Chapter 13
Defenses to Intentional Torts

Introductory Note. Just as with the negligence cases, the defendant may admit that his conduct met the legal definition that ordinarily imposes liability, but deny that he is liable because of some defense available to him. With intentional torts defenses are often called "privileges"; thus, an assault to defend oneself is often termed a "privileged assault." This section considers the types of privileges that will justify or excuse the intentional infliction of harm upon another.

§ A. Consent

Introductory Note. To the extent that the plaintiff has consented to physical contact by the plaintiff, ordinarily it will not be considered harmful or offensive, since the plaintiff has asked for it. However, in some circumstances the law will refuse to recognize the plaintiff's consent as a defense. Consider the following two cases:

STRAWN v. INGRAM
191 S.E. 401 (W. Va. 1937)

HATCHER, Judge

In a fight between plaintiff, Ray Strawn, and defendant, Arley Ingram, the former received personal injuries, for which he recovered a judgment. Defendant alleges error.

The physician who treated plaintiff after the fight testified without contradiction that his skull was fractured, his brain severely concussed and permanently contused, his face and head lacerated, and his vision permanently impaired. The plaintiff, aged 36 years, testified without contradiction that, since the assault, his head has pained him intermittently at the place where his skull was fractured, that his eyes have ached almost continuously, that he can "scarcely see" with his left eye and can see "not more than half" with his right eye, that he has been dizzy at times and "night after night" has not "known what sleep is." The verdict specified that actual damages were assessed at $800 and punitive damages at $25.

The points of error are that the trial court (1) struck from the record defendant's special plea of justification; (2) directed a verdict for plaintiff; (3) instructed the jury (in writing) it could consider as a part of plaintiff's damages an element not proven; (4) refused to instruct on the burden of proof and preponderance of the evidence; and (5) orally instructed the jury to find both compensatory and punitive damages for plaintiff.

1. The plea was stricken because not filed within the time required by a court rule, as construed by the court. This action, however, need not be considered seriously. Defendant testified unequivocally that he and plaintiff mutually agreed to fight. Defendant admitted striking plaintiff on the head with an iron bar "not exactly to protect" himself. He admitted intentionally gouging plaintiff's eye with his thumb and hitting plaintiff with his fist after having him on the ground. Under such circumstances, the law recognizes no justification for the injuries inflicted, and striking defendant's plea did not prejudice him. "If men fight the state will punish them. If one is injured, the law will not listen to an excuse based on a breach of the law.... The rule of law is therefore clear and unquestionable, that consent to an assault is no justification. Where a combat involves a breach of

the peace, the mutual consent of the parties thereto is generally regarded as unlawful, and as not depriving the injured party, or for that matter, each injured party, from recovering damages for injuries received from the unlawful acts of the other." COOLEY ON TORTS (4th Ed.) § 97....

2 and 4. Because the combat was by mutual consent and no counterclaim was interposed, verdict for the plaintiff was properly directed. The fact that plaintiff was also at fault is no defense. *Brown v. Patterson*, 214 Ala. 351, 108 So. 16, 47 A.L.R. 1093. That fact may be taken by the jury to preclude or mitigate punitive damages but not to reduce actual damages. *Grotton v. Glidden*, 84 Me. 589, 24 A. 1008, 30 Am. St. Rep. 413. And because there was no material conflict in the evidence as to the infliction or the extent of plaintiff's injuries, instruction on the burden of proof and preponderance of the evidence was uncalled for.

* * *

[*The trial court had directed the jury to award punitive damages; the appellate court found this erroneous, but since the jury only awarded $25 in punitive damages, the appellate court simply deducted that amount from the judgment and otherwise affirmed.*]

MILLER v. BENNETT

190 Va. 162, 56 S.E.2d 217 (1940)

HUDGINS, C.J., delivered the opinion of the court

Raymond J. Bennett, Adm'r of Kerneda C. Bennett, instituted this action against Iva Rodeffer Davis Coffman to recover $15,000 damages for the wrongful death of decedent. It was alleged that the death of decedent was the result of an abortion, or an attempted abortion, performed by defendant upon Mrs. Bennett. The trial court overruled defendant's contention that proof that decedent consented to the commission of the illegal or immoral act barred recovery. The jury returned a verdict for plaintiff in the sum of $8,000, on which judgment was entered.

This action was commenced before Mrs. Coffman was convicted under Code (Michie's 1942), sec. 4401, of an attempted abortion. After her conviction, and while she was confined in the State penitentiary, Francis S. Miller was appointed committee of her estate, and in his name the action was contested. There is no substantial difference in the evidence introduced in this case, and that introduced in the criminal case, which need not be repeated, as a full statement of it is found in *Coffman v. Commonwealth*, 188 Va. 553, 50 S.E.(2d) 431, to which reference is made.

The decisive question presented is, whether consent of a mature married woman to an attempt to produce an illegal abortion, resulting in death, bars recovery, under Lord Campbell's Act, in an action by her administrator against the party attempting to procure the abortion. This question has not been decided in this jurisdiction.

It is conceded that if the consent of decedent to the commission of the immoral or illegal act would have been a bar to decedent's right to recover had she survived, such consent bars recovery in an action by her administrator for her wrongful death under the provisions of Code (Michie's 1942), secs. 5786, 5787. *See Street v. Consumers Min. Corp.*, 185 Va. 561, 39 S.E.(2d) 271, 167 A.L.R. 886, and cases there cited.

The general rule, that a party who consents to and participates in an immoral or illegal act cannot recover damages from other participants for the consequence of that act, is well settled. The rule itself, and the reasons therefore, are clearly stated in the often quoted excerpt from the opinion of Lord Mansfield, in *Holman v. Johnson*, 98 Eng. Rep. 1120, which is as follows:

> No Court will lend its aid to a man who founds his cause of action upon an immoral or an illegal act. If, from the plaintiff's own stating or otherwise, the cause of action appears to arise ex turpi causa, or the transgression of a positive law of this country, there the Court says he has no right to be assisted. It is upon that ground the Court goes; not for the sake of the defendant, but because they will not lend their aid to such a plaintiff. So if the plaintiff and defendant were to change sides, and the defendant was to bring his action against the plaintiff, the latter would then have the advantage of it; for where both are equally in fault, potior est conditio defendentis.
>
> * * *

The principle applies to civil actions, whether based on tort or contract. When applied to actions in tort, it is said that consent or participation in an immoral or unlawful act by plaintiff precludes recovery for injuries sustained as a result of that act, on the maxim volenti non fit injuria. It is conceded that Mrs. Bennett consented to and participated in the immoral and illegal act when she solicited the services of Mrs. Coffman and submitted herself to

treatment to produce abortion. If the general rule is applicable, then this action is barred.

Appellee contends that there is an exception to the general rule, and cites numerous authorities to support his contention. Each is based on the reasons stated in 1 COOLEY ON TORTS, 4th Ed., sec. 97, p. 326, thus: "The life of an individual is guarded in the interest of the state, and not in the interest of the individual alone; and not his life only is protected but his person as well. Consent cannot justify an assault.... Consent is generally a full and perfect shield when that is complained of as a civil injury which was consented to.... But in the case of a breach of the peace it is different. The state is wronged by this, and forbids it on public grounds. If men fight, the state will punish them. If one is injured, the law will not listen to an excuse based on a breach of the law. There are three parties here, one being the state, which for its own good, does not suffer the others to deal on a basis of contract with the public peace. The rule of law is therefore clear and unquestionable, that consent to an assault is no justification."

* * *

The better reasoned cases support the view that no recovery can be had in such cases. While abortion was not involved in *Levy v. Kansas City*, 93 C.C.A. 523, 168 F. 524, 22 L.R.A.(N.S.) 862, 870, Judge Sanborn, after reviewing many authorities on consent to an illegal act, said: "But the maintenance of actions to recover moneys or property lost, or damages sustained, through transactions or contracts wherein the plaintiffs were guilty of moral turpitude, or of the violation of a general law passed to effectuate a public policy, is prohibited by this rule, as well as the maintenance of actions upon contracts of that nature."

* * *

In some states the anti-abortion statutes make the woman who consents to the procurement of an abortion upon herself an accomplice, and in others such a woman is not made an accomplice. But whether such a woman is or is not declared to be an accomplice is not regarded as material in a civil action brought by her to recover damages for injuries resulting from the abortion, or the illegal attempt to procure abortion.

It appears from the opinion in *Martin v. Morris*, 163 Tenn. 186, 42 S.W.(2d) 207, that the Tennessee statute does not make the woman who consents to take treatment for the purpose of procuring an abortion an accomplice. It was held that a woman of mature mind, who knew the serious consequences likely to result from such treatment, could not recover for personal injuries resulting therefrom, on the ground that she participated in an illegal or immoral act.

* * *

A number of cases are cited in the briefs in which a distinction is made between the purpose of an anti-abortion statute and assault and battery and dueling statutes. These cases hold that the former class of statutes are not designed for the protection of the woman, but only of the unborn child and through it society, while the assault and battery, dueling, etc., statutes are designed for the protection of the individuals concerned. Hence recovery is allowed in one class of cases and denied in the other. *See Herman v. Julian*, 117 Kan. 733, 232 P. 864; *Bowlan v. Lunsford*, 176 Okla. 115, 54 P.(2d) 666.

However, we do not deny recovery in this case on the distinction between the two classes of statutes, but upon the ground that the plaintiffs' decedent, a mature married woman, was guilty of moral turpitude and participated in the violation of a general anti-abortion statute, enacted to effectuate a public policy.

The judgment of the trial court is reversed, the verdict of the jury set aside, and final judgment entered for defendant.

Reversed and final judgment.

Questions and Notes

1. Are *Strawn* and *Miller* reconcilable? If you believe they are not, which was (more) correctly decided?

2. Athletic sports (*e.g.*, football) consist of a great deal of intentional physical contact — often quite painful, even injurious. What prevents an injured player from suing for an intentional tort? *See Hackbart v. Cincinnati Bengals, Inc.*, 601 F.2d 516, *cert. denied*, 444 U.S. 931 (10th Cir. 1979), (football player sued for injuries sustained in a football game, when a defensive end hit the receiver after the play was essentially over; district court found for the defendants; held, reversed).

§ B. Defense of Self

COTE v. JOWERS
515 So. 2d 339 (Fl. 1987)

NIMMONS, Judge

Mary Bessent Cote, as the personal representative of the Estate of Michael Bessent (plaintiff below), appeals from an adverse judgment entered upon a verdict in favor of the appellee/defendant.[1] This was a civil suit for damages for the wrongful death of plaintiff's decedent, Michael Bessent, against the defendant, Michael Jowers, who the plaintiff claims either carelessly and negligently, or willfully, intentionally and maliciously, shot and killed Bessent. The defendant answered, admitting that he intentionally shot Bessent but claiming that he did so in self defense.

Appellant claims, among other things, that the trial court erred in denying her motion for new trial on the grounds that the verdict was contrary to the manifest weight of the evidence. We disagree.

At the time of this unfortunate incident, Bessent was trespassing on the property of his second former wife, Deborah Bessent. He had been harassing and cursing her and was abusive.[2] He was told to leave. He did not. He remained in the front yard with his motorcycle. When appellee/Jowers arrived home and learned of Bessent's presence and of his offensive conduct, Jowers went out to the front yard and asked that Bessent leave.[3] Instead of leaving, Bessent approached Jowers and shoved him. Jowers responded by striking Bessent. The two men scuffled until Jowers was finally able to pin Bessent to the ground. Jowers released Bessent when the latter agreed to calm down and leave. But as soon as Jowers released him, Bessent began kicking Jowers. Jowers ran into the house, closed the door and told Deborah, to call the police. She and a neighbor, who had also witnessed the altercation, already had the police on the telephone.

Bessent had chased Jowers to the house and was yelling and trying to beat the front door down. Jowers obtained a pistol from his dresser drawer. He went to the front door, opened it slightly, told Bessent to leave the premises, told him that the police had been called and displayed the pistol.

Instead of leaving, Bessent persisted and managed to force the front door open. He approached Jowers and backed Jowers all the way across the living room. Jowers was pointing the pistol at Bessent. While approaching Jowers menacingly, Bessent taunted Jowers saying, "What are you going to do with that, big boy? Come on, come on." Jowers told Bessent not to come any closer or he would pull the trigger. At that point, Bessent lunged at Jowers who pulled the trigger, fatally wounding Bessent in the chest.

The above facts are uncontradicted. Clearly, the trial court did not err in rejecting the plaintiff's argument that the verdict was contrary to the manifest weight of the evidence as that standard has been articulated in *Cloud v. Fallis*, 110 So. 2d 669 (Fla. 1959). *See also Wackenhut Corporation v. Canty*, 359 So. 2d 430 (Fla. 1978); 38 FLA. JUR. 2D *New Trial* § 48. No citation of authority is needed for the proposition that the law does not demand that we employ heroic efforts at the risk of life and limb to protect those who would break into our homes and assault us.

The appellant also complains of the trial court's denial of six requested jury charges regarding "self defense" and "privilege." We find no error in such denial as the requested instructions are repetitive of those given by the court, inapplicable and unsupported by the evidence, or fail to accurately state the law.

We have examined and find without merit the remaining points urged by the appellant.

AFFIRMED.

THOMPSON, J., concurs.
SHIVERS, J., dissents with written opinion.

SHIVERS, Judge, dissenting.

I respectfully dissent.

On September 4, 1984, appellee, Michael

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1 Mary Bessent Cote was Michael Bessent's first wife. They had one child who survived Bessent's death.

2 At the time, there was an outstanding order enjoining Bessent from exercising visitation with his children if he had consumed alcoholic beverages within 24 hours prior to such visitation. This was an unannounced visitation on a day that was not ordinarily one of his visitation days.

3 Jowers was a Marine Corps sergeant who, at the time, was living on the subject premises. He and Deborah were subsequently married.

Jowers, intentionally shot and killed Michael Bessent in the home Bessent had shared with his wife and children during his marriage to Deborah Bessent. Bessent left surviving him three minor children, ages 5, 3, and 1, as well as his parents. Appellant, Mary Bessent Cote,[1] as the personal representative of the estate of the deceased, Michael Bessent, appeals final judgment, after jury verdict, in favor of Michael Jowers. The oldest child, Brittany Bessent, is the daughter of the decedent and Mary Bessent Cote. The other surviving children are the result of a marriage between the decedent and Deborah Bessent Jowers, who is now married to Michael Jowers.

The estate, by Mrs. Cote, seeks damages against Michael Jowers for the wrongful death of Michael Bessent. The estate contends that the defendant Michael Jowers either carelessly and negligently, or willfully, intentionally, and maliciously fired a gun at Michael Bessent, proximately causing his death. Jowers admits he intentionally shot Bessent, but he alleged below the following defenses: (1) self-defense; (2) trespass by Bessent; (3) violation of a restrictive court order prohibiting Bessent from coming on the premises after consuming alcohol; (4) lack of any justiciable issue of law or fact; (5) assumption of the risk; and (6) privilege to use deadly force. At issue is whether the trial court erred in its instructions to the jury and whether the verdict was contrary to the manifest weight of the evidence.

During Michael and Deborah Bessent's marriage, they and their two small children and Christopher Crews, Mrs. Bessent's child by a prior marriage, resided at 936 Player Road in Jacksonville. Mr. Bessent was a lineman who climbed telephone poles and installed lines for cable television. After their divorce, Deborah and the children continued to live on Player Road.

Through Michael Bessent, Deborah Bessent had met Michael Jowers, a 24-year-old Marine sergeant stationed at the Naval Air Station in Jacksonville. Jowers' duties as a Marine Sergeant included attending monthly drill and predrill meetings. When Jowers killed Bessent, Jowers was living with Deborah Bessent in the house on Player Road. Jowers was also paying rent on a separate apartment which, according to his testimony, he had to maintain until his lease had expired.

There was evidence that a strained relationship had developed between Bessent and Jowers. The apparent reason for this strain was that after Deborah Bessent divorced her husband and began to cohabit with Jowers, she nevertheless continued something of a relationship with Bessent. Bessent's visits to 936 Player Road after the divorce were fairly regular. Mrs. Deborah Bessent testified:

> **Question**: Now, on how many occasions prior to this would Mr. Bessent come to visit you or come to the house and see you or whatever or talk to you or how would that occur? How often would that occur?
>
> **Answer**: Approximately every other weekend and then sometimes he'd just pop over without — without me knowing.
>
> **Question**: Did he have a key to the house?
>
> **Answer**: No, sir.
>
> **Question**: Did you ever refuse him entry into the house when he would come?
>
> **Answer**: No, sir.

Jowers testified:

> **Question**: And you had been living there on Player Road at the House?
>
> **Answer**: That's right.
>
> **Question**: Was there any suggestion, Mr. Jowers, that Michael Bessent had been seeing or living with Debbie while you were away?
>
> **Answer**: Yes, sir.
>
> **Question**: And where did you get the information from?
>
> **Answer**: Debbie told me.
>
> **Question**: And had that created any animosity between you and Debbie?
>
> **Answer**: Yes, sir.
>
> **Question**: Tell me what took place in that regard.
>
> **Answer**: When I got back — I had been back two or three days, and one evening Debbie told me, said, "Baby, I got something I've got to tell you."
>
> So we went back in the bedroom. The kids were asleep. And she said, "While you were gone," she said, "Mike came over one night," said that he had tried to get her to go to bed with him, which he had done before on numerous occasions.

[1] Mary Bessent Cote was married to Michael Bessent prior to his marriage to Deborah Bessent.

And she said he was saying, "You remember how good it used to be between us."

She said, "Yes, but it's over between us."

He says, "Just give it one more chance."

And she told me she saw this as a chance to prove to him once and for all that she didn't want him. And she went to bed with him.

And he had said to her, he said, "If you can make love to me and tell me that you don't love me, I'll leave you alone."

He told her that, is what she told me. I believed her with all my heart.

She said, "All right." And she did it. And she looked at him and said, "I don't love you no more. I love him."

And he left very upset.

Question: And this apparently occurred during the time you were gone?

Answer: That's right.

Question: Well, did that create an additional anger in your [sic] against Bessent?

Answer: No, sir. I was mad at Debbie, because I'm a firm believer that a man can't go to bed with a woman unless she wants him to, see; unless she lets it happen, whether she wants to or not, unless she lets it happen. I was mad at her.

Question: Was that subject brought up to Bessent or to you the night of the shooting?

Answer: No, sir.

According to Jowers' deposition testimony, on September 4, 1984, Jowers returned to 936 Player Road at approximately 8:00 p.m. from a meeting at the Naval Air Station and noticed Michael Bessent standing on the front porch. Jowers went into the house through the back door and asked Deborah what Bessent was doing at the house. Sheryl Young, a friend of Deborah's who was visiting the home at the time, informed Jowers that Bessent "just came over here causing trouble. He has been drinking, cussing at Debbie, aggravating her." Jowers announced that he was going to have a talk with Bessent, and went out the front door to where Bessent was standing beside his motorcycle in the front yard.

Jowers said he told Bessent that Bessent should not be visiting the children except on weekends when a visitation had been set up in advance, and that he was not supposed to visit when he had been drinking. According to Jowers, Bessent had obviously been drinking. The conversation lasted a minute or two, at which point Jowers said Bessent stepped up to Jowers and pushed him in the chest with both hands. Jowers then hit Bessent, and the two men scuffled on the ground until Jowers pinned Bessent and ended the fight. Jowers agreed to let Bessent up if he would calm down and leave the premises. Bessent agreed to leave but, upon rising, kicked at Jowers. Jowers ran into the house, closed the door, and instructed Deborah to call the police. Sheryl Young had already done so and had them on the line, she and Debbie having witnessed the scuffle from a bedroom window.

Bessent was still outside the house, but was beating on the front door and yelling. Jowers went into his bedroom, grabbed a loaded pistol from his dresser drawer, returned to the wooden front door of the house (which had been closed since Jowers reentered the house) and opened it slightly. He again told Bessent to leave, warned him that he had called the police, and showed him the gun. Bessent then slammed into the door, forcing it to open further, and entered the house. Jowers testified that Bessent then approached him, causing him to back up across the living room. While approaching Jowers, Bessent said, "What are you going to do with that, big boy? Come on, come on." Jowers again told Bessent to leave. Bessent continued to approach, and Jowers continued to back up until he was into the kitchen area. Jowers then told Bessent not to come any closer or he would shoot him. At that point, Bessent (who was unarmed) "came at" him, and Jowers shot Bessent in the chest, killing him. Jowers picked up the telephone and informed the police, who were still on the line, that he had shot Bessent. The police arrived immediately thereafter.

The depositions of Sheryl Young and Deborah Bessent were read into the record at trial. The testimony of both women was fairly similar to Jowers' version of the facts. In addition, both testified that Bessent had been using foul language and harassing Deborah prior to Jowers' arrival. Deborah testified that Bessent had been drinking, and that she had asked him to leave the house. Both Jowers and Deborah testified that Bessent had stated on other occasions he was going to kill Jowers or have someone kill him, apparently because he was jealous of the relationship between Deborah and Jowers. Jowers did not testify in person; he relied

instead on those portions of his deposition which were read into the record by appellant's attorney.

After the jury had retired to deliberate, it sent out the following question to the trial judge:

> We would like to hear a clarification of the law regarding self-defense and the right of privilege.

Over appellant's objection to rereading only that portion of the charge, the jury was brought in and the court reread Jowers' requested jury instructions (numbers 4 and 5), which were the sole instructions given on self-defense and privilege:

> THE COURT: You may be seated. Members of the jury, your question has been turned in to me and I believe it states: "We would like to hear a clarification of the law regarding self-defense and the right of privilege." Is that the question to me?
>
> A JUROR: Yes.
>
> THE COURT: I am going to read to you the instructions and law regarding self-defense and also privilege.
>
> > A defense raised by Michael Jowers and is [sic] an issue in this case, is whether Michael Jowers acted in self-defense. It is a defense if the death of Michael Bessent resulted from the justifiable use of force likely to cause death or great bodily harm.
> >
> > The use of force likely to cause death or great bodily harm is justifiable only if Michael Jowers reasonably believes [sic] that the force is necessary to prevent imminent death or great bodily harm to himself while resisting any attempt to commit burglary upon any dwelling occupied by him, or resisting any attempt to commit a burglary with intent to commit an assault in any dwelling house occupied by him.
> >
> > A person is justified in using force likely to cause death or great bodily harm if he reasonably believes that such force is necessary to prevent the imminent commission of a burglary with intent to commit an assault against himself or another.
> >
> > However, the use of force likely to cause death or great bodily harm is not justifiable if you find Michael Jowers initially provoked use of force against himself, unless: in good faith, Michael Jowers withdrew from physical contact with Michael Bessent and indicated clearly to Michael Bessent that he wanted to withdraw and stop the use of force likely to cause death or great bodily harm, but Michael Bessent continued or resumed the use of force.
> >
> > In deciding whether Michael Jowers was justified in the use of force likely to cause death or great bodily harm, you must judge him by the circumstances by which he was surrounded at the time the force was used. The danger facing Michael Jowers need not have been actual; however, to justify the use of force likely to cause death or great bodily harm, the appearance of danger must have been so real that a reasonably cautious and prudent person under the same circumstances would have believed that the danger could be avoided only through the use of that force. Based upon appearances, Michael Jowers must have actually believed that the danger was real.
> >
> > If Michael Jowers was attacked in his home or on his premises, he had no duty to retreat and had the lawful right to stand his ground and meet force with force, even to the extent of using force likely to cause death or great bodily harm, if it was necessary to prevent commission of a forcible felony.
> >
> > Another defense raised by Michael Jowers which is an issue for your determination is whether Michael Jowers was privileged to use deadly force against Michael Bessent.
> >
> > The Florida Statute 782.02

> states, the killing of a human being is justifiable homicide and lawful if necessarily done while resisting an attempt to murder or commit a felony upon the defendant, or to commit a felony in any dwelling house in which the defendant was at the time of the killing. Those are your instructions on self-defense and privilege. You may —
>
> A JUROR: Your Honor —
>
> THE COURT: You can't ask any questions. You can return to the jury room to deliberate. The only questions I can answer are those questions that the jury sends out to me in written form.

After retiring again, the jury asked a second question:

> Is he within the law to kill in self-defense if he could have defended himself otherwise?

The trial judge then told the jury that since he had already read the self-defense and privilege instructions twice, there was no other appropriate comment he could make in response to the question. The jury returned a verdict in favor of Jowers. After final judgment, the court denied appellant's motion for new trial.

Jowers' intentional ending of a human life, through gunshot wounds fired at close range, warrants our close examination of the record. In this case there were six witnesses: Brian DeWitt Bessent, Brenda Hot, Mary Bessent Cote, Michael Jowers, Sheryl Young, and Deborah Bessent Jowers. Testimonies of Mr. Bessent, father of the decedent, Mrs. Cote, first wife of the decedent, and Brenda Holt, sister of the decedent, were all brief and not directly related to the killing. The testimonies of Michael Jowers, Mrs. Jowers, and Miss Young were by deposition. These key witnesses were not heard or observed by the jury or the trial judge.

In these circumstances, the presumption of correctness which ordinarily attaches to the trial court's fact findings is slight because the jury and trial judge have not seen and heard the witnesses. As to these key witnesses, the appellate court has the same record before it as did the trial court and therefore has the same opportunity to weigh its evidentiary value. *Hinkle v. Lindsey*, 424 So. 2d 983 (Fla. 5th DCA 1983). *See also West Shore Restaurant Corp. v. Turk*, 101 So. 2d 123 (Fla. 1958); *Conklin v. Pruitt*, 182 So. 2d 644 (Fla. 1st DCA 1966).

These evidentiary sources, I think, clearly reveal certain salient facts about the events immediately preceding Michael Bessent's death. First, at no time during his confrontation with Jowers, either in the yard, on the porch, or in the house, did Bessent display or threaten Jowers with a weapon of any sort. Bessent was at all times unarmed. Second, Bessent had left the house and, in all probability, would have departed on his motorcycle had not Jowers initiated the argument by going out into the front yard to accost Bessent. Third, the disparate physical abilities of Bessent and Jowers are evidenced by the fact that Jowers had no real trouble in besting Bessent and pinning him to the ground. Fourth, Jowers reentered the house, closed the door, and told Deborah Bessent to call the police. It was Jowers who reopened the door (thus making it possible for Bessent to fore his way into the house) and exhibited his gun to Bessent. Once he had again entered the house, Bessent used no force whatsoever on Jowers when Jowers shot him at close range with a .357 magnum. At best, Jowers may have feared another fistfight with a man who had been drinking and whom he had already easily brought under control. But there was nothing to cause Jowers to fear for his life, or for that matter, for the lives of Deborah Bessent and her children; nothing, in short, which would have justified the use of deadly force. Finally, although Jowers had given instructions to call the police, he shot to kill rather than cripple. In my view, these facts amply demonstrate that Jowers had no legal justification in killing Bessent and that, accordingly, the jury's verdict was against the manifest weight of the evidence. On this basis alone, I would find that reversal and a new trial are warranted.

I also think that that part of the jury instruction which refers to section 782.02, Florida Statutes (1983)[2] severely misled the jury because it implies that once an intruder enters a home, the occupant can use deadly force to prevent any felony, and not merely those which are life-threatening. On this rationale, an armed homeowner, upon confronting an unarmed juvenile burglar in his home, may kill the juvenile with impunity, notwithstanding that the homeowner does not fear for his life and notwithstanding that a reasonable man similarly

[2] The statute provides: "The use of deadly force is justifiable when a person is resisting any attempt to murder such person or to commit any felony upon him or in any dwelling house in which such person shall be."

situated would not fear imminent death or serious bodily injury. *See* Note, *Lovers and Other Strangers: Or When Is a Home a Castle?*, 11 FLA. ST. U. L. REV. 465 (1983).

Clearly, this is not the law. Section 782.11, Florida Statutes (1983), which states that "[w]hoever shall unnecessarily kill another, either while resisting an attempt by such other person to commit any felony, or to do any other unlawful act, or after such attempt shall have failed, shall be deemed guilty of manslaughter" limits the scope of section 782.02 by engrafting a standard of necessity on the justifiable use of deadly force. The Florida Supreme Court recognized this very principle in *Popps v. State*, 120 Fla. 387, 162 So. 701, 702 (1935), when it stated that "a plainly unnecessary killing, even defending oneself against an unlawful personal attack being made by the person slain, may be deemed manslaughter, where a plea of justifiable homicide under [section 782.02] is interposed as a justification, but such defense is not sufficiently supported to constitute an absolute bar to conviction." Just this past year, the court stated:

> A homeowner is not entitled to use deadly force to protect his person or dwelling in all instances. A homeowner may use deadly force to protect himself or his dwelling only if there exists a reasonable belief that such force is necessary. *Butler v. State*, 493 So. 2d 451, 453 (Fla. 1986); *see also Falco v. State*, 407 So. 2d 203, 208 (Fla. 1981).

The trial court should not give instructions to the jury which are confusing, contradictory, or misleading. *Butler*, 493 So. 2d at 452. It is manifest that the trial judge's instructions suggesting that Jowers had a carte blanche right to kill Bessent once the latter entered the house confused the jury, for they requested not once, but twice, to be given a clarification on the justifiable use of deadly force. It bears repeating that the jury's second request for clarification queried whether Jowers was within the law to kill Bessent in self-defense if he could have defended himself otherwise. To my mind, that the jury posed this question to the trial judge after he had completely reread them the instructions on self-defense and privilege illustrates not only that the instructions were confusing; it also points to the inescapable conclusion that the jurors simply could not believe that the law as to the justifiable use of deadly force in a dwelling house was as the trial judge explained it to them.

I recognize that during the trial, appellant did not request instructions which would have taken into account the specific limitations on section 782.02 which I have discussed, and which Florida courts have acknowledged. I nevertheless would find that the trial court's statement of the law of justifiable use of deadly force, as it appears in section 782.02, is so misleading as to have been fundamental error. If it "is fundamental that when the trial judge purports to give a charge on justifiable homicide, that every element of justifiable homicide ... should be given," *Bagley v. State*, 119 So. 2d 400, 403 (Fla. 1st DCA 1960), then it follows that the limitations on such a defense, as they appear in statutes and case law, are similarly fundamental.

Jowers' killing of an intoxicated and unarmed man whom he had already outfought was a consequence he could have easily averted by simply remaining inside Deborah Bessent's house until the police arrived. For the foregoing reasons, and because I believe that the majority's opinion places this court's imprimatur on a senseless and unlawful killing, I respectfully dissent.

§ C. Defense of Others

YOUNG v. WARREN
95 N.C. App. 585, 383 S.E.2d 381 (1989)

GREENE, Judge

In this civil action the plaintiff appeals from a final judgment entered by the trial court, pursuant to a jury verdict, denying any recovery on a wrongful death action.

The evidence introduced at trial showed that defendant shot and killed Lewis Reid Young ("Young") on 12 May 1986. The death occurred as a result of a 20-gauge shotgun blast fired at close range into the deceased's back. On 14 October 1986, the defendant pled guilty to involuntary manslaughter.

Prior to the shooting, in the early morning hours of 12 May 1986, Young, who had been dating

defendant's daughter for several months, went to the home of defendant's daughter who lived with her two children within sight of the defendant's residence. Upon arriving at the defendant's daughter's home, Young threw a large piece of wood through the glass in the front door. He then entered the home by reaching through the broken window and unlocking the door. Once inside the house Young argued with the defendant's daughter and "jerked" her arm. At that point, the defendant arrived with his loaded shotgun, having been awakened by a telephone call from a neighbor, his ex-wife, who had told him "something bad is going on" at his daughter's house. When the defendant arrived at his daughter's house, he heard screaming and saw Young standing inside the door. The defendant then testified:

> **A**. I told him like, `Come on out. This doesn't make any sense,' and he kind of came forward, you know, kind of had his hands up like that. (Indicating) I backed away from the door and I told him to get on out. `This can be taken care of tomorrow,' or something to that effect.
>
> **Q**. You told him to get the hell out, didn't you?
>
> **A**. Well, okay; something like that.
>
> **Q**. Okay. And then what happened?
>
> **A**. Then he walked out the door and I just backed up like he came out the door and he walked over about six feet. There is a cement porch there, and he stepped right there, and I was behind him anywhere from a foot to eighteen inches, maybe even two foot, and he stopped. And in my opinion, he started to turn around....
>
> **Q**. What did he do?
>
> **A**. He stopped and started to lower his hands and started to turn around.
>
> **Q**. What did you do?
>
> **A**. I prodded him with the gun and told him to get on out, and that's when it went off.

The trial judge submitted two issues to the jury, the second issue being submitted over the objection of the plaintiff:

> 1. Did Lewis Reid Young, deceased, die as a result of the negligent acts of the defendant, William S. Warren?
>
> Answer: Yes.
>
> 2. Did the defendant, William S. Warren, act in the lawful defense of his daughter, Autumn Stanley, and her children, his grandchildren?
>
> Answer: Yes.

Pursuant to the jury's answers to the issues submitted by the judge, the trial court ordered "that the plaintiff, Lewis Rankin Young, Jr., have and recover nothing of the defendant, William S. Warren, and that the costs be taxed against the plaintiff."

The determinative issue is whether the trial court erred in submitting the defense of family issue to the jury.

I

We first determine whether a defendant in a civil action may assert defense of family to justify assault on a third party. While self-defense and defense of family are seen more often in the context of criminal law, these defenses are nonetheless appropriate in civil actions. *See Haris v. Hodges*, 57 N.C. App. 360, 291 S.E.2d 346, *disc. rev. denied*, 306 N.C. 384, 294 S.E.2d 208 (1982); S. SPIESER, C. KRAUSE & A. GANS, THE AMERICAN LAW OF TORTS Sec. 5:8 at 802 (1983) (self-defense and defense of others recognized in both criminal and civil law); 22A AM. JUR. 2D *Death* Sec. 163 at 237 (1988) (the "defense of self-defense is available in a wrongful death action").

If the defenses apply, the defendant's conduct is considered "privileged" and the defendant is not subject to tort liability for actions taken within the privilege. SPIESER, THE AMERICAN LAW OF TORTS Sec. 5:6 at 794. The defenses, as they result in avoidance of liability, are considered affirmative defenses and must be affirmatively pled. N.C.G.S. Sec. 1A-1, Rule 8(c) (1983); *see also* SPIESER, THE AMERICAN LAW OF TORTS Sec. 5:8 at 802. The burden of proof is on the defendant to prove the defenses by a preponderance of the evidence. Annot. "*Death Action — Self Defense — Proof*," 17 A.L.R.2D 597, 601 (1951).

An assault on a third party in defense of a family member is privileged only if the "defendant had a well-grounded belief that an assault was about to be committed by another on the family member...." *State v. Hall*, 89 N.C. App. 491, 494, 366 S.E.2d 527, 529 (1988). However, in no event may defendant's action be in excess of the privilege of self-defense granted by law to the family member. *Id*.; SPIESER, THE AMERICAN LAW OF TORTS Sec. 5:10 at 810. The privilege protects the

defendant from liability only to the extent that the defendant did not use more force than was necessary or reasonable. PROSSER & KEETON, THE LAW OF TORTS Sec. 20 at 130 (5th ed. 1984); *Hall*, 89 N.C. App. at 493, 366 S.E.2d at 528. Finally, the necessity for the defense must "be immediate, and attacks made in the past, or threats for the future, will not justify" the privilege. PROSSER & KEETON, THE LAW OF TORTS at 130.

The defendant did not properly plead in his answer the "defense of family." N.C.G.S. Sec. 1A-1, Rule 8(c) (matter constituting affirmative defense must be pled). The parties neither expressly nor impliedly consented to trying the issue of "defense of family." In fact, the plaintiff objected to the submission of this issue to the jury. Procedurally, no grounds existed for placing the issue before the jury. *See Nationwide Mut. Ins. Co. v. Edwards*, 67 N.C. App. 1, 6, 312 S.E.2d 656, 660 (1984) (when affirmative defense is not pled, parties may by "express or implied consent" waive pleading of the affirmative defense).

Additionally, the record contains no evidence that the defendant reasonably believed his daughter was, at the time of the shooting of the plaintiff, in peril of death or serious bodily harm. At that time, the plaintiff stood outside the house with his back to the defendant. Defendant's daughter and children were inside the house, removed from any likely harm from plaintiff. Accordingly, assuming arguendo the "defense of family" had been adequately pled or tried by consent, the evidence in this trial did not support the submission of the issue to the jury, and the plaintiff is entitled to a new trial. *See Hall*, 89 N.C. App. at 494, 366 S.E.2d at 529; *cf. Harris*, 57 N.C. App. at 361, 291 S.E.2d at 347 (self-defense issue for jury only after evidence was presented from which jury may infer defendant acted in self-defense).

II

On remand, as several of the additional issues raised by plaintiff's assignments of error may arise at re-trial, we briefly address them.

A

Plaintiff first contends the trial court erred in denying his in limine motion seeking to prevent the admission of testimony concerning Young's possession of a firearm and his blood/alcohol level. We agree. An autopsy report indicated Young's blood/alcohol level at the time of his death was .23 and that a detective removed a .22 caliber pistol from plaintiff's pocket after his death. However, no testimony exists on record that the defendant knew Young had a handgun in his possession or that he was aware that Young had consumed any alcohol. Accordingly, we determine this evidence was not relevant as it had no tendency to "make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." N.C.G.S. Sec. 8C-1, Rule 401 (1988). Therefore the evidence was not admissible, and the motion in limine should have been allowed. N.C.G.S. Sec. 8C-1, Rule 402 (1988).

B

The plaintiff next argues the trial court incorrectly instructed the jury as follows:

> The defendant's plea of "guilty" in the criminal case may be considered by you on the issue of the defendant's potential liability in this civil case. However, I instruct you that this conviction is not conclusive of the defendant's civil liability because this case involves different parties....

We find no error in this part of the trial court's instructions. Evidence of a plea of guilty to a criminal charge is generally admissible in a civil case, but it is not conclusive evidence of defendant's culpable negligence. *Grant v. Shadrick*, 260 N.C. 674, 133 S.E.2d 457 (1963).

C

Plaintiff next argues that his motion for directed verdict on the issue of the defendant's negligence should have been allowed since defendant had pled guilty to manslaughter. Again, the evidence of the plea of guilty to manslaughter is only some evidence in the civil proceeding and does not justify a directed verdict for the plaintiff on the issue.

D

Plaintiff finally argued in his motion for directed verdict that, as a matter of law, Young was not contributorily negligent. Again we disagree. Whether Young's actions amounted to contributory negligence in this case is a question for the jury. *See Taylor v. Walker*, 320 N.C. 729, 734-35, 360 S.E.2d 796, 800 (1987). We do note, if on retrial the jury determines the defendant's negligence amounted to a wilfull or wanton injury, the defense of contributory negligence would not be available. *Pearce v. Barham*, 271 N.C. 285, 289, 156 S.E.2d 290, 294 (1967).

As the other assignments of error raised by the

plaintiff are not likely to recur at trial, we do not address them.

New trial.

Judges ARNOLD and LEWIS concur.

Questions and Notes

1. The *Gortarez* case, *supra*, contains additional discussion of the right to use force to defend another from harm.

§ D. Defense of Property

C.I.T. CORPORATION v. BREWER
146 Fla. 247, 200 So. 910 (1941)

PER CURIAM

On writ of error we review judgment in favor of the plaintiff in a suit for damages alleged to have been inflicted by an assault and battery. The facts to sustain a verdict as gleaned from the record are, in effect: One Amos had bought an automobile under conditional sales contract. The conditional sales contract had been assigned to C.I.T. Corporation, a corporation. J.B. Brewer was president and manager of J.B. Brewer, Inc., a Florida corporation, engaged in the business commonly known as an automobile garage in Fort Pierce, Florida. Amos had delivered the automobile to J.B. Brewer, Inc., to be repaired. The automobile had been repaired. Amos had not paid the repair bill. The automobile was in possession of J.B. Brewer, Inc., just outside of the garage building on the premises of J.B. Brewer, Inc. The ignition key had been removed from the automobile by the garage owner or its agent.

One Denmark was agent for C.I.T. Corporation with authority to collect installments due under conditional sales contract and to repossess automobiles in event of default in payment. Amos and Denmark went into the garage of J.B. Brewer, Inc., and requested J.B. Brewer to make payment for Amos of the amounts in default under the conditional sales contract. Brewer declined to do so, whereupon Denmark said that he would repossess the automobile. J.B. Brewer told Denmark that he was holding the car for the amount due his corporation for repairs and also told Denmark that he could not remove the car from his possession without paying the repair bill. While they were discussing the matter Brewer's attention was called somewhere else and as he turned away Denmark got into the automobile, found the ignition key was not in it and thereupon attempted to remove the automobile from the premises by using the starter as motive power. The noise of the operation of the starter attracted Brewer; he returned and attempted to get Denmark out of the automobile. Denmark resisted and put up a fight. Brewer called on some of his employees to assist him and together they separated Denmark from the automobile. But, in the fight or altercation over possession of the automobile Denmark injured Brewer by either striking him or kicking him in or about the abdomen, thereby causing a serious hernia resulting in great pain and suffering and in permanent injury.

Plaintiff in error has posed seven questions for our consideration, stated as follows:

> **1**. Has the holder of a conditional sales contract upon an automobile the right to take possession of the automobile when it is parked on the premises of an automobile sales agency and garage serving the public when the holder or his agent is rightfully on the premises and did not commit a breach of the peace or trespass in entering into and taking possession of the automobile?
>
> **2**. Has the holder of a conditional sales contract on an automobile the right to defend his possession of the automobile after he has rightfully repossessed it and is in complete charge and control of it?
>
> **3**. Has the holder of a mechanic's and materialmen's lien on an automobile the right to physically and forcibly take possession of the automobile from one holding the conditional sales contract of prior date and effect, who is actually in custody and possession thereof?
>
> **4**. Is it incumbent upon a trial court to fully charge on all material questions of law pertaining to the facts before the jury after it is specifically requested by one of the parties litigant?
>
> **5**. Is it incumbent upon a trial court to

instruct the jury at the request of one of the parties litigant as to the law of priority of liens when such issues being before the jury may be confusing in the absence of such instructions?

6. Is it prejudicial error to charge the jury as follows: `One who attempts to take the law in his own hands and attain his property rights does so at his peril and is responsible in damages for an assault and battery committed in accomplishing the desired result without process of law' where there is no evidence in the record that plaintiff in error did attempt to take the law into his own hands, and at no time or place in the instructions to the jury did the Court enlarge or enlighten that statement?

7. Is the verdict rendered in this cause in accordance with the substantial justice of the case as shown by the record?

The first and second questions indulge the unwarranted assumption that the agent of the holder of the conditional sales contract repossessed the automobile in question without committing a breach of the peace or a trespass in taking possession of the automobile.

In *C.I.T. Corporation et al. v. Reeves,* 112 Fla. 424, 150 So. 638, 639, in discussing the rights of the holder of retain title contract to retake property, we said: "Without doubt, trespasses or assaults perpetrated in exercising the right to peaceably retake possession, as conferred by the contract, are not contemplated by any of the contractual provisions, and if any such trespasses or assaults are committed by the title holder or his agent, in the course of exercising the contract right given, an action on the case for damages will clearly lie. *See Silverstin v. Kohler & Chase*, 181 Cal. 51, 183 P. 451, 9 A.L.R. 1177."

Authorities are legion to support that enunciation. *See Percifield v. State*, 93 Fla. 247, 111 So. 519; Annotation and authorities cited 9 A.L.R. 1180 *et seq*., also annotations and authorities cited 105 A.L.R. 926 *et seq*.

The third question unwarrantedly assumes that the agent of the holder of the conditional sales contract had accomplished taking possession of the automobile, that is of divesting J.B. Brewer, Inc., of the possession of the automobile when Brewer undertook to remove Denmark from the automobile. The jury was warranted in finding a contrary condition. There is ample evidence to establish it as a fact that Denmark was attempting to forcibly and against the will of the person in possession of the property remove that property from the possession of the garage owner.

In *Crews et al. v. Parker*, 192 Ala. 383, 68 So. 287, 288, that court said: "Any act or action manifesting force or violence, or naturally calculated to provoke a breach of the peace, in the recaption of property renders the actor a trespasser, and precludes him from availing of his right to retake the property. To enter one's premises, and notwithstanding the possessor's protest, and in a rule and rough manner to take chattels against his will, is, we think, clearly not an assertion of a right in a peaceful manner."

In *Singer Sewing Machine Co. v. Phipps*, 49 Ind. App. 116, 94 N.E. 793, it was held: "A corporation is liable in damages as an individual for a tort committed by its agent in the line of his employment and within the scope of his authority, though it be malicious and against its express order." *See also Peddie v. Gally*, 109 App. Div. 178, 95 N.Y.S. 652; *Regg v. Buckley-Newhall Co.*, 72 Misc. 387, 130 N.Y.S. 172; *Gerstein v. C. F. Adams Co.*, 169 Wis. 504, 173 N.W. 209; *Singer Sewing Machine Co. v. Methvin*, 184 Ala. 554, 63 So. 997; *Lambert v. Robinson*, 162 Mass. 34, 37 N.E. 753, 44 Am. St. Rep. 326.

So it may be said that the attempt to seize manual control of a chattel and to remove it from the premises of one who is in lawful possession thereof by one claiming the right to repossess it under conditional sales contract after he had been expressly denied the right by the person in lawful possession constitutes a trespass for which damages may be awarded; and where such trespass is committed by the agent of the owner of a conditional sales contract when the agent is shown to have general authority to repossess property covered by such contracts the employer is liable for the trespass or assault and battery committed and may be required to answer in damages for the same.

The fourth, fifth and sixth questions may be considered together.

We have considered the charges and instructions given the jury by the trial court and find that they sufficiently cover the law of the case and sufficiently clearly state the issues to be determined by the jury.

No reversible error is reflected in the refusal to give certain requested charges. There appears ample evidence in the record to support the verdict and the judgment.

A consideration of the entire record discloses no reversible error. The judgment is affirmed.

So ordered.

BROWN, C.J., and WHITFIELD, TERRELL, BUFORD, and CHAPMAN, JJ., concur.

KATKO v. BRINEY
183 N.W.2d 657 (Iowa 1971)

MOORE, Chief Justice

The primary issue presented here is whether an owner may protect personal property in an unoccupied boarded-up farm house against trespassers and thieves by a spring gun capable of inflicting death or serious injury. We are not here concerned with a man's right to protect his home and members of his family. Defendants' home was several miles from the scene of the incident to which we refer *infra*.

Plaintiff's action is for damages resulting from serious injury caused by a shot from a 20-gauge spring shotgun set by defendants in a bedroom of an old farm house which had been uninhabited for several years. Plaintiff and his companion, Marvin McDonough, had broken and entered the house to find and steal old bottles and dated fruit jars which they considered antiques. At defendants' request plaintiff's action was tried to a jury consisting of residents of the community where defendants' property was located. The jury returned a verdict for plaintiff and against defendants for $20,000 actual and $10,000 punitive damages.

After careful consideration of defendants' motions for judgment notwithstanding the verdict and for new trial, the experienced and capable trial judge overruled them and entered judgment on the verdict. Thus we have this appeal by defendants.

* * *

II. Most of the facts are not disputed. In 1957 defendant Bertha L. Briney inherited her parents' farm land in Mahaska and Monroe Counties. Included was an 80-acre tract in southwest Mahaska County where her grandparents and parents had lived. No one occupied the house thereafter. Her husband, Edward, attempted to care for the land. He kept no farm machinery thereon. The outbuildings became dilapidated.

For about 10 years, 1957 to 1967, there occurred a series of trespassing and housebreaking events with loss of some household items, the breaking of windows and "messing up of the property in general". The latest occurred June 8, 1967, prior to the event on July 16, 1967 herein involved.

Defendants through the years boarded up the windows and doors in an attempt to stop the intrusions. They had posted "no trespass" signs on the land several years before 1967. The nearest one was 35 feet from the house. On June 11, 1967 defendants set "a shotgun trap" in the north bedroom. After Mr. Briney cleaned and oiled his 20-gauge shotgun, the power of which he was well aware, defendants took it to the old house where they secured it to an iron bed with the barrel pointed at the bedroom door. It was rigged with wire from the doorknob to the gun's trigger so it would fire when the door was opened. Briney first pointed the gun so an intruder would be hit in the stomach but at Mrs. Briney's suggestion it was lowered to hit the legs. He admitted he did so "because I was mad and tired of being tormented" but "he did not intend to injure anyone". He gave no explanation of why he used a loaded shell and set it to hit a person already in the house. Tin was nailed over the bedroom window. The spring gun could not be seen from the outside. No warning of its presence was posted.

Plaintiff lived with his wife and worked regularly as a gasoline station attendant in Eddyville, seven miles from the old house. He had observed it for several years while hunting in the area and considered it as being abandoned. He knew it had long been uninhabited. In 1967 the area around the house was covered with high weeds. Prior to July 16, 1967 plaintiff and McDonough had been to the premises and found several old bottles and fruit jars which they took and added to their collection of antiques. On the latter date about 9:30 p.m. they made a second trip to the Briney property. They entered the old house by removing a board from a porch window which was without glass. While McDonough was looking around the kitchen area plaintiff went to another part of the house. As he started to open the north bedroom door the shotgun went off striking him in the right leg above the ankle bone. Much of his leg, including part of the tibia, was blown away. Only by McDonough's assistance was plaintiff able to get out of the house and after crawling some distance was put in his vehicle and rushed to a doctor and then to a hospital. He remained in the hospital 40 days.

Plaintiff's doctor testified he seriously considered amputation but eventually the healing process was successful. Some weeks after his release from the hospital plaintiff returned to work on crutches. He was required to keep the injured leg in a cast for approximately a year and wear a special brace for another year. He continued to suffer pain

during this period.

There was undenied medical testimony plaintiff had a permanent deformity, a loss of tissue, and a shortening of the leg.

The record discloses plaintiff to trial time had incurred $710 medical expense, $2056.85 for hospital service, $61.80 for orthopedic service and $750 as loss of earnings. In addition thereto the trial court submitted to the jury the question of damages for pain and suffering and for future disability.

III. Plaintiff testified he knew he had no right to break and enter the house with intent to steal bottles and fruit jars therefrom. He further testified he had entered a plea of guilty to larceny in the nighttime of property of less than $20 value from a private building. He stated he had been fined $50 and costs and paroled during good behavior from a 60-day jail sentence. Other than minor traffic charges this was plaintiff's first brush with the law. On this civil case appeal it is not our prerogative to review the disposition made of the criminal charge against him.

IV. The main thrust of defendants' defense in the trial court and on this appeal is that "the law permits use of a spring gun in a dwelling or warehouse for the purpose of preventing the unlawful entry of a burglar or thief"....

* * *

PROSSER ON TORTS, Third Edition, pages 116-118, states:

> [T]he law has always placed a higher value upon human safety than upon mere rights in property, it is the accepted rule that there is no privilege to use any force calculated to cause death or serious bodily injury to repel the threat to land or chattels, unless there is also such a threat to the defendants' personal safety as to justify a self-defense ... spring guns and other mankilling devices are not justifiable against a mere trespasser, or even a petty thief. They are privileged only against those upon whom the landowner, if he were present in person would be free to inflict injury of the same kind." RESTATEMENT OF TORTS, section 85, page 180, states: "The value of human life and limb, not only tho the individual concerned but also to society, so outweighs the interest of a possessor of land in excluding from it those whom he is not willing to admit thereto that a possessor of land has, as it is stated in §79, no privilege to use force intended or likely to cause death or serious harm against another whom the possessor sees about to enter his premises or meddle with his chattel, unless the intrusion threatens death or serious bodily harm to the occupiers or users of the premises.... A possessor of land cannot do indirectly and by a mechanical device that which, were he present, he could not do immediately and in person. Therefore, he cannot gain a privilege to install, for the purpose of protecting his land from intrusions harmless to the lives and limbs of the occupiers or users of it, a mechanical device whose only purpose is to inflict death or serious harm upon such as may intrude, by giving notice of his intention to inflict, by mechanical means and indirectly, harm which he could not, even after request, inflict directly were he present."

* * *

In *United Zinc & Chemical Co. v. Britt*, 258 U.S. 268, 275, 42 S. Ct. 299, 66 L. Ed. 615, 617, the court states: "The liability for spring guns and mantraps arises from the fact that he defendant has ... expected he trespasser and prepared an injury that is no more justified than if he had held the gun and fired it."

* * *

Study and careful consideration of defendants' contentions on appeal reveal no reversible error.

Affirmed.

All Justices concur except LARSON, J., who dissents.

LARSON, Justice.

I respectfully dissent, first, because the majority wrongfully assumes that by installing a spring gun in the bedroom of their unoccupied house the defendants intended to shoot any intruder who attempted to enter the room. Under the record presented here, that was a fact question. Unless it is held that there property owners are liable for any injury to a intruder from such a device regardless of the intent with which it installed, liability under these pleadings must rest upon two definite issues of fact, *i.e.*, did the defendants intend to shoot the invader, and if so, did they employ unnecessary and unreasonable force against him?

It is my feeling that the majority oversimplifies the impact of this case on the law, not only in this

but other jurisdictions, and that it has not thought through all the ramifications of this holding.

There being no statutory provisions governing the right of an owner to defend his property by the use of a spring gun or other like device, or of a criminal invader to recover punitive damages when injured by such an instrumentality while breaking into the building of another, our interest and attention are directed to what should be the court determination of public policy in these matters. On both issues we are faced with a case of first impression. We should accept the task and clearly establish te law in this jurisdiction hereafter. I would hold that there is no absolute liability for injury to a criminal intruder by setting up such a device on his property, and unless done with an intent to kill or seriously injure the intruder, I would absolve the owner from liability other than for negligence. I would hold the court had no jurisdiction to allow punitive damages when the intruder was engaged in a serious criminal offence such as breaking and entering with intent to steal.

Questions and Notes

1. If spring guns are an unacceptable means of protecting property from burglary, what about ferocious dogs? If Katko had received the same injuries from a Doberman Pinscher, would there be liability? *See* RESTATEMENT (TORTS) 2d, §516, Watchdogs, which in turn relies upon §§ 82-85.

2. A Miami storekeeper electrocuted a burglar by wiring a grate to an electrical outlet. *Miami Herald,* Oct. 4, 1984. What defenses could the storekeeper raise?

3. In *Tennessee v. Garner,* 471 U.S. 1 (1985), the Supreme Court reviewed a case in which a policeman shot a burglar who was attempting to flee the burglary scene. The court held that it is unconstitutional to use deadly force against a fleeing felon unless the suspect poses an immediate threat to the officer or a threat to others. Would this ruling affect *Katko*-like cases in the future?

4. OKLA. STAT. ANN., tit. 21, provides:

§ 1289.25. Unlawful entry of a dwelling — Physical or deadly force against intruder — Affirmative defense and immunity from civil liability

> A. The Legislature hereby recognizes that the citizens of the State of Oklahoma have a right to expect absolute safety within their own homes.
>
> B. Any occupant of a dwelling is justified in using any degree of physical force, including but not limited to deadly force, against another person who has made unlawful entry into that dwelling, and when the occupant has a reasonable belief that such other person might use any physical force, no matter how slight, against any occupant of the dwelling.
>
> C. Any occupant of a dwelling using physical force, including but not limited to deadly force, pursuant to the provisions of subsection B of this section, shall have an affirmative defense in any criminal prosecution for an offence arising from the reasonable use of such force and shall be immune from any civil liability for injuries or death resulting from the reasonable use of such force.

Would you support the passage of such a statute in your jurisdiction?

§ E. Statutory Privilege

Note. In *Gortarez v. Smitty's Super Value, Inc.,* and *Moore v. Pay'n'Save, supra,* the issue of statutory privilege is presented along with an analysis of whether the tort of false imprisonment had been committed. The privilege to detain someone has been created by statute not only for the storekeepers, but also for law enforcement personnel. Note that it extends only to detention based upon *reasonable grounds* and only for a *reasonable time*. That will make it a jury question in most cases.