JOBNAME: No Job Name PAGE: 1 SESS: 1 OUTPUT: Fri Feb 5 13:52:12 2010
/journals/journal/tlj/vol18/09-18001

Self-defence and illegality under the Civil Liability Act 2002 (NSW)

James Goudkamp[*]

The Civil Liability Act 2002 (NSW) provides for a number of defences to liability. This article seeks to add to our understanding of two of these defences: 'self-defence' and 'illegality'. It is argued that although these defences may seem to have relatively little to do with each other, there are important connections between them. An examination of the circumstances in which they apply is also undertaken. This analysis demonstrates that the enactment of these defences was a step in the wrong direction.

1 Introduction

The Civil Liability Act 2002 (NSW) (CLA) provides extensively for rules that limit liability for personal injury and death. Broadly speaking, these limiting rules can be divided into three categories. One category contains rules that make it more difficult for the plaintiff to establish his or her side of the case. The rules in this category either raise the height of pre-existing hurdles that the plaintiff is required to clear or erect new obstacles in the plaintiff's path. The second category consists of rules that reduce the damages to which successful plaintiffs are entitled. The third category comprises provisions that create new defences to liability. Two such defences are 'self-defence' and 'illegality'. This article examines the relationship between these defences and the circumstances in which they apply. The analysis will show that they are, on the whole, deeply problematic. It would have been better had they not been created.

Roughly equivalent statutory defences exist in several other jurisdictions. Self-defence is governed by statute in Queensland, Tasmania, Western Australia and the Northern Territory.[1] Statutory illegality defences have been created in Queensland, South Australia, the Australian Capital Territory and the Northern Territory.[2] This article is, however, concerned only with the NSW defences. Its scope is so limited for two reasons. First, it is not practical

* Junior Research Fellow, Jesus College, University of Oxford; Visiting Fellow, Faculty of Law, University of Wollongong. This article would have been much worse had I not had the benefit of detailed suggestions for improvement from Harold Luntz and the anonymous referees. I am also grateful to Banu Ahtam for alerting me to several errors. The remaining shortcomings are, of course, my responsibility.

1 Criminal Code Act 1899 (Qld) s 6; Criminal Code (Qld) ss 270–278; Criminal Code Act 1974 (Tas) s 9; Criminal Code (Tas) s 46; Criminal Code Act 1913 (WA) s 5; Criminal Code (WA) ss 247–255; Criminal Code Act (NT) s 7; Criminal Code (NT) s 43BD. These provisions apply in both the criminal and civil contexts, a fact which has generally been overlooked by tort lawyers.

2 Civil Liability Act 2003 (Qld) s 45; Criminal Code Act 1899 (Qld) s 6; Civil Liability Act 1936 (SA) s 43; Civil Law (Wrongs) Act 2002 (ACT) s 94; Personal Injuries (Liability and Damages) Act 2003 (NT) s 10. There is no statutory illegality defence in Western Australia or Victoria. It is worth noting, however, that s 14G(2) of the Wrongs Act 1958 (Vic) provides that in determining whether the defendant breached a duty of care that he or she owed to the plaintiff, the court must consider whether the plaintiff was engaged in an illegal activity at

JOBNAME: No Job Name PAGE: 2 SESS: 1 OUTPUT: Fri Feb 5 13:52:12 2010
/journals/journal/tlj/vol18/09-18001

to take account of the position in all the other jurisdictions in any comprehensive manner owing to the lack of uniformity in the legislation.[3] Justice cannot be done to the NSW defences and to the defences elsewhere within the space available. Secondly, on the whole, the NSW defences are more noteworthy. This is because they break with the common law to the greatest extent and offer a higher level of protection to defendants than the corresponding defences in other jurisdictions.

2 The pre-existing law

As the common law also provides for defences of self-defence and illegality, it is worth saying something about these judge-made defences before we consider their statutory counterparts.

2.1 Self-defence at common law

Since at least the fifteenth century, the courts have recognised self-defence as an answer to liability in tort.[4] A defendant acts in self-defence if he or she uses force that he or she reasonably believes is both necessary and proportionate to resist an attack. This defence is not, therefore, confined to those who are actually under attack. It extends to those who mistakenly but reasonably believe in the need to act in their own defence.[5] For example, a person who strikes a jogger in a dark alleyway because he or she thinks on reasonable grounds that the jogger is a mugger would be able to rely on the defence provided that he or she strikes the jogger in a way that would be justified had the jogger been a mugger.

2.2 Rationales supporting the common law defence of self-defence

Of all the defences recognised by tort law, self-defence is perhaps the least controversial.[6] It seems self-evident that liability should be withheld from a person who defends himself or herself against an aggressor. It is widely believed that leaving those attacked by aggressors to a remedy in damages is manifestly inadequate. As Blackstone put it:

> The future process of law is by no means an adequate remedy for injuries accompanied with force; since it is impossible to say, to what wanton lengths of rapine or cruelty outrages of this sort might be carried, unless it were permitted a man immediately to oppose one violence with another.[7]

---

the time of suffering injury. Put differently, s 14G(2) stipulates that unlawful conduct on the part of the plaintiff is a factor to be taken into account in the negligence calculus.

3 I offered an analysis of the statutory illegality defences throughout Australia in J Goudkamp, 'A Revival of the Doctrine of Attainder? The Statutory Illegality Defences to Liability in Tort' (2007) 29 *Syd L Rev* 445.

4 See W P Keeton et al (Eds), *Prosser and Keeton on Torts*, 5th ed, West Group, St Paul, Minn, 1984, p 124.

5 *Walker v Hamm* [2008] VSC 596; BC200811385 at [46]; *Ashley v Chief Constable of Sussex Police* [2008] AC 962; [2008] 3 All ER 573; [2008] 2 WLR 975; [2008] UKHL 25.

6 'Self-defence is the clearest of all laws; and for this reason – the lawyers didn't make it': D Jerrold, *Comedies*, Bradbury & Evans, London, 1853, p 167.

7 III *Comm* 4.

JOBNAME: No Job Name PAGE: 3 SESS: 1 OUTPUT: Fri Feb 5 13:52:12 2010
/journals/journal/tlj/vol18/09-18001

While the existence of the defence of self-defence is not contentious, identifying its philosophical foundations has proved to be a challenging task. Why, precisely, does the law let persons who act in their own defence out of liability? This question has spawned a vast theoretical literature.[8] It is impractical for us to engage with the relevant debates in this article. It will suffice to sketch the main theories, none of which is entirely satisfactory.

Self-defence as an excuse

The defence of self-defence can be seen as an allowance for persons who find themselves 'caught in a maelstrom of circumstances'.[9] On this interpretation, self-defence is characterised as an excuse. This is how Blackstone perceived the plea of *se defendendo* upon a chance medley, which was the precursor to the modern defence of self-defence. Blackstone insisted that *se defendendo* was only available to those who used force against an aggressor 'in the heat of blood or passion'.[10] The main weakness in this theory is that we do not think that those who act in self-defence are merely excused. In contemporary society, self-defence is regarded as the paradigmatic justificatory defence. It is not seen as a concession for human frailty, but as a rule that recognises that it is reasonable (or even commendable) to resist aggressors.

Self-defence as punishment

Another theory of self-defence holds that defenders are let out of liability because they are administering punishment to aggressors. This theory has some purchase. There is a tendency to think that aggressors who are injured by their victim's defensive force get what they deserve. The punishment theory is also supported by the fact that an aggressor who is held criminally liable is permitted to adduce evidence of injuries suffered at the hands of the defender in mitigation of sentence.[11] The logic underpinning this rule appears to be that cognisance needs to be taken of the aggressor's injuries in order to ensure that he or she is not punished twice. This suggests a link between defensive force and punishment.[12] However, despite the foregoing, the punishment theory is unconvincing.[13] A serious difficulty with it is that aggressors are sometimes morally innocent and do not deserve punishment (consider insane aggressors and infant aggressors). A second and more serious problem is that private individuals do not have the authority to mete out punishment. The state reserves to itself the right to administer punishment. As

8 Some of the more important contributions include A Ashworth, 'Self-Defence and the Right to Life' (1975) 35 *CLJ* 282; G Fletcher, 'Proportionality and the Psychotic Aggressor: A Vignette in Comparative Criminal Theory' (1973) 8 *Israel L Rev* 367; J Thomson, 'Self-Defense' (1991) 20 *Phil & Pub Aff* 283; S Uniacke, *Permissible Killing*, CUP, Cambridge, 1994; and F Leverick, *Killing in Self-Defence*, OUP, Oxford, 2007. Contributors to this literature are overwhelmingly criminal lawyers and moral philosophers. No tort lawyer has made a serious attempt to justify the defence of self-defence.

9 G Fletcher, *Rethinking Criminal Law*, Little Brown, Boston, 1978, p 808.

10 IV *Comm* 184.

11 *R v Cooksley* [2003] 3 All ER 40; [2003] EWCA Crim 996 at [20].

12 See further R Nozick, *Anarchy, State and Utopia*, Harvard University Press, Boston, Mass, 1974, pp 62–3. Nozick contends that injuries inflicted in self-defence are a down payment on the punishment that the aggressor deserves.

13 I have been influenced here by Ashworth, above n 8, and G Fletcher, 'Punishment and Self-Defense' (1989) 8 *Law & Phil* 201.

JOBNAME: No Job Name PAGE: 4 SESS: 1 OUTPUT: Fri Feb 5 13:52:12 2010
/journals/journal/tlj/vol18/09-18001

Andrew Ashworth puts it, 'it is the mark of a civilised society that punishment may only be carried out by official agencies according to the law'.[14]

Forfeiture theory of self-defence

A further rationale for the defence of self-defence is based on the notion of forfeiture of rights.[15] The basic idea is that the right to physical security is conditional on acting consistently with the possession of that right by others. It follows, for proponents of this view, that victims of attacks are permitted to use defensive force because aggressors, by embarking on an attack, waive the right to physical security. This theory suffers from obvious deficiencies.[16] For one thing, it sees aggressors as outlaws. However, the law moved on from the notion of outlawry long ago. Today, all persons are entitled to protection under the law, no matter how despicable their deeds.[17] Secondly, the forfeiture theory cannot explain why it is permissible to use defensive force against innocent aggressors or persons who are reasonably but mistakenly perceived to be aggressors. Why should an innocent aggressor lose his or her rights considering that they are not responsible for initiating the attack in question? Equally, why should those who are merely perceived to be aggressors through no fault of their own forfeit their rights? Thirdly, this theory does not explain why it is impermissible to use force against aggressors who become disabled after embarking on an attack. Suppose that an aggressor, while murderously attacking a victim, falls and breaks his or her neck. The law does not countenance the use of force against such an aggressor. The aggressor's right to physical security is intact. The forfeiture theory does not tell us why this is the case. It does not account for how the aggressor 'reacquired' the right to physical security.

Autonomy

Attempts have been made to support the defence of self-defence on the basis that it vindicates personal autonomy.[18] George Fletcher, a leading proponent of this theory, described it in the following terms:

> If a person's autonomy is compromised by [an] intrusion, then the defender has the right to expel the intruder and restore the integrity of his domain. The underlying image is that of a state of warfare. An aggressor's violation of our rights is akin to an intrusion of foreign troops on our soil. As we are inclined to believe that any

14 Ashworth, above n 8, at 288. See also H L A Hart, *Punishment and Responsibility*, 2nd ed, OUP, Oxford, 2008, p 5.

15 See generally Uniacke, above n 8, Ch 6.

16 The argument here relies, to an extent, on G Fletcher, 'The Right to Life' (1980) 63 *Monist* 135 at 142–5.

17 As Judge LJ said in *Cross v Kirkby*, *The Times*, 5 April 2000:

> The medieval concept of outlawry is unacceptable in modern society. An outlaw forfeited the protection of the law. He could not invoke the assistance of the court to enforce non-existent rights. In the United Kingdom today there are no outlaws. However abhorrent the crime, whatever the subsequent conviction, the protection of the law extends to the criminal who enjoys rights not only in theory but enforceable in practice.

18 Fletcher, above n 9, pp 860–4.

JOBNAME: No Job Name PAGE: 5 SESS: 1 OUTPUT: Fri Feb 5 13:52:12 2010
/journals/journal/tlj/vol18/09-18001

> community has the absolute right to expel foreign invaders, any person attacked by another should have the absolute right to counteract aggression against his vital interests.[19]

The main criticism that has been levelled against the autonomy theory is that it does not suggest a limit on the amount of force that a defender may use against an aggressor. It implies that a defender may use all necessary force to remove an intrusion upon his or her personal space and that the reasonableness of the force applied is neither here nor there. This is inconsistent with the way the courts have defined self-defence.

The utilitarian account

Bentham made the utilitarian case for the defence of self-defence as follows:

> Were you to slay ten lawless assailants, their death would be a gain to society, whereas the loss of one upright and amiable man is a great evil. The right of defence is absolutely necessary. The vigilance of magistrates could never supply the place of that watchful care which every individual takes on his own behalf. Bad men would never be restrained as effectively by mere fear of the laws as they are by fear of the resistance of individuals in the aggregate. Take away this right, then, and you become an accomplice of the base and the mischievous.[20]

Bentham makes two arguments in this passage in support of the defence of self-defence and it is important to separate them. The first is that it is better that an aggressor suffer injury than an innocent person. The main problem with this suggestion is that it assumes that the life of an aggressor is worth less than the life of an innocent person. This assumption is incompatible with the understanding that all persons are of equal moral value. Bentham's second argument is that permitting self-defence deters aggression. It is difficult to assess the strength of this claim. Whether or not fear of resistance is a disincentive to aggression is debatable. Far from deterring aggression, it is conceivable that permitting private defence may result in an escalation in violence.

2.3 The defence of illegality at common law

The common law defence of illegality[21] is a much more recent invention than that of self-defence. Often paraded under the banner *ex turpi causa non oritur actio*,[22] it comes in several different flavours. The more important of these flavours are as follows. First and foremost, the defence can deny the existence of a duty of care in the tort of negligence.[23] The basic rule is that participants

---

19 Ibid, p 860.

20 J Bentham, *Bentham's Theory of Legislation*, translated from the French of Etienne Dumont by C M Atkinson, Humphrey Milford, London, 1914, vol 2, p 45. See also J Bentham, *An Introduction to the Principles of Morals and Legislation*, 1789, Ch XIII, §2(V).

21 See generally Law Commission of England and Wales, *The Illegality Defence*, CP 189, HMSO, London, 2009, pp 127–46.

22 'An action does not arise from a base cause'. For criticism of the use of this maxim to refer to the illegality defence, see *Smith v Jenkins* (1970) 119 CLR 397 at 409–14 per Windeyer J; [1970] ALR 519; [1970] HCA 2; BC7000150.

23 For a recent example of a case in which the defence negated a duty of care see *Miller v Miller* [2009] WASCA 199; BC200910023. It should be observed that when the illegality doctrine functions in this way it does not constitute an affirmative defence. That is to say, it

JOBNAME: No Job Name PAGE: 6 SESS: 1 OUTPUT: Fri Feb 5 13:52:12 2010
/journals/journal/tlj/vol18/09-18001

in a joint illegal enterprise will not owe reciprocal duties of care if the nature of their enterprise is such that it would be 'grotesque' to enquire how the reasonable person would have acted in their position.[24] So, for example, the defence would apply in an action brought by a bankrobber in respect of injuries sustained in a car crash due to the negligence of his or her getaway driver. This is because one cannot, according to the courts, sensibly ask how much care the reasonable getaway driver would have taken.[25]

Secondly, the defence may be enlivened where the plaintiff suffers damage while committing an illegal act in which the defendant is not implicated (such cases are sometimes described as involving 'unilateral illegality'). The test for whether the defence applies in this context is as follows: did the legislature in creating the offence concerned intend to deprive those injured while committing it of civil remedies that they would have otherwise enjoyed.[26] The defence will bite if this question is answered in the affirmative. Since legislatures do not usually advert to issues of civil liability when enacting penal statutes, this test is rarely met. Defendants have, for instance, failed to satisfy it in cases in which the plaintiff was injured while unlawfully leaning out of a tram window,[27] fleeing from police at high-speed on a motorcycle[28] and vandalising a train.[29]

Thirdly, the defence can reduce damages awards under specific heads.[30] The general principle is that damages will not be granted in respect of losses that are intimately connected to an unlawful act on the part of the plaintiff. For example, damages for loss of earning capacity have been withheld under this rule because the lost income would have been derived by working as an illegal bookmaker[31] and as a crane driver while unlawfully concealing a history of epileptic seizures.[32] Similarly, in a claim under Lord Campbell's Act damages for loss of financial support were denied because the deceased would have obtained the money concerned by committing burglaries.[33]

Fourthly, the illegality defence prevents damages from being recovered in

---

is not a rule that gets the defendant out of liability even if all the elements of a tort are present. Rather, it denies that the defendant committed the tort of negligence. It is an 'absent element defence' (the language is borrowed from P Robinson, *Structure and Function in Criminal Law*, Clarendon Press, Oxford, 1997, p 12).

24 *Gala v Preston* (1991) 172 CLR 243; 100 ALR 29; 12 MVR 405; [1991] HCA 18.

25 *Ashton v Turner* [1981] QB 137; [1980] 3 All ER 870; [1980] 3 WLR 736; *Fabre v Arenales* (1992) 27 NSWLR 437 (CA); 15 MVR 303.

26 *Henwood v Municipal Tramways Trust (South Australia)* (1938) 60 CLR 438; [1938] ALR 312; [1938] HCA 35; BC3800031.

27 Ibid.

28 *Winter v Commonwealth* (1992) 112 ACTR 10; 111 FLR 275; Aust Torts Reps 81-197.

29 *Rundle v State Rail Authority of New South Wales* [2001] NSWSC 862; BC200106003 (the illegality defence was not considered on appeal to the NSW Court of Appeal: *Rundle v State Rail Authority of New South Wales* (2002) Aust Torts Reports 81-678; [2002] NSWCA 354; BC200206292).

30 Strictly speaking, the illegality doctrine does not operate as a defence when it only reduces the damages to which a successful plaintiff is entitled. However, this role played by the doctrine is mentioned here for completeness.

31 *Meadows v Ferguson* [1961] VR 594.

32 *Hewison v Meridian Shipping Pte Ltd* [2003] ICR 766.

33 *Burns v Edman* [1970] 2 QB 541; [1970] 1 All ER 886; [1970] 2 WLR 1005.

JOBNAME: No Job Name PAGE: 7 SESS: 1 OUTPUT: Fri Feb 5 13:52:12 2010
/journals/journal/tlj/vol18/09-18001

respect of the imposition of criminal sanctions.[34] The decision of the English Court of Appeal in *Clunis v Camden and Islington Health Authority*[35] exemplifies this dimension of the defence.[36] The plaintiff in this case, who was mentally-ill, stabbed a man to death on a London tube station. The plaintiff pleaded guilty to manslaughter on the basis of diminished responsibility and was sentenced to detention in a mental hospital. The plaintiff then sued the defendant health authority claiming that its staff had failed to provide him with adequate care and that, had he been competently treated, he would not have committed the manslaughter. Upholding an application to strike out the action, the Court of Appeal held that the illegality defence would have prevented the plaintiff from succeeding.

2.4 Rationales supporting the common law defence of illegality

Like the defence of self-defence, the illegality defence appears to most people to be a reflection of common sense. It is firmly supported by public sentiment. The layperson is of the view that persons injured while committing a criminal offence should not be compensated. While these opinions are strongly held, a little reflection reveals that they are misconceived.[37] The fact of the matter is that there is no good reason for denying actions that are contaminated with illegal conduct on the part of the plaintiff except in very rare cases. The defence of illegality is far wider than is justifiable. In this section we will consider a number of arguments that have been made in support of the defence and see why they are unconvincing. Exceptional cases in which the illegality defence may discharge a useful function will also be mentioned.

Punishment

It has been argued that the illegality defence is justified on the ground that it punishes wrongdoing plaintiffs and thereby bolsters the criminal law. For example, Allen Linden claims that 'tort law is not unwise to reinforce the criminal law by adding the civil sanction of denying tort recovery to whatever penal sanctions may be imposed for the offence'.[38] However, this suggestion does not survive critical examination. Far from supporting the criminal law in its quest to realise retributive justice, the illegality defence is liable to impede it. This is because the defence has the potential to mete out punishment that is disproportionate to the gravity of the plaintiff's wrongdoing. It is pregnant with this potential for two reasons. First, the defence may apply even if the

34 See further J Goudkamp, 'Can Tort Law be Used to Deflect the Impact of Criminal Sanctions? The Role of the Illegality Defence' (2006) 14 *TLJ* 20. The illegality defence can also prevent the recovery of damages in respect of losses sustained by the orders of criminal courts even though the orders do not spring from a conviction. Consider, eg, *Hunter Area Health Service v Presland* (2005) 63 NSWLR 22; [2005] NSWCA 33; BC200502326.

35 [1998] QB 978; [1998] 3 All ER 180; [1998] 2 WLR 902.

36 See also *Cole v Taylor* 301 NW 2d 766 (1981); *Lord v Fogcutter Bar* 813 P 2d 660 (1991); *State Rail Authority (NSW) v Wiegold* (1991) 25 NSWLR 500 (CA); Aust Torts Reps 81-148; *Worrall v British Railways Board* [1999] EWCA Civ 1312; and *Gray v Thames Trains* [2009] 3 WLR 167; [2009] UKHL 33. Cf *Meah v McCreamer* [1985] 1 All ER 367.

37 For a devastating critique of the defence of illegality, see E Weinrib, 'Illegality as a Tort Defence' (1976) 26 *UTLJ* 28. The argument here relies, to a degree, on Weinrib's analysis.

38 A Linden, *Canadian Tort Law*, 5th ed, Butterworths, Toronto, 1993, p 473.

JOBNAME: No Job Name PAGE: 8 SESS: 1 OUTPUT: Fri Feb 5 13:52:12 2010
/journals/journal/tlj/vol18/09-18001

plaintiff has already been punished, or will be punished, by the criminal law. As a result, the defence may impose double punishment. Secondly, because the defence wipes out the plaintiff's entitlement to damages completely (or completely under a specific head), the punishment that it hands out depends on the extent of the plaintiff's loss rather than on the seriousness of his or her unlawful act.

Deterrence

An attempt to justify the illegality defence on the ground that it deters offending would be unconvincing. The main reason why the defence does not pack a deterrent punch is that a person who is considering whether to commit an offence is unlikely to be thinking about the law of tort. If he or she has the law in mind at all it will be the criminal law with which he or she is concerned.

Preventing wrongful profiting

According to public opinion, awarding compensation to a person injured while engaged in an unlawful act is tantamount to rewarding criminal behaviour. If this understanding is correct, it might supply grounds for supporting the illegality defence. It is, after all, a general principle of law that a person should not profit from his or her wrong.[39] However, the belief that awarding damages to an individual who is injured while committing an offence facilitates wrongful profiting is clearly wrong. Tort law is a restorative institution. It seeks to undo the consequences of the defendant's tort. Except in rare situations, such as when exemplary damages are awarded,[40] tort law does not facilitate profiting. Accordingly, the illegality defence cannot be upheld on the basis that it stops tort law from rewarding offenders.

Maintaining the dignity of the courts

The illegality defence cannot be justified on the ground that it prevents the integrity of the courts from being undermined. This is because the courts lend a helping hand to wrongdoers no matter whether claims that are tainted with illegality succeed or fail. If a claim that is contaminated with illegality is allowed, the courts will be seen to assist a wrongdoing plaintiff. Conversely, if such a claim is denied, the tortfeasor, who may also have committed a criminal offence, will be benefited. So, in short, the dignity of the courts is threatened by actions in which the plaintiff acted unlawfully regardless of how they are dealt with.

Situations in which the defence may be justified

We have considered a number of arguments in support of the defence of illegality. None of them is persuasive. Accordingly, illegality should not constitute a tort defence of general application. There are, however, some rare cases in which the defence would seem to play a legitimate role. The most important of these cases are what I have elsewhere described as 'sanction

39 *Commodum ex injuria sua nemo habere debet*.

40 Section 21 of the CLA prohibits the courts from awarding exemplary damages in most personal injury cases.

JOBNAME: No Job Name PAGE: 9 SESS: 1 OUTPUT: Fri Feb 5 13:52:12 2010
/journals/journal/tlj/vol18/09-18001

shifting actions'.[41] Such actions involve attempts by the plaintiff to harness tort law to deflect the impact of a sanction imposed on him or her by the criminal law. An example of a sanction shifting action is *Clunis*, which was discussed earlier.[42] The plaintiff in this case unsuccessfully argued that the defendant should compensate him for the losses he suffered in consequence of being convicted of a criminal offence. The problem with sanction shifting actions is that they may undermine the goals of the criminal law by taking some of the sting out of criminal penalties. Because it is important for the law to operate as a coherent institution,[43] a strong case can be made for using the illegality defence to deny such actions.[44]

3 Introducing the statutory defences

3.1 The legislative text

The statutory defence of self-defence is housed in s 52 of the CLA. This section is supplemented by s 53. The statutory illegality defence is set out in s 54.[45] All these sections are located within Pt 7 of the Act. Pursuant to s 51, Pt 7 applies to 'civil liability of any kind for personal injury damages or damage to property'.[46] Under s 3B, Pt 7 does not apply in a small number of cases.[47] It is convenient to set out ss 52–54.

Section 52 No civil liability for acts in self-defence

(1) A person does not incur a liability . . . arising from any conduct of the person carried out in self-defence, but only if the conduct to which the person was responding:

(a) was unlawful, or

41 Goudkamp, above n 34.

42 See 2.3.

43 See the remarks in *Hall v Hebert* [1993] 2 SCR 159 at 176 and *Sullivan v Moody* (2001) 207 CLR 562; 183 ALR 404; [2001] HCA 59; BC200106147 at [60].

44 One may wonder whether I am being too cautious here. It might be thought that there is an overwhelming case for denying sanction shifting actions. However, this is probably not so since certain types of sanction shifting actions may paradoxically promote the objectives of the criminal law. I discuss this issue further in J Goudkamp, 'The Defence of Illegality: *Gray v Thames Trains Ltd*' (2009) 17 *TLJ* 205.

45 A second and much narrower illegality defence is provided for in s 54A. This defence limits the damages that can be recovered by claimants who suffer injury while committing an act that would be illegal but for the fact that they suffered from a mental illness. It is not practical to discuss this defence in this article. It is considered in Goudkamp, above n 3, at 469–72.

46 The expression 'personal injury damages' is defined in s 11 as 'damages that relate to the death of or injury to a person'. For analysis of the words 'relate to' in this definition see *Chaina v The Presbyterian Church (NSW) Property Trust* (2007) 69 NSWLR 533; Aust Torts Reports 81-882; [2007] NSWSC 353; BC200702718 at [18], [41]–[42]; and *Adams v NSW* [2008] NSWSC 1257; BC200810510 at [128]. The word 'injury', which is defined in the same section as including 'pre-natal injury', 'impairment of a person's physical or mental condition' and 'disease', was considered in *NSW v Ibbett* (2005) 65 NSWLR 168; [2005] NSWCA 445; BC200510884 at [22], [123]–[125], [210]–[211] (its meaning was not in issue on appeal to the High Court: *NSW v Ibbett* (2006) 229 CLR 638; 231 ALR 485; [2006] HCA 57; BC200610288).

47 Pt 7 does not apply to dust diseases or tobacco cases or to claims under workers' compensation legislation.

JOBNAME: No Job Name PAGE: 10 SESS: 1 OUTPUT: Fri Feb 5 13:52:12 2010
/journals/journal/tlj/vol18/09-18001

(b) would have been unlawful if the other person carrying out the conduct to which the person responds had not been suffering from a mental illness at the time of the conduct.

(2) A person carries out conduct in self-defence if and only if the person believes the conduct is necessary:

(a) to defend himself or herself or another person, or
(b) to prevent or terminate the unlawful deprivation of his or her liberty or the liberty of another person, or
(c) to protect property from unlawful taking, destruction, damage or interference, or
(d) to prevent criminal trespass to any land or premises or to remove a person committing any such criminal trespass,

and the conduct is a reasonable response in the circumstances as he or she perceives them.

(3) This section does not apply if the person uses force that involves the intentional or reckless infliction of death only:

(a) to protect property, or
(b) to prevent criminal trespass or to remove a person committing criminal trespass.

Section 53 Damages limitations apply even if self-defence not reasonable response

(1) If section 52 would operate to prevent a person incurring a liability . . . in respect of any conduct but for the fact that the conduct was not a reasonable response in the circumstances as he or she perceived them, a court is nevertheless not to award damages against the person in respect of the conduct unless the court is satisfied that:

(a) the circumstances of the case are exceptional, and
(b) in the circumstances of the case, a failure to award damages would be harsh and unjust.

(2) If the court determines to award damages on the basis of subsection (1), the following limitations apply to that award:

(a) [the limitations that apply to claims in negligence in respect of personal injury and death], and
(b) no damages may be awarded for non-economic loss.

Section 54 Criminals not to be awarded damages

(1) A court is not to award damages in respect of liability to which this Part applies if the court is satisfied that:

(a) the death of, or the injury or damage to, the person that is the subject of the proceedings occurred at the time of, or following, conduct of that person that, on the balance of probabilities, constitutes a serious offence, and
(b) that conduct contributed materially to the death, injury or damage or to the risk of death, injury or damage.

(2) This section does not apply to an award of damages against a defendant if the conduct of the defendant that caused the death, injury or damage concerned constitutes an offence (whether or not a serious offence).

Note: Sections 52 and 53 can apply to prevent or limit recovery of damages even though the defendant's conduct constitutes an offence.

(3) A 'serious offence' is an offence punishable by imprisonment for 6 months or more.

(4) . . .

JOBNAME: No Job Name PAGE: 11 SESS: 1 OUTPUT: Fri Feb 5 13:52:12 2010
/journals/journal/tlj/vol18/09-18001

(5) This section operates whether or not a person whose conduct is alleged to constitute an offence has been, will be or is capable of being proceeded against or convicted of any offence concerned.

3.2 What prompted the legislature to enact these defences?

An important catalyst in the enactment of ss 52–54 was the decision of the NSW District Court in *Fox v Peakhurst Inn Pty Ltd*.[48] The plaintiff in this case wanted to gain entry to a nightclub to which he had been refused admission because he was 16 years old and intoxicated. To this end, he entered premises adjoining the club in the hope of finding an alternative point of access. These premises were occupied by the defendant's licensee. The licensee spotted the plaintiff through a window, cornered him and beat him around the head with a metal bar. The plaintiff sued the defendant and obtained judgment for nearly $50,000. The court awarded the plaintiff's mother almost $20,000 in respect of a psychiatric disorder that she suffered as a result of seeing the plaintiff in his injured state.[49] Predictably, the decision was condemned by the press.[50] Impassioned calls were made for greater protection to be given to occupiers who cause injury while defending their property against trespassers and to strip those who suffer injury while committing an illegal act of any entitlement to compensation that they might have otherwise enjoyed. A perusal of the parliamentary *Hansard* suggests that the enactment of ss 52–54 was primarily a response to the media's criticism of *Fox*.[51]

48 Unreported, McGuire DCJ, 29 August 2002, discussed in H Luntz, 'The Future of Accident Compensation: The Australian Picture' (2004) 35 *VUWLR* 879 at 882.

49 The decision was set aside by the Court of Appeal owing to procedural defects at the hearing: *Peakhurst Inn Pty Ltd v Fox* [2004] NSWCA 74; BC200401821. The defendant apparently lost on the retrial: V Goldner, 'Drunk youth gets payout back', *Daily Telegraph* (Sydney), 18 December 2004, p 26.

50 See, eg, E Connolly, 'Court Awards Intruder $50,000 for Pub Beating', *The Age*, 30 August 2002, p 3; S Gee, 'Judge Called Joshua Fox a Drunken Lout but Still Awarded him Almost $50,000', *Daily Telegraph* (Sydney), 30 August 2002, p 30; B Clifton, 'Outrage over Lout's $50,000', *Daily Telegraph* (Sydney), 31 August 2002, p 20.

51 Consider, eg, the following remarks:

> [I refer to] the case [of *Fox v Peakhurst Inn Pty Ltd*] . . . I challenge the Premier to prevent such . . . claim[s from succeeding in the future] . . . and to ensure that . . . compensation is not available to offenders or their relatives (New South Wales, *Parliamentary Debates*, Legislative Assembly, 30 October 2002 (Mr Andrew Fraser), pp 6202–3).
>
> Hopefully [the Civil Liability Amendment (Personal Responsibility) Bill 2002 (NSW)] will . . . address farcical outcomes whereby litigants have been awarded huge payouts, despite high levels of personal responsibility for the injuries they sustained. I cite the example [of *Fox v Peakhurst Inn Pty Ltd*]' (New South Wales, *Parliamentary Debates*, Legislative Assembly, 30 October 2002 (Mr Andrew Stoner), p 6271).

JOBNAME: No Job Name PAGE: 12 SESS: 1 OUTPUT: Fri Feb 5 13:52:12 2010
/journals/journal/tlj/vol18/09-18001

3.3 The defences are a result of legislative experimentation

Much of the CLA is based on recommendations made in the *Review of the Law of Negligence*.[52] As readers of this *Journal* will know,[53] this report was authored by a panel set up at the height of the 2002 insurance crisis to advise how the common law might be reformed so as to limit liability for personal injury and death. No view was expressed in the report on the merits of enacting defences of self-defence and illegality. Sections 52–54 are an initiative of the legislature.

3.4 The connection between the statutory defences

It might be thought that it is rather odd to write an article about the defences in ss 52 and 54. One might think that these defences have relatively little in common. It is true that there is a fundamental difference between them: self-defence under s 52 looks to the reasonableness of the defendant's behaviour, while the illegality defence under s 54 does not. However, despite this important point of distinction, the defences are closely connected in two senses. First, the factual pattern needed to open the door to the possibility that the defendant might be able successfully to rely on s 52 will almost always enliven s 54. Consider the following scenario. P attacks D. D resists the attack and injures P in the process. P sues D in trespass. In this example, both ss 52 and 54 may be live issues. D may be able to invoke s 52 as D injured P in repulsing P's attack. Section 54 may also apply as P suffered injury while acting in contravention of the criminal law. Although the factual matrix needed to activate the defence in s 52 will usually also engage the defence in s 54, it is worth noting that the converse is not the case. Section 54 will often be triggered without the defence in s 52 being brought into play. Many cases in which the plaintiff was engaged in a breach of the criminal law at the time of suffering injury do not involve any act of self-defence on the part of the defendant.

Secondly, s 54 was crafted around ss 52–53.[54] Section 54(2) provides that the illegality defence in s 54(1) does not apply if the defendant's tortious act constitutes an offence. The apparent goal of this provision is to ensure that plaintiffs who are injured by excessive self-defence can take advantage of the gap in the defence in s 52 that is carved out by s 53. Section 53, which will be discussed below, exceptionally makes limited damages available to aggressors who are injured by excessive self-defence.[55] Because aggressors are usually liable to be convicted of an offence, s 54(1) would normally block access to this possible entitlement to limited damages but for s 54(2). Of

52 Commonwealth of Australia, *Review of the Law of Negligence: Final Report*, Canberra, 2002.

53 J J Spigelman, 'Negligence and Insurance Premiums: Recent Changes in Australian Law' (2003) 11 *TLJ* 291; P Underwood, 'Is Mrs Donoghue's Snail in Mortal Peril?' (2004) 12 *TLJ* 39; B McDonald, 'The Impact of the Civil Liability Legislation on the Fundamental Policies and Principles of the Common Law of Negligence' (2006) 14 *TLJ* 268.

54 This point is discussed in more detail in Goudkamp, above n 3, at 466–8.

55 See 4.7.

JOBNAME: No Job Name PAGE: 13 SESS: 1 OUTPUT: Fri Feb 5 13:52:12 2010
/journals/journal/tlj/vol18/09-18001

course, the legislature does not seem to have thought things through here, as s 54(2) may be enlivened even if there is no act of self-defence that is capable of picking up s 52.

4 A breakdown of ss 52 and 53

Now that we have introduced the statutory defences we will examine them in some detail. We will begin with the defence in s 52 and the supplementary provisions in s 53.

4.1 The onus of proof

Which party carries the onus of establishing the elements of the defence in s 52? The answer to this question seems obvious. As s 52 creates a defence, the defendant ought to bear the onus of proving the facts needed to enliven it. This was accepted by Ipp JA in *Presidential Security Services of Australia Pty Ltd v Brilley*.[56] His Honour thought that this conclusion was justified on the basis that the defendant would usually have superior access to evidence relevant to the applicability of s 52.

4.2 The necessity and proportionality requirements distinguished

The applicability of the defence in s 52, like that of the common law defence of self-defence, is subject to necessity and proportionality requirements (although, as we will see shortly,[57] s 53 effectively removes the proportionality requirement). It is important to appreciate the difference between these prerequisites. The necessity requirement means that the defence in s 52 will not be available unless using defensive force was the least expensive means of thwarting the plaintiff's attack. In contrast, the proportionality requirement looks to whether the level of force used by the defendant was excessive. It balances the interests of the plaintiff and defendant by imposing a limit on the amount of harm that may be inflicted. The distinction between these requirements can be brought out by example. Suppose that A is attempting to kill B. B can save him- or herself either by locking a door between them or by shooting A with a gun that B is holding. The proportionality requirement would be satisfied if B were to shoot A. It is proportionate to kill an aggressor in order to save oneself from being killed. However, the necessity requirement would obviously not be met. B, in shooting A, would be choosing the more costly means of salvation. Let us take another scenario. Suppose that C is defacing D's book with a pen. C is much stronger than D and D is incapable of physically restraining C. However, D has a gun and can shoot C (suppose that C would not be deterred simply by having the gun brandished in C's face or by a warning shot). If D shoots C, the necessity requirement would be satisfied. Using the gun is the only means available to D to stop C from defacing the book. But the proportionality requirement would not be met. D,

56 (2008) 67 ACSR 692; Aust Torts Reports 81-968; [2008] NSWCA 204; BC200807974 at [123], [126], [162].

57 See 4.7.

JOBNAME: No Job Name PAGE: 14 SESS: 1 OUTPUT: Fri Feb 5 13:52:12 2010
/journals/journal/tlj/vol18/09-18001

in using the gun, would be sacrificing a superior interest to uphold an inferior interest. Tort law requires D to tolerate the violation of D's property rights and leaves D with a remedy in damages.

When will harm be excessive for the purposes of the proportionality requirement? It is not practical to provide a comprehensive answer to this question here. However, it is worth noting that force is not excessive merely because it causes more harm than it averts. There is no doubt that the proportionality criterion may be satisfied even if the defendant inflicts a greater harm than that with which the defendant is threatened. For example, it would be proportionate to kill to prevent oneself from being raped despite the fact that, all other things being equal, being raped is less harmful than being killed.

4.3 The meaning of 'unlawful'

The defence in s 52 is available only if the plaintiff, in attacking the defendant, was acting 'unlawfully' or would have been acting 'unlawfully' but for the fact that he or she was 'suffering from a mental illness at the time'. Section 52 proceeds, therefore, on the assumption that an insane aggressor acts lawfully. What about aggressors who would be entitled to a criminal law defence other than insanity, such as necessity or duress? Do they act lawfully or 'unlawfully'? It might be argued that they act 'unlawfully' on the basis that s 52 singles out insane aggressors and specifies that they act lawfully. However, such an argument would be unconvincing. It would make no sense to describe aggressors who are entitled to the defence of insanity as having acted lawfully, but not those with another type of defence. The better view is that an aggressor with a defence to criminal liability, of any variety, acts lawfully under s 52.

4.4 Different types of aggressors

No one seriously doubts that a person should be permitted to resist an insane aggressor. Section 52 is on safe ground in so far as the defence for which it provides is made potentially available to a defendant who uses defensive force against an aggressor who would escape criminal liability by virtue of his or her insanity. What, however, does s 52 say about aggressors who enjoy another type of criminal law defence? Such aggressors do not, for the reasons given in the preceding section, act 'unlawfully' under s 52. It follows that the defence in s 52 is not available to defendants who injure such aggressors by employing defensive measures. Is this situation defensible? In order to answer this question we need to distinguish between the different types of criminal law defences. It is convenient to do this by way of a number of hypothetical examples. Consider the following scenarios:

Infant Aggressor

Aggressor1, a baby, picks up a loaded gun and waves it in the direction of Defender1. Defender1 throws a heavy object that Defender1 is holding at Aggressor1 to disable the infant. Aggressor1 is injured as a result.

JOBNAME: No Job Name PAGE: 15 SESS: 1 OUTPUT: Fri Feb 5 13:52:12 2010
/journals/journal/tlj/vol18/09-18001

Excused Aggressor
Aggressor2 enters a bank, brandishes a knife at a teller and demands money. Defender2, a security guard, disables Aggressor2. Aggressor2 held up the bank because a third-party credibly threatened to injure Aggressor2's spouse if Aggressor2 did not do so.

Justified Aggressor
Aggressor3, a fire-fighter, is about to demolish Defender3's house in order to create a firebreak between an inferno and a town. Defender3 sees what Aggressor3 is planning to do and incapacitates Aggressor3.

Exempt Aggressor
Aggressor4 attacks Defender4 out of inexplicable hatred. Defender4 resists Aggressor4 and injures Aggressor4 in the process. Aggressor4 is immune from criminal liability because Aggressor4 is a diplomat.

In all these scenarios, the aggressors enjoy a defence to criminal liability. In **Infant Aggressor**, Aggressor1, being below the age of criminal responsibility,[58] can invoke the defence of infancy. In **Excused Aggressor**, Aggressor2 can rely on the defence of duress. In **Justified Aggressor**, Aggressor3 is not liable for an attempt or any other offence in respect of the acts that Aggressor3 took to protect the town because of the defence of public necessity.[59] In **Exempt Aggressor**, Aggressor4 cannot be held liable because of diplomatic immunity.[60] Since all the aggressors in these scenarios have a defence to criminal liability, they are acting lawfully and the defenders would not, therefore, be able to rely on s 52. Is this problematic? We will consider this question in relation to each of the scenarios taken *seriatim*.

Infant aggressor

It is obvious that the unavailability of the defence in s 52 to the defender in **Infant Aggressor** is a cause for concern. Just as one is permitted to resist an insane aggressor,[61] so too should one be entitled to resist an infant aggressor. This is because there is no ethical difference between an insane aggressor and an infant aggressor. Neither type of aggressor is a rational agent.

Excused aggressor

Aggressor2's conduct is unjustified in the eyes of the law. It follows that it is problematic that the defender in **Excused Aggressor** cannot benefit from s 52. The defender should not have to submit to Aggressor2's unreasonable act. The legislature erred in failing to make the defence in s 52 available to the defender in **Excused Aggressor**.

58 The age of criminal responsibility in all jurisdictions is 10. The relevant provision in New South Wales is Children (Criminal Proceedings) Act 1987 (NSW) s 5.
59 Aggressor3 would probably also benefit from the defence of lawful authority: Fire Brigades Act 1989 (NSW) ss 16(2), 78.
60 Diplomatic Privileges and Immunities Act 1967 (Cth) s 7.
61 Section 52(1)(b).

JOBNAME: No Job Name PAGE: 16 SESS: 1 OUTPUT: Fri Feb 5 13:52:12 2010
/journals/journal/tlj/vol18/09-18001

Justified aggressor

Is the outcome in **Justified Aggressor** satisfactory? It is widely thought among criminal law theorists that it is impermissible to resist one who justifiably commits an offence.[62] The reasoning underpinning this understanding is that as justified offenders act reasonably in breaching the criminal law, it is unreasonable to resist them. It seems that tort law adopts this logic as well. Consider the famous decision in *Ploof v Putnam*.[63] The plaintiff in this case was the captain of a ship. A tempest arose and, in order to protect the passengers and the ship, the plaintiff sought to moor at the defendant's wharf. However, an employee of the defendant prevented the plaintiff from docking. The ship was driven ashore and wrecked. The plaintiff recovered damages from the defendant. The court held that as the plaintiff was justified in interfering with the defendant's property rights on the basis of necessity, the defendant had to submit to the intrusion. If one agrees that justified aggressors should not be resisted then one should support the legislature's decision to withhold the defence in s 52 from a person who defends himself or herself against such an aggressor.

Exempt aggressor

The aggressor in **Exempt Aggressor** is not justified in attacking Defender4. Aggressor4 is not even excused. Aggressor4 is able to avoid criminal liability only because of the immunity afforded by virtue of the status as a diplomat. No one would think that Defender4 should have to submit to Aggressor4's attack. Absurdly, however, Defender4 is not entitled to the defence in s 52.

Summary

It is convenient to summarise the argument in this section. An aggressor who commits an offence in circumstances where he or she would not be criminally liable because he or she has a defence acts lawfully under s 52. Consequently, the defence in s 52 is not available to a defender who resists such an aggressor (unless the criminal law defence in question is insanity). This is unproblematic if the aggressor is justified. However, no one should have to submit to an unjustified attack. The legislature failed to appreciate this fact since it withheld the defence in s 52 from those who resist unjustified aggressors (other than insane aggressors).

4.5 The unthinking reproduction of the criminal law definition of self-defence

Section 52 is essentially an amalgamation of ss 418 and 420 of the Crimes Act 1900 (NSW). These sections define self-defence for the purposes of the criminal law.[64] In this part of this article it will be argued that the legislature erred in failing to adopt a different definition of self-defence in the tort setting.

---

62 See, eg, Fletcher, above n 9, pp 760–6 and P Robinson, *Criminal Law Defenses*, West Publishing, St Paul MN, 1984, p 165. Cf D Husak, 'Criminal Law Justifications and the Criminal Liability of Accessories' (1989) 80 *J Crim L & Criminology* 491.

63 81 Vt 471 (1908). My analysis of this case draws on Fletcher, above n 9, pp 760–1.

64 For judicial consideration of s 418 see *R v Katarzynski* [2002] NSWSC 613; BC200203724; *R v Burgess* (2005) 152 A Crim R 100; [2005] NSWCCA 52; BC200500489; and *R v Forbes* (2005) 160 A Crim R 1; [2005] NSWCCA 377; BC200509320.

JOBNAME: No Job Name PAGE: 17 SESS: 1 OUTPUT: Fri Feb 5 13:52:12 2010
/journals/journal/tlj/vol18/09-18001

Tortious and criminal trespasses to land

By virtue of s 52(2)(d), the defence in s 52(1) is potentially available to a person who prevents or terminates a *criminal* trespass to land. However, the defence is not offered to a person who prevents or terminates a *tortious* trespass to land. In order to see why this is a problem, we need to remind ourselves of the definition of each type of trespass. The tort of trespass to land consists in a physical entry on land in the possession of another person. The entry needs to be intentional in the sense that the defendant must have desired to enter the land concerned. However, the tort can be committed by one who does not realise that he or she is violating the interests of the occupier. It is therefore irrelevant that the defendant thought that he or she owned the land[65] or that the occupier consented to his or her entry.[66] Criminal trespass[67] is defined in s 4(1) of the Inclosed Lands Protection Act 1901 (NSW). This subsection relevantly provides:

> Any person who, without lawful excuse (proof of which lies on the person), enters into inclosed lands[68] without the consent of the owner, occupier or person apparently in charge of those lands, or who remains on those lands after being requested by the owner, occupier or person apparently in charge of those lands to leave those lands, is liable to a penalty . . .

The definition of the tort of trespass to land is wider than the definition of criminal trespass in at least four respects. First, one is liable to be convicted of the offence in s 4 only if one encroaches on 'inclosed lands', whereas one can commit a tortious trespass by entering any land that is in someone else's possession.[69] A second way in which the tort of trespass is broader concerns the mode of encroachment. It is doubtful that one could commit the offence in s 4 other than by physically entering 'inclosed lands'. However, one is able to commit the tort of trespass to land by propelling an object onto another's property.[70] Thirdly, s 4 requires mens rea (ie, the defendant must not have genuinely believed that he or she was entitled to be on the land),[71] whereas

65 *Basely v Clarkson* (1681) 3 Lev 37; *Isle Royale Mining Co v Hertin* 37 Mich 332 (1887).

66 *Lowenburg v Rosenthal* 18 Or 178 (1889).

67 Unlike the tort of trespass, criminal trespass is an invention of statute. It was not an offence at common law: G Williams, *Textbook of Criminal Law*, 2nd ed, Stevens, London, 1983, pp 915–17.

68 'Inclosed lands' is defined in s 3(1) to include certain 'prescribed premises' as well as:

> any land, either public or private, inclosed or surrounded by any fence, wall or other erection, or partly by a fence, wall or other erection and partly by a canal or by some natural feature such as a river or cliff by which its boundaries may be known or recognised, including the whole or part of any building or structure and any land occupied or used in connection with the whole or part of any building or structure.

For analysis of this provision see *Ex parte Baldwin* (1908) 25 WN (NSW) 12; *Treweeke v Benson* (1936) 53 WN (NSW) 151; *In the Appeal of Thompson* (1948) 67 WN (NSW) 183; *Press v Tuckwell* [1968] 2 NSWR 212.

69 In tort law, it is presumed that land is enclosed. As Blackstone put it: 'every man's land is in the eye of the law inclosed and set apart from his neighbour's' (III *Comm* 209).

70 See, eg, *Davies v Bennison* [1927] Tas LR 52 (bullet); *Rigby v Chief Constable of Northamptonshire* [1985] 2 All ER 985; [1985] 1 WLR 1242 (tear gas cylinder); *Amaral v Cuppels* 831 NE 2d 915 (2005) (golf ball).

71 *Darcey v Pre-Term Foundation Clinic* [1983] 2 NSWLR 497; *Barns v Edwards* (1993) 31 NSWLR 714; 68 A Crim R 140.

JOBNAME: No Job Name PAGE: 18 SESS: 1 OUTPUT: Fri Feb 5 13:52:12 2010
/journals/journal/tlj/vol18/09-18001

proof of fault is not required to establish liability in the tort of trespass to land. Fourthly, the absence of consent is part of the definition of a criminal trespass, while consent is arguably a defence to liability in trespass to land.[72]

The fact that the definition of the tort of trespass to land is wider than that of criminal trespass presents a problem because it means that one who prevents or terminates a tortious trespass may not be able to benefit from s 52. This cannot have been intended by the legislature. The legislature surely would have wanted a person who uses reasonable force against a person who commits a tortious trespass to be eligible for the defence in s 52. The fact that such a person is protected by s 52 only to the extent that an intruder commits a criminal trespass is a product of the unthinking replication of the criminal law definition of self-defence.

Mistaken belief as to the need for self-defence

The use of the criminal law definition of self-defence in s 52 also causes problems in relation to the necessity requirement. Since the enactment of s 52, the necessity requirement in self-defence, in both the tort and criminal contexts, has been determined subjectively. Whether or not it was necessary to use self-defence depends solely on the defendant's beliefs. The reasonableness of the defendant's beliefs is irrelevant. This situation is to some extent understandable in the criminal context. The criminal law is much more concerned than tort law with the culpability of the defendant. It makes a certain amount of sense, therefore, for the criminal law to use a subjective test, since subjective tests are more sensitive to the defendant's blameworthiness than objective tests. However, a subjective test is inappropriate in the tort setting. The reason why this is so was explained clearly by Lord Scott in *Ashley v Chief Constable of Sussex Police*, in which the House of Lords, by a majority, opted for an objective test:

> The function of the civil law of tort is different [from that of the criminal law. Tort law's] main function is to identify and protect the rights that every person is entitled to assert against, and require to be respected by, others. The rights of one person, however, often run counter to the rights of others and the civil law, in particular the law of tort, must then strike a balance between the conflicting rights. . . . [E]very person has the right in principle not to be subjected to physical harm by the intentional actions of another person. But every person has the right also to protect himself by using reasonable force to repel an attack or to prevent an imminent attack. The rules and principles defining what does constitute legitimate self-defence must strike the balance between these conflicting rights. The balance struck is serving a quite different purpose from that served by the criminal law when answering the question whether the infliction of physical injury on another in consequence of a mistaken belief by the assailant of a need for self-defence should be categorised as a criminal offence and attract penal sanctions. To hold, in a civil case, that a mistaken and unreasonably held belief by A that he was about to be attacked by B justified a pre-emptive attack in believed self-defence by A on B would, in my opinion, constitute a wholly unacceptable striking of the balance. 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

72 *Secretary, Dept of Health & Community Services (NT) v JWB and SMB (Marion's case)* (1992) 175 CLR 218 at 310–11; 106 ALR 385; 15 Fam LR 392; [1992] HCA 15.

JOBNAME: No Job Name PAGE: 19 SESS: 1 OUTPUT: Fri Feb 5 13:52:12 2010
/journals/journal/tlj/vol18/09-18001

> 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. I would have no hesitation whatever in holding that for civil law purposes an excuse of self-defence based on non-existent facts that are honestly but unreasonably believed to exist must fail.[73]

The core of this argument is difficult to fault. Lord Scott correctly notes that tort law is a bilateral affair. Unlike the criminal law, which focuses on the defendant, tort law does not give priority to either party. It treats the parties as equals. It would seem to follow, as Lord Scott observes, that a subjective test is inappropriate as it would give preferential treatment to the defendant. Likewise, a test for self-defence that made no allowance for reasonable mistakes as to the need for self-defence would put the plaintiff in an unduly favourable position. Only an objective test charts a course between these extremes.[74]

4.6 The significance of the defendant's motive

Consider the following scenario.[75] X and Y are enemies. X has been searching for Y so that X can injure Y. X locates Y. Y is murderously attacking Z. X is aware that assaulting Y will save Z. However, X does not care in the slightest about Z. X is only concerned with hurting Y. X inflicts a non-fatal injury on Y. Y is incapacitated and Z is saved. Could X rely on s 52 if Y were to sue X despite the fact that X was improperly motivated in performing a justifiable act? There is authority that suggests that s 52 would be applicable in such a scenario. In *Brilley*,[76] the plaintiff broke into a sports club owned by the defendant with the intention of stealing money from poker machines. A security guard employed by the defendant was patrolling the premises at the time. The guard saw the plaintiff breaking in and lay in wait for him. Once the plaintiff gained entry the security guard fired several shots at him. The guard continued firing after the plaintiff began to retreat. The plaintiff was injured by one of the shots and he sued the defendant. The defendant relied on s 52. The trial judge rejected this defence on the basis that the security guard had been motivated by a 'callous intention to cause injury'. The defendant successfully appealed to the NSW Court of Appeal.[77] Ipp JA, who delivered the principal opinion, said that a 'finding of callous intention to cause injury says nothing about whether, in causing that injury, the defendant acted in self-defence'.[78]

---

73 [2008] AC 962; [2008] 3 All ER 573; [2008] 2 WLR 975; [2008] UKHL 25 at [18]. See also at [53], [76], [85]–[88].

74 Lord Scott's analysis in this respect tracks that presented by E J Weinrib, *The Idea of Private Law*, Harvard University Press, Cambridge Mass, 1995, pp 177–9; and A Ripstein, *Equality, Responsibility and the Law*, CUP, Cambridge, 1999, pp 193–4.

75 This example is based on a hypothetical postulated in V Tadros, *Criminal Responsibility*, OUP, Oxford, 2005, p 278.

76 (2008) 67 ACSR 692; Aust Torts Reports 81-968; [2008] NSWCA 204; BC200807974.

77 The Court of Appeal ordered a retrial in which the defendant succeeded: *Brilley v Presidential Security Services of Australia Pty Ltd* [2009] NSWDC 14.

78 (2008) 67 ACSR 692; Aust Torts Reports 81-968; [2008] NSWCA 204; BC200807974 at [132].

JOBNAME: No Job Name PAGE: 20 SESS: 1 OUTPUT: Fri Feb 5 13:52:12 2010
/journals/journal/tlj/vol18/09-18001

This suggests that so long as there is a good reason to inflict harm on another it is irrelevant, for the purposes of s 52, that the defendant did not act for that reason.[79]

4.7 Undermining the proportionality requirement

Section 53 supplements s 52. It provides that if the defence in s 52 would have been available but for the fact that the degree of force used was unreasonable, the court must nevertheless withhold damages unless the court is satisfied that the case is 'exceptional' and 'a failure to award damages would be harsh and unjust'. Even if these twin requirements are satisfied, the court is prohibited from awarding damages for 'non-economic loss'[80] and, if the plaintiff sues in respect of an act intended by the defendant to cause injury or death, a host of restrictions on damages awards from which proceedings for such acts are ordinarily exempt will apply.

Section 53 renders it extremely difficult for a plaintiff who suffers injury caused by the application of necessary but disproportionate defensive force to recover damages. It essentially empties the proportionality requirement in s 52 of its content. It is difficult to support this state of affairs. The most glaring problem with it is that it permits defenders to act selfishly. Defenders are allowed to inflict a severe injury to avoid a minor injury, subject to the necessity requirement. This is inconsistent with the bilateral nature of tort law.

4.8 The philosophical foundations of the defence in s 52

We canvassed a number of theories supporting the common law defence of self-defence earlier.[81] It was noted that although everyone agrees that victims of attacks should not incur liability if they act in their own defence, rationalising this understanding is far from straightforward. All the theories on offer suffer from shortcomings. However, it is worth noting that the defence in s 52 is most easily accounted for on the autonomy theory. The main problem from which this theory suffers as an explanation of the common law defence of self-defence is its inability to account for the proportionality requirement. This problem basically disappears when the autonomy theory is used to account for s 52, since the proportionality requirement in that section is effectively removed by s 53.[82] Section 52 essentially permits defenders to take all necessary steps to preserve their autonomy irrespective of the consequences of doing so for the aggressor. The interests of aggressors are virtually ignored.

4.9 The status of the common law defence of self-defence

Is the common law defence of self-defence still potentially available to a defendant who uses defensive force against an aggressor? One could argue

79 Young CJ in Eq arguably took a contrary view in *Sangha v Baxter* [2007] NSWCA 264; BC200712154 at [71].

80 'Non-economic loss' is defined in s 3 of the CLA as 'pain and suffering', 'loss of amenities of life', 'loss of expectation of life' and 'disfigurement'.

81 See 2.2.

82 See 4.7.

JOBNAME: No Job Name PAGE: 21 SESS: 1 OUTPUT: Fri Feb 5 13:52:12 2010
/journals/journal/tlj/vol18/09-18001

that the common law defence was abolished by s 52, given that subs (1) states that a person will not incur liability for damage caused while he or she was acting in 'self-defence . . . *but only if*' specified conditions are met. However, the better view is that the common law defence still has some life left in it. The main reason why this is the case is that s 3A(1) of the CLA expressly preserves pre-existing restrictions on liability.

If it is accepted that the common law defence of self-defence still exists, we need to consider whether it has been rendered redundant by s 52. The defence in s 52 is certainly far wider in a number of significant respects than its common law counterpart. One important way in which it is broader concerns the necessity requirement. Under s 52, a subjective test is used to determine whether the necessity requirement[83] is satisfied, whereas the common law defence employs an objective test.[84] Section 52 is also considerably broader than the common law defence due to the fact that, as discussed above, its proportionality requirement is a sham.[85] In contrast, the common law defence applies only if the force used by the defendant was reasonable.[86] It is clear, therefore, that the defence in s 52 offers far more substantial protection to defendants relative to the common law defence. Nevertheless, the common law defence has not been rendered obsolete. For one thing, s 52 does not, as noted earlier, apply where the force is used against an unjustified aggressor who has a defence to criminal liability unless the defence concerned is insanity.[87] The common law defence is not similarly restricted. Furthermore, the common law defence is arguably available where lethal force is used to protect property or to prevent a trespass.[88] In contrast, s 52(3) provides that the defence in s 52(1) is not available where the defendant kills to protect such interests.

4.10 Summary

The politicians who foisted the CLA upon us committed a litany of errors when they provided for ss 52 and 53. The foregoing analysis has catalogued a number of their mistakes. These mistakes include:

- failing to make the defence in s 52 available to defendants who resist all unjustified aggressors;
- failing to realise that the definition of a criminal trespass is narrower than the definition of the tort of trespass to land, with the result that

83 See text at n 74 above.
84 See 2.1.
85 See 4.7.
86 Admittedly, the courts have taken a generous view of what constitutes reasonable force. This approach is exemplified by Holmes J's famous dictum that 'detached reflection cannot be demanded in the presence of an uplifted knife': *Brown v United States* 256 US 335 at 343 (1921). Consider also *Reed v Wastie* [1972] Crim LR 221 per Geoffrey Lane J ('one does not use jewellers' scales to measure reasonable force') and *Cross v Kirkby*, *The Times*, 5 April 2000 (Judge LJ) (the law does not require the defendant 'to measure the violence to be deployed with mathematical precision').
87 See 4.4.
88 Consider *Hackshaw v Shaw* (1984) 155 CLR 614; 56 ALR 417; [1984] HCA 84; BC8400458.

JOBNAME: No Job Name PAGE: 22 SESS: 1 OUTPUT: Fri Feb 5 13:52:12 2010
/journals/journal/tlj/vol18/09-18001

the defence in s 52 will not always be potentially available to occupiers who use defensive force against intruders who tortiously trespass on their land;
- failing to recognise that assessing the need for self-defence subjectively, while arguably appropriate in the criminal context, is inconsistent with tort law's bilateral structure; and
- making the defence in s 52 available to defendants who use disproportionate force to defend themselves.

5 A breakdown of s 54[89]

The defence in s 54(1) is engaged when the following conditions are met:
- the plaintiff committed a 'serious offence';[90]
- the damage suffered by the plaintiff occurred 'at the time of, or following,' the commission of that offence; and
- the commission of the offence contributed materially to the damage.

Pursuant to s 54(2), the defence is inapplicable if the defendant's tort constitutes an 'offence'.

5.1 Onus of proof

Section 54 is silent on the allocation of the onus of proof. However, in *Brilley* Ipp JA declared that '[g]eneral principles of statutory construction, and fairness, lead to the conclusion that it is for the defendant to establish [the elements of] s 54(1)'.[91] This seems to be correct, since s 54(1) provides for a defence. Ipp JA added, however, that 'it is for the plaintiff to plead and prove that s 54(2) applies'.[92] His Honour gave no reasons in support of this claim. It is unclear whether this is right. Section 54(2), which disapplies the section 'if the conduct of the defendant . . . [also] constitutes an offence (whether or not a serious offence)', is arguably part and parcel of the defence in s 54(1). If this is so, it should fall to the defendant to disprove it.

5.2 The standard to which s 54(2) must be proved

Section 54(1) expressly provides that the issue of whether the plaintiff committed an offence is to be determined on the balance of probabilities. In contrast, s 54(2) makes no mention of the standard of proof applicable to the determination of whether the defendant committed an offence. Does this suggest that proof other than to the civil standard is required for the purposes of s 54(2)? Ipp JA answered this question in the negative in *Brilley*. His

89 I provided an analysis of s 54 in Goudkamp, above n 3, at 462–9. This analysis was conducted before s 54 had been subjected to judicial consideration. What follows here updates my previous account.

90 A 'serious offence' is an offence that is punishable by at least 6 months' imprisonment: s 54(3).

91 (2008) 67 ACSR 692; Aust Torts Reports 81-968; [2008] NSWCA 204; BC200807974 at [124].

92 Ibid, at [125].

JOBNAME: No Job Name PAGE: 23 SESS: 1 OUTPUT: Fri Feb 5 13:52:12 2010
/journals/journal/tlj/vol18/09-18001

Honour stated that '[a]lthough [s 54(2)] makes no express mention of proof on a balance of probabilities, there is nothing to suggest that the usual rule in civil proceedings does not apply'.[93]

5.3 The required proximity between the plaintiff's loss and his or her criminal conduct

The defence in s 54 is applicable only if the loss about which the plaintiff complains was sustained 'at the time of, or following' conduct on his or her part that constitutes a 'serious offence'. This requirement was considered in *Sangha v Baxter*.[94] The plaintiff in this case hailed a taxi owned by the defendant. The driver of the taxi carried the plaintiff, who was intoxicated, to his destination. On arrival, the driver asked the plaintiff for $7, which was more than the plaintiff was accustomed to paying for the journey in question. The plaintiff became belligerent and punched the driver in the face several times while shouting 'I will kill you'. The plaintiff eventually exited the taxi, but held the front passenger door open and continued to argue with the driver. The driver reversed the taxi a short distance in an attempt to dislodge the plaintiff. The plaintiff lost his balance, but was able to maintain his grip on the taxi. The driver repeated the manoeuvre a second time without achieving the desired result. The driver then reversed the taxi a third time, on this occasion at high speed. The plaintiff was hit by, and went under, the front passenger door. He suffered serious injury and sued for damages. The defendant relied on several defences, including that in s 54. The trial judge held that s 54 did not apply, as the injury that the plaintiff suffered did not occur 'at the time of, or following' his attack on the driver.[95] The Court of Appeal unanimously allowed an appeal by the defendant on account of procedural defects in the trial.[96]

Significantly, however, Young CJ in Eq, who was the only member of the court to consider s 54, affirmed the trial judge's conclusions in relation to it. His Honour's reasons on this point are worth examining. He asserted that the plaintiff's loss did not occur 'at the time of' the commission of a 'serious offence' because the plaintiff was not attacking the driver when he was injured.[97] This overlooks the fact that, even though the plaintiff had stopped his attack before he was injured, the driver was surely still apprehensive that he might be struck again and the plaintiff was, therefore, committing an assault right up to the moment when he was run over.[98] Young CJ in Eq contended that the plaintiff's loss did not 'follow' the attack because of the

93 Ibid.

94 [2007] NSWCA 264; BC200712154. The facts as recounted here were hotly contested at the two trials in the District Court and on the appeals.

95 Unreported, 8 February 2007, Garling DCJ.

96 The plaintiff won at the retrial, but the defendant again successfully appealed to the Court of Appeal on procedural grounds: (2009) 52 MVR 492; [2009] NSWCA 78; BC200902490. In a rebuke to the District Court, the Court of Appeal ordered that the third trial be held in the Supreme Court.

97 [2007] NSWCA 264; BC200712154 at [80].

98 In the second appeal to the Court of Appeal, mentioned above in n 96, Tobias JA was alive to this point: [2009] NSWCA 78; BC200902490 at [107]. His Honour also thought that the plaintiff committed the 'offence' of trespass to property in leaning back into the taxi. However, there is no such offence in New South Wales. Trespass to a chattel is only a tort.

JOBNAME: No Job Name PAGE: 24 SESS: 1 OUTPUT: Fri Feb 5 13:52:12 2010
/journals/journal/tlj/vol18/09-18001

length of time between the cessation of the attack and the point at which injury was suffered (this period was not precisely quantified, but it could not have been more than a few minutes).[99] Young CJ in Eq did not commit himself to a formula for determining when an injury 'follows' a 'serious offence'. However, he said that he was attracted to the following test: did the injury occur '"if not absolutely contemporaneous[ly] with the" crime then "at least so clearly associated with it, in time, place and circumstances" that it can be considered part of the criminal conduct'?[100] This test[101] is extraordinarily restrictive. There are at least two reasons for thinking that the legislature intended that the word 'following' be read far more broadly. The first reason concerns the amendment history of s 54. Section 54, as originally enacted, did not contain the word 'following'.[102] That word was added later in order to widen the ambit of the defence.[103] In these circumstances, it would be rather odd to give s 54 a narrow reading. Secondly, the word 'following' is not qualified by an adverb such as 'immediately' or 'directly'. The absence of such an adverb tells against a restrictive construction.

5.4 The meaning of the word 'offence'

The meaning of the word 'offence' is pivotal to the operation of both s 54(1) and (2). Section 54(1) is engaged only if the plaintiff commits a 'serious offence'. Section 54(2) disengages s 54(1) if the defendant's tort constitutes an 'offence'. Unfortunately, the word 'offence' is ambiguous. The problem is that it is unclear whether a person who commits an act that falls within the definition of an offence commits an 'offence' for the purposes of s 54 if he or she has a defence to criminal liability. In *Brilley*, Ipp JA asserted that a defendant who commits a criminal battery in self-defence does not commit an 'offence'.[104] Regrettably, his Honour did not offer any reasons to back up this claim. Nor did he say whether he would have extended this view to other criminal law defences.

For the sake of argument, let us assume that Ipp JA supports the view that one who has a defence, of any type, does not commit an 'offence'. Is this understanding correct? A case can be made both ways. It might be said that it is incorrect on the ground that it is inconsistent with the temporal logic of the criminal law. To say that a person who has a defence commits no 'offence' is to ignore the fact that one does not need a defence unless one has committed an offence. Furthermore, s 54(5) suggests that a person who has a criminal law

---

It is not a crime. The plaintiff may have committed the offence of entering a vehicle without authorisation under s 6A of the Summary Offences Act 1988 (NSW). But whether he did or not is immaterial since this is not a 'serious offence' under s 54 as it is not punishable by imprisonment.

99 [2007] NSWCA 264; BC200712154 at [85].

100 Ibid, at [84].

101 This test is essentially that which the Privy Council adopted in *Teper v R* [1952] AC 480; [1952] 2 All ER 447 to determine whether a statement forms part of the *res gestae*.

102 Young CJ in Eq seemed to think that it had appeared in the CLA from the outset: [2007] NSWCA 264; BC200712154 at [81].

103 It was inserted by the Civil Liability Amendment Act 2003 (NSW). Potential reasons why this word was added are canvassed in Goudkamp, above n 3, at 464–5.

104 (2008) 67 ACSR 692; Aust Torts Reports 81-968; [2008] NSWCA 204; BC200807974 at [120].

JOBNAME: No Job Name PAGE: 25 SESS: 1 OUTPUT: Fri Feb 5 13:52:12 2010
/journals/journal/tlj/vol18/09-18001

defence still commits an 'offence'. This subsection provides that s 54 operates 'whether or not a person whose conduct is alleged to constitute an offence has been, will be or is capable of being proceeded against or convicted of any offence concerned'. This provision seems to contemplate that a person who has a public policy defence to criminal liability, such as a time bar, still commits an 'offence'. Conversely, there are at least two considerations that point in the other direction. First, tension would be created between ss 52 and 54 if one who has a defence to criminal liability commits an 'offence' for the purposes of s 54. As we saw earlier,[105] a person with a criminal law defence does not act 'unlawfully' under s 52. Given that this is the case, it would be odd if one who has a defence to criminal liability commits an 'offence' under s 54. Secondly, to say that a person who has a defence nevertheless commits an offence is to deploy the word 'offence' in a rather technical way and it seems unlikely that the legislature intended to use it in this manner. Section 54 does not contain specialist terms. A layperson would be able to glean its general thrust. This tells against giving the word 'offence' its specialist meaning.

5.5 The philosophical foundations of the defence in s 54

A number of arguments for withholding a remedy in cases contaminated with illegal conduct on the part of the plaintiff were considered above.[106] None of these arguments is capable of supporting an illegality defence such as that in s 54. Section 54 serves no useful purpose. It is highly unlikely that it deters criminal behaviour. Nor does it prevent wrongful profiting. Nor does it help to preserve the dignity of the courts. Indeed, far from discharging a worthwhile function, s 54 will have pernicious results. It has the potential to inflict indiscriminate punishment. This is because the hardship that a plaintiff will suffer by having a remedy denied by s 54 depends on the magnitude of his or her loss rather than his or her blameworthiness. Section 54 is also prone to impose double punishment since it may bite even though the plaintiff has already been dealt with under the criminal law. In short, s 54 is an indefensible provision. It has set the law of tort backwards. It should be repealed.

5.6 The status of the common law defence of illegality

What is the status of the common law defence of illegality? There is much in the decision in *Sangha*[107] that suggests that s 54 implicitly abolished the common law defence. Young CJ in Eq referred to the common law defence in the past tense.[108] Furthermore, after finding that s 54 was not engaged, his Honour did not consider whether the common law defence denied the plaintiff's action. Despite these indications that the common law defence was killed off by s 54, there is no doubt that it is alive and well. This is primarily because, as we have already noted, s 3A(1) conserves pre-existing rules that provide protection to defendants.[109]

---

105 See 4.3.
106 See 2.4.
107 *Sangha* is discussed above in 5.3.
108 [2007] NSWCA 264; BC200712154 at [82].
109 See 4.9.

JOBNAME: No Job Name PAGE: 26 SESS: 1 OUTPUT: Fri Feb 5 13:52:12 2010
/journals/journal/tlj/vol18/09-18001

While the common law illegality defence survived the enactment of s 54, it is clear that s 54 has rendered it substantially obsolete. The defence in s 54 has a much broader ambit. Because most offences in New South Wales are 'serious offences',[110] a large number of relatively trivial offences are capable of activating s 54. The common law defence, in contrast, is enlivened only by comparatively serious offending on the part of the plaintiff. However, the common law defence is still of some relevance. This is primarily because s 54(2) disengages the defence in s 54(1) when the defendant's tort constitutes an offence. The common law defence is not similarly restricted. Indeed, it is most frequently activated in cases in which the parties were involved in a joint illegal enterprise at the time the plaintiff was injured.

6 Conclusion

In its rush to placate those who demanded the rewriting of tort law at the height of the insurance crisis, the NSW Government provided in the CLA for a number of new defences to liability. Two of these defences are 'self-defence' and 'illegality'. This article has examined these answers to liability. The analysis exposed several ambiguities in them and suggested how they might be resolved. It also argued that the defences have, on the whole, done serious damage to the law of torts. They stand as nothing but a warning of the consequences of legislating in response to 'scandals' exaggerated by the tabloid media.

110 For the meaning of a 'serious offence' see above n 90.