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A POLICEMAN, A GUN, AND A FATAL MISTAKE—SELF-DEFENCE IN THE TORT OF BATTERY

Ashley v. Chief Constable of Sussex Police[1]

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I. INTRODUCTION

Justice demands that a person who is being attacked, or who perceives that he is about to be attacked, should have the right to defend himself. For this reason, both civil and criminal law provide that if a person injures or kills another person while defending himself against an actual or anticipated attack he may, in certain circumstances, escape liability for his act. Unfortunately, though—particularly in civil law—the precise parameters of self-defence have always been somewhat woolly. Although all courts deciding cases in which self-defence has been at issue have agreed on the key requirement that the force used by the defendant must be proportionate to the actual or perceived threat,[2] there has been little examination of the scope of the defence. Recently, however, the House of Lords had the opportunity to review and clarify the nature of self-defence in the high-profile case of *Ashley*, a tort action which arose from the killing of an unarmed suspect by a police officer who mistakenly believed that the suspect posed an imminent threat. The decision in *Ashley*—that in civil law, self-defence requires the defendant's belief that he is under serious threat to be both honest *and* reasonable—is of significance throughout the common law world for the many interesting observations it contains on the differences between civil and criminal law. It is, moreover, of particular interest in Singapore, in light of changes to the *Penal Code*[3] and proposed changes to the *Criminal Procedure Code*[4] to limit the criminal liability of police officers who kill or injure suspects during anti-terrorist operations.

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1 *Ashley v. Chief Constable of Sussex Police (Sherwood intervening)*; *Ashley and another v. Chief Constable of Sussex Police (Sherwood intervening)* [2008] UKHL 25, [2008] 1 A.C. 962 [*Ashley*].

2 See, *e.g.*, *Lane v. Holloway* [1968] 1 Q.B. 379.

3 Cap. 224, 1985 Rev. Ed. Sing. [*Penal Code*]

4 Cap. 68, 1985 Rev. Ed. Sing. [*Criminal Procedure Code*].

II. The Facts of *Ashley* and the Findings of the Lower Courts

The action in *Ashley* arose from the death of James Ashley, who was shot dead by a policeman, P.C. Christopher Sherwood, during an authorised armed raid on his flat in the early hours of 15 January 1998. Just after 4 a.m., a number of officers forcibly entered the flat and made their way to the bedroom, where Mr. Ashley and his girlfriend had been sleeping. Having been woken by the noise of the raid, Mr. Ashley was standing naked in the unlit room when the police entered. P.C. Sherwood entered the room with his gun in 'aim' position and his finger on the trigger. Within seconds he shot Mr. Ashley, who sustained a single bullet wound to the neck. Although some of the circumstances of the shooting were disputed, it was not alleged that Mr. Ashley had been armed. He was given emergency treatment by paramedics at the scene of the shooting, but was pronounced dead by a police surgeon at 5.15 a.m.

Following a police inquiry into the incident, P.C. Sherwood was charged with murder. His trial at the Central Criminal Court commenced in February 2001. In May 2001, Rafferty J. directed the jury to acquit him of both murder and manslaughter. In a criminal trial for assault (including the more serious variants of murder and manslaughter) the prosecution had to prove to the satisfaction of the jury that the defendant had intended to apply unlawful force. In this case, unlawful force would have been established only if the prosecution had proved that P.C. Sherwood had not acted in self-defence, and Rafferty J. found there to be no evidence in all the circumstances to negative the assertion of self-defence. Shortly after P.C. Sherwood's acquittal, the authorities decided not to prosecute the other officers involved in the raid, and the criminal proceedings thus came to an end. In July 2001, the coroner notified the interested parties that the inquest into the death, which had been adjourned pending the outcome of the criminal investigation and proceedings, would not be resumed. In spite of a campaign by Mr. Ashley's family for a public inquiry, none was held.

Both Mr. Ashley's son and his father instituted civil proceedings against the Chief Constable of Sussex Police.[5] The causes of action on which they relied (in relation to both the planning and the execution of the raid) included assault and battery, false imprisonment, negligence and misfeasance in public office. The Chief Constable conceded negligence with respect to the pre-raid planning, and acknowledged that this had led to Mr. Ashley's death, but denied all the other claims, which he sought to have struck out. In 2004, the matter came before Dobbs J. in the Queen's Bench Division of the High Court. During the hearing, the Chief Constable—while maintaining that the shooting itself was not negligent—accepted liability in negligence for

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[5] In January 2000, Mr. Ashley's son brought a claim for damages under the *Fatal Accidents Act 1976* (U.K.), 1976, c. 30 [*Fatal Accidents Act*] as his father's dependant, as well as damages for the allegedly tortious conduct of the police following the fatal shooting. In October 2002, Mr. Ashley's father sought damages, including dependency damages under the *Fatal Accidents Act*, on his own behalf and that of his wife, Mr. Ashley's mother, who died shortly after the commencement of proceedings. He also claimed damages on behalf of Mr. Ashley's estate, relying on the survival of the causes of action against the police which vested at the time of his death, under s. 1(1) of the *Law Reform (Miscellaneous Provisions) Act, 1934* (U.K.), 24 & 25 Geo. V, c. 41. (Since the actions against the Chief Constable were vicarious in nature, their success depended on tortious liability being established against P.C. Sherwood and/or his fellow officers.)

all consequential damage caused by the shooting. He also admitted the false imprisonment claim. In March 2005, Dobbs J. gave judgment for the Ashleys with respect to these claims, but gave summary judgment for the Chief Constable in relation to the claims for misfeasance in public office and assault and battery—holding with respect to the latter that the burden of negativing self-defence lay with the claimants, and that since P.C. Sherwood's explanation could not be excluded, the claim therefore had no real prospect of success. She held, moreover, that since full compensation would already be payable under the negligence claim, it would be an abuse of process to allow the action for assault and battery to proceed.[6]

The Ashleys appealed to the Court of Appeal.[7] In July 2006, the Court allowed their appeal against the striking out of the claim for assault and battery,[8] holding that Dobbs J. had been wrong in concluding that the burden of disproving self-defence was on the claimants. The burden was on the defendant to prove the defence, and for this reason it could *not* be said that the claim for assault and battery had no prospect of success. The Court also held that, in civil proceedings, the defendant could plead self-defence successfully only if his belief that he was at imminent risk of attack was both honest *and* reasonable.[9] In addition, the majority held that, even though all relevant compensation would be awarded under the negligence and false imprisonment claims, and no additional damages would be payable for assault and battery, it would nevertheless *not* be an abuse of process to allow the assault and battery claim to proceed.[10] The Chief Constable then appealed to the House of Lords.

III. The Decision of the House of Lords

In the House of Lords,[11] their Lordships examined two principal issues, both relating to the action for assault and battery. The first was whether, in a civil law action for assault and battery where a defendant acted in the mistaken belief that he was in imminent danger of attack, the belief must be both honestly and reasonably held in order for him successfully to plead self-defence. The second was whether the claim for assault and battery should be allowed to proceed, given that damages were

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6 [2005] EWHC 415 (Q.B.D.).

7 The court comprised Sir Anthony Clarke M.R., Arden and Auld L.JJ. In the Court of Appeal, the Ashleys made it clear that they were seeking aggravated damages. To the extent that the Chief Constable had admitted liability in negligence for the consequences of, and aggravated features associated with, the shooting, he was treated as having conceded the aggravated damages point, notwithstanding the fact that aggravated damages would not normally be available in a negligence claim. Indeed, during the course of the proceedings, the parties agreed the basis on which these damages should be assessed. The agreement left no room for additional damages to be payable should the action for assault and battery subsequently succeed, and the Chief Constable continued to maintain that this action must fail on the ground that P.C. Sherwood had acted in self-defence.

8 [2007] EWCA Civ 1085, [2007] 1 W.L.R. 398.

9 The Court of Appeal also held that Dobbs J. had been wrong to strike out the claim for misfeasance in public office relating to events after the shooting, but that she had been entitled to direct that the issue of compensatory damages should be determined before the issue of liability. There was no appeal against this aspect of the Court of Appeal's judgment.

10 Sir Anthony Clarke M.R and Arden L.J., Auld L.J. dissenting on this point.

11 The court comprised Lord Bingham of Cornhill, Lord Scott of Foscote, Lord Rodger of Earlsferry, Lord Carswell and Lord Neuberger of Abbotsbury.

already payable in negligence and false imprisonment for the consequences of the shooting.

A. *The Criteria for Self-Defence in Civil Law Actions*

The starting point for their Lordships was Sir Anthony Clarke M.R.'s identification in the Court of Appeal of the three possible bases for the defence. These were: (1) that the defendant's belief that he had to take action in response to an attack or a perceived imminent attack need only be honest; (2) that the defendant's belief that he had to take action in response to an attack or a perceived imminent attack must be both honest and reasonable; or (3) that the defendant must actually be under attack or at real and imminent risk of attack.

As had been the finding in the Court of Appeal, all the members of the House of Lords held that, for the purpose of tort law, the second basis for the defence applied, and that the defence could be established only where the defendant's belief that he had to respond to an attack or perceived imminent attack was both honest and reasonable—which meant that if he was mistaken in that belief, the mistake must be a reasonable one to make in the circumstances. Indeed, Lord Scott (drawing on the views of Sir Anthony Clarke M.R. in the Court of Appeal) even suggested that he would have favoured the third basis for the defence[12]—that of an actual threat—and both Lord Rodger[13] and Lord Neuberger[14] also left open this possibility. However, since the claimants had not pressed the submission, the House did not pursue it, and the remaining two judges did not favour any change in the law.[15]

None of their Lordships were swayed by the argument that tort law should be consistent with criminal law—under which self-defence can be established as long as the accused honestly believes there are facts to justify his actions.[16] As Lord Scott observed:

> It is fundamental to criminal law … that, as a general rule, no one should be punished for a crime that he or she did not intend to commit or be punished for the consequences of an honest mistake … [T]hese principles … explain … why a person who honestly believes that he is in danger of an imminent deadly attack and responds violently in order to protect himself from that attack should be able to plead self-defence as an answer to a criminal charge of assault, or indeed murder …
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> The function of the civil law is different. Its main function is to identify and protect the rights that every person is entitled to assert against, and require to be

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[12] *Ashley, supra* note 1 at para. 20.

[13] *Ibid.* at para. 55.

[14] *Ibid.* at para. 90.

[15] See Lord Bingham, *ibid.* at para. 3 and Lord Carswell, *ibid.* at para. 76 (although the latter did recognise that it found favour with some academics).

[16] Honest belief was sufficient to determine the outcome of P.C. Sherwood's criminal trial. In Singapore, the equivalent provisions are found under "General Exceptions" in Part IV of the *Penal Code*, *supra* note 3. The exception relevant to police officers performing their public duties is contained in s. 79, which provides that a person may plead the defence of justification "who by reason of a mistake of fact … in good faith believes himself to be justified by law". For further discussion of this section, see *infra*, text accompanying note 51.

> respected by, others. The rights of one person, however, often run counter to the rights of others and the civil law, in particular the law of tort, must then strike a balance … As to assault and battery and self-defence, every person has the right in principle not to be subjected to physical harm by the intentional actions of another person. But every person has the right also to protect himself by using reasonable force to repel an attack or to prevent an imminent attack. The rules … must strike a balance between these conflicting rights … The balance struck is serving quite a different purpose from that served by the criminal law… It is one thing to say that if A's mistaken belief was honestly held he should not be punished by the criminal law. It would be quite another to say that A's unreasonably held mistaken belief would be sufficient to justify the law in setting aside B's [civil law] right not to be subjected to physical violence by A …[17]

Similar views were expressed by the rest of their Lordships. Lord Bingham observed that "the ends of justice which the two rules respectively exist to serve are different",[18] and Lord Carswell concurred that "there is a clear difference between the aims of the two branches of the law".[19] Lord Rodger agreed that there was "nothing anomalous in the civil and criminal law now continuing along separate paths and adopting different standards",[20] and Lord Neuberger considered that, in tort law, "it would be wholly unfair on the victim of violence, and unduly favourable to the inflictor, if the victim had no right to any redress … simply because the inflictor had an honest belief that he was under the threat of imminent attack, irrespective of the reasonableness of that belief".[21]

B. *Whether the Claim for Assault and Battery Should be Allowed to Proceed*

Their Lordships were divided on the question of whether the assault and battery claim should be allowed to proceed, given that it could offer no financial benefit to the Ashleys. By a majority of three to two, Lords Scott, Bingham and Rodger decided that it would not be an abuse of process to allow the claim to be decided. Lords Carswell and Neuberger dissented, although for different reasons.

Lords Bingham, Scott and Rodger all took the view that although the Ashleys would obtain no financial benefit if they were to pursue the claim—and might even be exposed to financial risk—it was nonetheless for them to decide whether or not they wished to continue, since, as Lord Bingham observed, "case management … gives no warrant to extinguish the autonomy of the individual litigant".[22] In reaching their decision on this point, Lords Scott and Rodger both focused on the vindicatory

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[17] *Ashley*, *supra* note 1 at paras. 17 and 18.

[18] *Ibid.* at para. 3.

[19] *Ibid*. at para. 76.

[20] *Ibid*. at para. 53.

[21] *Ibid.* at para. 86. With respect to what would constitute a "reasonable" basis for a defendant to believe that he faced an imminent threat, Lord Neuberger (at para. 91) and Lord Rodger (at para. 54) both considered the possibility of belief being reasonable even if it were engendered not by the claimant himself but by, for example, a third party. However, they ultimately left the issue open. For further discussion, see *infra* text accompanying note 32.

[22] *Ibid.* at para. 4.

nature of tort law. Lord Scott, referring to decisions such as *Chester v. Afshar*,[23] where the primary foundation for liability is the vindication of rights, concluded that Mr. Ashley would have been entitled to vindicatory as well as compensatory damages had he survived the shooting, and that the same action should therefore be available to his father and son suing under the relevant legislation. And while there was no reason in principle why compensatory damages should not also vindicate rights, it was "difficult to see how compensatory damages could ever fulfil a vindicatory purpose in a case of alleged assault where liability for the assault were denied and a trial of that issue never took place".[24] Lord Rodger pointed out that it was commonplace for claimants to rely on several causes of action arising from a single set of circumstances—and moreover in this case the actions in negligence and assault and battery served entirely different functions, as was evidenced by the fact that while negligence gave rise to compensation based on proof of harm, the vindication of a person's right to bodily integrity through an action for trespass to the person could be marked by an award of nominal damages. Nor was the agreement which had been reached with respect to damages in the Court of Appeal a reason to bar the claim, since if it was successful and an award of damages was deemed appropriate, the court could adjust the agreed damages to extend to the assault and battery as well.[25]

A further, related, argument—that it would amount to an unlawful collateral attack on P.C. Sherwood's acquittal, and would infringe the rule against double jeopardy, if the assault and battery claim were permitted—was also given short shrift by the majority. Again examining the differences between criminal and civil law, in terms both of the applicable criteria and the onus of proving or disproving those criteria, Lord Scott opined:

> If a defendant's acts in … self-defence are a reasonable and proportionate response to the facts as he honestly believed them to be, it would seem to me quite wrong for the criminal law to impose penal sanctions on him. But if an individual is attacked because the assailant mistakenly believes that the attack is necessary as an act of self-defence and the belief although honestly held is unreasonable in all the circumstances, it would seem to me a travesty for the victim to have to be told that the attack was a lawful one. The prosecution of the Ashleys' civil action based on assault and battery is not a collateral attack on P.C. Sherwood's acquittal. It raises issues different from those on which the criminal charges against P.C. Sherwood turned, issues which were not relevant to and could not be raised in the criminal trial. Nor will the prosecution of the civil action place

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[23] [2004] UKHL 41, [2005] 1 A.C. 134 [*Chester*]. In *Chester*, the defendant doctor advised the claimant to undergo spinal surgery, which carried a small risk of paralysis of which the doctor failed to warn her. The surgery was carried out competently, but the risk eventuated. Even though the claimant could not show that she would have refused the surgery had she been aware of the risk, the House of Lords held (by a majority of 3:2) that the defendant was liable for depriving the claimant of the right to make an informed choice about whether, when and from whom she wished to receive treatment.

[24] *Ashley, supra* note 1 at para. 22.

[25] *Ibid.* at paras. 56 to 64. Echoing the point made by Lord Bingham, and drawing a parallel with the decision to allow the claimants in *Fairchild v. Glenhaven Funeral Services Ltd.* [2002] UKHL 22, [2003] 1 A.C. 32 [*Fairchild*] to pursue their claims to the House of Lords notwithstanding their problems in establishing causation under the traditional test, Lord Rodger also observed, at para. 70: "Case management is intended to assist, not to frustrate, the administration of justice between the parties".

P.C. Sherwood in double jeopardy. There are no penal consequences for adverse findings in the civil courts.[26]

Of the two dissenting voices, Lord Carswell considered that it would be an abuse of process to allow the claim to proceed. In his Lordship's view, the sole basis for allowing such a claim would be if it were the only way to obtain compensatory damages. Since in this case compensatory damages had already been awarded, there was no justification for an additional claim. Nor could the action be justified on the vindicatory basis favoured by Lords Scott and Rodger since, in his Lordship's view, vindicatory damages could be awarded only where there was no other remedy. In this respect, Lord Carswell agreed with Dobbs J. in the High Court and Auld L.J. in the Court of Appeal that "the civil courts exist to award compensation, not to conduct public inquiries".[27] Lord Neuberger, while agreeing with the majority that the claim *could* proceed, considered that it would not be appropriate in the circumstances for it to do so—an assessment which he based on the court's inherent discretion.[28] In view of the fact that the Chief Constable had conceded liability for, and agreed to pay for all the damages flowing from, Mr. Ashley's death, and since he had proffered a full public apology, there was "little purpose in pursuing any point of principle, either from the point of view of the Ashleys or in the public interest".[29] There had also been "real and detailed scrutiny" at the criminal trial and at two inquiries. These facts taken together made out "a formidable case" for staying the claim.[30]

IV. Comments on *Ashley*

As a decision which confirms rather than changes existing law, *Ashley* is not, at one level, ground-breaking. All of their Lordships took the view that they were maintaining the existing position with respect to the elements of self-defence in tort, and in none of the judgments is there any suggestion that the law is being so much as modified, let alone re-written.

The decision is, however, of significance for a number of reasons, the most obvious being its clarification that, in civil law, a defendant can escape liability for attacking someone whom he mistakenly believes to pose a threat only if his belief in the need to respond to the perceived threat is reasonable as well as honest. Although their Lordships could perhaps have considered other alternatives—such as a test based on a combination of honesty and good faith, or the more defendant-friendly test of absence of recklessness—few would contend that their decision to impose a test based on honest and reasonable belief is anything but fair.[31] As their Lordships observed, civil law is about the protection of rights, and it would be unfair to hold that

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[26] *Ibid.* at para. 24. See, too, the judgment of Lord Rodger at para. 66.

[27] *Ibid.* at paras. 78 to 81. His Lordship also expressed concern (at para. 82) that "It has all the portents of a bitterly contested case which will drag out at great length and at substantial expense".

[28] *Ibid.* at paras. 111 and 112.

[29] *Ibid.* at para. 130.

[30] *Ibid.*

[31] Moreover, since good faith is frequently linked with reasonableness—both in the civil and criminal arenas—the adoption of such a test might not actually have resulted in a very different outcome. For further discussion of the good faith requirement in the context of the liability of the police in Singapore, see *infra* text accompanying note 49.

a person has forfeited his right not to be attacked because the person who attacks him has unreasonably misinterpreted the situation. The balance between the claimant's right not to be attacked and the defendant's right to protect himself from perceived harm must require the defendant to justify his actions, and establishing that his apprehension of an imminent threat was both honest and reasonable is a logical and fair way to provide such justification.

One interesting question which arises in this respect is whether a defendant who argues self-defence may rely on factors outside the responsibility of the claimant—such as, for example, the acts of a third party. Lord Rodger and Lord Neuberger both touched in their judgments on the possibility of the defence being available in such circumstances, but both ultimately left the issue open. Lord Neuberger, while considering that there was a strong argument for holding "that a defendant can rely on such factors. Otherwise one would be getting close to holding that the belief must be correct …," also conceded that it could be "unfair on the claimant if matters for which he had no responsibility can serve to justify the reasonableness of the defendant's mistaken belief".[32] On this point, it is suggested that the better view is that a defendant should be able to rely *only* on acts attributable to the claimant in order to establish self-defence. While it would undoubtedly be hard on a defendant who had reasonably relied on other factors to be deprived of the defence, it would be even harder on, and more unfair to, the claimant if he were left without a remedy for harm suffered in a situation over which he had absolutely no control.[33] The balance struck in civil law should require the claimant's right not to be harmed to trump the defendant's right to protect himself from perceived harm.[34]

Lord Neuberger's reference to the law coming close to "holding that the belief must be correct", also leads to the question of whether it would, in fact, be preferable to require there to be an *actual* threat in order to establish self-defence. As the third—and, from the defendant's point of view, the most onerous—of the possible bases for establishing the defence,[35] the "actual threat" requirement received strong support from Lord Scott and tacit endorsement from two of his colleagues[36]—and of the two who opposed it, Lord Bingham did so mainly in the interests of certainty.[37] Given that mistake *per se* is not a defence to trespass to the person or the other intentional torts,[38] there is certainly an argument that even a reasonable mistake with respect to a perceived threat should not excuse a defendant from liability. On the other hand, since there are a number of situations where mistake is relevant as a component of other defences—such as lawful arrest, where a reasonable but mistaken belief that a person has committed an arrestable offence will excuse a policeman from liability

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[32] *Ashley, supra* note 1 at para. 91.

[33] While the defendant might also have very little control in a situation in which he had been led to believe that the claimant posed an imminent threat, he would at least have the ability to decide whether or not to act in response to that perceived threat.

[34] In a parallel situation, old cases suggest that a person who, in seeking to defend himself, strikes an innocent bystander, may not argue self-defence. See, *e.g.*, *The Case of Thorns* (1466) Y.B. 6 Ed. Fo. 7 pl. 18 and *Lambert v. Bessey* (1681) T. Ray 421, both cited in Simon Deakin *et al*., eds., *Markesinis and Deakin's Tort Law*, 6th ed. (Oxford: Oxford University Press, 2008) at 462.

[35] See discussion *supra*, Section III. A.

[36] See *supra*, text accompanying note 12 *et seq*.

[37] See *supra*, text accompanying note 15.

[38] See, *e.g.*, discussion in John Murphy, ed., *Street on Torts*, 11th ed. (Oxford: Oxford University Press, 2005) at 85.

for false imprisonment—it is difficult to argue conclusively that a reasonable mistake should not offer a legitimate basis for establishing self-defence. Again, though, in view of the fact that the purpose of battery is to recognise a person's right not to be attacked, there is much to be said for a rule under which the victim of a battery would be entitled to a remedy in all but the most extreme circumstances—*i.e.*, those where he had actually initiated, or was about to initiate, an attack on the defendant. It is, however, extremely unlikely in the wake of *Ashley* that this issue will fall to be reconsidered again in the near future—and the requirement that the defence be available only if the defendant's belief in an imminent attack is both honest and reasonable is probably enough to satisfy the demands of justice in most situations (at least if confined to circumstances where that belief is triggered by the conduct of the claimant rather than being attributable to a third party or some other factor).

Ashley is also significant for its predictable yet welcome confirmation that, in tort law, the burden of proving self-defence lies with the defendant, and that Dobbs J. in the High Court was therefore wrong in holding that it was for the Ashleys to disprove that P.C. Sherwood had acted in self-defence. It is a well-established principle of civil law that a claimant bears the burden of making out a *prima facie* case, while the burden of establishing a defence to that *prima facie* case is borne by the defendant. This is quite right and proper, since logic demands that the person making the relevant assertion be the one to substantiate it. While there is obvious justification for applying different criteria in criminal law—where liability leads to both punishment and social stigma—it would create a serious imbalance in the defendant's favour, and run counter to the interests of justice, to place the burden of disproving a defence on the claimant in a civil law action.[39]

Another notable feature of the decision is the majority's conclusion that the assault and battery action to vindicate Mr. Ashley's right not to be shot could be pursued notwithstanding the fact that full compensatory damages had already been agreed with respect to the events surrounding the shooting. In recent years, a number of major tort law decisions have had their origins in the vindication of rights[40]—whether in the context of protection from life-threatening risks in the workplace,[41] physical self-determination with respect to medical treatment,[42] or, as in *Ashley*, security from unwarranted bodily attack. While in most such cases recognition of the relevant rights has offered the only avenue to establish liability and thus to obtain compensation, the majority of their Lordships in *Ashley* were surely correct in accepting that an action founded on vindication of rights can arise regardless of whether a claimant has any other cause of action, and regardless of whether there is any additional financial element to his claim. In a case such as *Ashley*, the individual (or the individual's representative) seeks a vindicatory ruling in order to obtain judicial

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[39] For general consideration of the burden of proof in tort law, and of the fact that, while normally efficient and appropriate, it occasionally requires to be relaxed in the interests of equality and corrective justice, see Ariel Porat & Alex Stein, *Tort Liability Under Uncertainty: Evidential Deficiency and the Law of Tort* (Oxford: Oxford University Press, 2001) at 57 *et seq*.

[40] For discussion of the move towards a more "rights based" approach to negligence, see, *e.g.*, Kumaralingam Amirthalingam, "The Changing Face of the Gist of Negligence" in Jason W. Neyers, Erika Chamberlain and Stephen G. A. Pitel, eds., *Emerging Issues in Tort Law* (Oxford and Portland, Oregon: Hart Publishing, 2007) 467 at 468 *et seq*.

[41] See, *e.g.*, *Fairchild*, *supra* note 25.

[42] See, *e.g.*, *Chester*, *supra* note 23.

acknowledgment that he has suffered a particular wrong. The opportunity to obtain such an acknowledgment should not be refused simply because liability has already been established, and compensation has already been awarded, for a different wrong. As Lord Rodger observed,[43] litigants commonly argue that several causes of action have arisen from a single incident. While such arguments are normally motivated by a desire to spread the chances of establishing liability, they may equally—and perhaps more importantly—be motivated by a desire to receive a ruling that the defendant has committed distinct wrongs attracting differing levels of moral blameworthiness. Lord Carswell's objection that civil courts exist not to conduct public inquiries but to award compensation[44] is only partly accurate. While it is clearly not the role of the courts to carry out public investigations, their role goes beyond merely awarding compensation—as is evidenced by the fact that torts such as assault and battery have always been actionable without proof of damage, and have thus always given rise to claims for purely nominal, vindicatory damages. Where such torts are concerned, the vindication of rights may frequently go hand in hand with, but will be independent of, questions of compensation. If the consequence of allowing vindicatory actions is a more expensive and time-consuming judicial process, then that is the price which must be paid for recognising that aggrieved persons should be entitled to pursue all their claims.

Of the various aspects of the decision, the one which may in the end be the most influential—certainly in the academic context—is the excellent analysis of the differences between civil and criminal law. Lord Scott, in particular, offered an admirably clear explanation of these differences, and of the respective roles of tort and criminal law in common law systems. Although his Lordship considered and compared the two branches of law in three separate contexts—the nature of the defendant's belief in the threatened harm, the burden of establishing self-defence, and the significance in civil law of an acquittal on criminal charges—his observations contain an understandable degree of overlap. His over-arching conclusion—that the severe penalties associated with criminal conviction require the exercise of considerable caution in establishing guilt on the part of the accused, whereas the non-punitive, compensatory and vindicatory role of civil law places a justifiable emphasis on the rights of the claimant—is unimpeachable. And while this conclusion merely reiterates long-recognised tenets, its application to the facts of *Ashley* offers a very useful example of the distinct functions served by a civil action for battery and a prosecution for criminal assault, as well as confirmation that an unsuccessful prosecution need not necessarily result in a similarly unsuccessful civil suit.

V. Police Liability for Civilian Shootings in the U.K. and Singapore—Some Observations

While criminal prosecutions, civil actions, internal investigations and calls for public inquiries into injuries and death due to wrongful shootings by the police are not a frequent occurrence in the U.K., they are not entirely uncommon either, particularly in situations of mistaken identity. Past decades have seen several heavily

[43] See *supra* text accompanying note 25.
[44] *Supra* note 27.

publicised shootings in such circumstances, including those of Stephen Waldorf and Harry Stanley.[45] And probably the highest-profile mistaken identity shooting in recent years was that of Jean Charles de Menezes. De Menezes, a Brazilian national, was shot dead by police at a tube station in London on 21 July 2005, after being mistaken for a terrorist. Following two investigations by the Independent Police Complaints Commission (IPCC), the Crown Prosecution Service concluded that there was insufficient evidence to prosecute any of the individual officers involved in the shooting, but the Metropolitan Police was prosecuted for, and later convicted of, "failing to provide for the health, safety and welfare of Jean Charles de Menezes".[46] No civil suit has been initiated by the de Menezes family,[47] who rejected the apology which the police issued immediately after the shooting. They and others have consistently called for a public inquiry to take place, although to date none has been initiated.

Since there has been no civil claim in the de Menezes case, and since *Ashley* was decided only months before the de Menezes inquest was held, it would be inappropriate to seek to draw any direct parallels between the two cases. However, it is hard to avoid the conclusion that while their Lordships' decision in *Ashley* has improved—or at least clarified—the chances of success in civil actions brought against the police for shooting members of the public, the difficulties inherent in prosecuting the police officers who are responsible for such shootings, and in persuading the state to conduct public inquiries into such incidents, remain as strong as ever.[48]

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[45] Stephen Waldorf was a film editor, who was shot and seriously injured by the police while sitting in his car in a traffic jam in Earls Court, London, in January 1983. Waldorf, who had been mistaken for an escaped prisoner, eventually made a full recovery, and was paid £150,000 in compensation. Two police officers were tried for his attempted murder, but were acquitted of all charges in October 1983. Harry Stanley was shot and killed by two police officers when returning home from a pub in Hackney, London, having been mistaken for a suspected Irish terrorist. The first inquest into Stanley's death resulted in an open verdict, after the coroner directed that the jury must reach an open verdict or one of lawful killing. His widow petitioned the High Court for judicial review, and the Court ruled that there had been "insufficient inquiry". A second inquest was held, and this time the jury returned a verdict of unlawful killing, which led to the two police officers being suspended. However, in May 2005, the High Court decided that there was "insufficient evidence" for the verdict of unlawful killing, and restored the open verdict of the first inquest. In October 2005, the CPC decided not to charge the two officers, and in February 2006 the IPCC published a report recommending that no further disciplinary action be brought against them. The Stanley family expressed "bitter disappointment".

[46] The first IPCC investigation, while recommending changes to operational procedures, decided that no officer involved in the shooting should face disciplinary charges. The second strongly criticised the police command structure and brought pressure on the Metropolitan Police Commissioner to resign. The prosecution of the Metropolitan Police, under the *Health and Safety at Work Act 1974* (U.K.), 1974, c. 37, ss. 3(1) and 33(1)(a), resulted in a fine of £175,000 and an order to pay £385,000 in costs. In December 2008, at the end of the inquest in de Menezes' death, the coroner barred the jury from reaching a finding of unlawful killing (a ruling with respect to which Mr. de Menezes' family lodged an immediate application for judicial review). The jury returned an open verdict on the questions of whether the police honestly believed at the time they fired that Mr. de Menezes represented an imminent mortal danger to them and/or others around them, and whether they used no more force than was reasonably necessary in the circumstances—thus indicating that they were not satisfied on these points.

[47] It was, however, reported at the time that the family had been offered £585,000: see, *e.g.*, "London Police Chief Defends Handling of Shooting" *New Zealand Herald* (22 August 2005).

[48] The de Menezes shooting has been likened in the media to that of Ashley, as well as the shootings of Waldorf and Stanley, *supra* note 45.

In Singapore, shootings of suspects by the police are occasionally reported,[49] although no such incidents appear to have given rise to any criminal prosecutions or civil actions. There seems to be tacit acceptance that the police in Singapore should be armed, and that they should use their arms when necessary. However, concerns are occasionally raised about the possible lack of police accountability. For example, in 2008, a number of changes were made to the *Penal Code*.[50] One was the addition of an illustration to section 79, which affords the defence of justification—the equivalent, certainly for police officers acting in the line of duty, of the defence of self-defence under U.K. criminal law. Under the section, "Nothing is an offence which is done by any person who is justified by law, or which by reason of a mistake of fact and not by reason of a mistake of law in good faith believes himself to be justified by law, in doing it".[51] The new illustration, which was introduced to explain the ambit of the defence in counter-terrorism operations, gives an example very similar to the scenario in the de Menezes case, in which a person fitting the profile of a possible terrorist is shot by a police officer who considers him to be acting suspiciously in an underground station.[52] Some critics have expressed misgivings about the degree of latitude to "shoot to kill" on the part of the police which this illustration suggests.[53]

In addition, one of the proposed amendments in a new *Criminal Procedure Code Bill*[54] which is being introduced with the aim of repealing and replacing the current

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[49] See, *e.g.*, Elena Chong, Carolyn Quek & Teh Joo Lin, "Knife-Wielding Suspect Shot Dead at MRT" *The Straits Times* (6 March 2008), online: Asiaone News http://www.asiaone.com/News/AsiaOne+News/Crime/Story/A1Story20080306-53088.html. The item concerned a 43 year-old man who had been shot dead at Outram Park MRT station the previous day. The man had apparently fled after fatally stabbing another man at a nearby food centre. Bystanders had given his description to the police, and he was spotted a short while later by two police officers at Outram MRT. One of the officers shot him dead after he reportedly took a knife from his bag and lunged at them when they approached him.

[50] *Penal Code*, *supra* note 3. The *Penal Code (Amendment) Bill* was passed by Parliament on 23 October 2007, and the amendments came into force on 1 February 2008.

[51] *Penal Code*, s. 79, *ibid*. For further discussion of this section, see *supra* note 16.

[52] The illustration reads:

> (c) *A*, a police officer, is deployed to perform patrol duty at an underground train station. *A* receives information from police headquarters that someone is attempting to plant a bomb in the public transport system. The profile of the suspect is also provided. While patrolling the underground train station, *A* sees *Z*, who fits the profile. *Z* is seen carrying a backpack and behaving suspiciously. *A* approaches *Z* and orders him to stop. *Z* suddenly starts running towards a crowd in the station. *A*, after assessing the circumstances of the case, and to the best of his judgment exerted in good faith, believes that *Z* has a bomb and will set it off. *A* shoots *Z* and *Z* dies as a result. *A* has committed no offence, even though it may turn out that *Z* was not carrying a bomb.

[53] See, *e.g.*, Sylvia Lim, "Send Penal Code Amendments to Select Committee", online: The Online Citizen <http://theonlinecitizen.com/2007/10/put-penal-code-amendments-to-select-committee-ncmp-sylvia-lim/> where Non-Constituency Member of Parliament Sylvia Lim referred specifically to the parallels with the de Menezes case. Other commentators, however, have suggested that since good faith is defined under s. 52 of the *Penal Code*, *supra* note 3, as "due care and attention", which arguably implies the need for reasonableness, the risk of abuse will be inherently limited. (Note that a requirement of reasonableness is explicitly included in s. 100 (a) and (b), under which the right of private defence is extended to acts causing death where the defendant reasonably apprehends that he faces the risk of death or grievous injury.)

[54] See Sing., Ministry of Law, Legal Policy Division, *Consultation on the Criminal Procedure Code Bill* [*Consultation*]. The consultation period was 11 December 2008 to 28 February 2009.

Criminal Procedure Code,[55] is a change to the current section 111, which provides that "every police officer may interpose for the purpose of preventing and shall to the best of his ability using all lawful means prevent the commission of any offence".[56] Under the proposed change, the concept of interposition will be "strengthened to be in line with current operating realities".[57] A defence will be available to a police officer who uses "lethal force based on the reasonable belief that a person has committed or is, either alone or in concert with others, preparing to commit a terrorist act, and where the use of such force was necessary to effect his apprehension".[58]

Between them, section 79 of the *Penal Code* (as explained by new illustration (c)) and the proposed amendment to section 111 of the *Criminal Procedure Code* clearly extend the circumstances within which the police may use lethal force, even when that force is not necessitated on the grounds of immediate self-defence. And while these provisions do not, of course, guarantee the failure of any civil action which might be brought against a police officer for the use of lethal force in such circumstances, in practice it seems unlikely that such an action would be brought—or that, if brought, it would be regarded sympathetically by the courts.

VI. Conclusion

The decision of the House of Lords in *Ashley* is to be welcomed for its confirmation that while the severe penalties associated with criminal liability require the law to take a somewhat flexible approach to the scope of self-defence in a prosecution for criminal assault, considerably less flexibility is necessary in a civil action for the tort of battery. Their Lordships' decision that a defendant who pleads self-defence in tort must at the very least honestly and reasonably believe that he faces an imminent threat is manifestly correct. *Ashley* is also notable for its clear and illuminating discussion of the contrasting roles of criminal and civil law, and for its conclusion that a claimant at civil law should be entitled to exhaust all the causes of action which arise from the facts of his claim, regardless of any additional compensation to which these individual causes of action may give rise. Moreover, while the decision does not comment specifically on the position of the police as defendants in civil actions for battery, its outcome confirms that—while taking account of the special pressures under which police officers operate—the liability of the police for committing intentional acts which cause bodily harm is to be assessed according to the same criteria as are applied to other defendants.

Ashley is likely to be embraced in other common law jurisdictions, not least because its conclusions with respect to self-defence in the tort of battery are, on the whole, confirmatory rather than ground-breaking. For this reason, it is probable that, should the issue of self-defence arise in a general tort law context in Singapore, the courts here will choose to apply their Lordships' analysis. Where the specific liability of the police is concerned, the picture might, however, be somewhat different. Not only do recent changes to the *Penal Code* and proposed changes to the *Criminal*

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[55] *Criminal Procedure Code*, *supra* note 4.
[56] *Ibid.*, s. 111.
[57] *Consultation on the Criminal Procedure Bill*, *supra* note 54 at para. 16.
[58] *Ibid*.

Procedure Code suggest that (certainly in the realm of anti-terrorism activities) the prosecution of a police officer for shooting a member of the public would be even less likely to succeed here than in the U.K, but history suggests that in the civil law arena there is little appetite in Singapore for bringing actions against those whose role is to defend the community.