

(From Wikipedia)A **Castle Doctrine** (also known as a **Castle Law** or a **Defense of Habitation Law**) is an [American](#) legal concept derived from [English Common Law](#), which designates one's place of residence (or, in some states, any place legally occupied, such as one's car or place of work) as a place in which one enjoys protection from illegal trespassing and violent attack. It then goes on to give a person the legal right to use deadly force to defend that place (his/her "castle"), and/or any other innocent persons legally inside it, from violent attack or an intrusion which may lead to violent attack. In a legal context, therefore, use of deadly force which actually results in death may be defended as [justifiable homicide](#) under the Castle Doctrine.)

## **The Castle Doctrine Brings Change to Kentucky's Justification of Force Law**

**by Michael S. Schwendeman, Staff Attorney, Legal Training Section**

In 2006, the Kentucky General Assembly adopted a version of what is commonly known as the Castle Doctrine, addressing a person's right to the use of force. The Castle Doctrine has widely been supported across the country, and variations of it have been adopted in many other states.

This legislation made a number of changes to KRS Chapter 503 regarding the justification of use of force. The Castle Doctrine has been somewhat problematic in that the General Assembly did not completely reconcile the language of the model law, which had been used in other states, with the existing law in Kentucky when it adopted provisions of that model law. While some of the changes arguably should have no significant impact on the state of the law and law enforcement, certain changes may prove to be very significant. Depending upon how they are applied in the courts, they could have great impact and also may expose officers to civil liability for making arrests in certain cases.

Despite having been in effect for two years, anecdotal evidence indicates that many Kentucky law enforcement officers are unaware of these changes in the law and of their potential liability.

### **Justification**

Chapter 503 sets forth who is justified in using what otherwise would be unlawful force, how much they may use and under what circumstances they may use it. The chapter generally applies to all persons in the commonwealth.

The legal defense of justification in the event that any person is charged with an offense alleging an unlawful use of force, is addressed in KRS 530.020. When a person is claiming the justification defense, they do not deny they used force. Rather, they admit the use of force, but claim they are justified under the circumstances. If the court agrees that they were justified, they are acquitted of the charge.

In addition to the provisions permitting force, including deadly force, to defend oneself or another, KRS 503.090 provides law enforcement officers with the ability to use physical force, including deadly physical force, to make an arrest or capture a dangerous, violent subject. It was not amended by the Castle Doctrine.

The overall intent of the Castle Doctrine is to broaden and clarify the range of situations in which a person threatened with unlawful force would be justified in responding with deadly

force. The doctrine also makes it more difficult to prosecute or bring a lawsuit against an individual who claims justification in using deadly force.

Two definitions were added to KRS 503.010 as a result of the Castle Doctrine, and the definition of “dwelling” in subsection 2 was modified. The definition of dwelling now “means a building or conveyance of any kind, including any attached porch, whether the building or conveyance is temporary or permanent, mobile or immobile, which has a roof over it, including a tent, and is designed to be occupied by people lodging therein at night.” This change now does not specify that the structure actually be occupied, only that it must be able to be occupied by people overnight.

A definition for “residence” was added – “a dwelling in which a person resides either temporarily or permanently or is visiting as an invited guest.” This broadens the prior provision that presumed that an individual could only use deadly force to defend their own dwelling.

The final definition added is that of “vehicle,” which states it is “a conveyance of any kind, whether or not motorized, which is designed to transport people or property.” This would cover automobiles, boats, aircraft, buses, trains and anything propelled by muscle power, which would include animal drawn vehicles and bicycles.

### **Self protection**

The use of physical force in self protection is provided for in KRS 503.050. Subsection 2 provides for justification in using deadly force in self protection. As modified by the Castle Doctrine, it reads as follows, with the changes underlined:

The use of deadly physical force by a defendant upon another person is justifiable under subsection (1) only when the defendant believes that such force is necessary to protect himself against death, serious physical injury, kidnapping, or sexual intercourse compelled by force or threat, felony involving the use of force, or under those circumstances permitted pursuant to KRS 503.055.

Two circumstances have been added under which a person may be justified in using deadly force for self protection. The first is if the defendant believes he is being threatened with a felony involving the use of force.

This broad language includes felonies in which the person may or may not be in danger of death or serious physical injury. These would include, but not be limited to, second-degree assault, third-degree assault, first-degree sexual abuse, first-degree robbery, second-degree robbery and assault of a sports official.

In all of these crimes, the victim might perceive himself to be in danger of death, serious physical injury, kidnapping or forcible sexual intercourse, and would have been justified under both the Castle Doctrine and the prior version of the law in using deadly force for self protection. The Castle Doctrine language arguably extends the justification to use deadly force in self protection against such forcible felonies, even when the victim perceives no danger of death or serious physical injury to himself.

### **Defensive force**

KRS 503.055, which addresses the use of defensive force, is a significant, but potentially confusing, addition to Chapter 503. To a certain degree, however, it is redundant, merely restating justifications already set forth elsewhere in the chapter.

One issue it creates is that it uses the term “great bodily harm,” but provides no definition for the phrase. The term “serious physical injury” is defined in KRS 500.080(15) as “physical injury which creates a substantial risk of death, or which causes serious and prolonged disfigurement, prolonged impairment of health or prolonged loss or impairment of the function of any bodily organ.” Physical injury is defined in KRS 500.080(13) as “substantial physical pain or any impairment of physical condition.”

The courts will have to apply some meaning to the term “great bodily harm.” Logically, it cannot mean exactly the same thing as the definition of serious physical injury, although, in states that use that phrase, it is obvious the meaning is essentially the same. Kentucky law presumes the use of different phrases or terms to indicate different meanings. Since one aspect of serious physical injury is that a person could die as a result of it, logically there is no injury more serious than that.

Furthermore, since physical injury covers any impairment of physical condition, however minor, that is presumably the lowest level of harm. The use of the word “great” in the term plainly intends a significant injury. Therefore, great bodily harm may be interpreted by the courts to mean some level of injury between physical injury and serious physical injury.

What the courts may conclude great bodily harm means could greatly affect which uses of force are found to be justified and which are not.

### **Reasonable fear**

KRS 503.055(1) states that:

[a] person is presumed to have held a reasonable fear of imminent peril of death or great bodily harm to himself or another when using defensive force that is intended or likely to cause death or great bodily harm to another if:

(a) The person against whom the defensive force was used was in the process of unlawfully and forcibly entering or had unlawfully and forcibly entered a dwelling, residence, or occupied vehicle or if that person has removed or was attempting to remove another against that person’s will from the dwelling, residence or occupied vehicle; and (b) The person who uses defensive force knew or had reason to believe that an unlawful and forcible entry was occurring or had occurred.

The next subsection of that statute sets forth exceptions to the above presumption. In these exceptions, the person using force will not have the benefit of presumption if the person against whom the defensive force was used falls into one of the categories listed in Subsection 2.

These categories include (a) a person who “has the right to be in or is a lawful resident of the dwelling, residence, or vehicle, such as an owner, lessee or titleholder,” and there is no domestic violence order or pretrial release order or any sort of no contact order; (b) “[t]he person sought to be removed is a child or grandchild, or is otherwise in the lawful custody or under the lawful guardianship of, the person against whom the defensive force is used”; (c) the actor using defensive force is engaged in unlawful activity or using the dwelling, residence or vehicle to further an unlawful activity; or (d) the person against whom the defensive force is used is a peace officer “who enters or attempts to enter a dwelling, residence, or vehicle in the performance of his or her official duties, and the officer identified himself or herself in accordance with any applicable law or the person using force knew or reasonably should have known that the person entering or attempting to enter was a peace officer.”

### **No duty to retreat**

A person who is not engaged in any sort of unlawful activity who is attacked in any place he has a lawful right to be, does not have a duty to retreat and may stand his ground and meet force with force, according to KRS 503.055(3). This includes the right to use deadly force if he or she “reasonably believes it is necessary to do so to prevent death or great bodily harm to himself or herself or another, or to prevent the commission of a felony involving the use of force.”

This codifies and elaborates upon what Kentucky case law generally held, which was that there was no duty to retreat when confronted by a threat. However, it did not add anything to the existing state of the law in Kentucky regarding a person having no duty to retreat in self protection.

In *Gibson v. Commonwealth*,<sup>1</sup> the Court of Appeals of Kentucky, then Kentucky’s highest court, held that a self defense instruction to a jury was wrong because it included language that they had to find the defendant had no reasonable means of escaping in order to claim justified self defense. The Court stated: “It is the tradition that a Kentuckian never runs. He does not have to.”<sup>2</sup>

Subsequent cases generally have upheld the “no duty to retreat” ruling, but did not require it to be included in jury instructions when a defendant claimed to be acting in self protection.<sup>3</sup>

The fourth subsection addresses burglars, stating that “[A] person who unlawfully and by force enters or attempts to enter a person’s dwelling, residence or occupied vehicle is presumed to be doing so with the intent to commit an unlawful act involving force or violence.”

This subsection codifies and broadens the existing presumption regarding burglars, their presumed felonious intent and the clear and present danger they pose to the occupants of the dwelling. Deadly force was thus justified in dealing with the burglar. The language of subsection 4 applies the presumption of danger to any forcible intruder in a dwelling, residence or occupied vehicle.

### **Protection of another**

KRS 503.070, Protection of Another, also was amended by the Castle Doctrine. Subsection 2 addresses use of deadly force as it relates to protection of another. The same language that was added to KRS 503.050(2) was added to KRS 503.070(2)(a). That paragraph now reads “[T]he defendant believes that such force is necessary to protect a third person against imminent death, serious physical injury, kidnapping, sexual intercourse compelled by force or threat or other felony involving the use of force, or under those circumstances permitted pursuant to KRS 503.055.”

The impact of these changes in 503.070(2) is the same as discussed for 503.050(2). The requirement in KRS 503.070(2)(b), that deadly force is only permitted when under the circumstances as they actually exist the person whom the defendant sought to protect would have been justified in using such protection, was not changed. Subsection 3 of this statute also provides that a person has no duty to retreat if he or she is in a place where they have a right to be.

### **Protection of property**

Justification of force in the protection of property also was modified by the Castle Doctrine. The justification of using physical force in protection of property in KRS 503.080(1)(a) was changed as follows, with the new language underlined:

The commission of criminal trespass, robbery, burglary or other felony involving the use of force, or under those circumstances permitted pursuant to KRS

503.055, in a dwelling, building or upon real property in his possession or in the possession of another person for whose protection he acts; . . .

Arguably, however, this language makes no substantive change in the law. Under the pre-existing statute, a victim already was privileged by law to use physical force to defend his dwelling or building against a burglar, to defend himself with physical force against an attacker, including a robber and to protect any sort of property of his or another's on whose behalf he acted against any sort of crime against it.

The justification in using deadly force to defend property under KRS 503.080(2) was amended at paragraph b. As amended, it provides as follows, with the new language underlined:

Committing or attempting to commit a burglary, robbery, or other felony involving the use of force, or under those circumstances permitted pursuant to KRS 503.055, of such dwelling; . . .

Again, the statutory changes may have little impact on the applicability of the justification defense. A burglary, as defined in KRS Chapter 511, has the criminal entering or remaining unlawfully in a building or dwelling with the intent to commit a crime. That language is very broad and not limited to felonies or any crime of violence. Therefore, such conduct would have encompassed crimes contemplated by the Castle Doctrine language.

Under KRS 503.080 prior to enactment of the Castle Doctrine, the law did not consider any fear by the defendant that he or another was in physical danger of the suspect. If the defendant was acting in self protection, he would have invoked KRS 503.050 (the self protection law) as justification. Even if the suspect had been invited in and somehow never becomes a burglar within the meaning of KRS Chapter 511, it is hard to envision a scenario not covered by the pre-existing statutes. Subsection 3 of this section also restates that a person does not have a duty to retreat if the person is where he or she has a right to be.

### **Legal Immunity**

The most important, and potentially the most problematic change made by the Castle Doctrine for law enforcement, is the enactment of KRS 503.085. This new statute provides for legal immunity from criminal prosecution and civil actions. The statute reads as follows:

(1) A person who uses force as permitted in KRS 503.055, 503.050, 503.070, and 503.080 is justified in using such force and is immune from criminal prosecution and civil action for the use of such force, unless the person against whom the force was used is a peace officer, as defined in KRS 446.010, who was acting in the performance of his or her official duties and the officer identified himself or herself in accordance with any applicable law, or the person using force knew or reasonably should have known that the person was a peace officer. As used in this subsection, the term criminal prosecution includes arresting, detaining in custody, and charging or prosecuting the defendant.

(2) A law enforcement agency may use standard procedures for investigating the use of force as described in subsection (1) of this section, but the agency may not arrest the person for using force unless it determines that there is probable cause that the force that was used was unlawful.

(3) The court shall award reasonable attorney's fees, court costs, compensation for loss of income, and all expenses incurred by the defendant in

defense of any civil action brought by the plaintiff if the court finds that the defendant is immune from prosecution as provided in subsection (1). (Emphasis added)

One of the primary purposes of the Castle Doctrine was to protect people who justifiably used deadly force in defense of themselves, others or their homes from the costs and stress of criminal prosecution and civil litigation, when they ultimately would prevail. KRS 503.085 is intended to provide that protection, although it does not serve as a complete shield. It effectively creates a rebuttable presumption that when a person claims he or she was justified in using deadly force according to the law, that he in fact is justified. It shifts the burden of proof to law enforcement or the prosecutor to show that he was not justified in that belief.

The following hypothetical situation may be useful to illustrate the point.

Officers are dispatched to a shooting call. When they arrive, they find a subject dead of an apparent gunshot wound and the apparent shooter still at the scene. The shooter is cooperative and readily talks to officers. He claims he believed that the decedent was about to kill him, so he used his own weapon to shoot and kill the decedent. After interviewing other witnesses and collecting physical evidence at the crime scene, the officers conclude that there is probable cause to believe this was a criminal homicide, and that there is probable cause to believe the shooter committed the homicide.

Prior to the enactment of the Castle Doctrine, the officers would probably have arrested the shooter at that time. However, subsection 1 provides that the person is immune from criminal prosecution – which includes the actions of arresting, detaining in custody and charging or prosecuting him.

Subsection 2 does permit officers to arrest the shooter, but only if they “determine that there is probable cause that the force that was used was unlawful.”<sup>4</sup> This is a fundamental change in the usual way such situations are handled by most law enforcement agencies.

### **Affirmative defenses**

In criminal cases, affirmative defenses are what a suspect might raise when they admit they committed the act but claim some legal justification for committing the act. Officers can and should take a suspect’s affirmative defenses into account in determining if they have probable cause to believe both that the crime occurred and that the suspect committed it. The mere existence of a possible affirmative defense does not ordinarily bar an arrest. Usually it is the defendant’s responsibility to raise the affirmative defense in court.

With the Castle Doctrine, that usual process is cast aside. Officers must now have probable cause not only to believe the offense was committed and that the suspect did it, but also probable cause to believe that the affirmative defense will fail before they can arrest the suspect. In many cases, this will not be a problem in that the suspect’s claim will clearly be weak. The problem arises in cases where the claim is more credible.

A likely result of this will be that officers have to contact the prosecutor to seek guidance as to how to proceed before arresting a suspect who is claiming justification under KRS Chapter 503. That contact will provide some shield from liability for the officers.

### **Civil liability**

Further, KRS 503.085 creates potential civil liability for officers who arrest a suspect claiming legal justification for their action. If the suspect’s justification ultimately is accepted by

the court or the case is dismissed, the suspect may sue the officers for false arrest. This is an issue that apparently is not well understood by the law enforcement community. Due to the newness of the law, Kentucky does not have any reported court cases that provide guidance on how the statute should be applied.

All officers need to be familiar with the changes created by the Castle Doctrine to KRS Chapter 503. Caution is the byword in responding to deadly force cases where the suspect is claiming justification under the new laws. It is recommended that law enforcement agencies discuss the matter with their legal advisors and local prosecutors now to be prepared to deal with such cases before they arise.

---

<sup>1</sup> 34 S.W.2d 936 (Ky., 1931).

<sup>2</sup> Id.

<sup>3</sup> *Hilbert v. Commonwealth*, 162 S.W.3d 921 (Ky., 2005)

<sup>4</sup> KRS 503.085(2).