

## CASES

## Police Shootings and the Role of Tort

Phil Palmer\* and Jenny Steele\*\*

In *Ashley v Chief Constable of Sussex*, the House of Lords ruled that a civil claim in trespass to the person may be sustained against an individual police officer in respect of a fatal shooting, in circumstances where the officer had already been acquitted in criminal proceedings and where liability to compensate in respect of all losses had been conceded. Two members of the majority clearly ruled that trespass torts may have a vindicatory purpose which survives a concession of liability to compensate, thus deepening the connection between tort, and the protection of fundamental rights, and suggesting an intriguing distinction between the functions of civil and criminal law.

*Ashley and another v Chief Constable of Sussex Police*<sup>1</sup> (*Ashley*) was a civil claim arising from the fatal shooting of a suspect by a police officer. Originally, the claim was framed in terms of a number of different torts and related not only to the shooting itself but also the planning of the raid, the briefing that preceded it, and post-shooting events. However, during the proceedings the Chief Constable accepted liability in negligence and (later) false imprisonment, and comprehensively admitted liability to compensate the claimants for all damage flowing from the shooting (including aggravated damage). The issue which divided the Court of Appeal, and then the House of Lords, concerned the sustainability of a civil action in trespass to the person, given that no compensatory purpose in respect of the shooting itself appeared to remain unfulfilled. By a narrow majority the Lords, like the Court of Appeal, determined that there was still an issue which could appropriately be permitted to go to trial, raising important questions about the purpose of trespass torts. The House was not required to consider the availability of a claim in misfeasance in a public office in respect of post-shooting events. The Court of Appeal had directed that no further steps should be taken in respect of this claim until the issue of injury flowing from the relevant events had been resolved.

The case also raised an important issue in respect of the relationship between criminal and civil actions for trespass. The House concluded unanimously that the criteria for establishing self-defence in criminal law and civil law were justifiably different. The difference reflected the functions of the two systems of law. In punishing criminal wrongdoing the courts should have regard to the subjective

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The views expressed in this note are the authors' alone and any errors are our responsibility. With that proviso, we are extremely grateful to Mark Telford for comments on an earlier draft, and to members of the National Police Improvements Agency.

1 [2008] UK HL 25, (2008) 2 WLR 975.

personal knowledge of an accused person before any liability can be established. Since this was a civil claim, discussion of the criminal law was understandably truncated. The House did not point out therefore that the justice of the subjective test for self-defence in criminal law has itself been intensely debated, in part on the grounds that it does not sufficiently protect the right to life.<sup>2</sup> Lord Scott in particular proposed that the function of the civil law of tort is to provide a framework for compensation for wrongs which holds the balance fairly between the conflicting rights and interests of different people.<sup>3</sup> Rather than responding to harm caused through the defendant's fault, the civil trespass claim was concerned with establishing lawfulness or entitlement to shoot. Tort on this interpretation has a particular affinity with the protection of human rights, and its principles should not necessarily be modelled on the position reached – not without controversy – in the criminal law.

Beyond these issues of legal principle, the case of James Ashley also echoes previous controversial police shootings. More than 20 years ago armed officers shot and seriously wounded an innocent man, Steven Waldorf, believing him to be a dangerous criminal. Two officers were later acquitted on charges of attempted murder and wounding with intent. Serious questions were also raised about the cases of Harry Stanley, who was shot in September 1999 when the table leg that he was carrying was mistaken for a sawn-off shotgun, and of Andrew Kernan, a schizophrenic who was shot dead by police in Liverpool in July 2001. Recently, following the fatal shooting of Jean Charles de Menezes after he was mistaken for a terrorist, the Independent Police Complaints Authority concluded that all of the 15 officers they had investigated should not face any further proceedings. The *Ashley* litigation raises the possibility of a civil action in battery in such cases.

## THE CONTEXT

At 4.20am on 15 January 1998 armed police raided a flat in St Leonard's on Sea. The flat was occupied by James Ashley who was believed to have been involved in the supply of class A drugs and had previous convictions for firearms offences and violence. According to the police,<sup>4</sup> as the armed police team entered a bedroom Ashley moved quickly towards them and raised one or both of his hands. Within seconds he had been shot dead by a police firearms officer, PC Sherwood. Ashley was naked and unarmed when shot.

The Ashley family made a referral to the Police Complaints Authority (PCA) who commissioned two experienced and highly respected police officers to report into what had happened. Barbara Wilding, then Assistant Chief Constable of Kent, was asked to investigate the facts surrounding the shooting. The late Sir

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<sup>2</sup> See for example F. Leverick, 'Is English self-defence law incompatible with Article 2 of the ECHR?' [2002] Crim LR 347; J. C. Smith, 'The Use of Force in Public or Private Defence and Article 2' [2002] Crim LR 958; and F. Leverick, 'The Use of Force in Public or Private Defence and Article 2: A Reply to Professor Sir John Smith' [2002] Crim LR 963.

<sup>3</sup> n 1 above, Lord Scott at [17]–[18].

<sup>4</sup> The police account is summarised by Sir Anthony Clarke MR in the Court of Appeal, [2006] EWCA Civ 1085; (2007) 1 WLR 398 at [16].

John Hoddinott, then the Chief Constable of Hampshire, was asked to produce a report into the involvement of the Sussex chief officer team. Parts of the information in the reports were leaked to the press, specifically to the Guardian, which published a detailed article.<sup>5</sup> The Guardian article formed the basis for comments in Parliament by Louise Ellman, MP for Ashley's constituency of Liverpool Riverside, suggesting that the Wilding and Hoddinott reports had been highly critical of the Sussex command team.<sup>6</sup> Neither report has ever been fully published or exposed to public scrutiny, though in the Court of Appeal it was noted by Sir Anthony Clarke MR that much that they contain has made its way into the public domain.<sup>7</sup>

The CPS declined to prosecute any of the senior officers involved and in May 2001, following a submission of no case to answer, the presiding judge halted the Old Bailey trial of PC Sherwood. At a separate trial, the officers who planned the raid were acquitted. According to Louise Ellman, 'the CPS offered no evidence, alleging that the depth of corporate failure in Sussex Police was too great to make any individual responsible'.<sup>8</sup>

Following the criminal proceedings, several civil claims were brought by the family of the deceased including assault and battery, or alternatively negligence, by the officer who had done the shooting; negligence and misfeasance in public office regarding preparation for the raid; and negligence and misfeasance in public office regarding the post-shooting conduct of the police. Dobbs J accepted police arguments that the Hoddinott and Wilding reports were 'irrelevant' to the issues in the case. Nevertheless the Chief Constable admitted negligence and false imprisonment and took full responsibility for any damage caused by the shooting. The issue of why he made such far-reaching concessions is interesting in itself and is explored below. However he denied assault and battery (and apparently negligence) on the part of the officer who shot Ashley.

The judge gave summary judgement for the claimants in respect of negligence and false imprisonment; and gave summary judgement for the Chief Constable both for the claim for battery and for misfeasance in public office after the raid.

On appeal, the Court of Appeal held that the misfeasance claim in respect of post-shooting events should not be struck out. Nor were the reports 'irrelevant': indeed they dealt directly with many of the same issues raised by the misfeasance claim. Further, it was in the public interest for the claimants to see a 'redacted' version of the reports, edited to remove irrelevant material, and disclosure was therefore not defeated by reason of public interest immunity. However, the Court of Appeal directed that the misfeasance claim should not proceed until the issue of injury flowing from the post-shooting events had been resolved. By reference to the House of Lords' decision in *Watkins v Home Office*,<sup>9</sup> it was clear that a misfeasance claim could not be pursued simply in order to seek exemplary damages. 'Material damage' is a prerequisite for such a claim.

5 N. Hopkins and M. Dean, 'Top Officer Condemned over Failed Police Raid' *The Guardian* May 23 2001.

6 Hansard 11 Feb 2002 Column 46.

7 n 4 above at [167].

8 Hansard 11 Feb 2002 Column 47.

9 [2006] UKHL 17; [2006] 2 AC 395.

As to the claim in battery, the Court of Appeal held that while in criminal proceedings the burden of disproving self-defence was on the prosecution, in civil proceedings the burden of establishing self-defence rested with the defendant. Further, while in criminal proceedings, a defendant who honestly but mistakenly has the belief that it is necessary to act in self-defence was entitled to be judged on the basis of the mistaken belief, in civil proceedings the defendant's mistaken belief had to be both honestly and reasonably held. Concluding by a majority that there was also still a legitimate purpose to be pursued by a trespass action despite the admission of liability to compensate, the Court of Appeal determined that the claim should go to trial.

The Chief Constable appealed. The issues before the House of Lords were summed up by Lord Scott as follows:<sup>10</sup>

1. Does self-defence in a civil law claim for assault and battery, in a case where a person has acted in the mistaken belief that he/she is in imminent danger of attack, require that the assailant acted under a mistaken belief that was both honestly and reasonably held? (the first issue); and
2. Should the assault and battery claims, based on the fatal shooting, be allowed to proceed to trial? (the second issue).

### THE FIRST ISSUE: SELF-DEFENCE IN A CIVIL ACTION

Lord Scott identified three 'solutions' suggested by the Court of Appeal as the possible requisites for a successful plea of self-defence:<sup>11</sup>

Solution one: the necessity to take action in response to an attack or imminent attack must be judged on the assumption that the facts were as the defendant honestly believed them to be, whether or not he was mistaken and, if he made a mistake of fact, whether or not it was reasonable for him to have done so;

Solution two: the necessity to take action in response to an attack or imminent attack must be judged on the facts as the defendant honestly believed them to be, whether or not he was mistaken, but, if he had made a mistake of fact, he can rely on the fact only if the mistake was a reasonable one for him to have made;

Solution three: in order to establish the relevant necessity the defendant must establish that there was in fact an imminent and real risk of attack.

The Court of Appeal held that solution two was the proper approach to take, the Chief Constable maintained that solution one was correct, whilst the family argued for the third solution.

The House of Lords accepted that, for the purposes of criminal law, solution one applied. This subjective approach was established in *R v Williams (Gladstone)*<sup>12</sup> where the Court held that a defendant could rely on self-defence if his belief in its necessity was genuine even if the belief was mistaken and unreasonable. It was also applied by the Privy Council in *Beckford v R.*<sup>13</sup> Presumably, had there been a full trial, PC Sherwood would have argued that he shot Ashley in the mistaken

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<sup>10</sup> n 1 above at [15].

<sup>11</sup> n 1 above at [15].

<sup>12</sup> [1987] 3 All ER 411.

<sup>13</sup> [1988] AC 130.

belief that he was armed and posed an imminent threat. In any criminal trial, if he claimed that he was acting in self-defence and that his belief was genuine, there would be no additional requirement for him also to show that belief to be reasonable.

The Chief Constable submitted that the criteria for self-defence in civil law should be the same as in criminal law, and that any continued prosecution of the assault and battery claim would be an unlawful collateral attack on PC Sherwood's acquittal, infringing the rule against double jeopardy. These arguments were unanimously dismissed by the House of Lords. Lord Scott said that '[the] plea for consistency between the criminal law and the civil law lacks cogency for the ends to be served by the two systems are very different'.<sup>14</sup> All the other judges echoed his statement in various ways. Lord Bingham suggested that 'the test of self-defence as a defence in a civil action is well understood. There is no reason in principle why it should be the same test as in a criminal trial, since the ends of justice which the two rules respectively exist to serve are different'.<sup>15</sup> Their Lordships therefore endorsed the Court of Appeal's adoption of 'solution two' in this case.

But what distinct 'ends of justice' are served by the criminal and civil law? Gavin Dingwall, in a comment on the Court of Appeal decision, proposed that 'someone who used force because he genuinely believed he was about to be attacked does not deserve to be prosecuted, convicted and punished, assuming the force he employed was objectively reasonable. However, if that initial belief was unreasonable, it is appropriate that he compensates his innocent victim'.<sup>16</sup>

Lord Scott explained the contrasting role of civil liability slightly differently:

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 right not to be subjected to physical violence by A.<sup>17</sup>

The emphasis here is not on compensation as such, but on the definition of the rights of the claimant and negotiation of the conflict between the defendant's actions and these rights. Lord Scott proposed that the general purpose of the civil law of tort 'is to identify and protect the rights that every person is entitled to assert against, and require to be respected by, others'. Where the rights of claimants run counter to the rights of others 'the civil law, and in particular the law of tort, must strike a balance between the conflicting rights'.<sup>18</sup>

These comments help to explain the strength of Lord Scott's reasoning not only on issue one, but also on issue two. Lord Scott clearly took the view that compensation for loss suffered is not the sole function of the law of tort, and that the Chief Constable's efforts to remove compensation as an appropriate goal for

<sup>14</sup> n 1 above at [17].

<sup>15</sup> n 1 above at [3].

<sup>16</sup> G. Dingwall, 'Self-Defence; Difference between Civil and Criminal Law' (2007) 119 *Journal of Criminal Law* 71.

<sup>17</sup> n 1 above at [18].

<sup>18</sup> n 1 above at [18].

this action were therefore misplaced. Although Lord Scott expressed the point broadly, it would appear that trespass is distinctively different in this respect from ‘damage-based’ torts such as misfeasance in a public office,<sup>19</sup> or negligence. Even if liability to compensate has been admitted, if the merits of the trespass claim have not been heard then the definition and protection of rights remains as a legitimate goal. This goal may be served by a declaratory remedy, or through damages. The answers to issues one and two are therefore related, because the function of trespass torts in defining and protecting rights explains the answers to both questions.

### **The amount of force used**

It is important to note that the amount of force used in self-defence must also be objectively reasonable and proportionate.<sup>20</sup> A defendant in a civil case therefore cannot rely on an honest and reasonable belief in the need for self defence or the use of force, if the force employed was unreasonable or disproportionate in the circumstances. But equally, it may clearly sometimes be lawful to shoot a suspect who presents or appears to present an imminent threat to life.

### **DEFINING REASONABLE BELIEF: THE ROLE OF THE POLICE BRIEFING**

The considerations that should be taken into account in determining what might be considered reasonable belief in the circumstances of this case will be a particularly important issue at any trial of the civil claim. Hinting at this, Lord Rodger referred to a situation ‘where D shoots V, in the reasonable belief that V is about to attack him, but that belief is based to a material extent, not on V’s actions, but on something which D has been told previously by a third party.’ He concluded that he would ‘wish to leave the effect of a reasonable belief of that kind open for further discussion’.<sup>21</sup>

Lord Neuburger was more explicit: in any claim against PC Sherwood it should be open to him to ask the court to take into account what he had been told at the briefing, when considering whether his belief at the time he shot Mr Ashley was reasonable, even if what he was told was negligently relayed to him.<sup>22</sup>

If this is the correct approach, then if PC Sherwood can show that his belief that he was facing an imminent threat was reasonably held, notwithstanding that the belief was based on non-existent facts, he can rely on self-defence to defeat a civil claim in battery. Presumably, the test is what a reasonable constable, firearms

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<sup>19</sup> n 9 above and accompanying text.

<sup>20</sup> n 1 above at [24].

<sup>21</sup> n 1 above at [54].

<sup>22</sup> n 1 above at [93]. The full content and nature of the pre-shooting briefing in the Ashley case is not fully known. However in her statement to Parliament (n 6 above), Louise Ellman claimed that, ‘experts on firearms and the law told Kent police that even if the intelligence had been correct, the firearms should not have been authorised’. Hansard 11 Feb 2002 Column 46. Negligence in respect of the pre-raid planning and briefing was explicitly conceded: n1 above at [10].

trained and equipped to manage conflict and intervene in potentially violent situations, would believe given the preparation he received. But this approach opens up the possibility of significant conflict between the interests of PC Sherwood and other officers, indeed ultimately of his Chief Constable, in the conduct of his defence at any civil trial. In order to avoid liability in trespass, PC Sherwood (and thus the Chief Constable) may need to argue that the briefing was such that he was reasonable in holding the beliefs that he held. The trespass claim is focused on the shooting itself, since trespass is concerned with the direct application of force. But establishing self-defence will require argument about the events that led to the shooting, and potentially therefore exploration of the briefing itself.

The considerations that will be relevant to the reasonableness of PC Sherwood's beliefs at the time of the shooting are at the heart of most police operations where either lethal or less than lethal options have been deployed. Operational decisions are not made with the luxury of hindsight enjoyed by the court: 'the postulated balancing of risk against risk, harm against harm is not undertaken in the calm analytical atmosphere of the courtroom . . . but in the brief second or two in which the accused had to decide whether to shoot or not under all the stresses to which he was exposed.'<sup>23</sup> When judging reasonableness, material considerations may also include the information officers had been given about the identity, behaviour and supposed character of the target; the target's believed criminal activities; and the strength of the intelligence upon which the briefing is based.

It is also significant that the aim of most operations involving the authorised use of firearms is to identify, locate, contain and neutralise the threat posed. While conflict management within the Police Service normally aims to contain and/or minimise threats, the degree of threat justifying the deployment of firearms officers is such that it must be neutralised (that is, ensuring no continuing threat exists).<sup>24</sup>

These considerations raise issues about the extent to which information impacts on the involved officers. The policy of an individual Police Force in respect of use of force, equipment, training and officer competence will be influential. Once the decision had been made to deploy potentially lethal force, the implications for those subjected to that force are brutally clear:

When it is considered necessary to open fire on a subject . . . police officers need to shoot to stop an imminent threat to life . . . Research has indicated that only shots hitting the central nervous system (which is largely located in the central body mass) are likely to be effective in achieving rapid incapacitation. Shots which strike other parts of the body cannot be depended upon to achieve this.<sup>25</sup>

To have a reasonable belief that an individual presents a risk sufficient to use this type of force should require a police officer to have reached some level of certainty

<sup>23</sup> Lord Diplock, *AG's Ref (NI) (No 1 of 1975)* [1977] AC 105 at 138.

<sup>24</sup> See Association of Chief Police Officers, *Manual of Guidance on Police Use of Firearms* (2003) Chapter 5 at 8.1.

<sup>25</sup> *ibid* Chapter 5 at 6.1.

about the nature of the force to be used, based on reasonable grounds. Even if there were imperfections in the information given to the officer, he or she may still believe that they have reasonable grounds to use lethal force in the circumstances. However if they are aware of imperfections in the information they may find it more difficult to show they had reasonable grounds to have any substantial degree of certainty.<sup>26</sup>

### **TRESPASS, NEGLIGENCE AND RESPONSIBILITY**

The decision to use force is an individual one based upon the apprehension of an imminent attack. This is well known to operational police officers. As far as the use of lethal force is concerned the policy is clear:

The ultimate responsibility for firing a weapon rests with the individual officer, who is accountable ultimately to the law in the courts. Individual officers are accountable and responsible for all rounds they fire and must be in a position to justify them in the light of their legal responsibilities and powers . . .

A Gold or Silver Commander can authorise when shots may be fired but such authorisation will not exempt an individual from their responsibility. No general rule can be laid down and much will depend on the circumstance of individual incidents.<sup>27</sup>

An officer who uses lethal force, and has no reasonable grounds so to do, may be subject to a civil claim for battery. Those who give an inaccurate briefing cannot be liable in battery,<sup>28</sup> though they may be liable in other torts, such as negligence. This illustrates the limitations of the trespass torts. But at the same time, in defending the trespass action (having admitted liability in negligence), the Chief Constable may be forced to bring evidence to show that inaccurate information was given to PC Sherwood which would cause him to believe that the deceased posed an imminent threat.<sup>29</sup> As such, the defence of the trespass action may necessitate the sort of inquiry into the nature of the pre-operation briefing that the Chief Constable has been keen to discourage.

### **THE SECOND ISSUE: SHOULD THE TRESPASS CLAIM BE ALLOWED TO PROCEED TO TRIAL?**

In what Lord Scott described as, 'an important, and remarkable, concession regarding damages',<sup>30</sup> the Chief Constable accepted liability for all consequential damages caused by the shooting. This included a concession in respect of aggra-

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26 See Dr J. Rogers, 'Shoot, identify and repent? 155 NLJ 1273.

27 *ibid* Chapter 5 at 31 and 51.

28 Trespass to the person is actionable only in respect of the direct application of physical force. At the same time, there can be vicarious liability for trespass: *Lister v Hesley Hall* [2001] UKHL 22; [2002] 1 AC 215; *Mattis v Pollock* [2003] EWCA Civ 887; [2003] 1 WLR 2158.

29 n 1 above at [94].

30 n 1 above at [12].



vated damages, despite the fact that in their Lordships' opinion, it is not at all clear whether aggravated damages are available in principle in an action in negligence. Nevertheless he steadfastly refused to accept any liability in respect of trespass. His intention in making these admissions was, as Lord Scott explained, probably to ensure that the additional claim of trespass to the person – disclosing unlawfulness – would not be subject to adjudication.<sup>31</sup> The Chief Constable submitted that any remedies following a finding of liability for trespass would not add anything to quantum of compensatory, including aggravated damages, any such action was an abuse of process which should be struck out.

This issue divided the House of Lords and indeed in terms of principle it divided both the majority (Lords Bingham, Scott and Rodger) and the minority (Lords Carswell and Neuberger). In the minority, Lord Neuberger thought the issues finely balanced and in the event would have exercised his discretion against permitting the action to proceed – chiefly because of the fulsome nature of previous inquiries into the events, including the discontinued criminal proceedings. Lord Carswell on the other hand disagreed directly with Lord Scott and with the majority of the Court of Appeal, strikingly asserting that:

Both Dobbs J and Auld LJ expressed the opinion, which I think is correct, that the civil courts exist to award compensation, not to conduct public inquiries. Nor is it their function to provide 'explanations', as Arden LJ suggested . . . On the contrary, the existence of a sanction by way of damages is the essential mark of a tort . . .<sup>32</sup>

As such, the trespass action (which may in principle, it seems, result in a declaratory remedy) would be an abuse of the process of the court. Lord Scott, as we have already seen, took the opposing view that the function of civil law – and especially of tort – was not solely to 'award compensation' but to define and protect the rights of the parties. This goal is of course generally performed through compensatory damages.

In the majority, Lord Bingham delivered the shortest opinion. He avoided taking any stance on the appropriate role of the law of tort or of damages, simply pointing out that the claim was a valid one and had not previously been the subject of adjudication: if the claim exposed the claimants to financial risk without the benefit of additional compensation, this was a matter for the 'autonomy of the individual litigant'. It was not the function of the court to 'monitor the motives of the parties'.<sup>33</sup>

Lord Rodger, also in the majority, went some way to accepting Lord Scott's reasoning. In particular, he accepted that in the case of trespass to the person, damages are not confined to a compensatory role, and may pursue a vindicatory purpose.<sup>34</sup> He reasoned that there was still a matter to be tried, because any judg-

31 n 1 above at [23]: 'the Chief Constable has gone to considerable lengths to try to avoid the possibility of an adverse finding of liability in the assault and battery claim'. Note also Lord Rodger at [69]: the motives of the claimants could not be challenged by the defendant 'without calling into question his own real interest in defending the action'.

32 n 1 above at [81].

33 n 1 above at [4].

34 n 1 above at [22] (Lord Scott), [60] (Lord Rodger).

ment for the claimants in a trial of the trespass issue 'would necessarily involve a finding that PC Sherwood had not been entitled to shoot the deceased in self-defence'.<sup>35</sup> This reference to entitlement implies a significant distinction between the nature of the wrong disclosed by trespass, and the nature of the wrong disclosed by negligence, even where the remedies are the same.

Lord Scott, as we have already seen, went the furthest in defining the role of tort in terms of the definition and protection of rights. Lord Scott has explained elsewhere that compensatory damages may also have the purpose of vindicating rights,<sup>36</sup> and he reiterated that point in *Ashley*.<sup>37</sup> In this case however, the admission of liability to compensate, accompanied by denial of the trespass, could not at the same time perform a vindicatory role. As Lord Scott put it: 'it is 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'. The issue is not quantum, but the *purpose* of the damages awarded. Notably, Lord Scott explicitly argued that a claim to vindicatory damages is enhanced by the engagement of Article 2, arguing that the rights under the ECHR are 'at least equivalent to the constitutional rights' which were in play in *AG of Trinidad and Tobago v Ramanoop*<sup>38</sup> and *Merson v Cartwright*,<sup>39</sup> where vindicatory damages were awarded. This is hard to reconcile with the general approach developed by the House of Lords to the Convention rights, where Strasbourg case law, but not constitutional case law from around the Commonwealth, is considered relevant to the interpretation of the rights.<sup>40</sup>

### CONCLUSIONS: KEY ISSUES

*Ashley* then is significant in a number of ways. It raises questions of the relative responsibility of individual firearms officers and of those responsible for planning operations and for briefing them; and clearly endorses divergence between legal tests in criminal and civil law, implying that distinct goals of justice are served by the two. Interestingly, the issue which divided the House of Lords concerns the very function of the law of tort in such a case. Both Lord Scott and Lord Rodger point out that a key function of a trespass action in this case will be to establish whether PC Sherwood was 'entitled' to shoot the deceased. The question is not whether he was 'at fault', but whether his actions were *justified*. This interprets the civil law of trespass as concerned primarily with defining and responding to unlawfulness (the definition and protection of rights). This deepens the likely connections between tort law, and the domestic protection of 'Convention rights', and this connection could also inform debates about subjective or objective tests, and between justificatory and excusatory defences, in criminal law. This is not to say that criminal law should mirror tort in this respect. Lords Scott and

35 n 1 above at [63].

36 *Merson v Cartwright* [2005] UKPC 15.

37 n 1 above at [22].

38 [2005] UKPC 15; (2006) 1 AC 328.

39 n 36 above.

40 See for example *Sheldrake v DPP* [2004] UKHL 42; [2005] 1 AC 264, at [33].

Rodger seem to suggest that tort law is distinctively suited to protection of conflicting rights and interests.

Finally, if self-defence is now raised in the context of a civil claim, the interpretation of reasonable belief described above may turn the spotlight on to the conduct of the pre-operation briefing in the context of an inquiry into unlawfulness. In a sense, this reflects the many dimensions of vicarious liability. In this case, notwithstanding issues of personal responsibility, the individual officer's actions are embedded in and influenced by the enterprise and culture of the 'employer', and shaped by the resources applied to his preparation. In the trespass claim, this may find its expression in the course of an inquiry into self-defence and, therefore, into the individual officer's state of mind and the processes that influenced it.

## International Co-operation in Cross-Border Insolvency: *HIH Insurance*

John Townsend\*

The House of Lords decision in *HIH Insurance* raised important questions about the *pari passu* principle of distribution in cross-border insolvency. This comment examines the case in light of academic debate, arguing that Lord Hoffmann's application of the principle of (modified) universalism achieved distributive justice amongst HIH group creditors.

Professor Fletcher has observed that the interaction of two or more legal systems in a cross-border insolvency provokes a diversity on 'fundamental matters of principle,' which is, 'unusually intense, even by the standards of private international law.'<sup>1</sup> Since any insolvency inevitably involves – as Professor Worthington has put it – a 'shortfall' of the assets of a company against creditors, it follows that differences between jurisdictions on questions of priority create incentives to litigate for creditors of a multinational company.<sup>2</sup> This has been recognised by Professor LoPucki as a noxious type of 'forum shopping.'<sup>3</sup> In an attempt to prevent, or at least to place limits upon, such value-destroying litigation, the approval of the UNCITRAL Model Law on Cross-Border Insolvency by the United Nations General Assembly was an important step towards facilitating future international

\*Pupil, Maitland Chambers, 2007–8. Thanks are due to Professor Vanessa Finch, of the London School of Economics, and the anonymous reviewer of the *Modern Law Review* for their helpful observations on the earlier drafts of this comment.

1 I. Fletcher, *Insolvency in Private International Law* (Oxford: Oxford University Press, 2005) at para 1.11.

2 S. Worthington, *Equity* (2nd ed) (Oxford: Oxford University Press, 2006) 53.

3 L. M. LoPucki, 'Cooperation in International Bankruptcy: A Post-Universalist Approach' (1999) 85 *Cornell Law Review* 696, 721.