief in the lawfulness of the order). Deadly force may be used if justified under this Code.

Subsection (7) permits force by a person authorized by law to maintain public order in public conveyances and public places. The person may not use force creating a substantial risk of death, bodily injury, or extreme mental distress.

The section is substantially in accord with preexisting Hawaii law. Hawaii law permits parents "to chastise [their children] moderately for their good." [1] Under prior law, any corporal punishment was permitted if reasonable. [2] To the extent that Hawaii case law suggests that the parents have uncontrolled discretion to discipline their children, [3] the Code represents a change. Similarly, teachers have had authority under Hawaii case and statutory law to use force to maintain discipline in

the schools.[4] The punishment must have been reasonable,[5] and the teachers' discretion was considered less extensive than that of parents.[6] Prison officials under prior Hawaii law were permitted to use force to maintain discipline in the prisons;[7] and ship captains had the right to employ force to keep order on their vessels.[8] In all the above situations, the Code states with greater clarity than existing law when, for what purposes, and to what extent force may be used by persons with special responsibility for the care, discipline, or safety of others. Also, subsections (3), (4), and (7) represent additions to Hawaii law.

SUPPLEMENTAL COMMENTARY ON §703-309

Act 210, Session Laws 1992, amended this section to clarify the permitted level of force that a person responsible for the care of a minor, or an incompetent person, may use. In determining whether the level of force used is permitted, a court must consider the age and size of the recipient and whether a reasonable relationship exists between the force used and a legitimate purpose as specified in the statute. Conference Committee Report No. 103.

Act 94, Session Laws 2001, amended this section to clarify that the use of force upon another person is justified when the actor is a principal or principal's agent, when necessary, during school events or at a departmentally supervised function on or off school property. Current law allowed the use of force by teachers or other persons entrusted with the care or supervision for a special purpose of a minor, if the teacher or person believed the force used was necessary to further the special purpose, including maintenance of reasonable discipline. The legislature found it necessary that school personnel be authorized to take reasonable, appropriate, and expeditious action when confronted with potentially dangerous situations or serious disciplinary situations, on campus and off-campus at authorized school functions. School officials must be allowed to take immediate action to preserve order and discipline without having to wait for the police to arrive. Senate Standing Committee Report No. 1400.

Act 31, Session Laws 2013, amended §703-309 to clarify the parental discipline defense by: (1) establishing a rebuttable presumption that specified types of physical force when used to discipline minors are not justified; and (2) expanding the state of mind element required to establish that the force used is justified by requiring that the force used does not intentionally, knowingly, recklessly, or negligently create a risk of causing substantial bodily injury, disfigurement,

extreme pain or mental distress, or neurological damage. Act 31 placed limitations on the parental discipline defense while preserving a parent's general right to safeguard and promote the welfare of a child through the use of disciplinary force. Senate Standing Committee Report No. 322, House Standing Committee Report No. 1223.

Law Journals and Reviews

Hamilton v. Lethem: The Parental Right to Discipline One's Child Trumps a Child's Right to Grow Up Free from Harm. 36 UH L. Rev. 347 (2014).

Case Notes

Parent did not inflict serious pain when hitting child with belt. 72 H. 241, 813 P.2d 1382 (1991).

Force used by defendant not reasonably related to protecting minor's welfare where, according to testimony, spanking caused minor to be unable to sit while in school classes. 81 H. 5, 911 P.2d 725 (1996).

Injuries inflicted by defendant designed to cause or known to create a risk of substantial bodily injury, extreme pain or mental distress where, according to testimony, minor was in extreme pain for days and unable to sit without pain for weeks after spanking. 81 H. 5, 911 P.2d 725 (1996).

Trial court's finding that defendant parent's "slap across the face" was not "reasonably proportional" to child's refusal to come to defendant when repeatedly directed to do so was not supported by substantial evidence. 90 H. 85, 976 P.2d 399 (1999).

Where defendant, a non-custodial parent, was acting within the defendant's court-prescribed unsupervised visitation time, defendant retained, as a "residual parental right", within the meaning of §571-2, the authority to discipline defendant's child with respect to that child's conduct during the visitation period; thus, defendant was a "parent" for purposes of paragraph (1). 90 H. 85, 976 P.2d 399 (1999).

Prosecution failed to prove beyond a reasonable doubt that mother's conduct did not come within the scope of parental discipline as prescribed in paragraph (1) where, considering the totality of the facts and circumstances, the force employed by mother was reasonably proportionate to daughter's defiant behavior towards mother, was reasonably believed to be necessary to discipline daughter, and the force used was "not designed to cause or known to create substantial bodily injury,

disfigurement, extreme pain or mental distress, or neurological damage". 115 H. 149, 166 P.3d 322 (2007).

Considering the totality of facts and circumstances, the force employed by mother's boyfriend (1) was reasonably proportionate to minor's defiant behavior towards boyfriend, (2) was reasonably believed to be necessary to discipline minor for minor's defiant attitude and demeanor, and the degree of force used was "not designed to cause or known to create a substantial risk of causing bodily injury"; thus, boyfriend's discipline was not excessive in light of minor's age, misconduct, and the comparatively mild physical force used, and the prosecution failed to disprove boyfriend's parental discipline defense beyond a reasonable doubt. 119 H. 468, 199 P.3d 57 (2008).

Appellate court erred in determining that respondent was precluded from having the jury instructed on the parental discipline defense because the force used against complainant resulted in substantial bodily injury; the plain language of paragraph (1)(b) specifically ties the defense to criminal liability to the nature of the force used as opposed to the result of such use of force. 125 H. 78, 253 P.3d 639 (2011).

Where there was some evidence indicating that under the circumstances, the force used was not designed to cause or known to create a risk of substantial bodily injury, defendant was entitled to have the parental discipline defense instruction given to the jury for it to make that determination. 125 H. 78, 253 P.3d 639 (2011).

Where, with respect to paragraph (1)(a), defendant did adduce some evidence that the force "was employed with due regard for the age and size of the minor and was reasonably related to the purpose of safeguarding or promoting the welfare of the minor, including the prevention or punishment of the minor's misconduct", the defendant was entitled to instruction on this defense, no matter how weak, unsatisfactory, or inconclusive the evidence might have appeared to the court; where a defendant asserts the parental discipline defense in a jury trial, it is for the jury to decide whether such a defense has merit. 125 H. 78, 253 P.3d 639 (2011).

Appellate court correctly held that there was sufficient evidence to sustain defendant's harassment conviction under §711-1106(1)(a) where defendant chose to slap minor in the face and strike minor with a bamboo stick at least five times with enough force to leave red welts visible the next day; based on the totality of circumstances in the case, substantial evidence existed to support the conclusion that the State proved beyond a reasonable doubt that the force defendant employed against minor was without due regard for minor's age and size, thus disproving

defendant's parental justification defense under this section. 126 H. 494, 273 P.3d 1180 (2012).

Where parent struck child, evidence insufficient to support finding that force used by parent exceeded protection provided by paragraph (1)(b) (1985). 9 H. App. 345, 841 P.2d 1076 (1992).

Trial court erred when it concluded that "reasonably related" standard in paragraph (1)(a) precludes altogether the use of disciplinary force simply because prior non-physical alternatives failed to prevent minor's continuing misconduct. 82 H. 373 (App.), 922 P.2d 986 (1996).

The "physical harm" encompassed in the definition of family violence in §571-2 would not preclude a parent's right to use force to discipline a child as permitted by paragraph (1), and duty to discipline a child under §577-7(a). 88 H. 200 (App.), 965 P.2d 133 (1998).

The term "family violence" in §571-46(9) (1993) does not extend to the type of physical discipline of a child by his or her parent that is expressly permitted in paragraph (1); the limits on the use of physical force as a disciplinary measure in paragraph (1) adequately served to guide the family court's application of §571-46(9) (1993) in determining the best interests of the child when awarding custody or visitation. 88 H. 200 (App.), 965 P.2d 133 (1998).

There was substantial evidence adduced to negate the "parental discipline" justification defense under paragraph (1) where what uncle levied upon nephew was a wanton beating that (1) was not reasonably related to the purpose of safeguarding or promoting the welfare of the nephew, including the prevention or punishment of the nephew's misconduct, nor reasonably proportional to the misconduct being punished and reasonably believed necessary to protect the welfare of the nephew, and (2) directly or by its common sequelae is "known to create a risk of substantial bodily injury". 105 H. 394 (App.), 98 P.3d 265 (2004).

Defendant's conviction of harassment under §711-1106 reversed where trial court erroneously concluded that father's actions could not be seen as reasonably necessary to protect the welfare of the recipient, and the State failed its burden of disproving beyond a reasonable doubt the justification evidence that was adduced, or proving beyond a reasonable doubt facts negating the justification defense under this section. 106 H. 252 (App.), 103 P.3d 412 (2004).

Family court addressed father's permissible discipline argument under paragraph (1) and did not err in failing to apply this parental discipline defense when it concluded that even if the defense were available, father's use of force was not

reasonably related to safeguarding or promoting minor's welfare. 125 H. 330 (App.), 260 P.3d 1148 (2011).

Although father's punches were forceful enough to cause bruising, they were not forceful enough to rise to the level of viciousness in which the level of attack "severed any relationship between the use of force and the welfare" of the complaining witness that "might be considered reasonable"; it was at most a "gray area" in which some in the community would find that father's extent of punishment was inappropriate; however, such gray areas are not resolved by criminalizing such parental discipline; therefore, there was insufficient evidence to disprove father's parental discipline defense under paragraph (1)(a). 125 H. 406 (App.), 263 P.3d 116 (2011).

Where there was no substantial evidence and nothing in the record to indicate that father's punching son twice on son's left leg was designed to cause or was known to create the risk of causing extreme mental distress, the State did not disprove beyond a reasonable doubt father's parental discipline defense under paragraph (1)(b). 125 H. 406 (App.), 263 P.3d 116 (2011).

§703-309 Commentary:

1. H.R.S. §577-7.
2. Id. §577-12.
3. Territory v. Cox, 24 Haw. 461, 463 (1918).
4. H.R.S. §298-16; Kahula v. Austin, 8 Haw. 54 (1890); Territory v. Cox, supra.
5. Territory v. Cox, supra (whipping considered reasonable punishment); Kahula v. Austin, supra (haircutting considered unreasonable punishment). It appears that judgments as to reasonableness in this area are likely to change to reflect more contemporary standards.
6. Territory v. Cox, supra at 463; Kahula v. Austin, supra.
7. H.R.S. §§353-91, 353-94; King v. Sherman, 1 Haw. 150 (1883); In re Candido, 31 Haw. 982 (1931).
8. United States v. Gisaburo, 1 U.S. Dist. Ct. Haw. 323 (1902).

" §703-310 Provisions generally applicable to justification.

- (1) When the actor believes that the use of force upon or

toward the person of another is necessary for any of the purposes for which such belief would establish a justification under sections 703-303 to 703-309 but the actor is reckless or negligent in having such belief or in acquiring or failing to acquire any knowledge or belief which is material to the justifiability of the actor's use of force, the justification afforded by those sections is unavailable in a prosecution for an offense for which recklessness or negligence, as the case may be, suffices to establish culpability.

(2) When the actor is justified under sections 703-303 to 703-309 in using force upon or toward the person of another but the actor recklessly or negligently injures or creates a risk of injury to innocent persons, the justification afforded by those sections is unavailable in a prosecution for such recklessness or negligence toward innocent persons. [L 1972, c 9, pt of §1; gen ch 1993]

Cross References

Definitions of "negligently" and "recklessly", see §702-206.

COMMENTARY ON §703-310

[The Proposed Draft of the Penal Code employed a subjective standard for justification. As mentioned previously and in the Supplemental Commentary hereafter, the legislature introduced an objective or "reasonable man" standard. The following commentary is based on the Proposed Draft. The Supplemental Commentary indicates that §703-310 may be contrary to the legislature's actual intent.]

Subsection (1) states that, where the actor is reckless or negligent in forming a belief about the existence of facts which would establish a justification for the actor's conduct, the actor does not have a defense of justification for any crime as to which recklessness or negligence suffices to establish culpability. This rule seems to be required in light of the Code's subjective standards of justification, which have led to the omission of the requirement that the actor's belief be reasonable.

Subsection (2) denies the defense of justification in cases in which the actor negligently or recklessly injures or creates a risk of injury to innocent persons. In such cases the actor may be prosecuted for a crime involving negligence or recklessness, as the case may be.

SUPPLEMENTAL COMMENTARY ON §703-310

As mentioned in the Supplemental Commentary on §§703-300 and 302, the legislature introduced the "reasonable man standard" or objective standard in making a determination of whether a defense of justification is available. This being the case, it would appear that, where the defendant has been negligent in believing the use of force to be necessary, the defendant loses the defense of justification for all related crimes, including those which require intent, knowledge, and recklessness, as well as negligence, to establish culpability. Thus, §703-310, which was consistent with the principles of chapter 703 as originally set forth in the Proposed Draft, now appears contrary to the legislature's intent in this area.