

**Open season for burglar battering: is it time to check in with the civil courts?**

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# Open season for burglar battering: is it time to check in with the civil courts?

JILL DICKINSON<sup>1</sup>

Burglars; Castle doctrine; Compensation culture; Criminal law; Home defence; Occupiers' liability; Personal injury claims; Torts

## Abstract

*In this article, Jill Dickinson examines the extent to which the law currently permits homeowners to defend their territory from trespassers. Identifying that the recent UK public debate on home-defence has largely overlooked the civil law dimension, Jill explores possible rationales behind the continued fascination with home defence and evaluates proposals for the law's future development.*

## Introduction

The well-established Castle Adage continues to be a firmly-founded cornerstone of our political and legal system. As early as the 17th century, it was recognised that:

'A man's home is his castle, et domus sua cuique est tutissimum [and each man's home is his safest refuge].'<sup>2</sup>

Since then this notion has been frequently popularised by high-ranking politicians. 250 years ago William Pitt noted that:

'The poorest man may in his cottage bid defiance to all the forces of the crown. It may be frail - its roof may shake - the wind may blow through it - the storm may enter - the rain may enter - but the King of England cannot enter.'<sup>3</sup>

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<sup>2</sup> Sir Edward Coke, *The Institutes of the Laws of England*, 1628

<sup>3</sup> William Pitt, The Elder, Lord Chatham *Speech, c. March 1763*, quoted in Brougham H.P. *Historical Sketches of Statesmen Who Flourished in the Time of George III*, vol. 1, 1839, p. 52

More recently the current UK Prime Minister David Cameron alluded to the Castle Adage when he vehemently challenged a Crown Court Judge's comment that:

'it takes a huge amount of courage... to burgle somebody's house [and that he wouldn't] have the nerve'.<sup>4</sup>

The Judge was attempting to rationalise passing a 12-months' suspended sentence for the burglary of 3 homes in 5 days. Critics have suggested that his statement that burglars are courageous is actually 'outrageous';<sup>5</sup> that such comments only serve to highlight the failure of the criminal justice system and further fuel the perception that victims are not really at its 'heart'.<sup>6</sup> It comes as no surprise that the Judge has since been formally reprimanded by the Office of Judicial Complaints for making such provocative comments<sup>7</sup> which: 'have damaged public confidence in the judicial process.'<sup>8</sup>

Clearly feelings run high on the topic of home defence and have done for some time. But what exactly can a homeowner do or not do to protect both themselves and their premises against intruders, without leaving themselves open to legal proceedings?

In exploring such questions, this article will focus on the relatively recent phenomenon of burglar battering. It will examine whether the civil law of England and Wales in relation to occupiers' rights and liabilities is keeping up with its criminal law counterpart. In doing so, it will discuss the reasoning behind the developments within each of these strands of law and evaluate some potential proposals for the future.

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<sup>4</sup> Mitchell D. *Where should we place burglars on the bravery-cowardice spectrum?* <http://www.guardian.co.uk/commentisfree/2012/dec/09/judge-peter-bowers-david-mitchell> [Accessed 3 June 2013]

<sup>5</sup> David Hines Chairman of the National Victims Association cited by Telegraph Reporters *Judge who said burglary needed courage to be investigated* The Telegraph <http://www.telegraph.co.uk/news/uknews/crime/9525652/Judge-who-said-burglary-needed-courage-to-be-investigated.html> [Accessed 3 June 2013]

<sup>6</sup> Labour unlocked *Victims should be at the heart of our criminal justice system - Khan* Labour unlocked <http://www.labour.org.uk/victims-at-the-heart-of-criminal-justice-system,2011-07-14> [Accessed 3 June 2013]

<sup>7</sup> Bowcott O. *Crown court judge reprimanded for telling burglar he had 'courage'* The Guardian. <http://www.guardian.co.uk/law/2012/dec/04/judge-reprimanded-buglar-courage> [Accessed 3 June 2013]

<sup>8</sup> Office for Judicial Complaints, *Statement from the Office of Judicial Complaints - His Honour Judge Bowers*, OJC 37/12, 4 December 2012, [http://judicialcomplaints.judiciary.gov.uk/docs/His\\_Honour\\_Judge\\_Bowers\\_-\\_OJC\\_Investigation\\_Statement\\_-\\_3712.pdf](http://judicialcomplaints.judiciary.gov.uk/docs/His_Honour_Judge_Bowers_-_OJC_Investigation_Statement_-_3712.pdf), [Accessed 15 July 2013]

First of all though, we need to examine the rationale behind the continuing plethora of news headlines relying on this Castle Adage.

## Brave or battered burglars?

Angrily responding to the Judge's observation that 'burglars are brave',<sup>9</sup> Prime Minister David Cameron stated that:

'Burglary is not bravery. Burglary is cowardice, burglary is a hateful crime.'<sup>10</sup>

Like many politicians before him,<sup>11</sup> Cameron capitalised on the opportunity to add:

'that is why this Government is actually changing the law to toughen the rules on self-defence against burglars, saying householders have the right to defend themselves.'<sup>12</sup>

## The Backdrop...

Before we examine these changes, we need to consider the backdrop against which they are being played out. Previously, the use of force in self-defence has been within the common law's remit. In comparison, the use of force in crime prevention has been dealt with by s.3 of the Criminal Law Act 1967. As such, there is a clear overlap between the two as householders, even though they might not realise it,<sup>13</sup> are likely to use force against intruders not only to defend themselves but

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<sup>9</sup> Mitchell D. *Where should we place burglars on the bravery-cowardice spectrum?*

<http://www.guardian.co.uk/commentisfree/2012/dec/09/judge-peter-bowers-david-mitchell> [Accessed 3 June 2013]

<sup>10</sup> Prime Minister David Cameron speaking on ITV's Daybreak *Burglary is cowardice not bravery* ITV <http://www.itv.com/news/update/2012-09-06/cameron-burglary-is-cowardice-not-bravery/> [Accessed 3 June 2013]

<sup>11</sup> Townsend M. *Householders to be given new rights to defend themselves against intruders* The Guardian. <http://www.guardian.co.uk/law/2010/jun/06/householders-rights-laws-intruders-burglars> [Accessed 3 June 2013]; Hennessy P. and Kite M. *Tories back new rights to help homeowners protect themselves from burglars* The Telegraph. <http://www.telegraph.co.uk/news/uknews/law-and-order/6844682/Tories-back-new-rights-to-help-home-owners-protect-themselves-from-burglars.html> [Accessed 3 June 2013]

<sup>12</sup> Prime Minister David Cameron speaking on ITV's Daybreak *Burglary is cowardice not bravery* ITV <http://www.itv.com/news/update/2012-09-06/cameron-burglary-is-cowardice-not-bravery/> [Accessed 3 June 2013]

<sup>13</sup> Archbold, *Criminal Pleading Evidence & Practice*, 2004, 19-39 as referred to in Criminal Law (Amendment) (Householder Protection) Bill, Bill 20 of 2004-5, Research Paper 05/10 31 January 2005, House of Commons Library, p.8 <http://www.parliament.uk/documents/commons/lib/research/rp2005/rp05-010.pdf> [Accessed 1 August 2013]

also to prevent the intruder from committing further crimes.<sup>14</sup> In deciding whether householders have used an appropriate amount of force, both legal frameworks ask whether the use of that force was *necessary*. If so, the next question to be asked is whether such force was also *reasonable in the circumstances*. To pass both of these tests, the householder does not need to undertake a detailed risk assessment;<sup>15</sup> they just need to show that they did what they 'honestly and instinctively thought was necessary.'<sup>16</sup> On the face of it, these tests seem clear. But how well do they actually operate in practice?

## The Tony Martin case<sup>17</sup>

To answer this question, we need to consider the high-profile case of Tony Martin.<sup>18</sup> 15 years ago, Martin shot 2 burglars from behind as they fled from his remote farm house. In doing so, he killed one of them. Martin was subsequently convicted of murder and imprisoned for 9 years. After submissions from Martin's defence team<sup>19</sup> that:

'there was "compelling" evidence to show that the farmer acted in self-defence and under provocation or diminished responsibility',<sup>20</sup>

the Court of Appeal reduced Martin's conviction to manslaughter and shortened his sentence to 3 years.<sup>21</sup>

Clearly frustrated by a spate of previous break-ins, Martin had taken what he believed were 'security measures'. He had removed part of the staircase within his property and set a booby trap on the landing. The Court also learned that Martin would:

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<sup>14</sup> Lipscombe S. *Householders and the Criminal Law of Self-Defence* House of Commons [www.parliament.uk/briefing-papers/SN02959.pdf](http://www.parliament.uk/briefing-papers/SN02959.pdf) [Accessed 17 July 2013] p.2

<sup>15</sup> Lipscombe S. *Householders and the Criminal Law of Self-Defence* House of Commons [www.parliament.uk/briefing-papers/SN02959.pdf](http://www.parliament.uk/briefing-papers/SN02959.pdf) [Accessed 17 July 2013] p.2

<sup>16</sup> as per Lord Morris in *Palmer v R*, 1971 AC 814 at para. 832

<sup>17</sup> *R v Martin (Anthony Edward)* [2003] Q.B. 1

<sup>18</sup> *R v Martin (Anthony Edward)* [2003] Q.B. 1

<sup>19</sup> led by Michael Wolkind QC

<sup>20</sup> BBC News *Timeline: the Tony Martin case* BBC News <http://news.bbc.co.uk/1/hi/england/norfolk/3087003.stm> [Accessed 4 June 2013]

<sup>21</sup> Press Association *Tony Martin says he has confronted another burglar on his property* The Guardian. <http://www.guardian.co.uk/uk/2013/may/10/tony-martin-confronted-burglar-property> [Accessed 4 June 2013]

'sleep fully clothed, wearing his boots in contemplation of something happening'.<sup>22</sup>

Such extreme actions surely indicate a man so disillusioned with the system that he felt the need to take the law into his own hands. Whilst it is often said that actions speak louder than words, the Court also heard that the farmer had:

'regularly professed his hatred of burglars, once threatening that if he caught them he would blow their heads off.'<sup>23</sup>

Despite being convicted of manslaughter and serving 4 years' imprisonment in total, it appears that Martin's views on home defence remain the same today. Just in May last year, Martin confronted another burglar who was attempting to steal from his shed. The burglar quickly fled in his car but this time Martin made no attempt to stop him. Speaking to the Press, Martin said:

'There were weapons inside the shed so, if I had wanted to fight him off, I could have. I wished I had but, after everything I've been through in the past, I just couldn't face all that hassle again... I haven't changed my views about what happened in 1999 but the whole experience has made me lose faith in the system and I didn't want to be made out as the criminal again.'<sup>24</sup>

There has been much public debate surrounding the case. Reports suggested that Martin had become a 'folk hero' and described his case as a 'cause celebre'.<sup>25</sup> Martin had been:

'depicted as the ordinary man... plagued by burglars and let down by the police. [He] had struck back but was... [seen as] being persecuted for his actions.'<sup>26</sup>

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<sup>22</sup> Gillan A. *Farmer set booby traps and waited in the dark* The Guardian. <http://www.guardian.co.uk/uk/2000/apr/11/tonymartin.ukcrime> [Accessed 5 April 2013]

<sup>23</sup> Gillan A. *Farmer set booby traps and waited in the dark* The Guardian. <http://www.guardian.co.uk/uk/2000/apr/11/tonymartin.ukcrime> [Accessed 5 April 2013]

<sup>24</sup> Press Association *Tony Martin says he has confronted another burglar on his property* The Guardian. <http://www.guardian.co.uk/uk/2013/may/10/tony-martin-confronted-burglar-property> [Accessed 4 June 2013]

<sup>25</sup> Morris S., *The killer who won a nation's sympathy* The Guardian <http://www.guardian.co.uk/uk/2001/oct/30/tonymartin.ukcrime2> [Accessed 17 July 2013]

It is not surprising then that 85% of people polled in a subsequent television survey believed that the jury had been wrong to convict Martin.<sup>27</sup> Such strong public support for householders' rights to defend themselves and their premises helped to pave the way for the subsequent introduction of s.76 of the Criminal Justice and Immigration Act 2008.

## **Criminal Justice and Immigration Act 2008**

This new section permitted an occupier to use such force as was reasonable in the circumstances as the occupier, acting genuinely, believed them to be. Householders, seeking to avoid prosecution, had to demonstrate a clear correlation between the danger that they faced from the intruder and the amount of force that they used against them. S. 76(6) went on to specifically make clear that the occupier was prohibited from using *disproportionate* force.

### **A knee-jerk reaction?**

Mendelle has suggested that the introduction of this new provision:

'illustrate[s] [just] how much political posturing has supplanted reasoned debate in the field of criminal law. Instead of allowing the common law to continue to develop in that pragmatic, rational way that is its peculiar genius, the two main parties now take turns to pass wholly unnecessary legislation... which is now deployed as a weapon in a PR war.'<sup>28</sup>

This is a particularly pertinent point given that s.76 merely codified the existing common law reasonableness test;<sup>29</sup> that:

'a person who uses force is to be judged on the basis of the circumstances as he perceived them, that in the heat of the moment he will not be expected to have judged exactly what action was called for, and that a degree of

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<sup>26</sup> Morris S., *The killer who won a nation's sympathy* The Guardian <http://www.guardian.co.uk/uk/2001/oct/30/tonymartin.ukcrime2> [Accessed 17 July 2013]

<sup>27</sup> Morris S., *The killer who won a nation's sympathy* The Guardian <http://www.guardian.co.uk/uk/2001/oct/30/tonymartin.ukcrime2> [Accessed 17 July 2013]

<sup>28</sup> Mendelle P. "Self-defence law shows how politicians use legislation as PR" The Guardian. <http://www.guardian.co.uk/law/2011/oct/31/self-defence-law-legislation-pr> [Accessed 3 June 2013]

<sup>29</sup> Lipscombe S. *Householders and the Criminal Law of Self-Defence* House of Commons [www.parliament.uk/briefing-papersSN02959.pdf](http://www.parliament.uk/briefing-papersSN02959.pdf) [Accessed 17 July 2013] p.3

latitude may be given to a person who only did what he honestly and instinctively thought was necessary.... even if that belief was mistaken.<sup>30</sup>

As such, s.76 did not really add anything to the existing equation. The result of an apparent knee-jerk reaction, it merely, as Mendelle suggested, provided a public relations' platform for politicians.<sup>31</sup>

## The Crime and Courts Act 2013

Can the same be said of the recently-introduced s.43 of the Crime and Courts Act 2013? This section was also enacted in the wake of 'overwhelming' public support<sup>32</sup> following well-publicised cases involving self-defence and the home.<sup>33</sup> The question is whether this new provision brings anything to the table or whether we are simply just seeing history repeat itself?

Upon examining the new provisions, it is clear that they do at least tip the balance further in favour of householders, providing them with 'even greater protection from burglars'.<sup>34</sup> In what could be perceived as a u-turn move, the new law now specifically *permits* householders to use *disproportionate* force against intruders. Whilst the new law recognises some of the concerns that have previously been raised by householders, it does go on to state that householders may still not use force which is *grossly* disproportionate.<sup>35</sup>

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<sup>30</sup> Lipscombe S. *Householders and the Criminal Law of Self-Defence* House of Commons [www.parliament.uk/briefing-papers/SN02959.pdf](http://www.parliament.uk/briefing-papers/SN02959.pdf) [Accessed 17 July 2013] p.3 citing Lord Morris in *Palmer v R* [1971] A.C. 814 at para. 832

<sup>31</sup> Mendelle P. "Self-defence law shows how politicians use legislation as PR" The Guardian. <http://www.guardian.co.uk/law/2011/oct/31/self-defence-law-legislation-pr> [Accessed 3 June 2013]

<sup>32</sup> Hennessey P., Barret D. and Lefort R., *Overwhelming support for campaign to protect householders who confront intruders*, The Sunday Telegraph, <http://www.telegraph.co.uk/news/politics/7004471/Overwhelming-support-for-campaign-to-protect-householders-who-confront-intruders.html> [Accessed 17 July 2013]

<sup>33</sup> *R. v Hussain (Tokeer) and R. v Hussain (Munir)* [2010] EWCA Crim 94; Telegraph Reporters *Burglary shooting couple emigrate to Australia* The Telegraph <http://www.telegraph.co.uk/news/uknews/crime/9568506/Burglary-shooting-couple-emigrate-to-Australia.html> [Accessed 5 April 2013]

<sup>34</sup> Ministry of Justice *Greater protection for homeowners* MOJ <https://www.gov.uk/government/news/greater-protection-for-homeowners--2> [Accessed 5 June 2013]

<sup>35</sup> s.76(5A) Criminal Justice and Immigration Act 2008



Interestingly this proposal was originally propounded by the Conservative Party in 2005,<sup>36</sup> but it has taken over 8 years to enact.<sup>37</sup> Why the delay? In sponsoring the Criminal Law (Amendment) (Householder Protection) Bill, Patrick Mercer<sup>38</sup> sought to:

'shift the balance so that the fear of imprisonment or physical harm... [lays] with the intruder, not the householder.'

In seeking support for the Bill, the Research Paper behind it<sup>39</sup> cited various case examples, including the *Martin* case<sup>40</sup> referred to earlier. In another case, a 73 year old, Ben Lyon, was originally charged with attempted murder and wounding with intent after firing a shotgun at a man that he thought was about to burgle his shed. Like Martin, Lyon had endured repeated raids and had decided to take matters into his own hands. However he was subsequently convicted of the lesser offence of unlawful wounding, and given an 18-month, suspended sentence accordingly.<sup>41</sup> Like Martin, he stated afterwards that he had: 'no confidence in the law and order system' and that he would 'do it again if [his] life was in danger.'<sup>42</sup> Following the case, the then Home Secretary Michael Howard suggested that people: 'who used violence to defend themselves should be treated more sympathetically'.<sup>43</sup>

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<sup>36</sup> Criminal Law (Amendment) (Householder Protection) Bill, Bill 20 of 2004-5, Research Paper 05/10 31 January 2005, House of Commons Library, <http://www.parliament.uk/documents/commons/lib/research/rp2005/rp05-010.pdf> [Accessed 1 August 2013] Summary of Main Points

<sup>37</sup> Casciani D. Q&A: *What is reasonable force?* BBC News <http://news.bbc.co.uk/1/hi/uk/6902409.stm> [Accessed 5 June 2013]

<sup>38</sup> The then Conservative Spokesman for Homeland Security

<sup>39</sup> Criminal Law (Amendment) (Householder Protection) Bill, Bill 20 of 2004-5, Research Paper 05/10 31 January 2005, House of Commons Library, <http://www.parliament.uk/documents/commons/lib/research/rp2005/rp05-010.pdf> [Accessed 1 August 2013]

<sup>40</sup> *R v Martin (Anthony Edward)* [2003] Q.B. 1

<sup>41</sup> Criminal Law (Amendment) (Householder Protection) Bill, Bill 20 of 2004-5, Research Paper 05/10 31 January 2005, House of Commons Library, <http://www.parliament.uk/documents/commons/lib/research/rp2005/rp05-010.pdf> [Accessed 1 August 2013] p.13

<sup>42</sup> Criminal Law (Amendment) (Householder Protection) Bill, Bill 20 of 2004-5, Research Paper 05/10 31 January 2005, House of Commons Library, <http://www.parliament.uk/documents/commons/lib/research/rp2005/rp05-010.pdf> [Accessed 1 August 2013] p.13

<sup>43</sup> "Vigilante or victim", 12 December 1995, *The Times* as referred to in Criminal Law (Amendment) (Householder Protection) Bill, Bill 20 of 2004-5, Research Paper 05/10 31 January 2005, House of Commons Library, <http://www.parliament.uk/documents/commons/lib/research/rp2005/rp05-010.pdf> [Accessed 1 August 2013] p.19

In a later case referred to by the Research Paper,<sup>44</sup> a man was cleared of:

'deliberately wounding two burglars after they broke into his wine store. He claimed he never intended to harm them when he opened fire in the dark with a 12 bore shotgun.'<sup>45</sup>

These cases, and the others that are referred to in the Research Paper,<sup>46</sup> help to illustrate the difficulties that the courts face in ensuring that home defence law is consistently applied to ensure that a fair and just result is reached in all cases, and as a resulting consequence, help to restore public faith in the criminal justice system.

Despite Mercer clearly stating that his proposals would not protect people like Tony Martin, who he suggested used *grossly* disproportionate force, his proposals were still subject to much criticism; that permitting householders to use disproportionate force could: 'encourage vigilantism and... sanction extrajudicial punishment'.<sup>47</sup>

There were also concerns that the uncertainties surrounding what was meant by *reasonable* force were simply being shifted; that questions would still be asked as to what the new threshold of *disproportionate* force would actually mean in practice.<sup>48</sup>

Human rights issues were also cited. Critics believed that the proposed Bill would breach the State's: 'positive obligations to protect Convention rights to life and

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<sup>44</sup> Criminal Law (Amendment) (Householder Protection) Bill, Bill 20 of 2004-5, Research Paper 05/10 31 January 2005, House of Commons Library, <http://www.parliament.uk/documents/commons/lib/research/rp2005/rp05-010.pdf> [Accessed 1 August 2013]

<sup>45</sup> Criminal Law (Amendment) (Householder Protection) Bill, Bill 20 of 2004-5, Research Paper 05/10 31 January 2005, House of Commons Library, <http://www.parliament.uk/documents/commons/lib/research/rp2005/rp05-010.pdf> [Accessed 1 August 2013] p.13-14

<sup>46</sup> Criminal Law (Amendment) (Householder Protection) Bill, Bill 20 of 2004-5, Research Paper 05/10 31 January 2005, House of Commons Library, <http://www.parliament.uk/documents/commons/lib/research/rp2005/rp05-010.pdf> [Accessed 1 August 2013] p.12-18

<sup>47</sup> Lipscombe S. *Householders and the Criminal Law of Self-Defence* House of Commons [www.parliament.uk/briefing-papers/SN02959.pdf](http://www.parliament.uk/briefing-papers/SN02959.pdf) [Accessed 17 July 2013] p.1

<sup>48</sup> Criminal Law (Amendment) (Householder Protection) Bill, Bill 20 of 2004-5, Research Paper 05/10 31 January 2005, House of Commons Library, <http://www.parliament.uk/documents/commons/lib/research/rp2005/rp05-010.pdf> [Accessed 1 August 2013] p.8

physical integrity"<sup>49</sup> as provided for in Article 2.<sup>50</sup> In permitting householders to use disproportionate force against intruders, the State could be:

'failing to safeguard the lives of individuals... (here, burglars). There is no doctrine of forfeiture of the right to life if one has entered... a building as a trespasser.'<sup>51</sup>

All of these concerns, coupled with a series of further high-profile cases, continued to help fuel the debate and keep it firmly in the public eye.

## Munir Hussain

One of these cases<sup>52</sup> concerned a householder, Munir Hussain, who was prosecuted for chasing away and then attacking an intruder so hard with a cricket bat, that the bat broke into 3 pieces and the intruder was left with serious brain damage as a result. Whilst the intruder was only given a supervision order for his role in the aggravated burglary, Hussain was sentenced to over 2 years in prison. His defence lawyer suggested at the time that as a result:

'the criminal justice system has failed twice. The court was unable to sentence [the intruder]... with sufficient harshness, or... Hussain with sufficient compassion.'<sup>53</sup>

However Hussain's sentence was not only subsequently reduced to a year, it was also then suspended for 2 years, which enabled his immediate release. In reaching this decision, the Lord Judge noted that Hussain had only attacked the man in reaction to 'extreme provocation'.<sup>54</sup> As such, the Judge said that it was inappropriate

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<sup>49</sup> Jefferson M. *Householders and the use of force against intruders*, Journal of Criminal Law, 2005, Vol. 69(5), p. 412

<sup>50</sup> European Convention on Human Rights

<sup>51</sup> Jefferson M. *Householders and the use of force against intruders*, Journal of Criminal Law, 2005, Vol. 69(5), p. 412

<sup>52</sup> *R. v Hussain (Tokeer) and R. v Hussain (Munir)* [2010] EWCA Crim 94

<sup>53</sup> Sturcke J. *Self defence or malicious revenge? Jail for brothers who beat burglar with bat* The Guardian. <http://www.guardian.co.uk/uk/2009/dec/14/jail-brothers-burglar-cricket-bat> [Accessed 3 June 2013]

<sup>54</sup> Bingham J. and Britten N. *Free businessman Munir Hussain calls for law to be changed to protect householders* The Telegraph. <http://www.telegraph.co.uk/news/7044895/Freed-businessman-Munir-Hussain-calls-for-law-to-be-changed-to-protect-householders.html> [Accessed 3 June 2013]

to rely on the usual sentencing principles and instead rationalised the reduced sentence by reference to the 'ancient principles of justice and mercy'.<sup>55</sup>

Unlike Tony Martin, Munir Hussain still believes in the criminal justice system but has stated that:

'the law does need perhaps to be revisited - it is very, very clear that it is ambiguous... It is not clear as to where the householder stands and [the law] may be interpreted in many different ways.'<sup>56</sup>

Despite such comments, and the continuing 'media frenzy about the rights of homeowners to protect themselves from attack',<sup>57</sup> the Court of Appeal made it clear that their decision in the *Hussain* case<sup>58</sup> had been based on very distinctive facts, and that no general legal, self-defence principles should be drawn from it. The Lord Judge, clearly stated that the case:

'is not, and should not be seen as, a case about the level of violence which a householder may lawfully and justifiably use on a burglar.'<sup>59</sup>

Instead, it was suggested that the judgment recognised how harshly Hussain had been reprimanded for an attack which was 'totally out of character' and one which could:

'only be understood as a response to the dreadful and terrifying ordeal and the emotional anguish'.<sup>60</sup>

Whilst the common law may be much better-placed than statute to facilitate the adoption of a more flexible approach, such comments clearly indicate the judiciary's

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<sup>55</sup> Bingham J. and Britten N. *Free businessman Munir Hussain calls for law to be changed to protect householders* The Telegraph. <http://www.telegraph.co.uk/news/7044895/Freed-businessman-Munir-Hussain-calls-for-law-to-be-changed-to-protect-householders.html> [Accessed 3 June 2013]

<sup>56</sup> Bingham J. and Britten N. *Freed businessman Munir Hussain calls for law to be changed to protect householders* The Telegraph. <http://www.telegraph.co.uk/news/7044895/Freed-businessman-Munir-Hussain-calls-for-law-to-be-changed-to-protect-householders.html> [Accessed 4 June 2013]

<sup>57</sup> Hirsch A. *Don't read too much into Munir Hussain judgment, say lawyers* The Guardian. <http://www.guardian.co.uk/uk/2010/jan/20/munir-hussain-appeal-court> [Accessed 5/4/2013]

<sup>58</sup> *R. v Hussain (Tokeer) and R. v Hussain (Munir)* [2010] EWCA Crim 94

<sup>59</sup> Hirsch A. *Don't read too much into Munir Hussain judgment, say lawyers* The Guardian. <http://www.guardian.co.uk/uk/2010/jan/20/munir-hussain-appeal-court> [Accessed 5/4/2013]

<sup>60</sup> Hirsch A. *Don't read too much into Munir Hussain judgment, say lawyers* The Guardian. <http://www.guardian.co.uk/uk/2010/jan/20/munir-hussain-appeal-court> [Accessed 5/4/2013]

concerns to avoid stepping over the apparently fine line between law-interpreting and law-making.

## The Ferries

Such a reserved approach meant that the uncertainties surrounding home defence law, and the consequent calls for its elucidation continued. Only 2 years ago, a couple moved to Australia earlier than expected following fears of revenge attacks after the husband, Mr. Ferrie, shot at burglars who had broken into their home.<sup>61</sup>

The couple had been asleep in bed late on a Saturday night when they were woken by the sound of both banging and breaking glass downstairs. 4 men had broken into their home. The couple awoke to find one of the burglars standing in their bedroom wearing a mask. In an attempt to scare the intruders away, Mr Ferrie fired a shot-gun that he used for clay pigeon shooting, and wounded two of them. Mr. and Mrs. Ferrie were subsequently arrested by Police on suspicion of causing grievous bodily harm. Mr. Ferrie was subsequently warned that he could possibly be charged with attempted murder. The couple were detained for 66 hours in total but were subsequently released without charge.

## Some general principles

Publishing a statement last September, the Crown Prosecution Service stated that:

'the law is clear that anyone who acts in good faith, using reasonable force, doing what they honestly feel is necessary to protect themselves, their families or their property, will not be prosecuted for such action.'<sup>62</sup>

In the Ferries' case, the MP for Rutland and Melton, suggested that the real crime would have been if the couple had been prosecuted for defending their home.<sup>63</sup>

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<sup>61</sup> Telegraph Reporters *Burglary shooting couple emigrate to Australia* The Telegraph <http://www.telegraph.co.uk/news/uknews/crime/9568506/Burglary-shooting-couple-emigrate-to-Australia.html> [Accessed 5 April 2013]

<sup>62</sup> CPS *CPS statement: Andy and Tracie Ferrie* CPS. [http://www.cps.gov.uk/eastmidlands/news\\_and\\_publications/press\\_releases/cps\\_statement\\_andy\\_and\\_tracie\\_ferrie/](http://www.cps.gov.uk/eastmidlands/news_and_publications/press_releases/cps_statement_andy_and_tracie_ferrie/) [Accessed 5 April 2013]

Despite the Crown Prosecution Service's assurance that each case will be considered on its own merits and only on the basis of the evidence available,<sup>64</sup> it is clear from the cases referred to earlier that crucial factors to be taken into consideration will include firstly the occupier's grounds for attacking the intruder because:

'the law should not exculpate those whose motivation is primarily revenge.'<sup>65</sup>

Secondly, and connected with this first point, consideration will be given to the lapse of time between the break-in and the intruder(s) being attacked. In using force against the intruder, is the householder merely acting on impulse, or has sufficient time elapsed to enable them to make a much more informed decision as to what would be the appropriate action to take?

And these are just a few of the many different factors which will need to be taken into account. As is evident from the examples cited, all cases will raise their own issues and will therefore need to be decided on their own merits. They help to illustrate that it is the common law, rather than statute, which is best-placed to achieve that goal.

Trying to draft more detailed statutory provisions to cover all of the different scenarios that householders and intruders could potentially find themselves in would be impossible. Whilst it would involve creating a:

'fascinating matrix [which] could calibrate 'victim shot three times in the back'/'victim slightly injured with porcelain teapot' with 'accused grabbed a weapon'/'accused searched for a weapon which he then used' and with 'victim weighed 16 stones and was six feet tall'/'accused weighed eight stones and was five feet tall'... [it would go on] just about *ad infinitum*.<sup>66</sup>

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<sup>63</sup> BBC News *Welby farm shooting couple Andy and Tracey Ferrie 'humbled'* BBC News <http://www.bbc.co.uk/news/uk-england-leicestershire-19507678> [Accessed 5 April 2013]

<sup>64</sup> CPS *CPS statement: Andy and Tracie Ferrie* CPS. [http://www.cps.gov.uk/eastmidlands/news\\_and\\_publications/press\\_releases/cps\\_statement\\_andy\\_and\\_tracie\\_ferrie/](http://www.cps.gov.uk/eastmidlands/news_and_publications/press_releases/cps_statement_andy_and_tracie_ferrie/) [Accessed 5 April 2013]

<sup>65</sup> Editorial *Defending self-defence: Criminal Law Review*, Volume 3, 2010, p.167

<sup>66</sup> Jefferson M. *Householders and the use of force against intruders*, *Journal of Criminal Law*, 2005, Vol. 69(5), p. 412

The one-size fits all statutory approach (clearly favoured by politicians),<sup>67</sup> does rely heavily on the flexibility of its common law counterpart to ensure that its provisions are interpreted to reach a fair and just outcome in each individual case.

## "Grossly Disproportionate"

It appears that s.43 of the Crime and Courts Act 2013 is no different in this respect. As was previously feared back in 2005,<sup>68</sup> the new provisions mean that we are still faced with definitive queries as to what *disproportionate* force actually means, and at what point such force becomes *grossly* disproportionate. As such it seems that case-law will still play an important role in the actual interpretation of these phrases in practice.

When Mercer sponsored the original Bill<sup>69</sup> which proposed this new test, he did try to tackle such concerns head-on, suggesting that:

'the term "not grossly disproportionate" [would] allow home owners... to do whatever they [thought was] necessary to defend themselves when confronted by an intruder. What they will not be entitled to do is chase a burglar down the street and plunge a knife into his back once he is off their property. My Bill is not a licence to commit murder.'<sup>70</sup>

But if, as Mercer seems to suggest, it is clear as to what the phrase "grossly disproportionate" means, why was there this missed opportunity to incorporate clear guidance on the point within the Criminal Law (Amendment) (Householder Protection) Bill itself?

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<sup>67</sup> Mendelle P. "Self-defence law shows how politicians use legislation as PR" The Guardian.

<http://www.guardian.co.uk/law/2011/oct/31/self-defence-law-legislation-pr> [Accessed 3 June 2013]

<sup>68</sup> Criminal Law (Amendment) (Householder Protection) Bill, Bill 20 of 2004-5, Research Paper 05/10 31 January 2005, House of Commons Library, <http://www.parliament.uk/documents/commons/lib/research/rp2005/rp05-010.pdf> [Accessed 1 August 2013] p.8

<sup>69</sup> Criminal Law (Amendment) (Householder Protection) Bill, Bill 20 of 2004-5, Research Paper 05/10 31 January 2005, House of Commons Library, <http://www.parliament.uk/documents/commons/lib/research/rp2005/rp05-010.pdf> [Accessed 1 August 2013]

<sup>70</sup> Criminal Law (Amendment) (Householder Protection) Bill, Bill 20 of 2004-5, Research Paper 05/10 31 January 2005, House of Commons Library, <http://www.parliament.uk/documents/commons/lib/research/rp2005/rp05-010.pdf> [Accessed 1 August 2013] p. 8-9

Whilst similar wording has been incorporated into other legislation, again little guidance has been provided as to its interpretation. For example, section 329 of the Criminal Justice Act 2003 enables those who are guilty of an imprisonable offence, in certain circumstances, to bring a civil action for damages for trespass to the person, against their victim and/or also against any third party who intervenes to protect that victim. Those circumstances include where either the victim and/or the third party intervener were acting in self-defence. If that is the case, the claim can only proceed if the victim and/or the third party (as the case may be) used 'grossly disproportionate' force in defending themselves. But again no interpretative guidance was provided as to what this meant in practice.

It has been suggested that the test was incorporated to help restore public faith in the civil justice system, and that perhaps attempts to include such a test in the criminal home defence framework have been based on a similar rationale.<sup>71</sup> But whilst such a motive is laudable, can the provisions of the Crime and Courts Act 2013 really have such a desired effect when inherent uncertainties remain as what level of force can be used in practice? As such, critics have suggested that the new test is just another "vote-catcher".<sup>72</sup> And when you reflect back on the rocky, evolutionary road of today's home defence law, it is easy to empathise with such scepticism.

Of course, the latest statutory intervention<sup>73</sup> has yet to be tested with high-profile cases. However history suggests that the introduction of these new home defence provisions will provide little reassurance to the public, who are seeking definitive guidance as to what they can and cannot do to protect both themselves and their premises from intruders. As such, the flurry of newspaper headlines concerning the rigour and suitability of the current home defence legal framework is likely to remain.

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<sup>71</sup> Jefferson M. *Householders and the use of force against intruders*, Journal of Criminal Law, 2005, Vol. 69(5), p. 408-9

<sup>72</sup> Michael Turner QC Chair of the Criminal Bar Association as cited by Bowcott O. *Plan to allow 'disproportionate force' against burglars included in crime bill* The Guardian <http://www.guardian.co.uk/law/2012/nov/25/disproportionate-force-burglars-crime-bill> [Accessed 3 June 2013]

<sup>73</sup> Crime and Courts Act 2013



Whether or not the Crime and Courts Act 2013 is seen as providing a satisfactory solution, it has certainly served to heighten what appears to be a general pre-occupation by key stakeholders in the defence of the home.

## Pre-occupation with home defence

Yet there is a clear disparity between the sheer amount of news articles and media campaigns<sup>74</sup> calling for increased home defence rights, and the number of homeowners who have actually been prosecuted for using force against intruders. To illustrate the point, the Crown Prosecution Service suggests that between 1990 and 2005, there were only 11 prosecutions of people who attacked intruders in houses, commercial premises or private land and only 7 of those resulted from domestic burglaries.<sup>75</sup>

So given this relatively low risk of a person being prosecuted for defending their home, why are the Government, the media and the general public still so clearly pre-occupied with home defence law?

Perhaps one answer is rooted in classic motivational theory. In 1943, Maslow<sup>76</sup> suggested that for a person to realise their full potential (or self-actualisation) they need to first fulfil a hierarchy of supporting, motivational needs. These are physiological, safety, belongingness and esteem. One of the most obvious physiological human needs is shelter. People clearly need their home but they also need to feel safe there if they are to develop to their full potential. Such feelings of safety are clearly compromised by the potential threat of burglary. Statistics<sup>77</sup> show that most occupiers<sup>78</sup> reported feeling emotionally affected by a burglary; whether

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<sup>74</sup> The Telegraph's Right to Defend Yourself Campaign as referred to by Hennessy P. "New rights for householders who attack burglars to be unveiled" The Telegraph.

<http://www.telegraph.co.uk/news/uknews/law-and-order/9700694/New-rights-for-householders-who-attack-burglars-to-be-unveiled.html> [Accessed 5 April 2013]

<sup>75</sup> CPS Homeowners and self defence - DPP issues further details of cases CPS.

[http://www.cps.gov.uk/news/press\\_releases/106\\_05/](http://www.cps.gov.uk/news/press_releases/106_05/) [Accessed 5 April 2013]

<sup>76</sup> Maslow A.H. *A Theory of Human Motivation* *Psychological Review* [PsycARTICLES] Volume 50(4), page 370 as referred to in Green C. *Classics in the history of psychology*

<http://psychclassics.yorku.ca/Maslow/motivation.htm> [Accessed 4 June 2013]

<sup>77</sup> Home Office *Crime in England and Wales 2010 to 11 2nd edition* Home Office.

<https://www.gov.uk/government/publications/crime-in-england-and-wales-2010-to-2011> [Accessed 4 June 2013]

<sup>78</sup> 87%

angry,<sup>79</sup> shocked<sup>80</sup> or vulnerable.<sup>81</sup> Occupiers need not just be fearful for their personal safety either as property damage is also caused in half of all burglaries.<sup>82</sup>

Besides being emotionally affected, it is easy to see why homeowners may also feel aggrieved; not only at the possibility of being prosecuted for defending their own home against intruders but also at the prospect of being sued by the intruders in the civil courts.<sup>83</sup> Homeowners need clarity as to what they can and cannot do when confronted by an intruder. Parliament's continued tinkering with the law suggests that the various statutory attempts have failed in this respect.

An additional explanation for perhaps excessive burglar battering debates may include the backdrop of the actual physical and economic environments within which the glut of home defence headlines on home defence is played out. For example, according to figures published by the Office for National Statistics for 2010,<sup>84</sup> the population of the United Kingdom has been growing at its fastest rate for 50 years.<sup>85</sup> It therefore comes as no surprise to learn that:

"an Englishman's home has become little more than a broom cupboard, and an expensive one at that."<sup>86</sup>

Such comments betray a concerned recognition that, not only is land a finite resource,<sup>87</sup> it is also in increased demand. These facts coupled with the recession<sup>88</sup>

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<sup>79</sup> 53%

<sup>80</sup> 41%

<sup>81</sup> 28%

<sup>82</sup> Home Office *Crime in England and Wales 2010 to 11 2nd edition* Home Office.

<https://www.gov.uk/government/publications/crime-in-england-and-wales-2010-to-2011> [Accessed 4 June 2013]

<sup>83</sup> Johnston P. *Move to ban burglars from suing victims* The Telegraph.

<http://www.telegraph.co.uk/news/uknews/1430314/Move-to-ban-burglars-from-suing-victims.html> [Accessed 4 June 2013]

<sup>84</sup> Office for National Statistics *National Population Projections*

Office for National Statistics. <http://www.ons.gov.uk/ons/rel/npp> [Accessed 4 June 2013]

<sup>85</sup> Whitehead T. *UK population growing at fastest rate for 50 years* The Telegraph.

<http://www.telegraph.co.uk/news/uknews/immigration/8608777/UK-population-growing-at-fastest-rate-for-50-years.html> [Accessed 4 June 2013]

<sup>86</sup> O'Shaunessey J, *An Englishman's home is a broom cupboard* The Telegraph. 27 February 2006

<sup>87</sup> Office of the Deputy Prime Minister *Land Use Change Statistics (LUCS) Guidance* 2004 p.2

<sup>88</sup> Elliot L. *George Osborne is upbeat, but the squeeze shows no sign of ending soon* The Guardian.

<http://www.guardian.co.uk/politics/2013/may/24/george-osborne-upbeat-squeeze> [Accessed 4 June 2013]

and also the recent rise in house prices<sup>89</sup> encourage empathy with homeowners who are keen to protect their home not only as a vital asset in itself but which will also help to defend them from unwanted visitors.

As such, whether the country is in a double-dip or triple-dip recession, or even if it is now finally on the path to financial recovery, it is particularly unlikely that the welfare of burglars will feature very prominently on most householders' priorities' lists.

And the problem appears, at least on the face of it, to have become more prevalent in recent times, with the results of the British Crime Survey 2010-11 apparently indicating a clear correlation between the economic downturn and such acquisitive crime. Upon closer inspection however, whilst the number of burglaries did rise by 14% in just 1 year,<sup>90</sup> it is important to recognise that levels have actually just returned to the level of burglaries committed 2 years earlier, and that: 'the underlying trend in domestic burglaries... has been generally flat since 2004-5'.<sup>91</sup> But it is easy to see how, without knowledge of this contextual background, such figures could easily add further kindling to help fuel householders' concerns over home defence issues.

## Human rights

Prosecutions of homeowners also bring into play difficult issues concerning the interface between different human rights. Articles 2, 3 and 8 of the European Convention on Human Rights enshrine the rights to life, freedom from inhuman and degrading treatment and respect for private life.<sup>92</sup> But in home defence situations there could often be a conflict between these three rights.

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<sup>89</sup> Osborne H. *UK house prices up again in May says Nationwide* The Guardian. <http://www.guardian.co.uk/money/2013/may/30/uk-house-prices-may-nationwide> [Accessed 4 June 2013]

<sup>90</sup> Home Office *Findings from the British Crime Survey and police recorded crime* (2nd Edition), July 2011, [https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/116417/hosb1011.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/116417/hosb1011.pdf) [Accessed 1 August 2013] p.73

<sup>91</sup> Home Office *Findings from the British Crime Survey and police recorded crime* (2nd Edition), July 2011, [https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/116417/hosb1011.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/116417/hosb1011.pdf) [Accessed 1 August 2013] p.73

<sup>92</sup> Liberty *Right to life* Liberty. <http://liberty-human-rights.org.uk/human-rights/human-rights/the-human-rights-act/index.php> [Accessed 4 June 2013]

In recognising this, the Joint Committee on Human Rights have referred to Article 2 as imposing:

'a positive obligation on the State to take reasonable steps to protect the right to life of individuals... [and that this includes] an obligation to protect against the actions of private individuals which breach that right.'<sup>93</sup>

The Committee went on to state that:

'where essential aspects of rights to life or physical integrity are at stake, it has been established that there is an obligation on the state to put in place criminal law sanctions which ensure effective deterrence against breaches of these rights.'<sup>94</sup>

The Committee made these comments in relation to the proposed Criminal Law (Amendment) (Householder Protection) Bill,<sup>95</sup> and, in doing so, expressed concern that such a change in the law would remove its deterrent effect in relation to home defence cases involving murder, manslaughter and assault, amongst others.<sup>96</sup>

Striking an appropriate balance between the rights of both householders and intruders is a difficult task, not only because such fundamental human rights issues are at stake but also because of the wide range of different circumstances that these parties often find themselves in.

Achieving such a balance is not just a criminal law issue; the same castle conundrum also raises its head in civil law proceedings too. Yet the public debate's clear emphasis on the criminal law means that the civil law framework of occupiers'

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<sup>93</sup> Criminal Law (Amendment) (Householder Protection) Bill, Bill 20 of 2004-5, Research Paper 05/10 31 January 2005, House of Commons Library, <http://www.parliament.uk/documents/commons/lib/research/rp2005/rp05-010.pdf> [Accessed 1 August 2013] p.10

<sup>94</sup> Criminal Law (Amendment) (Householder Protection) Bill, Bill 20 of 2004-5, Research Paper 05/10 31 January 2005, House of Commons Library, <http://www.parliament.uk/documents/commons/lib/research/rp2005/rp05-010.pdf> [Accessed 1 August 2013] p.10

<sup>95</sup> Criminal Law (Amendment) (Householder Protection) Bill, Bill 20 of 2004-5, Research Paper 05/10 31 January 2005, House of Commons Library, <http://www.parliament.uk/documents/commons/lib/research/rp2005/rp05-010.pdf> [Accessed 1 August 2013]

<sup>96</sup> Criminal Law (Amendment) (Householder Protection) Bill, Bill 20 of 2004-5, Research Paper 05/10 31 January 2005, House of Commons Library, <http://www.parliament.uk/documents/commons/lib/research/rp2005/rp05-010.pdf> [Accessed 1 August 2013] p.10

rights and liabilities has been inevitably side-lined. Perhaps if it is time for burglar-battering, someone needs to check-in with the civil courts too.

## The civil law framework

The civil law liability imposed on occupiers has changed considerably over time. In the key case of *Robert Addie and Sons (Collieries) Ltd v Dumbreck*,<sup>97</sup> a colliery company was held not liable for the death of a 4 year-old boy who was playing in, and was subsequently crushed by, the wheel of its haulage system. Criticising this decision, writers such as Fleming<sup>98</sup> have suggested that treating trespassers as getting their just desserts is not appropriate especially where, to coin a Lord Diplock phrase, more "meritorious trespassers"<sup>99</sup> are involved. A distinction should be drawn between burglars who have the intent to steal and trespassing children who are merely playing "hide and seek".

Matters came to a head in the key case of *British Railways Board v Herrington*<sup>100</sup> where the Court took the opportunity to overturn the *Addie*<sup>101</sup> decision, making it possible for trespassers to sue an occupier for injuries suffered whilst on their premises.

Despite this decision, there were still unanswered questions as to what the occupier's duty towards trespassers entailed. In seeking to provide some answers, the Law Commission stepped in.<sup>102</sup> The Commission originally suggested that an occupier should not owe any duty of care to a trespasser who was involved in a "serious criminal enterprise".<sup>103</sup> Whilst this proposal appeared commendable in principle, the Commission subsequently decided against it, suggesting that it would involve putting in place either an "unacceptably wide" or "unattractively complex"

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<sup>97</sup> *Robert Addie and Sons (Collieries) Ltd v Dumbreck* [1929] A.C. 358

<sup>98</sup> Fleming J. *Tort liability of occupiers of land: duties owed to trespassers* *The Yale Law Journal* Vol. 63 No. 2 1953 p. 144

<sup>99</sup> *British Railways Board v. Herrington* [1972] A.C. 877 at para. 933

<sup>100</sup> *British Railways Board v. Herrington* [1972] A.C. 877

<sup>101</sup> *Robert Addie and Sons (Collieries) Ltd v Dumbreck* [1929] A.C. 358

<sup>102</sup> The Law Commission (Law Com. No.75). *Report on liability for damage or injury to trespassers and related questions of occupiers' liability advice to the Lord Chancellor under section 3(1)(e) of the Law Commissions Act 1965* (Cmnd. 6428), (Session 1975-6), Law Commission, London

<sup>103</sup> The Law Commission (Law Com. No.75). *Report on liability for damage or injury to trespassers and related questions of occupiers' liability advice to the Lord Chancellor under section 3(1)(e) of the Law Commissions Act 1965* (Cmnd. 6428), (Session 1975-6), Law Commission, London, para. 32

definition".<sup>104</sup> In explaining their conclusion, the Commission noted that defining the phrase by reference to any offence which had a particular maximum sentence length, for example 10 years, would bring with it potentially unjust consequences. It would mean that someone stealing an apple would be owed the same duty of care as someone stealing the Crown jewels.<sup>105</sup> Whilst the cases are completely different in terms of their severity, because both involve theft, they are subject to the same maximum punishment. Applying the Commission's proposed definition of "serious criminal enterprise", both trespassers would therefore be categorised together accordingly and the occupier would owe them both the same duty of care. (In making this point, it appears that the Commission was suggesting a sliding scale duty of care which was closely correlated with the severity of the crime. But such a proposal only takes into account the trespasser's actions. It completely ignores what steps the occupier may or may not have taken to ensure the safety of entrants to their premises. Clearly such factors should also form part of the equation).

Rather than recommend the adoption of a more specific test, the Commission (and subsequently Parliament in its enactment of the Occupiers' Liability Act 1984) preferred to leave the courts with discretion; requiring reference to a test of "reasonableness" so that each case could turn on its own merits.

It is evident that the civil law on occupiers' liability shares a similar problem to the criminal law of self-defence; namely both legal frameworks need to cover an extraordinarily broad spectrum of situations in which occupiers and entrants might find themselves. Lord Morris alluded to this in the case of *Herrington*<sup>106</sup> when he noted that:

"the term trespasser...covers the wicked and the innocent: the burglar, the arrogant invader of another's land, the walker blithely unaware that he is stepping where he has no right to walk, or the wandering child."<sup>107</sup>

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<sup>104</sup> The Law Commission (Law Com. No.75). *Report on liability for damage or injury to trespassers and related questions of occupiers' liability advice to the Lord Chancellor under section 3(1)(e) of the Law Commissions Act 1965* (Cmnd. 6428), (Session 1975-6), Law Commission, London, para. 32

<sup>105</sup> The Law Commission (Law Com. No.75). *Report on liability for damage or injury to trespassers and related questions of occupiers' liability advice to the Lord Chancellor under section 3(1)(e) of the Law Commissions Act 1965* (Cmnd. 6428), (Session 1975-6), Law Commission, London p. 19 para. 32

<sup>106</sup> *British Railways Board v Herrington* [1972] 2 W.L.R. 537

<sup>107</sup> *British Railways Board v Herrington* [1972] 2 W.L.R. 537 as per Lord Morris of Borth-y-Gest at 904

Whilst the approach of the Occupiers' Liability Act 1984 was at least a step in the right direction (to address some of the concerns that had been raised previously by judges in cases such as *Herrington*),<sup>108</sup> there has been very little, subsequent case-law to help illustrate whether or not the new provisions have made much practical difference, at least when compared against the glut of criminal law cases on home defence issues.

## **Revill v Newbery**<sup>109</sup>

One case which did provoke much public interest though was *Revill v Newbery*.<sup>110</sup> Over 20 years ago, a 76 year-old pensioner, Newbery, owned an allotment shed. Like both Martin and Lyon, Newbery had suffered previous break-ins. So, in a bid to protect his garden shed from any further intruders, Newbery decided to start sleeping in it. One night Revill attempted to break into the shed. In doing so, he woke Newbery. Intending only to frighten Revill, Newbery loaded up his 12-bore shotgun and cartridges and fired through a hole in the door. He hit and injured Revill who was standing about five feet away.

In subsequent criminal proceedings Revill admitted attempting to burgle the shed and was prosecuted accordingly. Newbery was charged with, but subsequently acquitted for, wounding offences.

However Revill sued Newbery in the civil courts for both negligence and breach of duty under the Occupiers Liability Act 1984, claiming damages for the injuries that he had suffered.

In his defence, Newbery cited the doctrine of *ex turpi causa non oritur actio*, (that no action can be founded on an immoral or illegal act). Newbery claimed that because Revill had been attempting to burgle the shed, Revill should not be able to bring a claim against him.

Newbery also argued that, even if Revill could bring a claim against him, his damages should be reduced by two-thirds as he alleged that Revill was contributorily negligent by attempting to burgle the shed in the first place.

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<sup>108</sup> *British Railways Board v. Herrington* [1972] A.C. 877

<sup>109</sup> *Revill v Newbery* [1996] QB 567

<sup>110</sup> *Revill v Newbery* [1996] QB 567

At first instance the Judge found in Revill's favour but reduced the amount of compensation payable on the basis of contributory negligence. The Judge stated that:

"due allowance should be made for the natural fears of the defendant, a man in his seventies, suddenly woken in the middle of the night by things going bump, when fears become magnified and cloud reason and judgment".<sup>111</sup>

Newbery subsequently appealed. In the Court of Appeal, Lord Justice Neill referred to s.1(3)(b) of the Occupiers' Liability Act 1984 and made a similar distinction to that which can be made between the *Hussain*<sup>112</sup> and *Ferrie*<sup>113</sup> cases referred to above. Newbery had not just fired a warning shot up into the air to get rid of the burglars, as Ferrie had done. Instead, like Hussain, he had deliberately taken action to injure the intruder. Newbery had pointed his gun at a horizontal level where people in the vicinity could easily be injured or killed. Whilst Newbery could not see who was behind the door, he did believe that someone was there and he accordingly took direct action to attack them. Accordingly Newbery's appeal was unsuccessful.

In drawing these comparisons it is clear that for pleas of home defence to succeed, whether in criminal law or civil law actions, there must be a direct correlation between the risks posed by the intruder and the action taken by the occupier to stop them. However whilst it is clear that the criminal law has moved towards adopting a more burglar-battering approach, the case of *Revill*<sup>114</sup> suggests that, at least 20 years ago, the civil law may have been struggling to keep up. The key question is what, if anything, has changed since? Has the civil law developed to mirror the criminal law's tendency towards favouring occupiers?

## Since Revill...<sup>115</sup>

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<sup>111</sup> *Revill v Newbery* [1996] QB 567 as per Lord Justice Neill at 571 citing Justice Rougier

<sup>112</sup> Sturcke J. *Self defence or malicious revenge? Jail for brothers who beat burglar with bat* The Guardian. <http://www.guardian.co.uk/uk/2009/dec/14/jail-brothers-burglar-cricket-bat> [Accessed 3 June 2013]

<sup>113</sup> Telegraph Reporters *Burglary shooting couple emigrate to Australia* The Telegraph <http://www.telegraph.co.uk/news/uknews/crime/9568506/Burglary-shooting-couple-emigrate-to-Australia.html> [Accessed 5 April 2013]

<sup>114</sup> *Revill v Newbery* [1996] QB 567

<sup>115</sup> *Revill v Newbery* [1996] QB 567



Whilst there appears to be growing support for burglar-bashing in criminal home defence cases, the civil law seems to be following suit, albeit in its own way. There appears to be a growing tendency for civil courts faced with occupiers' liability claims to lay the blame, for any injuries suffered, squarely at the entrants' feet. For example in *Tomlinson v Congleton BC*,<sup>116</sup> Lord Hoffman stated that it should be:

"extremely rare for an occupier of land to be under a duty to prevent people from taking risks which are inherent in the activities that they freely choose to undertake...if people want to climb mountains, go hang-gliding or swim or dive in ponds or lakes, that is their affair."<sup>117</sup>

And in the case of *Grimes v Hawkins*,<sup>118</sup> a 19 year-old woman was left paralysed from the chest down after diving into a friend's swimming pool. In finding that the pool was safe and that the injuries resulted from the claimant's own actions, Mrs Justice Thirlwall concluded that it should not be:

"incumbent on a householder with a private swimming pool to prohibit adults from diving into an ordinary pool whose dimensions and contours can clearly be seen. It may well be different where there is some hidden or unexpected hazard but there was none here."<sup>119</sup>

In reaching her decision, the Judge noted that some witnesses appeared to regard the trial as "a social event or entertainment" and believed that this had provided her with "insight into their likely conduct" when the accident happened and "they were 5 years younger and in drink."<sup>120</sup> Perhaps, in making that decision, she was therefore sending out a message to encourage young adults to take more responsibility for their own safety.<sup>121</sup>

Such cases indicate the civil law's move away from a compensation culture towards an approach where responsibility is firmly put back on the claimants' shoulders for the consequences of their own actions.

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<sup>116</sup> *Tomlinson v Congleton BC* [2004] 1 A.C. 46

<sup>117</sup> *Tomlinson v Congleton BC* [2004] 1 A.C. 46 at para.84-85

<sup>118</sup> *Grimes v Hawkins and Another* [2011] E.W.H.C. 2004 Q.B.

<sup>119</sup> *Grimes v Hawkins and Another* [2011] E.W.H.C. 2004 Q.B. at para 86

<sup>120</sup> *Grimes v Hawkins and Another* [2011] E.W.H.C. 2004 Q.B. at para. 7

<sup>121</sup> *Grimes v Hawkins and Another* [2011] E.W.H.C. 2004 Q.B. at para. 7

## Returning full circle?

Whilst such cases may suggest a change in approach which favours the occupier, and it has been suggested that:

'hard working home and business owners need and deserve a justice system where their rights come first',<sup>122</sup>

it is still difficult to envisage the law returning full-circle to echo the position pre-1957 before occupiers' liability law was statutorily codified and there was an 'over-zealous preoccupation with the sanctity of real property rights'.<sup>123</sup> The debates and discussions which formed part of and were also provoked by the *Herrington* case<sup>124</sup> and the subsequent Law Commission's Report<sup>125</sup> should help to ensure this.

## Flexibility v certainty?

One question which is not so clearly answerable is the *flexibility* versus *certainty* issue. Whilst statute is best-placed to codify general principles, it is let down by its inflexible approach. Whilst case-law can provide this flexibility, it is not always easy to draw out general principles from cases which can often turn on their own facts. It is a question which troubles many areas of our law as it seeks to pursue an elusive "will-o'-the-wisp"<sup>126</sup> of an appropriate one size fits all approach.

How do other jurisdictions deal with such home defence issues?

## The Castle Doctrine

Such castle conundrums have vexed stakeholders across the world, most recently in Florida. There, a neighbourhood watch volunteer, George Zimmerman, spotted (what he thought was) a suspicious looking man, Trayvon Martin, walking through

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<sup>122</sup> Johnson W. *Government plans to scrap squatters' rights* The Independent. <http://www.independent.co.uk/news/uk/home-news/government-plans-to-scrap-squatters-rights-2312840.html> [Accessed 5 June 2013]

<sup>123</sup> Buckley R. A. *The Occupiers' Liability Act 184 - Has Herrington Survived? Conveyancer and Property Lawyer* 1984 p. 413

<sup>124</sup> *British Railways Board v Herrington* [1972] 2 W.L.R. 537

<sup>125</sup>

<sup>126</sup> Reynolds M. P. *The rise and fall of the Atkin doctrine: searching for a will-o'-the-wisp* *Construction Law Journals* Vol. 20(3), 2004, p. 111

down the street through a gated housing community.<sup>127</sup> Being later described as a "wannabe cop",<sup>128</sup> Zimmerman had "profiled... the black, hoodie-wearing student"<sup>129</sup> who was in fact simply "on his way home... armed only with a can of sweet ice tea and a bag of skittles".<sup>130</sup> There was a subsequent struggle between the two men, during which Zimmerman used the 9mm handgun that he had been carrying to shoot Martin dead.<sup>131</sup>

It was previously thought that Zimmerman's legal team would endeavour to have his second degree murder charge quashed on the basis of Florida's Stand Your Ground principle. This allows someone to use deadly force if they feel that their life is in danger. However, Zimmerman's defence lawyers instead successfully relied on self-defence principles;<sup>132</sup> the jury finding that Zimmerman only fired the gun during a violent onslaught from Martin. Zimmerman has been acquitted accordingly.<sup>133</sup>

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<sup>127</sup> Shelton H. *Court was prevented from considering the real issue at play - racial profiling* The Independent

[http://www.lexisnexis.com.lcproxy.shu.ac.uk/uk/nexis/results/docview/docview.do?docLinkInd=true&risb=21\\_T17788738565&format=GNBFI&sort=BOOLEAN&startDocNo=1&resultsUrlKey=29\\_T17788432600&cisb=22\\_T17788738568&treeMax=true&treeWidth=0&csi=8200&docNo=2](http://www.lexisnexis.com.lcproxy.shu.ac.uk/uk/nexis/results/docview/docview.do?docLinkInd=true&risb=21_T17788738565&format=GNBFI&sort=BOOLEAN&startDocNo=1&resultsUrlKey=29_T17788432600&cisb=22_T17788738568&treeMax=true&treeWidth=0&csi=8200&docNo=2) [Accessed 15 July 2013]

<sup>128</sup> Foster P. *'The law has spoken'... but America is divided over what it says;*

*Obama calls for calm as neighbourhood watch volunteer is cleared of murdering black teenager in trial that gripped a nation* The Daily Telegraph

[http://www.lexisnexis.com.lcproxy.shu.ac.uk/uk/nexis/results/docview/docview.do?docLinkInd=true&risb=21\\_T17788414396&format=GNBFI&sort=BOOLEAN&startDocNo=1&resultsUrlKey=29\\_T17788432600&cisb=22\\_T17788414399&treeMax=true&treeWidth=0&csi=8109&docNo=3](http://www.lexisnexis.com.lcproxy.shu.ac.uk/uk/nexis/results/docview/docview.do?docLinkInd=true&risb=21_T17788414396&format=GNBFI&sort=BOOLEAN&startDocNo=1&resultsUrlKey=29_T17788432600&cisb=22_T17788414399&treeMax=true&treeWidth=0&csi=8109&docNo=3) [Accessed 15 July 2013]

<sup>129</sup> Goddard J. *US protests grow after 'vigilante' is cleared* The Times

[http://www.lexisnexis.com.lcproxy.shu.ac.uk/uk/nexis/results/docview/docview.do?docLinkInd=true&risb=21\\_T17788525143&format=GNBFI&sort=BOOLEAN&startDocNo=1&resultsUrlKey=29\\_T17788432600&cisb=22\\_T17788525146&treeMax=true&treeWidth=0&csi=10939&docNo=9](http://www.lexisnexis.com.lcproxy.shu.ac.uk/uk/nexis/results/docview/docview.do?docLinkInd=true&risb=21_T17788525143&format=GNBFI&sort=BOOLEAN&startDocNo=1&resultsUrlKey=29_T17788432600&cisb=22_T17788525146&treeMax=true&treeWidth=0&csi=10939&docNo=9) [Accessed 15 July 2013]

<sup>130</sup> Young G *Cleared of Martin's murder, but has justice been done?* The Guardian

[http://www.lexisnexis.com.lcproxy.shu.ac.uk/uk/nexis/results/docview/docview.do?docLinkInd=true&risb=21\\_T17788525158&format=GNBFI&sort=BOOLEAN&startDocNo=1&resultsUrlKey=29\\_T17788432600&cisb=22\\_T17788525161&treeMax=true&treeWidth=0&csi=138620&docNo=1](http://www.lexisnexis.com.lcproxy.shu.ac.uk/uk/nexis/results/docview/docview.do?docLinkInd=true&risb=21_T17788525158&format=GNBFI&sort=BOOLEAN&startDocNo=1&resultsUrlKey=29_T17788432600&cisb=22_T17788525161&treeMax=true&treeWidth=0&csi=138620&docNo=1) [Accessed 15 July 2013]

<sup>131</sup> Young G *Cleared of Martin's murder, but has justice been done?* The Guardian

[http://www.lexisnexis.com.lcproxy.shu.ac.uk/uk/nexis/results/docview/docview.do?docLinkInd=true&risb=21\\_T17788525158&format=GNBFI&sort=BOOLEAN&startDocNo=1&resultsUrlKey=29\\_T17788432600&cisb=22\\_T17788525161&treeMax=true&treeWidth=0&csi=138620&docNo=1](http://www.lexisnexis.com.lcproxy.shu.ac.uk/uk/nexis/results/docview/docview.do?docLinkInd=true&risb=21_T17788525158&format=GNBFI&sort=BOOLEAN&startDocNo=1&resultsUrlKey=29_T17788432600&cisb=22_T17788525161&treeMax=true&treeWidth=0&csi=138620&docNo=1) [Accessed 15 July 2013]

<sup>132</sup> Luscombe R *Trayvon Martin case: Zimmerman drops stand-your-ground defence* The Guardian.

<http://www.guardian.co.uk/world/2013/mar/06/trayvon-martin-case-george-zimmerman> [Accessed 5/4/12]

<sup>133</sup> Foster P. *'The law has spoken'... but America is divided over what it says;*

*Obama calls for calm as neighbourhood watch volunteer is cleared of murdering black teenager in trial that gripped a nation* The Daily Telegraph

The case has been described as:

'a litmus test of justice in America today. It put the country's proliferating "stand your ground" gun laws, racial profiling and discrimination against black young men - as well as police incompetence - in the dock.'<sup>134</sup>

Whilst Zimmerman's defence did not ultimately rely on Florida's Stand Your Ground principle, the case has certainly reignited a worldwide debate as to what action a person should be able to take to defend not just themselves and their family at their own premises, but also beyond those boundaries too.

It is only relatively recently that Florida's self-defence law made the colossal leap from what was known as a Duty To Retreat to the current Stand Your Ground principle. Until 2005, if a person was involved in a violent confrontation, they were obliged to take steps to defuse the situation and retreat before resorting to using deadly force.

The exception was the Castle Doctrine, explained by U.S. Supreme Court Justice Benjamin Cardozo as:

'a man assailed in his own dwelling is [not] bound to retreat. If assailed there, he may stand his ground and resist the attack. He is under no duty to take to the fields and the highways, a fugitive from his own home.'<sup>135</sup>

As mentioned earlier, this doctrine has since been extended to apply beyond the "castle walls" enabling a person to use deadly force *wherever* they feel that their life is in danger. Critics<sup>136</sup> suggest that the real problem is not one of self-defence, but rather whether this change in law provides people with an excuse for provoking

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[http://www.lexisnexis.com.lcproxy.shu.ac.uk/uk/nexis/results/docview/docview.do?docLinkInd=true&risb=21\\_T17788414396&format=GNBFI&sort=BOOLEAN&startDocNo=1&resultsUrlKey=29\\_T17788432600&cisb=22\\_T17788414399&treeMax=true&treeWidth=0&csi=8109&docNo=3](http://www.lexisnexis.com.lcproxy.shu.ac.uk/uk/nexis/results/docview/docview.do?docLinkInd=true&risb=21_T17788414396&format=GNBFI&sort=BOOLEAN&startDocNo=1&resultsUrlKey=29_T17788432600&cisb=22_T17788414399&treeMax=true&treeWidth=0&csi=8109&docNo=3) [Accessed 15 July 2013]

<sup>134</sup> Pilkington E. *Trayvon Martin: how a teenager's death sparked a national debate* The Guardian [http://www.lexisnexis.com.lcproxy.shu.ac.uk/uk/nexis/results/docview/docview.do?docLinkInd=true&risb=21\\_T17788738565&format=GNBFI&sort=BOOLEAN&startDocNo=1&resultsUrlKey=29\\_T17788432600&cisb=22\\_T17788738568&treeMax=true&treeWidth=0&csi=284355&docNo=4](http://www.lexisnexis.com.lcproxy.shu.ac.uk/uk/nexis/results/docview/docview.do?docLinkInd=true&risb=21_T17788738565&format=GNBFI&sort=BOOLEAN&startDocNo=1&resultsUrlKey=29_T17788432600&cisb=22_T17788738568&treeMax=true&treeWidth=0&csi=284355&docNo=4) [Accessed 15 July 2013]

<sup>135</sup> Bellin J. *How 'duty to retreat' became 'stand your ground'* <http://edition.cnn.com/2012/03/21/opinion/bellin-stand-your-ground-law/> [Accessed 5 April 2013]

<sup>136</sup> for example Daniel Vice, senior attorney for the Brady Campaign to Prevent Gun Violence as referred to in Pearson M. *Florida shooting renews debate over 'stand your ground' laws* CNN. <http://edition.cnn.com/2012/03/20/us/florida-teen-shooting-law/index.html#1> [Accessed 5 June 2013]

confrontation and then shooting to kill. However the prime House sponsor of the legislation has attempted to quell such speculation.<sup>137</sup>

So whilst home-defence dilemmas are clearly faced cross-continently, it appears that such a comparative approach unfortunately does not provide any clear-cut answers. However what it does do is help to highlight a precautionary tale if, we are, as the Conservatives have suggested,<sup>138</sup> looking to adopt more robust protection mechanisms for occupiers. Since the "Stand Your Ground" principles were introduced in Florida 8 years ago, cases of so-called justifiable homicide have increased three-fold.<sup>139</sup>

The Conservatives have previously advocated following Ireland's lead on the issue; believing that their proposals strike an appropriate balance which provides comfort to concerned householders without advocating vigilantism.<sup>140</sup> Adopting this approach would mean that a householder could use lethal force against an intruder if there were no other means available. Furthermore, householders would also be allowed to stand their ground and use such lethal force, even if they could have safely retreated from their premises. It is this second element which, if adopted, would mean a giant leap for our current home defence laws,<sup>141</sup> and one that the current Government appears reluctant to take for the time being.

## Conclusion:

Whilst the examination of both the criminal and civil law frameworks for home defence has posed many more questions than answers, it is very clear that the

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<sup>137</sup> Pearson M. *Florida shooting renews debate over 'stand your ground' laws* CNN. <http://edition.cnn.com/2012/03/20/us/florida-teen-shooting-law/index.htm#1> [Accessed 5 June 2013]

<sup>138</sup> Casciani D. Q&A: *What is reasonable force?* BBC News <http://news.bbc.co.uk/1/hi/uk/6902409.stm> [Accessed 5 June 2013]

<sup>139</sup> Prince R. *Trayvon Martin: 'Justifiable homicide' cases double across US in last decade* The Telegraph. <http://www.telegraph.co.uk/news/worldnews/northamerica/usa/9179162/Trayvon-Martin-Justifiable-homicide-cases-double-across-US-in-last-decade.html> [Accessed 5 June 2013]

<sup>140</sup> A point that concerned both Liberty (*Liberty Report Stage Briefing on Crime and Courts Bill in the House of Commons* Liberty. <http://www.liberty-human-rights.org.uk/pdfs/policy13/liberty-s-hoc-report-stage-briefing-crime-and-courts-bill-march-2013-.pdf> [Accessed 5 June 2013]) and the Law Society. (*The Law Society The Law Society Parliamentary Brief House of Commons Second Reading 14 January 2013* The Law Society).

<sup>141</sup> Casciani D. Q&A: *What is reasonable force?* BBC News <http://news.bbc.co.uk/1/hi/uk/6902409.stm> [Accessed 5 June 2013]

ancient adage that a person's home is their castle (at least to some extent) is here to stay, in whatever guise that may take.

Whilst it is unlikely that Floridian methods will be adopted in the UK, it will be interesting to observe how Ireland's approach develops and consider whether there any aspects of that approach that could be adopted to help provide much-needed clarification on the home defence issues faced in England and Wales.

The continued deliberations about home defence law suggest that it remains an important issue, at least in terms of stakeholder perception if not in actual statistics. Recent debates appear to have focused unwaveringly on the criminal rather than the civil law. Yet to conclude that the civil law is not "keeping up" would be wrong. On the contrary civil claims appear to be following suit, albeit in a more understated way, as judges are moving away from a compensation culture and tipping the often delicate balance of rights in the occupiers' favour.

Whilst the flexibility versus certainty conundrum continues to be of concern, perhaps the best approach is to consider statute as a script which inevitably requires the judiciary to play a lead role in its interpretation according to the individual circumstances of each particular case.