# TORT

## SELF-DEFENCE AND THE CIVIL ACTION FOR ASSAULT

One of the most perplexing problems for the student of both the civil and the criminal law has been the extent to which a member of the public may protect himself, or his relatives against acts of violence. This question has once again risen for consideration in South Australia. The Chief Justice, Dr. J. J. Bray, has in the recent case of *Pearce* v. *Hallett*[1] examined in detail the law relating to self-defence in a civil action, with particular emphasis on what constitutes excessive defence.

The facts of the case are complicated. The incident began with the plaintiff Pearce shooting two of the defendant's pet dogs. The plaintiff alleged that one of the dogs had annoyed his pet kangaroo and had frightened it, while the other dog had been near several of his sheep which had been killed by a dog attack. His Honour held that the first shooting was not justifiable since the dog's harrassment of the kangaroo did not fall within the meaning of the Registration of Dogs Act 1924-1966 in that the plaintiff could not show that the kangaroo was in danger of being attacked. The second shooting was held justifiable. On the night after the shooting the defendants, father and son, arrived at the plaintiff's home with the intention of obtaining the bodies of the dead dogs.

After a short conversation the defendant Hallett senior, struck Pearce a blow in the mouth. The plaintiff retaliated immediately, with a series of blows to the defendant's head and chest. During the several minutes that elapsed between the first blow and the end of the fight, the plaintiff, Pearce, continued to attack Hallett senior even though the defendant was retreating and apologizing. It was established that Pearce struck Hallett senior three or four times. These blows resulted in the loosening of Hallett's front teeth and a fracture to a rib.

Hallett junior, the co-defendant, upon seeing his father in difficulty had gone to his aid. The Chief Justice accepted the evidence of an independant witness that the son struck Pearce "four or five times" with "rabbit-killers to the back of the neck". Medical evidence showed that the plaintiff had suffered injuries to the vertebra, and a fractured spine.

The first question considered was whether these blows by Hallett junior could be justified. It was argued that a son was not entitled to defend his father by force against any assault less than a felony. *R.* v. *Duffy*[2] was relied upon, but the court distinguished the case:

> "It was there laid down that anyone is entitled to intervene by force to prevent the commission of a felony, not necessarily as I read the case a violent felony"[3].

Edmund Davies J., reading the judgment of the court states:

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1. (1969) L.S.J. Scheme 303 (Bray C.J.).
2. [1967] 1 Q.B. 63.
3. (1969) L.S.J. Scheme 310.

> "The source of error in this case, as it appears to this court is . . . that the case of Lilian Duffy was not tramelled by any technical limitations on the application of the plea of self-defence, and this court is not here concerned to consider what those limitations are. Quite apart from any special relations between the persons attacked and his rescuer, there is a general liberty even as between strangers to prevent a felony"[4].

The Chief Justice in the present case however, unlike the court in *R.* v. *Duffy* does consider the limitations of the plea of self defence in the context of who can plead it and in what circumstances.

> "In truth however the defence of a parent by a child has always been regarded as comprehended under the plea of self-defence"[5].

This view of the law has been accepted unanimously by text-book writers[6]. It is also supported by an earlier South Australian case *Saler* v. *Klingbiel*[7] where a complete stranger went to the aid of a woman and a one-legged soldier who had been pushed to the ground by an assailant. In this situation the stranger's alleged assault was held justifiable on a plea of self-defence. It was upon the basis of this decision that the Chief Justice decided the blows struck by Hallett junior to be justifiable. The only question which then remained was whether the retaliation by the defendant had been excessive.

The difficulty of establishing on whom the onus of proving the excessive force lay, had first to be determined. Was it for the defendant to show that he had used reasonable force, or was it for the plaintiff as part of his case to show that excessive zeal had been shown in the defence of the father? The position had never been made clear in the case law and there is a multitude of conflicting decisions. The Chief Justice embarked on a long and thorough historical analysis.

Before the passage of the Common Law Procedure Act[8] the case law was clear. If a person wished to prove excessive defence he first had to plead to that. It was not permissible to show excessive force by merely defending the other parties plea of self-defence. Cases such as *Penn* v. *Ward*[9] and *Cockcroft* v. *Smith*[10] clearly show this. If then, the plaintiff had to plead excessive defence it followed that the onus of proof was upon the plaintiff.

After the passing of the Common Law Procedure Act the position becomes blurred. There are two conflicting streams of authority. The first begins with the case of *Dean* v. *Taylor*[11] which decided that the act had eliminated the

4. [1967] 1 Q.B. 63 at 67.
5. (1969) L.S.J. Scheme 310.
6. See Archbold, *Criminal Pleading Evidence and Procedure* (35th ed., 1962) para. 2497 and para. 2646; Hale, *Pleas of the Crown* (3rd ed., 1800) vol. 1, 484; Kenny, *Outlines of Criminal Law* (18th ed., 1962) 198; *Salmond on Torts* (16th ed., 1969) 166.
7. [1945] S.A.S.R. 171.
8. Common Law Procedure Act 1852.
9. 2 C.M. and R. 338.
10. 2 Salk 642.
11. 11 Ex. 68.

necessity of formal pleading and that therefore a plaintiff could argue excessive defence on the defendants' plea of justification, while still however, the onus of proof remained on the defendant. However in the case of *Rimmer* v. *Rimmer*[12] Mellor J. heavily criticised the decision of *Dean* v. *Taylor* and returned to the earlier authorities where the necessity of pleading, and hence the onus of proof, lie on the plaintiff. It would seem correct to say, as the Chief Justice does, that the form of pleading can no longer dictate, in these times, where the onus of proof should lie. The law is no longer concerned with excessive strictness of procedure, but rather with substantive matters. The effect however, of the earlier procedural cases on pleadings, and the consequent effect on the onus of proof, have had an influence in modern times. In *McClelland* v. *Symons*[13] Sholl J. of the Supreme Court of Victoria, comes to the conclusion, on the basis of these earlier authorities, that the burden of proving not only the assault but also the excess, if self-defence is the issue, is upon the plaintiff. Thus in the first place the plaintiff must prove an assault; if the defendant pleads justification, then the plaintiff to make out his original case of assault must show that there is no justification.

With this decision the Chief Justice in the present case disagrees.

> "I can not think under modern conditions the onus of proof can be affected by the form of pleading, still less that a plaintiff who replies specifically alleging excessive force thereby assumes a burden which would not otherwise fall upon him"[14].

His Honour goes on to suggest a rule of law which "seems to me to be at least good sense and I hope good law". If it is the number of blows struck which is in question, then the onus of proof is on the plaintiff; if however it is the nature or reasonableness of the blows struck the onus is upon the defendant. This is to say that if it is clear that the defendant was justified in striking one blow then the plaintiff must prove that more than one was struck. The plaintiff having shown this the onus of proof then shifts to the defendant to show that this additional blow was reasonable in the circumstances. In his Honour's view the reasonableness of the force used is an integral part of the defendant's plea of justification and if it is not proved then the plea of self-defence cannot be sustained. In this view he has the support of the Canadian Courts in *Miska* v. *Sivec*[15].

The question of where the onus should rest is extremely important in assault cases for by their very nature the evidence will most usually be conflicting and highly partisan. In such cases the plaintiff is charging a serious breach of the law, a breach which can quite easily result in a later criminal prosecution. Although the burden of proof is "reasonable satisfaction" the placing of the onus assumes great importance. With two mutually conflicting and highly partisan viewpoints the placing of the onus of proof upon the plaintiff or the defendant may well prove decisive, as in *McClelland* v. *Symons*. Having regard to the serious nature of the allegation, even though it is a

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12. 16 L.T. 238.
13. [1951] V.L.R. 157.
14. (1969) L.S.J. Scheme 311.
15. [1959] 18 D.L.R. 2nd Series 363.

civil trial, the onus should be upon the accusor. It is respectfully submitted that dividing the onus between the two parties does not answer the difficulty of whether the establishment of excessive defence is part of the plaintiff's original plea of assault or an integral part of the defendant's answer of justification. It is an important part of both. Equally it is the reasonableness as much as the number of blows which is in question for both parties. It is submitted that as the question of excessive defence is of equal importance to the original pleas of each party, the seriousness of the allegation by the plaintiff and its consequent social implications are the decisive factors upon which the question of the onus should rest.

It is important to point in conclusion, to a tendency which is more obvious in the civil than the criminal field involving assault but which has important ramifications for both. This tendency is particularly well illustrated by the present case. The test of what is excessive, has long been stated to be a general test of reasonableness, with the courts from time to time making statements of how they will be loath to enter upon an analysis of the exact balance between the two acts. As long as the defence was "reasonably proportionate", so they say, the defence will be upheld. The more recent cases in the civil field however show a definite leaning to a "blow by blow" analysis of the fracas with each blow being treated as a separate assault, and having to be proved and justified individually. This is shown by *McClelland* v. *Symons* where the first blow was admitted by all concerned to be justifiable and the entire case centred on an alleged second blow. The emphasis was not only on the reply to the threat as a whole but each individual blow. It may well be that this case is not the best illustration of this tendency because a "blow by blow" analysis was made easier by the fact that only two blows were given, and because there was a considerable time lapse between the first and the alleged second blow.

The present case however takes this tendency even further. The Chief Justice by dividing the onus of proof, has placed the burden of proving each individual blow upon the plaintiff. As the plaintiff proves each blow it is only fair to surmise that the defendant will have to justify it. He will no longer, if he ever did, be justifying the assault as a whole, but rather each individual blow. Such an analysis departs from at least the literal wording of such criminal cases as *R.* v. *Howe*[16] and *R.* v. *Tichos*[17] which have been emphatic in stating that only an approximate balance must be drawn. It is however respectfully suggested that this is not only an entirely unwelcome tendency A "reasonable balance" between the two acts cannot be drawn until each blow has been analyzed separately and a clear picture of what has occurred emerges. There is of course the great danger that a delicate balancing process will emerge from such an analysis. However, there are enough judicial statements in the cases to make one feel confident that it will be resisted and that the Chief Justice's refusal to pay lip service to such meaningless statements and to come to grips practically with the difficulty of determining what is "excessive", is to be welcomed.

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16. [1958] 100 C.L.R. 448.
17. [1963] V.R. 285 and [1963] V.R. 306.

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