HOUSE OF LORDS SESSION 2007–08

[2008] UKHL 25

on appeal from: [2006] EWCA Civ 1085

OPINIONS

OF THE LORDS OF APPEAL

FOR JUDGMENT IN THE CAUSE

Ashley (FC) and another (FC) (Respondents) v Chief Constable of Sussex Police (Appellants)

Appellate Committee

Lord Bingham of Cornhill
Lord Scott of Foscote
Lord Rodger of Earlsferry
Lord Carswell
Lord Neuberger of Abbotsbury

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Respondents:
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Interveners
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LORD BINGHAM OF CORNHILL

My Lords,

1. I have had the benefit of reading in draft the opinions of my noble and learned friends Lord Scott of Foscote and Lord Rodger of Earlsferry, whose summaries of the facts, history and issues I gratefully adopt and need not repeat.

2. Like my noble and learned friends I would dismiss the Chief Constable's appeal. Despite the range, ability and interest of the argument addressed to the House, I can state my conclusions on the two issues raised in argument very shortly and simply.

3. As to the first issue, the test of self-defence as a defence in a civil action is well-established and well-understood. There is no reason in principle why it should be the same test as obtains in a criminal trial, since the ends of justice which the two rules respectively exist to serve are different. There is nothing to suggest that the civil test as currently applied causes dissatisfaction or injustice and no case is made for changing it, even if that were an appropriate judicial exercise. I would not wish to inject any note of uncertainty into the current understanding of this rule.

4. As to the second issue, the claimants have an arguable claim for battery of the deceased which cannot be struck out as disclosing no cause of action, which has not been the subject of previous adjudication

and which can in principle succeed consistently with the acquittal of PC Sherwood at the criminal trial and without throwing doubt on his innocence. Success in establishing this claim will bring the claimants no additional compensation and may expose them to financial risk. But it is ordinarily for the claimant, properly advised of the litigation risk, to decide what claim, being arguable and legally unobjectionable, he wishes to pursue, and case management, legitimately used to ensure that the court's process is efficiently and justly used, gives no warrant to extinguish the autonomy of the individual litigant. The claimants' reasons for wishing to pursue their claim in battery are readily understandable, as are the Chief Constable's reasons for wishing to resist it, but it is not the business of the court to monitor the motives of the parties in bringing and resisting what is, on the face of it, a well-recognised claim in tort.

LORD SCOTT OF FOSCOTE

My Lords,

5. This is an interlocutory appeal in which your Lordships must decide whether a civil case of assault and battery should be permitted to progress to a trial. Two issues of considerable importance are raised but it is convenient first to outline the facts that have given rise to them.

The facts

6. This litigation arises out of the death of James Ashley, who was shot dead by PC Christopher Sherwood of the Sussex Police Special Operations Unit ("SOU") on 15 January 1998 during an armed raid by the SOU on Mr Ashley's home, Flat 6, 3-4 Western Road, Hastings. The armed raid had been authorised by police authorities and a search warrant had been obtained. The raid formed part of police investigations into drug trafficking in Hastings and into the stabbing of a man in a bar in Hastings by an alleged associate of Mr Ashley. The final briefing of those, including PC Sherwood, who were to take part in the raid was given early on the morning of 15 January. The briefing included details of Mr Ashley and his associates and their alleged activities. At about 4.20am police officers, one of whom was PC Sherwood, made a forcible entry into Flat 6. On entry he and another officer headed towards the bedroom. Mr Ashley and his girlfriend had been asleep in the bedroom but she, having been woken by the noise of

the police entry into the flat, had woken him and he was out of bed by the time the police entered the bedroom. He was naked and no light was on. PC Sherwood entered the bedroom with his handgun in the "aim" position and his finger on the trigger. Within seconds of his entry into the bedroom he shot Mr Ashley with a single bullet to the side of the neck. So much is agreed. Other circumstances of the shooting are in dispute but it is not alleged that Mr Ashley had any weapon in his hand at the time. He was unarmed. Immediate first aid was administered to Mr Ashley but when paramedics arrived on the scene at 4.33am he was not breathing and at 5.15am he was pronounced dead by a police surgeon.

7. Police inquiries into the shooting were instituted and on 31 March 1999 PC Sherwood was charged with murder. Other officers were charged with misfeasance arising out of their involvement in the gathering of intelligence for and the planning of the armed raid. The criminal trials commenced on 26 February 2001 at the Central Criminal Court but on 19 March 2001 Rafferty J ordered that PC Sherwood be tried separately from the others and be tried first. On 2 May 2001, following a submission of no case to answer at the close of the prosecution case, PC Sherwood was, on the direction of Rafferty J, acquitted of murder and manslaughter. She told the jury that "there is not evidence to negative the assertion of self-defence in all the circumstances..." Rafferty J's direction was given on the footing that, in a criminal trial for assault, and its more serious variants such as murder and manslaughter, the burden was on the prosecution to prove that the defendant intended to apply unlawful force to the victim and that that would involve satisfying the jury to the requisite standard of proof that the defendant did not act in self-defence. On 22 May 2001 the Crown decided not to offer evidence in respect of the other officers facing criminal proceedings arising out of the armed raid. So that was the end of any criminal proceedings.

8. An inquest into Mr Ashley's death had been opened on 4 February 1998 but adjourned pending the criminal investigation and criminal proceedings. On 31 July 2001 the coroner notified the interested parties that the inquest would not be resumed. Requests by Mr Ashley's family for a public inquiry into Mr Ashley's death to be held have met with no success.

9. The civil case with which this interlocutory appeal is concerned comprises two conjoined claims. There are two claimants, both, like the deceased, named James Ashley. They are the respondents before your

Lordships. The first respondent, James Ashley junior, is the son of the deceased Mr Ashley. By his claim, commenced on 5 January 2000, he seeks damages under the Fatal Accidents Act 1976 as a dependent of the deceased but also seeks damages for allegedly tortious conduct on the part of the police following the fatal shooting. The second respondent, James Ashley senior, is the father of the deceased. His claim, commenced on 25 October 2002, seeks damages, including dependency damages under the 1976 Act, both on his own behalf and on behalf of the estate of the deceased's mother, Eileen Ashley, who had been a co-claimant with her husband but had died shortly after the commencement of proceedings. He also claims damages on behalf of his deceased son's estate, relying on the survival, pursuant to section 1(1) of the Law Reform (Miscellaneous Provisions) Act 1934, of the causes of action vested in the deceased at his death. The causes of action that are relied on by the Ashleys are (i) assault and battery, or alternatively negligence, by PC Sherwood in his shooting of the deceased, (ii) negligence and misfeasance in public office in relation to the police's pre-shooting investigations and the briefing that was given to the officers who were to take part in the armed raid, and, (iii) negligence and misfeasance in public office in relation to the post-shooting conduct of the police. The defendant to all these claims is the Chief Constable of Sussex Police, the appellant before your Lordships. None of the individual police officers is named as a defendant and the potential liability of the Chief Constable is vicarious only. So the success of the actions depends upon tortious liability being established against one or more of the police officers. In particular, the assault and battery claims based upon the actual fatal shooting can only succeed if PC Sherwood in shooting the deceased committed that tort.

The course of the litigation

10. The documents before the House include a lengthy document entitled Draft Re-Amended Particulars of Claim in which the torts I have referred to are pleaded in considerable detail. The Ashleys' version of the shooting is given in para 31 and, under the heading "Particulars of Assault and Battery", it is simply said that "The shooting of the Deceased was the application of unreasonable force." For present purposes the content of the Chief Constable's Defence is more important and mention should be made of the following features :

(1) A duty of care owing to the occupants of Flat 6 is admitted (para 6.3). Breach of that duty in relation to a number of aspects of the pre-raid planning and briefing is admitted (paras 6.3.1 to 6.3.16, 13.1 to 13.6, 19 to 21, 26 and 27).

(2) It is admitted also that "as a result of the *said negligence* James Ashley was killed" (emphasis added) (para 7)

(3) Para 34.1 says that

> "It is specifically denied that a cause of action arises in assault and battery. It is averred that the shooting of James Ashley was not unlawful in that PC Sherwood was acting in self defence."

(4) In addition the alleged pre-shooting misfeasance (para 34.3), false imprisonment (para 34.2), post-shooting misfeasance (para 80) and post-shooting negligence (para 80) are denied, save for a partial admission in relation to post-shooting negligence (para 36).

11. There was then, on 29 April 2004, an application by the Chief Constable to strike out the claims based on assault and battery, false imprisonment, pre-shooting misfeasance and post-shooting misfeasance and for a stay of any cause of action in negligence not covered by the Chief Constable's admissions of negligence. The application was heard by Dobbs J who on 21 March 2005 gave summary judgment in the Chief Constable's favour on the assault and battery claim and on the post-shooting misfeasance claim. She struck out the claims "arising from misfeasance in public office in respect of the shooting of the Deceased" (para 4 of her Order) but gave judgment for the Ashleys in so far as their claims were based on the negligence that the Chief Constable had admitted in his Defence and (consequent upon a further admission made by the Chief Constable in the course of the hearing) false imprisonment. She gave directions for the purposes of a trial of an assessment of the quantum of damages to which the Ashleys would be entitled as a result of those admissions.

12. In the course of the hearing before Dobbs J the Chief Constable made an important, and remarkable, concession regarding damages. The concession was recorded by Dobbs J in para 17 of her judgment. It is worth setting out the paragraph in full:

> "The Defendant has admitted that the death of the Deceased was caused by the negligence of the police and further admits that the negligent handling of the release of the name of the Deceased has caused personal injury to the Claimants. At the hearing before me, the Defendant admitted the claim for false imprisonment, and although denying any other particulars of negligence with regards to

> the post-shooting events, full responsibility for **any** damages which can be proved to have flowed from the incident and its subsequent events has been accepted. Misfeasance in Public Office is denied in its entirety."

So the Chief Constable, while maintaining his denial of liability in respect of the assault and battery claims and, I think, maintaining his denial that either the tort of assault and battery or the tort of negligence had been committed by PC Sherwood in shooting Mr Ashley, accepted liability in damages for all consequential damage caused by the shooting.

13. The Ashleys appealed and, when the case reached the Court of Appeal [2007] 1 WLR 398, discussion took place on each of the three days of the hearing about the scope of the damages concession that the Chief Constable had made. It was made clear on behalf of the Ashleys that they were seeking aggravated damages. It was made clear on behalf of the Chief Constable that his concession about damages did not apply to aggravated damages in respect of the assault and battery claim. When pressed by the court, counsel for the Ashleys expressed the belief that aggravated damages were available in respect of personal injuries caused by negligence. The Master of the Rolls, Sir Anthony Clarke, expressed in paras 9 and 10 of his judgment his understanding of the scope of the damages concession the Chief Constable was making:

> "9…The defendant agreed to pay what are called basic (i.e. compensatory) damages: (i) to the deceased's estate under the Law Reform (Miscellaneous Provisions) Act 1934 for pain, suffering and loss of amenity prior to the deceased's death (if proved); (ii) under the Fatal Accidents Act 1976 to the claimants who claim to be the deceased's dependants for loss of dependency (if proved); and (iii) to the claimants and to the estate for psychiatric injury (if proved) and any financial losses consequent on that injury (if proved), provided that such injury and loss is shown to have been caused by the death or any other relevant event. 'Relevant event' was defined to mean any event or alleged event subsequent to and connected with the death of the deceased, including the conduct of the chief constable following the death and the investigation into the circumstances in which the deceased was killed, whether or not there had been an admission of negligence and/or a denial of assault and/or misfeasance in relation to such events.

> 10 It was agreed that aggravated damages are also compensatory in nature and are paid for the shock, distress, outrage and similar emotions experienced by the claimants caused by any aggravating or alleged aggravating features of the case, including humiliating circumstances at the time of the death or during the investigation, and/or any conduct or alleged conduct which shows that those responsible behaved in a high-handed, insulting, malicious or oppressive manner. The defendant agreed to pay aggravated damages assessed in accordance with those principles both to the estate and to the claimants or Mrs Ashley's estate (in each case if proved and in so far as not already compensated by an award of basic damages). The defendant further agreed that the issue of aggravated damages will be dealt with as if they were available in the tort of negligence."

It is to be noted that the Chief Constable's concession did not cover any exemplary damages and that at no point, either before Dobbs J or the Court of Appeal, did the Chief Constable agree to pay any of the Ashleys' costs. Dobbs J had ordered the Ashleys to pay the Chief Constable's costs of the hearing before her and directed that their costs liability be set off against any damages or costs ordered to be paid by the Chief Constable to them.

14. On 27 July 2006 the Court of Appeal allowed the Ashleys' appeal and, so far as is relevant to this appeal to the House, held that

(1) in civil proceedings the burden of proving self-defence lay upon the defendant;

(2) a defendant who had mistakenly but honestly thought it was necessary to defend himself against an imminent risk of attack could not rely on self-defence if his mistaken belief although honestly held had not been a reasonable one;

(3) in judging what was reasonable the court had to have regard to all the circumstances of the case, including the fact that the defendant's action might have had to be taken in the heat of the moment;

(4) (Auld LJ dissenting) the Ashleys should be permitted to take the assault and battery claim to trial to obtain declaratory relief notwithstanding the Chief Constable's admissions and concession in relation to negligence and compensation;

(5) the claim in assault and battery could not be said to have no real prospect of success.

The Court directed the Chief Constable to pay 80 per cent of the Ashleys' costs in the Court of Appeal and before Dobbs J. On 22 November 2006 this House gave the Chief Constable leave to appeal and, in addition, allowed a petition by PC Sherwood for leave to intervene and to present written and oral submissions at the hearing of the appeal. PC Sherwood availed himself of this leave in both respects.

The Issues

15. The issues for determination by the House are narrower than the issues before the Court of Appeal and are limited to issues relating to the Ashleys' assault and battery claim. Five issues are formulated in paragraph 19 of the Statement of Facts and Issues signed by counsel for the Ashleys, the Chief Constable and PC Sherwood respectively, but there are really, in my opinion, only two. The first issue is whether self-defence to a civil law claim for tortious assault and battery, in a case where the assailant acted in the mistaken belief that he was in imminent danger of being attacked, requires that the assailant acted under a mistaken belief that was not only honestly but also reasonably held. The second issue is whether in all the circumstances the assault and battery claims, based on the shooting by PC Sherwood of James Ashley, should be allowed to proceed to a trial.

Issue 1. The self-defence criteria

16. In para 37 of his judgment the Master of the Rolls identified three possible approaches to the criteria requisite for a successful plea of self-defence, namely, (1) the necessity to take action in response to an attack, or imminent attack, must be judged on the assumption that the facts were as the defendant honestly believed them to be, whether or not he was mistaken and, if he made a mistake of fact, whether or not it was reasonable for him to have done so (solution 1); (2) the necessity to take action in response to an attack or imminent attack must be judged on the facts as the defendant honestly believed them to be, whether or not he was mistaken, but, if he made a mistake of fact, he can rely on that fact only if the mistake was a reasonable one for him to have made (solution 2); (3) in order to establish the relevant necessity the defendant must establish that there was in fact an imminent and real risk of attack (solution 3). It was common ground that, in addition, based on whatever belief the defendant is entitled to rely on, the defendant must, in a civil action, satisfy the court that it was reasonable for him to have taken the action he did. Of the three solutions the Court of Appeal held that solution 2 was the correct one. On this appeal the Chief Constable

has contended, as he did below, that solution 1 is the correct one. The respondents have not cross-appealed in order to contend that solution 3 should be preferred.

17. It was held in *R v Williams (Gladstone)* [1987] 3 All ER 411 and is now accepted that, for the purposes of the criminal law, solution 1 is the correct one: per Lord Lane CJ, at p 415

> "Even if the jury come to the conclusion that the mistake was an unreasonable one, if the defendant may genuinely have been labouring under it, he is entitled to rely on it"

(see also *Beckford v The Queen* [1988] AC 130, 142-145). The Chief Constable has submitted that, for civil law purposes too, solution 1 should be the preferred solution. It is urged upon your Lordships that the criteria for self-defence in civil law should be the same as in criminal law. In my opinion, however, this plea for consistency between the criminal law and the civil law lacks cogency for the ends to be served by the two systems are very different. One of the main functions of the criminal law is to identify, and provide punitive sanctions for, behaviour that is categorised as criminal because it is damaging to the good order of society. It is fundamental to criminal law and procedure that everyone charged with criminal behaviour should be presumed innocent until proven guilty and that, as a general rule, no one should be punished for a crime that he or she did not intend to commit or be punished for the consequences of an honest mistake. There are of course exceptions to these principles but they explain, in my opinion, why a person who honestly believes that he is in danger of an imminent deadly attack and responds violently in order to protect himself from that attack should be able to plead self-defence as an answer to a criminal charge of assault, or indeed murder, whether or not he had been mistaken in his belief and whether or not his mistake had been, objectively speaking, a reasonable one for him to have made. As has often been observed, however, the greater the unreasonableness of the belief the more unlikely it may be that the belief was honestly held.

18. The function of the civil law of tort is different. Its 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. Thus, for instance, the right of freedom of expression may conflict with the right of others not to be defamed. The rules and principles of the tort of defamation must strike the balance. The right

not to be physically harmed by the actions of another may conflict with the rights of other people to engage in activities involving the possibility of accidentally causing harm. The balance between these conflicting rights must be struck by the rules and principles of the tort of negligence. As to assault and battery and self-defence, every person has the right in principle not to be subjected to physical harm by the intentional actions of another person. But every person has the right also to protect himself by using reasonable force to repel an attack or to prevent an imminent attack. The rules 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 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. This is the conclusion to which the Court of Appeal came in preferring solution 2.

19. I have found it helpful to consider also the somewhat analogous defence of consent. Consent is, within limits, a defence to a criminal charge of assault. It is relevant in physical contact games but is also frequently put forward as a defence where allegations of sexual assault, whether of rape or less serious varieties, are made. If the consent relied on had not been given but was honestly believed by the assailant to have been given, the accused would be entitled, as I understand it, to an acquittal. An honest belief that could not be rebutted by the prosecution would suffice. But why should that suffice in a tort claim based upon the sexual assault? It would surely not be a defence in a case where the victim of the assault had neither expressly nor impliedly consented to what the assailant had done for the assailant to say that he had honestly albeit mistakenly thought that she had, unless, at the very least, the mistake had been a reasonable one for him to have made in all the circumstances. So, too, with self-defence.

20. I would, therefore, dismiss the Chief Constable's appeal against the Court of Appeal's adoption of solution 2. It has not been contended on behalf of the Ashleys that solution 3 might be the correct solution in a civil case but, speaking for myself, I think that that solution would have a good deal to be said for it, as appears to have been the view also of the Master of the Rolls (see paras 63 to 78 of his judgment). I would start with the principle that every person is *prima facie* entitled not to be the object of physical harm intentionally inflicted by another. If consent to the infliction of the injury has not been given and cannot be implied why should it be a defence in a tort claim for the assailant to say that although his belief that his victim had consented was a mistaken one nonetheless it had been a reasonable one for him to make? Why, for civil law purposes, should not a person who proposes to make physical advances of a sexual nature to another be expected first to make sure that the advances will be welcome? Similarly, where there is in fact no risk or imminent danger from which the assailant needs to protect himself, I find it difficult to see on what basis the right of the victim not to be subjected to physical violence can be set at naught on the ground of mistake made by the assailant, whether or not reasonably made. If A assaults B in the mistaken belief that it is necessary to do so in order to protect himself from an imminent attack by B, or in the mistaken belief that B has consented to what is done, it seems to me necessary to enquire about the source of the mistake. If the mistake were attributable in some degree to something said or done by B or to anything for which B was responsible, then it seems to me that the rules relating to contributory fault can come into play and provide a just result. If the mistake were attributable in some degree to something said to A by a third party, particularly if the third party owed a duty to take care that information he gave was accurate, the rules relating to contributions by joint or concurrent tortfeasors might come into play. But I am not persuaded that a mistaken belief in the existence of non-existent facts that if true might have justified the assault complained of should be capable, even if reasonably held, of constituting a complete defence to the tort of assault. However, and in my view, unfortunately, solution 3 has not been contended for on this appeal, its pros and cons have not been the subject of argument, and your Lordships cannot, therefore, conclude that it is the correct solution. But I would, for my part, regard the point as remaining open.

Issue 2: Should the further prosecution of the assault and battery claim be barred?

21. It is submitted on behalf of the Chief Constable that since the further prosecution of the assault and battery claim and an eventual

finding of liability cannot, in view of the concession on damages that the Chief Constable has made, add anything at all to the quantum of compensatory, including aggravated, damages that the Ashleys will succeed in recovering, the claim should not be allowed to proceed. This issue requires some attention to the legitimate purposes for which an assault and battery claim can be made and for which, if liability is established, damages can be awarded against the Chief Constable.

22. The claim forms issued by the Ashleys simply seek damages for the torts giving rise to the deceased Mr Ashley's death. These torts include, of course, the assault and battery tort. The only legitimate purpose for which Fatal Accident Act damages can be claimed and awarded for this tort is, in my opinion, compensatory. The damages are awarded for a loss of dependency. But the purposes for which damages could have been awarded to the deceased Mr Ashley himself, if he had not died as a result of the shooting, are not confined to a compensatory purpose but include also, in my opinion, a vindicatory purpose. In *Chester v Afshar* [2005] 1 AC 134, para 87 Lord Hope of Craighead remarked that "The function of the law is to enable rights to be vindicated and to provide remedies when duties have been breached" and that unless an infringed right were met with an adequate remedy, the duty would become "a hollow one, stripped of all practical force and devoid of all content". So, too, would the right. How is the deceased Mr Ashley's right not to be subjected to a violent and deadly attack to be vindicated if the claim for assault and battery, a claim that the Chief Constable has steadfastly and consistently disputed, is not allowed to proceed? Although the principal aim of an award of compensatory damages is to compensate the claimant for loss suffered, there is no reason in principle why an award of compensatory damages should not also fulfil a vindicatory purpose. But it is difficult to see how compensatory damages can could ever fulfil a vindicatory purpose in a case of alleged assault where liability for the assault were denied and a trial of that issue never took place. In *Daniels v Thompson* [1998] 3 NZLR 22, 70 Thomas J observed that:

> "Compensation recognises the value attaching to the plaintiff's interest or right which is infringed, but it does not place a value on the fact the interest or right ought not to have been infringed at all".

In a later case, *Dunlea v Attorney General* [2000] 3 NZLR 136, Thomas J drew a distinction between damages which were loss-centred and damages which were rights-centred. Damages awarded for the purpose of vindication are essentially rights-centred, awarded in order to demonstrate that the right in question should not have been infringed at

all. In *Attorney General of Trinidad and Tobago v Ramanoop* [2006] 1 AC 328 the Privy Council upheld an award of vindicatory damages in respect of serious misbehaviour by a police officer towards the claimant. These were not exemplary damages; they were not awarded for any punitive purpose. They were awarded, as it was put in *Merson v Cartwright* [2005] UKPC 38, another case in which the Privy Council upheld an award of vindicatory damages, in order "to vindicate the right of the complainant … to carry on his or her life in the Bahamas free from unjustified executive interference, mistreatment or oppression" (para 18). The rights that had been infringed in the *Ramanoop* case and in *Merson v Cartwright* were constitutional rights guaranteed by the respective constitutions of the countries in question. But the right to life, now guaranteed by article 2 of the European Convention on Human Rights and incorporated into our domestic law by the Human Rights Act 1998, is at least equivalent to the constitutional rights for infringement of which vindicatory damages were awarded in *Ramanoop* and *Merson v Cartwright*. It is, of course, the case that if self-defence can be established as an answer to the Ashleys' claims of tortious assault and battery no question of vindicatory damages will arise. But, unless the claim can be said to have no reasonable prospect of success, that is no reason why the assault and battery claim should not be permitted to proceed to a trial.

23. The history of this litigation to date justifies, in my opinion, the drawing of two inferences. One is that the Chief Constable has gone to considerable lengths to try to avoid the possibility of an adverse finding of liability on the assault and battery claim. He has conceded liability for all compensatory damages flowing from the shooting. He has conceded liability for negligence in relation to the pre-shooting and post-shooting events, but not, as I understand it, negligence by PC Sherwood in relation to the actual pulling of the trigger. When the Ashleys made clear that they sought aggravated damages, he conceded those in relation to his negligence admissions notwithstanding that they would not normally be available in a negligence claim. I draw the inference that the Chief Constable is determined to avoid, if he can, a trial of liability on the assault and battery claim. The other compelling inference is that the Ashleys are determined, if they can, to take the assault and battery case to trial not for the purpose of obtaining a larger sum by way of damages than they have so far become entitled to pursuant to the Chief Constable's concessions, but in order to obtain a public admission or finding that the deceased Mr Ashley was unlawfully killed by PC Sherwood. They want a finding of liability on their assault and battery claim in order to obtain a public vindication of the deceased's right not to have been subjected to a deadly assault, a right that was infringed by PC Sherwood. They have pleaded a case that, if

reasonably arguable on the facts, cannot be struck out as being unarguable in law. Why, therefore, should they be denied the chance to establish liability at a trial? It is open to the Chief Constable to avoid a trial by admitting liability on the assault and battery claim. The Court cannot be required to entertain an action where there is nothing to decide (see *R (Rusbridger) v Attorney General* [2004] 1 AC 357). But the Chief Constable declines, as he is entitled to do, to admit liability on the assault and battery claim. That being so, I can see no ground upon which it can be said that it would be inappropriate for the claim to proceed for vindicatory purposes. Whether, if liability is established, the vindication should be marked by an award of vindicatory damages or simply a declaration of liability is, in my opinion, unimportant.

24. It is contended also that the continued prosecution of the assault and battery claim should not be permitted because it would amount to an unlawful collateral attack on PC Sherwood's acquittal and would infringe the rule against double jeopardy. I do not regard either of these contentions as reasonably arguable. PC Sherwood was entitled to be acquitted because the prosecution were unable to lead evidence probative of a rebuttal of his assertion that he had believed himself to be in imminent danger of a deadly attack and in that belief had shot James Ashley in self-defence. But the criteria for self-defence that constitute an answer to a criminal charge of assault will not necessarily suffice as an answer in a civil claim for tortious assault. Honest belief in the need for self-defence is not enough. In a civil case the belief must at least be reasonably held and, it may be, even that would not suffice to establish the defence. And in a civil case the onus of establishing the requisite criteria rests on the defendant. Accordingly, an acquittal on a criminal charge of assault based on an assertion by the defendant of the need for self-defence does not mean that the defendant did not unlawfully assault the victim. It does mean that the prosecution cannot prove, as they must prove if the defendant is to be convicted, that he did. Both for that reason and because there is a difference between the criteria for self-defence required in a criminal trial and the criteria for that defence required in a civil trial, an acquittal in a criminal trial does not demand a verdict for the defendant in a civil trial. This may seem anomalous but, in my opinion, for the reasons I have already given, it is not. If a defendant's acts in the believed need for self-defence are a reasonable and proportionate response to the facts as he honestly believed them to be, it would seem to me quite wrong for the criminal law to impose penal sanctions on him. But if an individual is attacked because the assailant mistakenly believes that the attack is necessary as an act of self-defence and the belief although honestly held is unreasonable in all the circumstances, it would seem to me a travesty for the victim to have to be told that the attack was a lawful one. The prosecution of the

Ashleys' civil action based on assault and battery is not a collateral attack on PC Sherwood's acquittal. It raises issues different from those on which the criminal charges against PC Sherwood turned, issues which were not relevant to and could not be raised in the criminal trial. Nor will the prosecution of the civil action place PC Sherwood in double jeopardy. There are no penal consequences for adverse findings in the civil courts.

25. Moreover, at no stage in the proceedings so far has the Chief Constable offered to pay or accepted liability for the Ashleys' legal costs incurred in connection with their claim based on assault and battery. On the contrary, he seeks his costs and, as counsel for the Ashleys has pointed out, he will, if the further prosecution of the assault and battery claim is barred, be able to recoup, from the damages he has agreed to pay, the costs of that part of the action that he seeks to avoid. I regard the costs implications of the bar on the further prosecution of the assault and battery claim that is sought by the Chief Constable as a matter of relatively minor importance in the reasons why the bar should not be imposed, but, nonetheless, those implications seem to me hardly consistent with justice.

26. It is contended also that, PC Sherwood having been acquitted, the further prosecution in a civil court of the assault and battery claim would be "manifestly unfair" to him (*Hunter v Chief Constable of the West Midlands Police* [1982] AC 529, 536) and would therefore infringe his right to a fair trial guaranteed under article 6 of the Convention. Strasbourg jurisprudence does not support this contention (see *Ringvold v Norway* (Application No 34964/97) (unreported) 11 May 2003). Moreover, the article 6 rights of an acquitted defendant cannot extinguish the article 6 rights of the alleged victim of the assault to a fair trial of his or her civil claim in tort. There is no jurisprudence of the Strasbourg court to support such a one-sided and unfair consequence.

27. As to the prospects of success of the Ashleys' assault and battery claim, they would, I think, be gloomy if solution 1 were, as the Chief Constable contended, the right answer to issue 1. But if it is right, as I think it is, that self-defence in a tortious assault and battery claim requires not only an honestly held belief but also, at the very least, a reasonably held belief in the existence of the facts said to justify the action taken as being reasonable and proportionate in the believed circumstances, it is, in my opinion, impossible to conclude that the Ashleys' pleaded case has no real prospect of success. The deceased Mr Ashley, while naked and unarmed, was shot by PC Sherwood within

seconds of the latter's entry at 4.20am or thereabouts into the bedroom. The question whether in all the circumstances it was reasonable for PC Sherwood to have believed that the figure facing him was armed and was presenting a deadly danger is, to me at least, an open one on the facts.

28. There is one further issue, referred to in para 96 of the written case prepared by counsel for the Chief Constable, that deserves attention. Section 1(1) of the 1934 Act provides that "all causes of action subsisting against or vested in [a person before his death] shall survive against, or, as the case may be, for *the benefit of*, his estate …" (emphasis added). The object of the 1934 Act was explained by Lord Wright in *Rose v Ford* [1937] AC 826, 841

> "The purpose … was to abolish in a special and particular way the rule preventing the prosecution of a claim in tort for personal injuries where the person who would otherwise be plaintiff or defendant in an action has died. The rule was expressed in the maxim 'actio personalis moritur cum persona'"

The rule had come to apply, as Lord Wright explained, to "what were called 'purely' personal wrongs". But there were a number of exceptions to the causes of action freed from this rule. The exceptions covered what perhaps might be described as "particularly" personal wrongs. The excepted causes of action were defamation, seduction, enticing away a spouse, or adultery. The latter three excepted causes of action were later removed by amendment but a cause of action for defamation remains an exception and cannot survive the death of the alleged defamer or the defamed. In addition, the 1934 Act barred, in relation to any cause of action that had survived for the benefit of the estate of a deceased person, the award of any exemplary damages. This is the background context to the submission that, in view of the concessions on damages made by the Chief Constable, it cannot be said that the estate of the deceased Mr Ashley can derive any benefit from the further prosecution of the assault and battery cause of action. If tortious liability were to be established and a declaration to that effect were to be made, the declaration would be of no benefit to the estate. It was not, but might have been, submitted that an action prosecuted for the purpose not of compensation but of vindicating the deceased's allegedly infringed rights is an action of a particularly personal nature, akin to those that were expressly excepted in the 1934 Act, and that vindicatory damages, although not punitive in intent, are, in common with exemplary damages, extra-compensatory in character. So the question is raised whether it is right to allow a cause of action that has

survived under the 1934 Act to be prosecuted for, as is to my mind the case here, reasons that are, essentially non-compensatory. There seems to me no doubt at all but that the assault and battery cause of action, with the other causes of action vested in the deceased at the time of his death, did survive his death pursuant to the 1934 Act. In *Attorney General v Canter* [1939] 1 KB 318 the Court of Appeal declined to restrict the literal breadth of the words "all causes of action" in section 1(1) (see pp 328 and 333 per Sir Wilfrid Greene MR). But if the cause of action did survive the death it remains vested in the estate and James Ashley senior, representing the estate, is *prima facie* entitled to prosecute it. He, in my opinion, is entitled to be the judge of whether it is for "the benefit of the estate" to pursue the action. In *Re Chase* [1989] 1 NZLR 325 the New Zealand Court of Appeal declined to allow to proceed an action for assault and battery against the police where the victim of the alleged assault had died. In New Zealand section 3(1) of the Law Reform Act 1936 is to the same effect as section 1(1) of our 1934 Act but other statutory provisions in force in New Zealand made it impossible for the action brought on behalf of the deceased's estate to proceed as an action for damages, whether compensatory, exemplary or nominal. A declaration was the only possible form of relief that could have been claimed or granted. So the question was raised whether the assault and battery claim could survive the death of the victim. Could its post-death prosecution be said to be "for the benefit of the estate"? As to that Cooke P (as he then was) thought that a declaration that the deceased had been the victim of high handed and oppressive police conduct "might be some solace or satisfaction to [his] family" and, at p 332, that

> "it would be narrow and excessively legalistic to treat this as not a benefit to the estate. The law need not be so materialistic as to treat pecuniary benefit as the only kind of benefit which it will recognise."

He was, therefore, not prepared to rule that the cause of action had not survived the death. But he went on to consider whether the desired declaration would be granted. He said this, at p 334:

> "the court would have jurisdiction to declare, in an action brought by the personal representative of a deceased person, that the death was caused by a grave violation of his rights as a citizen. But it is essentially a discretionary jurisdiction, to be exercised obviously with full care and, as I see it, only in exceptional cases"

He concluded, p 335, that

> "this is not such an exceptional case as to justify the court in embarking, under the declaratory jurisdiction, into an inquiry into the death of the deceased"

The other members of the court agreed with that conclusion.

29. My Lords I would, in respectful agreement with Cooke P, decline to conclude that if an action that has survived under the 1934 Act is pursued for a vindicatory purpose it is not being pursued "for the benefit of the estate". There is no bar in this jurisdiction comparable to the statutory bar in New Zealand that would have prevented the action there from being pursued for vindicatory damages. The Chief Constable has conceded compensatory damages. He has not conceded vindicatory damages and he cannot do so unless he concedes liability on the assault and battery claim. Nor, in my opinion, is it possible at this stage in the litigation to be certain whether or not at the conclusion of a trial of liability a declaration to the effect that the deceased Mr Ashley had been killed by a tortious assault, would be made.

30. For all these reasons I would dismiss this appeal with costs.

LORD RODGER OF EARLSFERRY

My Lords,

31. I gratefully adopt the full account of the facts and issues given by my noble and learned friend, Lord Scott of Foscote.

32. On 15 January 1998, in the course of an operation organised and conducted by Sussex Police, PC Christopher Sherwood shot and killed James Ashley ("the deceased").

33. In January 2000 the deceased's son, James Ashley Junior, raised an action against the Chief Constable of Sussex Police for damages arising out of his death. Presumably he brought the action, by virtue of section 2(2) of the Fatal Accidents Act 1976 ("the 1976 Act"), because no action had been brought by an executor or administrator.

34. At some point, the deceased's parents, Mrs Eileen Ashley and Mr James Ashley senior were appointed the administrators of his estate. They began another action against the Chief Constable in October 2002. In part, by virtue of section 1 of the Law Reform (Miscellaneous Provisions) Act 1934 ("the 1934 Act"), they sought damages for, inter alia, battery (trespass to the person) and, in particular, for the deceased's pain and suffering in the short interval between the moment when he was shot and the moment when he died.

35. In the same action, by virtue of the Fatal Accidents Act 1976, on behalf of the dependants of the deceased, Mr and Mrs Ashley claimed damages for loss which they had suffered as a result of the deceased's death. Mrs Ashley died in November 2004, before the hearing in the Court of Appeal and, as administrator of her estate, Mr Ashley maintains the claim vested in her estate.

36. At one stage, therefore, there appear to have been two actions in which claims were made under the Fatal Accidents Act 1976, even though section 2(3) provides that not more than one action is to lie in respect of the same subject matter of complaint. But the claims are now included in the one action. So nothing of substance turns on the point – but it explains why there are claims both by the deceased's son and by the administrators on behalf of the dependants.

37. The deceased's son and father are the respondents in the appeal.

38. The claimants proceeded on the basis that the deceased's death "was caused by the negligence, and/or in the alternative trespass to the person, and/or in the alternative misfeasance in public office and/or in the alternative, in breach of the deceased's right to life pursuant to article 2 of the ECHR as incorporated by the Human Rights Act 1998." So all the claimants - not just the deceased's estate under the 1934 Act– claimed on the basis that the deceased had died as a result of battery. In each case, too, there was a claim for "damages in negligence, misfeasance and under the Human Rights Act arising out of the manner in which the defendant by himself and/or his officers and/or his agents treated the claimants arising out of the fatal shooting." Finally, in each case, there was a claim for "damages in negligence, misfeasance and under the Human Rights Act arising out of the conduct of the defendant by himself and/or his officers and/or his agents in relation to and/or as part of the investigation into the death of the deceased."

39. It is now common ground that, since the shooting took place before 2 October 2000, no claims under the Human Rights Act 1998 can be entertained.

40. In the Court of Appeal Sir Anthony Clarke MR explained how the other claims stood at the start of the appeal to that court [2007] 1 WLR 398, 403, paras 3 and 4:

> "3. The claims were and are divided into two parts. The first part relates to the planning and execution of the armed raid and involves allegations of assault and battery (which I will together call 'battery'), false imprisonment, negligence and misfeasance in public office. The second part relates to the conduct of the chief constable and some of his officers after the raid and involves allegations of negligence and misfeasance in public office.
>
> 4. As to the first part, the defendant admitted negligence and false imprisonment and the judge accordingly gave judgment for the claimants on those claims as appropriate, with damages to be assessed. The defendant denied battery and misfeasance in public office. The judge struck out the claim for misfeasance in public office under CPR r 3.4. She also gave summary judgment for the defendant under CPR Pt 24 in respect of both the claim for battery and the claim for misfeasance in public office."

41. The Court of Appeal held that Dobbs J had been wrong to strike out the claim for misfeasance in public office, relating to the events after the shooting, but that, for the reasons which they gave, she had been entitled to direct that the issue of compensatory damages should be determined before the issue of liability. There is no appeal against that aspect of the judgment of the Court of Appeal.

42. In the case of the claims for battery, Dobbs J noted that:

> "the experts were not able to exclude the explanation given by PC Sherwood about what he believed the deceased to be doing with his hands/arms immediately prior to the shooting. Given what the claimant has to prove, I am of the view that this claim has, on the evidence, no real prospect of success."

Dobbs J accordingly struck out the claims based on battery. She also indicated that, if she had been against the Chief Constable on the application to strike out, in the exercise of her case management powers she would have stayed the proceedings pending the trial of the negligence aspect of the claims.

43. The Court of Appeal held that Dobbs J had erred in holding that, in a civil case, the burden of negativing self-defence was on the claimants. The Chief Constable has accepted the Court of Appeal's view on that point.

44. In the course of submissions developed before the Court of Appeal Mr Starmer QC also argued on behalf of the claimants that the test for self-defence in a civil case was not the same as the test in a criminal case. In a criminal context, the defence would be available if the accused honestly, even though unreasonably, believed that the deceased was armed and was going to shoot him imminently: *R v Williams (Gladstone)* [1987] 3 All ER 411 and *Beckford v The Queen* [1988] AC 130. But, in this civil case, the claims for battery would succeed unless the Chief Constable proved that the deceased had actually been armed and might have shot PC Sherwood imminently. Alternatively, the claims would succeed unless the Chief Constable proved that PC Sherwood not only honestly, but reasonably, believed that the deceased was armed and might shoot him imminently. The Court of Appeal upheld the claimants' alternative submission. The Chief Constable has appealed against this decision and contends that the test of self-defence is the same as in the criminal context. There is no cross-appeal by the claimants against the rejection of their other argument.

45. Applying their view of the law, the Court of Appeal reconsidered the decision of Dobbs J that the claims for battery should be struck out. Having done so, the court concluded that it could not properly hold that the claimants had no real prospect of defeating the defence of self-defence. Plainly, the House would have to reconsider that assessment if it allowed the Chief Constable's appeal on the test for self-defence. But at the hearing, when the committee indicated that it was not disposed to allow the appeal on that point, Mr Faulks QC did not seek to argue that, nevertheless, the claimants had no real prospect of defeating the defence of self-defence.

46. In the course of the hearing before the Court of Appeal, the parties came to an agreement as to the basis upon which damages for negligence and false imprisonment should be assessed. The terms of that agreement are explained in the opinion of the Master of the Rolls: [2007] 1 WLR 398, 404, paras 9 and 10, which Lord Scott has recited in his speech, at para [13]. The majority of the Court of Appeal (Sir Anthony Clarke MR and Arden LJ) held, however, that, despite the judgment in the claimants' favour and the agreement between the parties, the claimants should be allowed to have the claim based on the alleged battery tried - but only with a view to the court making an appropriate declaration, if it found the battery established. The Master of the Rolls explained, at para 96:

> "The role of the civil courts is not solely to provide compensation. As I see it, the civil justice system exists to adjudicate on the merits of individual claims by application of the law to the facts. The role of a civil court is to determine the parties' legal rights and liabilities. Such a determination can result in different types of relief, including compensation by way of damages, an injunction or a declaration. The pursuit of a declaration that the defendant is liable in the tort of battery for the shooting of the deceased by PC Sherwood is a remedy available to the court. While it does of course remain within the court's discretion whether declaratory relief should be granted, it seems to me, without wishing to prejudice the matter if it arises before the trial judge, that the court may well think it appropriate to grant such a declaration if the defendant fails to show that PC Sherwood used reasonable force in necessary self-defence (as described above)."

This particular approach had not been suggested by counsel for the claimants and had not been the subject of submissions to the Court of Appeal.

47. The Court of Appeal ordered that the issues of the Chief Constable's liability for battery and of the quantum of any damages should be tried at the same time as the issue of the assessment of compensation for negligence and false imprisonment. The Chief Constable has appealed against this aspect of the decision of the Court of Appeal. He contends that – as Auld LJ held - the claims for battery should now be stayed permanently.

48. Both in his written case and in the hearing before the House, Mr Faulks presented the issue as one which went beyond mere case management. He submitted that, by insisting on going ahead with their claim in battery, the claimants were guilty of abuse of process.

49. Basically, Mr Faulks argued that the claimants had no legitimate interest in pursuing their claims in battery now that the Chief Constable had admitted liability and agreed to pay damages in the negligence claims. Their only aim was to obtain a judgment from the civil court on the circumstances in which PC Sherwood had shot and killed the deceased. This was, he said, wholly unnecessary in the public interest. PC Sherwood had been charged with murder, had gone to trial and had been acquitted on the direction of Rafferty J, who had held that the Crown had not been in a position to negative his defence of self-defence. The deceased's family had sought a public inquiry but, after due consideration, that request had been turned down, because the circumstances of the shooting had been explored at the criminal trial. The claimants accepted that, as a result of the agreement on damages reached during the hearing before the Court of Appeal, even if they succeeded in their claims for battery, they could not obtain any higher sum by way of damages either under the 1934 Act or under the 1976 Act. In these circumstances, the claimants were merely trying to obtain a judgment from the civil court which would cast doubt on the verdict of acquittal in the criminal trial. A trial of their claims for battery would serve no legitimate purpose.

50. I turn very briefly to the first issue, the appropriate test for self-defence.

51. If a person is actually under a potentially lethal attack or such an attack is imminent, the law recognises that he is entitled, or permitted, to defend himself and, if need be, to kill his assailant. The killing is justified. See, for instance, *A Ashworth*, *Principles of Criminal Law*, 4th ed (2003), pp 135-136. In my view the civil and criminal law would look at that situation in the same way: it would be absurd to say that the person under attack was justified in killing his assailant, but nevertheless potentially liable in damages to the assailant's estate or to his dependants. To this extent the civil and criminal rules on self-defence must march together. And indeed the ex turpi causa and contributory negligence defences help to reinforce that policy.

52. The position is rather different where, for example, D believes that V is attacking him with potentially lethal force, when that is not in fact the case. For instance, V threatens D with a gun, which, unknown to D, is unloaded. There is a dispute among academic writers as to whether, in such circumstances, D is justified in killing V or whether what D did was wrong, but he has a defence to any criminal charge – in English law, even where his mistaken belief was unreasonable. See, for instance, *Gardner, Offences and Defences* (2007), pp 108-113 and 269-276, and H Stewart, "The Role of Reasonableness in Self-Defence" (2003) 14 Canadian Journal of Law and Jurisprudence 317, 320-323.

53. In situations where issues of mistake arise, I respectfully agree that, for the reasons given by Lord Scott of Foscote, there is nothing anomalous in the civil law and criminal law now continuing along separate paths and adopting different standards. In the Court of Appeal the Master of the Rolls analysed the cases and other material which describe the approach of the civil law: [2007] 1 WLR 398, 413-418, paras 45-62. Moreover, as Lord Scott has explained, there are good reasons why the civil law should hold the balance between the victim and the defendant by insisting that, for the defence to operate, any mistake on the part of the defendant must be reasonable. So the Chief Constable's appeal should be dismissed. I wish to reserve my opinion on two points, however.

54. First, Arden LJ [2007] 1 WLR 398, 449, para 196, drew attention to the situation where D shoots V, in the reasonable belief that V is about to attack him, but that belief is based to a material extent, not on V's actions, but on something which D has been told previously by a third party. Like Arden LJ and Lord Scott, I should wish to leave the effect of a reasonable belief of that kind open for further consideration.

55. Secondly, since the respondents did not cross-appeal against the rejection of their argument that self-defence should be available as a defence to a claim for battery only where the defendant was actually being attacked or in imminent danger of an attack, the House did not hear argument on that point. Although he ultimately rejected the argument, the Master of the Rolls acknowledged what he called, at para 39, its "undoubted force", especially in the light of *Cope v Sharpe (No 2)* [1912] 1 KB 496 and *Cresswell v Sirl* [1948] 1 KB 241. The argument is encapsulated in Sedley LJ's crisp observation that "honest belief in a non-existent state of affairs does not excuse a trespass to the person": *Hepburn v Chief Constable of Thames Valley Police* [2002]

EWCA Civ 1841; The Times, 19 December 2002, at para 24. Again, I would reserve my opinion on that, fundamental, question.

56. My Lords, in addressing the second issue, I start by reminding myself that "English law has no objection to concurrent liability … between one wrong and another": *Burrows (ed)*, *English Private Law*, 2nd ed (2008), para 17.246. In an ordinary action of personal injuries arising out of an industrial accident, for example, it is commonplace for the claimant to rely on more than one cause of action. So the claimant may use the one claim form to initiate both a claim based on the common law and a claim based on a breach, or breaches, of statutory duty: CPR r 7.3. Leaving aside any question of case management, at the trial the claimant is entitled to pursue both claims - and will often be well advised to do so. There may be problems about some aspect of the common law claim or about the application of the statutory provisions to the particular circumstances. The claimant will run both cases, in the hope of succeeding on at least one of them. Of course, the evidence needed to establish liability at common law and under the statute may well be different: for the purpose of his common law case, the claimant may have to explore circumstances relating to the reasonable foreseeability of harm which do not arise in his statutory case. Nevertheless, the advantage will generally be in favour of proceeding with both claims in a single trial.

57. At the end of the trial, the judge may hold that the common law claim is established and so find it unnecessary to deal with the statutory claim – or vice versa. In that event, the judge will find the defendant liable to pay damages on the basis of the claim that he has held to be established. Part 36 offers or payments aside, the defendant will usually have to pay the claimant's costs. But, equally, the judge may find both the common law and statutory claims established. The defendant will then be held liable to pay damages to the claimant both in respect of the common law tort and in respect of the breach of statutory duty. Again, the defendant will have to pay the claimant's costs.

58. Although, in such a case, there are two causes of action and the defendant is found liable in respect of each, both causes of action relate to the same injuries. It follows that, as a rule, the damages recoverable under both causes of action will be the same. And, since the damages are intended to provide compensation for the injuries suffered by the claimant, he is entitled to the same damages, whether he succeeds on one cause of action or on both. The only material advantage to the claimant in succeeding on both causes of action is that he will be

entitled to retain his damages, even if an appeal court later holds that he should not have succeeded on one of them.

59. From the outset, in their various capacities, the claimants in the present case had a cause of action against the Chief Constable based on the negligence of his officers and another cause of action against him based on battery by PC Sherwood. The Chief Constable admitted liability in respect of the negligence claims and Dobbs J gave judgment for the claimants on their claims in negligence and false imprisonment. She ordered that a hearing for the assessment of damages should take place, but, in the event, that did not happen because of the appeal to the Court of Appeal.

60. A claimant has no cause of action in negligence unless he has suffered injury or damage. By contrast, battery or trespass to the person is actionable without proof that the victim has suffered anything other than the infringement of his right to bodily integrity: the law vindicates that right by awarding nominal damages. I respectfully agree with what Lord Scott has said, at para [22], on that matter. But the 1934 Act claim of the estate of someone, such as the deceased, who has allegedly suffered the ultimate form of battery, resulting in pain and suffering before death supervenes, is not for nominal damages, but for compensatory damages for what he suffered due to the battery. The award of such damages can indeed serve a vindicatory purpose. Especially since there is no longer any right to damages for the loss of expectation of life, in a case like the present it would be artificial to divorce damages for the battery itself from damages for the deceased's pain and suffering. In any event, the parties are agreed that, for purposes of the 1934 Act, the deceased's estate could not "recover more damages for assault and battery than those to which it is entitled pursuant to the appellant's concessions." Equally, there is no suggestion that the damages due to the deceased's estate for assault and battery would be smaller. The same applies to the claims on behalf of the dependants under the 1976 Act.

61. The position can be summarised in this way. The claimants have a judgment in their favour on the Chief Constable's liability in negligence and false imprisonment. In addition, in the course of the hearing before the Court of Appeal, the parties agreed a formula under which damages in respect of the claims of negligence and false imprisonment would be assessed. Finally, it is agreed that the claimants cannot obtain any more by way of damages if they succeed in their claims for battery.

62. The judgment and the agreement on damages do not have any direct effect on the claimants' cause of action based on battery. In other words, while they are entitled to judgment for the damages to be assessed in relation to the claims of negligence and false imprisonment, their causes of action based on battery remain intact. Prima facie, therefore, they are entitled to proceed with the cause of action in battery and, if they succeed, they can ask the court to pronounce judgment, in the usual way, ordering the Chief Constable to pay the appropriate sum of damages, both in respect of their claims in negligence and false imprisonment and in respect of their claims in battery.

63. In these circumstances there is no need to consider whether, as the Master of the Rolls and Arden LJ held, it would have been appropriate for the proceedings to continue only in order to give the claimants an opportunity to obtain a declaration in respect of the claims in battery. If the proceedings continue, any declaration which the judge chose to make would be ancillary to any ultimate judgment that the Chief Constable should pay damages in respect of both causes of action. The decision of the Court of Appeal of New Zealand in *Re Chase* [1989] 1 NZLR 325, where no damages could be claimed, is accordingly distinguishable. Indeed, in the present case the discretionary nature of the remedy of declaration is irrelevant: what matters is that, if the claimants are permitted to proceed, and if they then prove their case, they will have a right ex debito iustitiae to a judgment for the appropriate sums of damages for the battery done to the deceased. That judgment would necessarily involve a finding that PC Sherwood had not been entitled to shoot the deceased in self-defence.

64. Despite this, the Chief Constable submits that the claims for damages for battery should be permanently stayed as an abuse of process. In my view, however, parties who have a claim for damages for battery, which is not struck out, cannot be said to abuse the process of the court by proceeding with that claim. Suppose, for example, that the claimants had chosen to sue PC Sherwood as well as the Chief Constable for battery. In that situation, the judgment against the Chief Constable and the agreement on damages could not possibly have been a basis for holding that it was an abuse of process for the claimants to continue their action against PC Sherwood. The position should not be any different just because the only claim is against the Chief Constable.

65. The Chief Constable draws attention to the claimants' supposed motives in continuing with the claims in battery. Assume that one of

their motives is indeed a desire to obtain a judicial finding about the circumstances in which PC Sherwood killed the deceased. The existence of that motive is not in itself a reason for the court to stay their claims.

66. As the Chief Constable accepts, the fact that PC Sherwood was acquitted of the criminal charge against him does not, of itself, make it improper or an abuse of process for the claimants to raise and insist in the civil claims based on battery. That emerges quite distinctly from the discussion by Lord Diplock in *Hunter v Chief Constable of the West Midlands Police* [1982] AC 529, 542H-543C. I refer also to the decision of Lightman J in *Raja v Van Hoogstraten* [2005] EWHC 2890 (Ch), paras 43-46. For the reasons given by the Master of the Rolls [2007] 1 WLR 398, 426, para 98, not only the processes but the issues in a civil trial relating to the shooting would be significantly different from those in the criminal trial. Therefore the acquittal of PC Sherwood does not justify the conclusion that a civil trial of the allegation of battery would be an abuse of the process of the civil court.

67. Nor would an award of damages for battery violate PC Sherwood's article 6(2) Convention right to be presumed innocent of the charge of murder of which he was acquitted. This is made quite clear by the European Court of Human Rights in their judgment in *Y v Norway* (2005) 41 EHRR 87, 102-103, para 41:

> "In the view of the Court, the fact that an act which may give rise to a civil compensation claim under the law of tort is also covered by the objective constitutive elements of a criminal offence could not, notwithstanding its gravity, provide a sufficient ground for regarding the person allegedly responsible for the act in the context of a tort case as being 'charged with a criminal offence'. Nor could the fact that evidence from the criminal trial is used to determine civil law consequences of the act warrant such characterisation. Otherwise, as rightly pointed out by the Government, article 6(2) would give a criminal acquittal the undesirable effect of pre-empting the victim's possibilities of claiming compensation under the civil law of tort, entailing an arbitrary and disproportionate limitation on his or her right of access to court under article 6(1) of the Convention. This again could give an acquitted perpetrator, who would be deemed responsible according the civil burden of proof, the undue advantage of avoiding any responsibility for his or her actions. Such

> an extensive interpretation would not be supported either by the wording of article 6(2) or any common ground in the national legal systems within the Convention community. On the contrary, in a significant number of Contracting States, an acquittal does not preclude establishing civil liability in relation to the same facts.
>
> Thus, the Court considers that, while the acquittal from criminal liability ought to be maintained in the compensation proceedings, it should not preclude the establishment of civil liability to pay compensation arising out of the same facts on the basis of a less strict burden of proof (see, mutatis mutandis, *X v Austria* (Application No 9295/81), Commission decision of 6 October 1992, Decisions and Reports (DR) 30, p 227; *MC v United Kingdom* (Application No 11882/85), decision of 7 October 1987, DR 54, p 162)."

The European Court added, in para 42:

> "However, if the national decision on compensation contains a statement imputing the criminal liability of the respondent party, this could raise an issue falling within the ambit of article 6(2) of the Convention."

Provided that the judge makes no such statement, an award of damages would be quite consistent with PC Sherwood's article 6(2) Convention right.

68. It is, of course, well established that the courts will not entertain cases which serve no sufficient or legitimate legal purpose. Courts of law have no concern with hypothetical or academic questions and are "neither a debating club nor an advisory bureau": *Macnaughton v Macnaughton's Trs* 1953 SC 387, 392, per Lord Justice Clerk Thomson. So the House dismissed a claim for a declaration of incompatibility in relation to a statutory provision which was, in practice, a dead letter: *R (Rusbridger) v Attorney General* [2004] 1 AC 357. A court will also dismiss proceedings which might have had a legitimate purpose when they began, but no longer do so, because of a change of circumstances: *Clarke v Fennoscandia Ltd* [2007] UKHL 56; 2008 SLT 33.

69. Frequently, however, a defendant cannot challenge the interest of the claimant to pursue the action without simultaneously calling into question his own real interest in defending the action. After all, if the

claimant gains nothing of value by winning, equally, the defendant loses nothing of value if he is defeated. Cf *Murray's Trs v Trustees for St Margaret's Convent* (1906) 8 F 1109, 1116-1117, per Lord Kinnear. Conversely, in the present case the very fact that the Chief Constable remains understandably concerned to defend the claim of battery tends to confirm that the claimants may remain, equally understandably, concerned to pursue that claim.

70. Case management is intended to assist, not to frustrate, the administration of justice between the parties. Where parties have a valid cause of action, justice is unlikely to be served by preventing them from advancing their cause of action on the ground that their motive for doing so is somehow improper. For instance, a trade union backing a claimant with an established cause of action for personal injuries may, quite legitimately, wish to use the proceedings to try out another novel, and more doubtful, cause of action. Or, like Mrs Doreen Fox, the principled widow of one of the victims of industrial mesothelioma, a claimant may feel morally obliged to refuse a full offer of settlement and to proceed, in order to try to establish a point of law which would help others in a similar plight. In these circumstances the House recognised her right to press on with her appeal against the unfavourable ruling of the Court of Appeal. The result was the decision in *Fairchild v Glenhaven Funeral Services Ltd* [2003] 1 AC 32.

71. In the present case the claimants have a cause of action for damages for battery as well as for negligence and false imprisonment. Any motives - besides obtaining damages - which they may have in pursuing their claims in battery neither enhance nor damage their case for allowing those claims to proceed: *Halford v Brookes* [1991] 1 WLR 428, 440H-441A, per Nourse LJ. In fact, the issue raised by the claims for damages for battery is far from academic – even if, in the end, the judge could choose not to decide it. In respectful agreement with the majority of the Court of Appeal, I accordingly consider that it would be wrong to use the court's case management powers to impose a permanent stay of these claims.

72. Of course, this does not mean that the respondents can litigate the claims for battery irresponsibly but with impunity. The usual safeguards apply. Once the evidence has been heard and the arguments have been presented, the trial judge has a wide discretion in awarding costs and may use it to reflect his or her view of the substantial merits of the claimants' insistence on pursuing the claims in battery. Equally significantly, the Chief Constable can protect his position by Part 36

offers or payments. The House was not surprised to be told that he had already made Part 36 offers carrying costs consequences, depending on the amount of any damages awarded and on the eventual outcome. The claimants and their advisers will have to take these factors into account when deciding what they should do.

73. For these reasons, and in substantial agreement with Lord Scott, I would dismiss the appeal.

LORD CARSWELL

My Lords,

74. On 15 January 1998 at about 4.20 am James Ashley was shot dead by PC Sherwood, a member of the Sussex Police Special Operations Unit, in the course of an armed raid on his flat in Hastings. His death was a tragic error which should not have happened, as the appellant Chief Constable has explicitly admitted. He has accepted responsibility for the deficiencies in the planning of the operation and the briefing of the police personnel, which led up to the fatal shooting and without which the raid would probably have taken place without incident. He has agreed to pay damages for the admitted negligence of his force, and if it is adjudged that aggravated damages should be payable, to pay them on that basis.

75. The facts relating to this appeal have been fully set out by my noble and learned friend Lord Scott of Foscote and I would gratefully accept his account without repeating them. In agreement with him, I consider that they give rise to two main issues, first, whether the decision of the Court of Appeal was right in respect of the circumstances in which a defendant can establish self-defence in a civil action for assault or battery, and, secondly, whether the claim for assault and battery should be stayed as an abuse of the process of the court or should be allowed to proceed to trial.

76. On the first issue I agree with Lord Scott and with the Court of Appeal, that the Chief Constable's appeal against the adoption of solution 2, as set out by Sir Anthony Clarke MR, should be dismissed. I do not see that there is any *a priori* reason why the criteria should be identical. Indeed, as Lord Scott has pointed out (para 13), there is a

clear difference between the aims of the two branches of the law. The criminal law has moved in recent years in the direction of emphasising individual responsibility. In pursuance of this trend it has been held in different areas of the criminal law that it is the subjective personal knowledge or intention of the accused person which has to be established: see, e.g., *R v Morgan* [1976] AC 182, *R v Kimber* [1983] 1 WLR 1118. So in the case of self-defence it has been held that that if a defendant is labouring under an honest mistake, even if it is regarded as unreasonable, the defence is open to him: *R v Williams (Gladstone)* [1987] 3 All ER 411. The function of the civil law is quite distinct. It is to provide a framework for compensation for wrongs which holds the balance fairly between the conflicting rights and interests of different people. I agree that that aim is best met by holding that for the defence of self-defence to succeed in civil law the defendant must establish that he honestly believed in the existence of facts which might afford him that defence and that that belief was based upon reasonable grounds. Sir Anthony Clarke MR's solution 2 is therefore the correct one. I do not myself find the cases of *Cope v Sharpe (No 2)* [1912] 1 KB 496 and *Cresswell v Sirl* [1948] 241 helpful in deciding the present issue, but if and in so far as they may be said to support a different conclusion I would not regard them as correct. I would not, however, support Lord Scott in regarding solution 3 as possibly containing the correct principle, although it has been favoured by some distinguished academic commentators: see *Brazier, The Law of Torts,* 10th ed (1999) p 82, *Markesinis and Deakin's Tort Law,* 5th ed (2003) p 424.

77. On the second issue I respectfully disagree with Lord Scott and the majority in the Court of Appeal, as I consider that Auld LJ and Dobbs J were right in their view that to allow the cause of action in assault and battery to proceed would be an abuse of the process of the court.

78. There has been a very detailed and thorough investigation of the circumstances of Mr Ashley's death. PC Sherwood was tried on a charge of murder, on which he was acquitted on the direction of the trial judge. I would observe in passing that a charge of murder in such circumstances is a very blunt instrument, but in the present state of our law of homicide the prosecuting authorities had nothing else at their disposal if they were going to bring a charge. An amendment of the law to cover such cases in a just and proportionate fashion is long overdue, and I would commend it to Parliament for their attention. The coroner decided that he would not resume the inquest, as he was empowered to do, and the Government has declined to order a public inquiry. It is patent that the respondents' wish to pursue the cause of action in assault

and battery stems from a desire to publicise Mr Ashley's death and to attempt to obtain a finding which will hold PC Sherwood at fault in civil law. As Dobbs J said at para 99 of her judgment, it is their admitted intention to pursue the claim "to the bitter end", irrespective of any damages awarded for negligence.

79. It is not necessarily an abuse to proceed with a civil claim in tort against a defendant who has been acquitted on a charge of a criminal offence based on the same set of facts, since the content of the criminal offence and the tort may not be identical, the defences may vary and the standard of proof will differ: see, e.g., *Raja v Van Hoogstraten* [2005] EWHC 2890 (Ch), and contrast this with *Hunter v Chief Constable of the West Midlands Police* [1982] AC 529, where the allegation of assault by police officers on the claimants had been disproved beyond reasonable doubt in the course of the criminal proceedings. This may be legitimate where the claimant is seeking a remedy which the civil law affords, generally damages. In my view the situation is different where the claimant already has been given or is to be given that remedy and wishes to pursue the civil case for collateral reasons. This in my view is the nub of the present case.

80. The High Court has a discretion in its inherent jurisdiction to stay or dismiss an action as being an abuse of the process of the court. This may be exercised on various grounds (as to which see Jacob, *The Inherent Jurisdiction of the Court,* (1970) 23 CLP, 40-44). The ground material to the present case is that to proceed would serve no useful purpose. The only relief which the respondents could ask the court to give them would be a declaration and, for the reasons which I shall give, I consider that one should not be made. I am unable to agree with Lord Scott's view that it would be a suitable case for what he terms vindicatory damages. In my opinion the only function for damages of this kind is when there is no other remedy which will meet the case – there being perhaps no provable loss -- except a nominal award of damages to establish formally the validity of the claim. It is a time-honoured way of establishing a point of principle or vindicating wounded feelings or character: *Salmond & Heuston on the Law of Torts*, 21st ed (1996) p 9. In the present case the appellant has admitted liability for negligence and has undertaken to pay the respondents damages, including any award for aggravated damages (though it is more than a little difficult to see how such damages can be in question, when it is very questionable whether the deceased was conscious and sentient for any significant period between the shooting and his death).

81. Both Dobbs J and Auld LJ expressed the opinion, which I think is correct, that the civil courts exist to award compensation, not to conduct public inquiries. Nor is it their function to provide explanations, as Arden LJ suggested (para 189 of her judgment). On the contrary, the existence of a sanction by way of damages is the essential mark of a tort: *Salmond & Heuston, op cit*, p 9.

82. Auld LJ summarised his reasons for holding that to continue with the claim for assault and battery would be an abuse of the process of the court in para 186 of his judgment, with which I agree entirely:

> "186. Sir Anthony Clarke MR rightly observed, in para 94 of his judgment, that, whether proceedings with a collateral purpose are an abuse of the process of the court turns on the particular facts of each case. I am strongly of the view that such a collateral purpose in the circumstances of this case is an abuse for the following reasons, some already succinctly identified by Dobbs J in indicating that, but for her strikeout of the claim, she would have stayed it until after the conclusion of the claim in negligence. (i) The remedy in respect of the events leading to and including the fatal shooting is already wholly provided for in the damages recoverable in respect of the admitted negligence of the chief constable in respect of those events and in respect of the admitted short period of false imprisonment. (ii) Although the defendant to the claims is the chief constable, the person most immediately concerned, and personally affected by the continuance of the claim in battery with a view only to a declaration of unlawful killing, is PC Sherwood. Any such 'redress' as the end product of an exercise of securing for the claimants further information about and explanation of the tragic death of the deceased, however understandable in human terms their wish for it, is not the proper function of civil proceedings. Such proceedings are not, and should not be treated as, a proxy for a public inquiry. (iii) Given the critical issue of self-defence common to the criminal proceedings and the civil complaint of battery, the latter would, in substance, subject PC Sherwood to allegations of criminality of which he has been acquitted in the criminal proceedings. (iv) In addition, PC

> Sherwood and, through him, the chief constable, would have the incubus of establishing his innocence, albeit to the civil standard, and by reference to a standard of reasonableness of necessity not required of him in the criminal proceedings where the burden of disproving self-defence lay on the prosecution and he was able to rely upon his honesty of belief, whether or not reasonably held, in the necessity for self-defence. (v) Although, as I have said, the claimants' concern to pursue this matter, as Dobbs J put it, 'to the bitter end' is understandable in human terms, there are other considerations to he borne in mind, including: (1) the effect on PC Sherwood and others immediately involved in the events surrounding the fatal shooting, of pursuit after all these years of this part of the claim; (2) proportionality of the public costs of funding both sides on an issue, which in terms of damages is now entirely academic, given the chief constable's admissions of liability in negligence; and (3) the interests of finality of proceedings—enough is enough…."

I would only add that I cannot regard it as likely, as Sir Anthony Clarke MR suggested, that it should be a comparatively short trial and thus not too costly. It has all the portents of a bitterly contested case which will drag out at great length and at substantial expense.

83. For these reasons I would regard proceeding with the claim of assault and battery as an abuse of the process of the court. I would allow the chief constable's appeal and stay that claim. I would, however, do so on the terms that the appellant should, subject to any issue if there has been a Part 36 offer, pay all the respondents' costs, including their costs in this House.

LORD NEUBERGER OF ABBOTSBURY

My Lords,

84. This appeal raises two issues arising out of a claim in battery against the police. The first concerns the defence of self-defence where

the defendant was mistaken in his belief that he was under threat. The second issue is whether the claim should proceed, in view of a concession made by the defendant. I have had the advantage of reading in draft the speech of my noble and learned friend Lord Scott of Foscote, and gratefully adopt his description of the history of this case. I can therefore turn straight to the two issues.

The ingredients of self-defence as a defence to a civil claim in battery

85. Both authority and principle appear to me to point firmly in favour of the conclusion that, where a defendant was not actually under the threat of imminent attack, self-defence can only be an answer to a claim in battery if he reasonably, as well as honestly, believed that he was under such a threat. In his numinous judgment on this issue in the Court of Appeal [2007] 1 WLR 398, Sir Anthony Clarke MR discussed the principles, the authorities, and the textbooks at paras 39 to 81, and there is little left to say about it. However, there are four points I wish to mention.

86. First, in the context of a claim in tort, the law often has to strike a balance between two conflicting interests or rights. Like Lord Scott of Foscote, I consider that it would be wholly unfair on the victim of violence, and unduly favourable to the inflictor, if the victim had no right to any redress, and the inflictor had no civil liability, simply because the inflictor had an honest belief that he was under the threat of imminent attack, irrespective of the reasonableness of that belief.

87. Secondly, the fact that the civil law differs from the criminal law in this respect does not cause me any concern. The criminal law and civil law of battery substantially march together, as my noble and learned friend, Lord Rodger of Earlsferry (whose speech I have had the opportunity of seeing in draft) says. Nonetheless, the criminal law often involves very different considerations from the law of tort, as Lord Scott explains. The fact that the belief of imminent attack must be reasonable in the tortious context, but need only be genuine to operate as a defence to a criminal charge, seems to reflect the same sort of dichotomy between the jurisdictions as the difference in the applicable standards of proof.

88. Further, it is noteworthy that the criminal law used to require the belief of a defendant who thought he was under imminent threat of

attack to be reasonable as well as genuine. It was only following a report of the Criminal Law Revision Committee that this was changed by the courts (see paras 45 to 52 of the Master of the Rolls' judgment). It would be surprising, indeed wrong in principle, if the judges changed the law of tort simply to reflect a change they had effected to the criminal common law pursuant to recommendations of the Criminal Law Revision Committee and decisions in criminal cases (cited by the Master of the Rolls at the end of the passage quoted in para 52). While such recommendations and cases may have some persuasive force outside the criminal law, they do not have to be followed in a field where they were not intended to apply and where they do not have to be applied as a matter of logic.

89. Thirdly, there is the argument that the inflictor of an alleged battery has to go further than the Court of Appeal held, and show that he was in fact under imminent threat of attack. The point appears to me to be difficult, and the authorities are not entirely clear on the point - see the Master of the Rolls' analysis, in paras 63 to 78. Like him, I think that the balance of authority favours the conclusion that a defendant does not have to go that far, although the point is plainly open for reconsideration in your Lordships' House.

90. There are powerful arguments both ways. It is easy to conceive of circumstances where it would be inevitable that either the inflictor or the victim would have a thoroughly understandable sense of great grievance if, as the case may be, there was or was not a valid claim for damages for the infliction of severe violence in circumstances where the inflictor reasonably, but wrongly, believed he was under imminent threat of attack. As the Ashley's have not challenged the Court of Appeal's conclusion on this issue, it appears to me that in this case it should be left open in your Lordships' House.

91. Fourthly, if a reasonable but mistaken belief will do, other questions may need to be considered. One such question is whether, when seeking to justify the reasonableness of his belief, a defendant can rely on factors which were not the claimant's responsibility. There is obviously a strong argument for saying that a defendant can rely on such factors. Otherwise, one would be getting close to holding that the belief must be correct. Further, it could lead to difficulties if one had to decide whether the claimant was responsible for the defendant's belief, especially if only some of the factors which influenced the defendant could be taken into account. However, it can also be said to be unfair on the claimant if matters for which he had no responsibility can serve to

justify the reasonableness of the defendant's mistaken belief. The answer may ultimately depend on whether one judges the issue of reasonableness from the claimant's point of view or from that of the defendant.

92. Subject to that point, I believe that it would be inappropriate for your Lordships in this case to cut down the factors which can be taken into account when deciding that issue. When considering the reasonableness of the belief of a defendant in a particular case, it must be for the trial judge to take into account those factors which, provided they are permissible in principle, appear to him relevant, and to give each of them such weight as he thinks appropriate.

93. Arden LJ said below, at para 196, that it might be inappropriate to take into account "any mistake that was not one caused by Mr Ashley but by an earlier inaccurate briefing", apparently on the ground that it "did not form part of the immediate events in which PC Sherwood perceived a real and imminent danger". She may well be right that the inaccuracy of any briefing should be irrelevant because, as discussed, it was (presumably) not caused by Mr Ashley. Subject to that, however, at least if the claim was against PC Sherwood, it seems to me that he would, in principle, be entitled to ask the court to take into account what he had been told at the briefing, when considering whether his belief at the time he shot Mr Ashley was reasonable, even if what he was told was negligently relayed to him.

94. However, given that the defendant in these proceedings is the Chief Constable, I question whether it would be open to him to rely on what his police officers told PC Sherwood about Mr Ashley as justifying PC Sherwood's belief, at least to the extent that they were negligently inaccurate in their briefing. There must be a strong case for saying that it should not be open to the Chief Constable to rely on his own (if vicarious) negligently inaccurate imparted information to PC Sherwood to justify the reasonableness of a shooting by PC Sherwood for which he was vicariously liable.

Should the battery claim be allowed to proceed?

Introductory

95. The Chief Constable's argument that the battery claim should not be allowed to proceed rests on the fact that he has submitted to judgment on the negligence claim and has accepted liability for damages. The terms and effect of that concession ("the concession") were explained in paras 7 to 11 in the judgment of Sir Anthony Clarke MR, the central parts of which are quoted by Lord Scott.

96. The Chief Constable's case can be summarised in five propositions. (i) The Ashleys' claim against the Chief Constable rests on two grounds, negligence and battery. (ii) The Chief Constable has submitted to judgment for negligence, and to an assessment of those damages. (iii) The damages which the Ashleys could recover for battery would be no more than the damages they will recover for negligence. (iv) There is thus no point in the battery claim proceeding. (v) Accordingly, that claim should be stayed.

97. This contention raises the question of what circumstances, if any, justify a claimant pursuing a claim in tort purely for the purposes of establishing that the tort was committed, viz for personal or public vindication. However, before addressing that question, I turn to consider four preliminary points, two of which are relied on by the Ashleys, and two by the Chief Constable.

Four preliminary issues

98. First, the Ashleys say that they should be entitled to seek to establish their claim in battery, as otherwise they may not recover their costs of that issue. In my view, that could be a good argument for refusing a stay. When he made the concession, the Chief Constable did not offer to pay the Ashley's' costs; that remains the position. It would be open to either of the parties, despite the concession, to seek to go to trial on the battery claim with a view to recovering their costs of that issue if they succeed on it (although the allocation of costs would, of course, be a matter for the court). The court could stay a claim, if it was being pursued simply to recover costs, but it has not been suggested that that would be appropriate in this case.

99. Accordingly, the Ashleys' argument based on costs is good in principle, but that need not (and, I suspect, would not) be the end of the matter, if the Chief Constable's case for staying the battery claim were otherwise sound. In that event, your Lordships could grant a stay of the

battery claim on terms that he accepts liability to pay all the Ashleys' costs to date (including the costs of the battery claim), subject to his right to seek to rely on any offer under Part 36 of the Civil Procedure Rules to reduce or avoid such liability.

100. When a defendant submits to judgment, then, subject to the effect of any Part 36 offer which has been made, the claimants should normally be entitled to all their costs of the action up to the date of the submission (and, at least often, for a short further period thereafter, to enable the claimants to consider the submission). In this case, although there would be no resolution of the battery claim, it was put forward as an alternative basis for their claim for damages, and it has only become unnecessary as a result of the concession. (Indeed, that reflects the Chief Constable's argument as to why the battery claim should be stayed). Even now, the Chief Constable's proposals have not included any offer on costs. Therefore, if the battery claim is stayed, it should be on terms that, subject to there having been a Part 36 offer (the effect of which would have to be considered by the court if it could not be agreed), the Ashley's should be awarded all their costs of the action to date.

101. Secondly, the Ashleys say they should be able to proceed with their claim in battery to recover aggravated damages. This argument did not really feature in their printed case, and it was not apparently pursued below. That was presumably because the Chief Constable's concession extends to liability for aggravated damages (see para 11 of the Master of the Rolls' judgment). However, it appears to be common ground that aggravated damages can be awarded for battery but not for negligence, and I am slightly troubled by the assumption that a defendant can confer jurisdiction on the court to award aggravated damages for a tort in respect of which aggravated damages are not recoverable as a matter of law.

102. Aggravated damages are awarded for feelings of distress or outrage as a result of the particularly egregious way or circumstances in which the tort was committed, or in which its aftermath was subsequently handled by the defendant. If that is so, I cannot see why such damages should not logically be recoverable in some categories of negligence claims. In the present case, for instance, it must have been reasonably foreseeable (the normal tort test) that a negligently mishandled armed police raid could result in just the sort of mental distress or shock that aggravated damages are intended to reflect. It appears to me that it would be reminiscent of the bad old days of forms of action if the court held that the Ashley's' claim could result in

aggravated damages if framed in battery, but not if framed in negligence. In my view, there is a strong enough case for saying that aggravated damages would be recoverable for the instant negligence for the point to have been validly conceded by the Chief Constable.

103. Thirdly, the Chief Constable contends that Mr Ashleys estate, on whose behalf the Ashleys are suing, has no interest in the bare question of whether his death was caused by unlawful battery. If the claim in battery can otherwise proceed, I agree with Lord Scott's reasoning for rejecting that contention.

104. Fourthly, there is the argument, principally pursued on behalf of PC Sherwood, as intervener, that to permit the battery claim to proceed would be to allow an impermissible collateral attack on his acquittal, or would infringe his rights under article 6 of the ECHR. Unlike in *Hunter v Chief Constable of the West Midlands Police* [1982] AC 529, there would be no inconsistency with the acquittal if the battery claim succeeded. That is because of the higher standard of proof, and the absence of reasonableness as an ingredient of the belief justifying self-defence, in the criminal proceedings. Further, the determination of the battery claim in favour of the Ashleys would be "civil law consequences" of the shooting of Mr Ashley. As such they would not be precluded by article 6, as a result of the acquittal – see *Y v Norway* (2005) 41 EHRR 87, 102, para 41, quoted by Lord Rodger. However, I accept that PC Sherwood's interests in this connection are relevant if the issue of whether to let the battery claim proceed rests on the court's discretion.

Staying the battery claim: jurisdiction

105. The Ashleys found their entitlement to proceed on the battery claim on two different bases. First, they have sued for damages for negligence and for battery, and are entitled to seek judgment for damages under both heads. Their alternative argument, preferred by the Court of Appeal, is that, although their claim for damages may have fallen away as a result of the concession, the Ashleys can seek a declaration that Mr Ashleys death was caused by battery.

106. The Chief Constable's answer to the Ashleys' case that they should be allowed to proceed to seek judgment for damages on their battery claim, is that they have a judgment for damages which

effectively puts an end to that claim. If a claim in battery were established, they would be entitled to consequential damages, but they now have judgment for that very relief. As the only purpose of a claim based on a past tort is to compensate for the resultant injury, runs the argument, there is nothing left in the battery claim.

107. The answer to this point, in my judgment, is that, at any rate until the damages have been assessed, the claim in battery can still be maintained. However, given that there is a judgment for such damages to be assessed for negligence, it seems to me that the Chief Constable can seek to invoke the court's case management powers to stay the battery claim. I have in mind both the inherent powers of the court and the specific powers under CPR 1.4(2) (c) and (d) (which enable the court to decide which issues need to be determined, and the order of determination) and, in particular, under CPR 3.1(2)(f) (which enables the court to stay any part of proceedings).

108. Where there are two bases of claim for the same damages and the first basis is conceded, it seems to me that it would require a relatively exceptional case where it would not be appropriate to give directions for the assessment of damages and to stay the resolution of the second basis, thereby avoiding costs and court time. Nonetheless, I accept that there will be cases where, under its case management powers, the court can, even should, permit the second basis to proceed to judgment – e.g. where it would be appropriate to do so in the public interest, or to vindicate a contention. This means that case management powers can be invoked to determine substantive rights, but there is nothing surprising about that – see the decision of this House in *Bristol City Council v Lovell* [1998] 1 WLR 446.

109. As to the alternative argument preferred by the Court of Appeal, even now the Ashleys have not formulated the declaration which they are seeking. Before the claim for a declaration could proceed, it must be right for the Chief Constable to be told the terms of the declaration being sought, and to have the opportunity to make submissions on it. For the moment, I proceed on the assumption that an acceptably worded form of declaration will be found.

110. The court's power to grant a declaration is subject to a well-established, if developing, discretion, as discussed in chapter 4 of *Zamir & Woolf on The Declaratory Judgment,* 3rd ed (2002). If it is a discretionary remedy, the court must have power, in appropriate cases,

to stay a claim for a declaration. The Chief Constable's argument is that a declaration would have no point, and the court will not make a declaration unless it has some point - see *R (Rusbridger) v Attorney General* [2004] 1 AC 357 and *Clarke v Fennoscandia Ltd* 2008 SLT 33. I accept the Ashleys' response to this, namely that there is a point in seeking a declaration, for the reasons mentioned above, namely because it is reasonable for Mr Ashleys estate to wish to establish that his death was unlawfully caused and because there is a public interest element in proceeding.

111. However, in relation to neither of these points can it fairly be said, at least to my mind, that the Ashleys should have a virtually automatic right to proceed. The desire for "mere" vindication must be very rarely the sole private law ground on which a claim for a declaration is pursued or can even be justified. As to the public interest, that frequently involves competing factors which the court has to balance against each other. Accordingly, as with the first basis on which the Ashleys justify their claim proceeding, it must be a matter for the court's discretion whether to let the claim for a declaration proceed. Whether that discretion is that traditionally applicable to declarations or is based on case management sense seems to me to be of no practical significance. Although these discretions may be juridically different (see per Lord Hoffmann in *Bristol City Council* [1998] 1 WLR 446, 453E-454E), the same considerations must apply to their exercise here.

112. Accordingly, I reject the argument that the battery claim cannot proceed. Like the Master of the Rolls, "I do not accept the submission that a party with a real prospect of success on a particular point in a case is entitled to a trial", as "each case of course depends upon its own particular facts" (para 148). So I turn to the question of how the discretion should be exercised in this case.

The factors in favour of the battery claim proceeding

113. As already indicated, it appears to me that, where the defendant has conceded one basis for claiming damages, the court would normally stay determination of a disputed, alternative, basis for claiming the same damages, and would refuse to permit a claim for a declaration that such a basis exists to proceed, if the purpose was simply to establish a principle or to show that the claimant was right. Ordinarily, it would either be pointless, or it would involve an unjustifiable or disproportionate use of effort money and court time, if a claimant was

permitted to try to establish his alternative basis of claim simply for vindicatory purposes. However, this case involves a claim on behalf of the estate of a victim of an allegedly unlawful killing by the police, which takes it out of the ordinary.

114. First, there is, at least potentially, a substantial public interest in the outcome of the battery claim. If the claim does not proceed, there will, with the exception of a criminal trial, where the prosecution failed to make out its case, never be a full scrutiny or judicial (or quasi-judicial) assessment in public of what happened on 15 January 1998.

115. The constitutional and public interest aspects of the court's functions in the present connection are identified by the editors of *Clerk & Lindsell on the Law of Torts*, 19th ed (2006), para 1-10, where they emphasise that "tort law protects a wide range of interests against harmful conduct and that protection is not limited to compensation". The editors go on to say that "in many situations it is the publicity resulting from an action which may do most to protect rights" and that "[t]ort law may serve as an 'ombudsman' function in this respect". To similar effect, in *Governor and Company of the Bank of Scotland v A Ltd* [2001] 1 WLR 751, para 45, Lord Woolf CJ cited with approval an extra-curial observation of Lord Denning about "the need" for the court to develop the scope of its declaratory jurisdiction "in order to control the abuse of executive power", going on to emphasise that the "development of declaratory relief has not however been confined to judicial review".

116. However, in my view, only very limited assistance is gained in this connection from the decision in *Attorney General of Trinidad and Tobago v Ramanoop* [2006] 1 AC 328, as explained in para 18 of *Merson v Cartwright* [2005] UKPC 38. In that case, damages were awarded to "vindicate the right of the complainant … to carry on his or her life … free from unjustified executive interference, mistreatment or oppression", in other words to acknowledge that her constitutional rights had been infringed. As damages were sought and awarded, the complainant pursued her claim for thoroughly conventional reasons, indeed effectively as of right. The decision nonetheless emphasises the court's role in ensuring that allegations of unjustified invasion of fundamental rights by the executive are scrutinised.

117. Having said that, the court's function of supervising, and curbing the excesses of, the executive, should obviously be invoked only in

appropriate cases. A citizen is, of course, entitled to expect the court's assistance in relation to excesses or wrongful acts of the executive. But the executive is sometimes entitled to seek the court's protection from a claim from a citizen – e.g. where the costs and effort involved in its resolution are disproportionate to any benefit.

118. Secondly, the fact that the claim is for the unlawful killing of Mr Ashley means that it could not be more serious from the point of view of his estate, which the Ashleys represent, and it means that article 2 of the ECHR is potentially engaged. Accordingly, the claimants' desire for vindication has far more force and deserves far more sympathy than in the normal run of cases.

119. However, the fact that a death, which may turn out to have been caused by unlawful police shooting, was involved cannot conclusively entitle the battery claim to proceed, particularly as the Chief Constable has accepted full civil liability for that death, albeit only in negligence. In the case of a death occurring before the Human Rights Act 1998 came into force, there is no right to an investigation – see *In re McKerr* [2004] 1 WLR 807 and *R (Hurst) v London Northern District Coroner* [2007] 2 AC 189.

120. I am unpersuaded by a third point, namely that the Chief Constable's desire to stay the battery claim helps justify its prosecution. If it proceeds, it may well involve the Sussex police in much expenditure in terms of money, time, and manpower, and it is easy to understand why he wishes to avoid that. No doubt, he also wants to avoid the risk of a finding of battery, but that is no more a reason for refusing (or granting) a stay than the fact that the Ashleys want to obtain such a finding. The Chief Constable's desire to avoid a trial is perfectly proper, as is the Ashleys' desire to have such a trial.

The factors against the battery claim proceeding

121. On the other side of the coin, there are a number of arguments as to why the battery claim should not be entitled to proceed, quite apart from the fact that the Chief Constable has accepted liability for Mr Ashleys death (albeit in negligence) and submitted to an assessment of damages, and that, at least in general, as Auld LJ said in para 181 below, "the civil courts exist to award compensation, not to conduct public enquiries" (quoting from Dobbs J at para 99 at first instance).

122. First, the tribunals in which public investigations normally take place into allegedly unlawful killings are a criminal court, a coroner's court or a public inquiry. All those three options have been pursued in respect of Mr Ashleys death, at least to some extent. There has been a criminal trial, where the prosecution case, with full argument and evidence, was aired in public over more than 10 days, and a verdict obtained, although, as the prosecution did not make out a *prima facie* case, PC Sherwood and other defence witnesses have never given evidence in public about Mr Ashleys death. The coroner decided not to proceed with the inquest after the acquittal of PC Sherwood, pursuant to section 16(3) of the Coroners Act 1989. The Ashleys' request for a public inquiry was refused by the Home Office in 2001 and in 2004, and an application by the Ashleys for leave to challenge the 2004 decision by way of judicial review has been refused.

123. Secondly, there have been the activities of the police themselves. There have been two inquiries into the shooting of Mr Ashley, although neither inquiry was conducted in public. One was carried out by an independent police force under section 43 of the Police Act 1996, the other by the Sussex Police Authority itself for the benefit of Mr Ashley's family. There has also been an unqualified public apology to Mr Ashley's family delivered in person by the Chief Constable and the Chairman of the Authority.

124. Thirdly, there is the position of PC Sherwood. He stood trial for murder in 2001, and was acquitted. If the battery claim proceeds, he will effectively (but not technically, as he is not a defendant) be facing what amounts to the same claim in the civil court. He will be likely to have to give evidence relating to acts which took place some 10 years ago, more than seven years after he was acquitted. Further, there is no new and compelling relevant evidence, which was not available at the criminal trial.

125. It is true that the battery claim would not involve PC Sherwood in double jeopardy or constitute a collateral attack on his acquittal, as explained. However, the purpose of the battery claim is, in practice, close to representing a collateral attack on his acquittal. The Ashleys' reason for proceeding with the battery claim is simply to establish that Mr Ashley was unlawfully shot by PC Sherwood. All the civil cases considered by the courts in this jurisdiction and in Strasbourg, such as *Y v Norway*, where a claimant was seeking to show that an accused had been responsible for an act of which he had been acquitted in a criminal

court, were for claims for monetary compensation suffered as a result of that act.

126. In other words, the purpose of the civil proceedings in those cases was to recover compensation for damage suffered as a result of the act. The purpose of the Ashleys in pursuing the battery claim here is simply to establish that Mr Ashley was unlawfully killed, which is a much more limited and unusual (if quite understandable) sole reason for pursuing a civil claim. The interest of PC Sherwood, as a person acquitted of murder and who was responsible for the shooting, must, in my opinion, be relevant when the court is considering whether, in its discretion, it should permit such a claim to proceed.

127. Fourthly, there are the implications of a civil trial of the battery claim. The Master of the Rolls may be right in saying that the trial would be "comparatively short" and "thus not too costly" (para 99). However, like my noble and learned friend Lord Carswell, whose speech I have had the privilege of seeing in draft, I have severe doubts about that. I note that at first instance Dobbs J said that a trial would involve "huge costs to the public purse" (quoted in para 146 in the Court of Appeal). There could be many witnesses, much examination of and dispute over the detailed circumstances of, and leading up to, the shooting, and considerable legal and factual argument. Although it can only be a very rough guide, at best, the criminal trial, which did not get past the prosecution case, lasted nearly three weeks.

128. Additionally, the trial will relate to an event that occurred over 10 years earlier in very fraught circumstances. The resolution of the ultimate issue will almost certainly involve disputed points of law and fact, much examination of witnesses as to what happened, what they thought, and why they acted in the way they did. There will, I suspect, be many and detailed cross-references to evidence and conclusions at the criminal trial and the two inquiries.

129. The need for caution before a civil court permits a trial to proceed simply to establish that a person was subjected to unlawful battery is all the greater where, as here, there is a risk of substantial police time and resources being diverted to prepare for and proceed with the trial. The point is not as clear-cut as in *Hill v Chief Constable of West Yorkshire* [1989] AC 53, but, as in that case, according to Lord Keith of Kinkel at p 63G, a "great deal of police time, trouble and expense might be expected to have to be put into the preparation of the defence to the

action" resulting in "a significant diversion of police manpower and attention from their most important function, that of the suppression of crime."

Conclusion on whether the battery claim should proceed

130. Although I acknowledge that there is a real case to the contrary, I have come to the conclusion that the claim in battery should not be allowed to proceed. The Chief Constable has conceded that he is liable for the death of Mr Ashley, albeit only on grounds of negligence, and has proffered a full public apology, so there is only a rather limited purpose in pursuing any point of principle, either from the point of view of the Ashleys or in the public interest. The Chief Constable has also agreed to pay all the damages which could flow from the killing of Mr Ashley, so the Ashleys have no financial interest in the battery claim proceeding. There has been a three week criminal trial (albeit that it did not go beyond the prosecution case), and two inquiries (albeit not a full public inquiry), so there has been real and detailed scrutiny in more than one forum, one of which was wholly in public, of the circumstances in which Mr Ashley was killed. The entities primarily responsible for any further public investigation, the Home Office and the Coroner, have decided that such an investigation would be unnecessary.

131. Taken together, these points make out a formidable case for staying a claim whose purpose is simply to try and establish that the police were liable for Mr Ashleys death on the ground of battery as well as their conceded negligence. As Cooke P said in the New Zealand Court of Appeal, in a case on strikingly similar facts, *Re Chase* [1989] 1 NZLR 325, 334, the "basic facts of the episode culminating in [the deceased's] death have become well known. … Little or nothing would be likely to be gained by further raking over of the details." What he went on to say (on the following page) is also equally applicable here, namely "this is not such an exceptional case as to justify the Court in embarking, under the declaratory jurisdiction, into an inquiry into the death of the deceased". He also said that in that case "to allow the action to proceed under the guise of a claim for nominal damages … would be an abuse of procedure"; similarly, it be inappropriate to allow the Ashleys' claim for battery simply to recover damages already awarded for negligence.

132. Of course, there is an obvious and substantial public interest in any death for which the police are responsible being publicly

investigated, especially where there is an arguable case that the killing was unlawful. However, in this case, the three primary routes to obtaining a public investigation have either been taken or, perfectly lawfully, not been adopted, there have been two internal inquiries (one of them statutory and independent), as well as a public apology, and a full acceptance of liability for damages to the family of the victim. I question whether, in those circumstances, it is right for court, exercising its common law jurisdiction in tort, to permit a trial to proceed simply because it may enable his family to show that the victim was killed by battery as well as negligence.

133. Of additional significance are two other factors. The immediate perpetrator was prosecuted and acquitted seven years ago, and his reasonable interest, as an acquitted person whose actions 10 years ago would again be challenged in court, militates against the claim proceeding merely for the purpose of establishing in a civil court that he had committed the wrong of which he had been acquitted. Further, substantial costs and court time, as well as police effort, might very well have to be devoted to the claim if it proceeds, and a reliable assessment of a split second decision and action in very fraught circumstances would be difficult, especially more than 10 years after the event.

134. I had wondered whether it would be appropriate to reverse the conclusion of the Court of Appeal on this issue, and stay the battery claim, given that the issue is one of discretion. However, the original discretion was that of Dobbs J, who clearly indicated that she would have stayed the battery claim for cogently expressed reasons, if she had not struck it out (because she concluded that reasonableness was not an ingredient of self-defence in a civil claim for battery) – see the passage quoted in para 146 of the Master of Rolls' judgment.

Disposition

135. For these reasons, in common with all your Lordships, I would uphold the decision of the Court of Appeal on the law relating to self-defence in a civil claim for battery, but, in agreement with Lord Carswell, I would reverse their decision to permit the battery claim to proceed. I would stay the battery claim, subject to imposing appropriate terms (whose nature I have indicated) as to costs on the Chief Constable.