

# **Equipment deficiencies and the injured soldier: a critical evaluation of the MoD's liability under the law of tort.**

**by**

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## Abstract

**Key Words:** Inadequate and/or Defective Equipment, Combat Immunity, Human Rights, Health and Safety, Armed Forces Compensation Scheme, Standard of care, Causation, Public Policy

There is a negative portrayal of contemporary conflict in Iraq and Afghanistan as a result of the rise in the number of deaths of service personnel. The common view of the media, coroners, military charities and academic commentators is that this is a result of the failure of the MoD and the Government to provide adequate equipment to service personnel on the battlefield.

Through the critical evaluation of key equipment cases, combat immunity law, human rights law and health and safety legislation and civil law this thesis will evaluate whether the MoD can be held liable in tort for the procurement of inadequate equipment on the battlefield, and whether service personnel are able to rely upon any legal remedies in the event that injury is sustained in combat as a result of equipment deficiencies.

In order to investigate whether the MoD can be held liable in tort for equipment deficiencies the thesis will consider current civil law in establishing whether the MoD owed a duty of care in combat and if so, in which circumstances that duty of care has been breached. The thesis will consider the doctrine of combat immunity and whether it imposes restrictions on service personnel's human rights or whether the Human Rights Act surpasses combat immunity, before turning to the evaluation of the Armed Forces Compensation Scheme and whether it adequately compensated injured service personnel.

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## Introduction

In recent years the wars in Afghanistan and Iraq have brought attention to the deaths and serious injuries of armed forces personnel which has exposed questions of serious deficiencies in both the legal and moral duty of care owed by the state to service personnel on operations. The number of British armed forces fatalities stands at 444 after three soldiers died on the 30<sup>th</sup> April 2013 when their vehicle was hit by an Improvised Explosive Device (IED) in Helmand province.<sup>1</sup> While most of the deaths and injuries of service personnel have been caused by IEDs, others have been caused by friendly fire accidents, with the main argument being whether the equipment that service personnel are deployed on operations with are suitable for the conditions they face.<sup>2</sup> The press have published accounts of deaths and serious injuries of service personnel that have been linked to inadequate body armour, vehicles and equipment. One of the main incidents regarding inadequate equipment concerned the multiple deaths of personnel on board a Nimrod aircraft, another concerning the casualties sustained by personnel travelling in the Snatch Land Rover. More recently the case of *Smith and Others v Ministry of Defence*<sup>3</sup> came before the courts with regard to service personnel deaths in Challenger tanks and Snatch Land Rovers. There has been a recent Supreme Court ruling on this case which has changed the law in relation to deaths and injuries of service personnel in combat, although the judgment on this case has come too late to be properly incorporated into the main body of the thesis.

These apparent equipment deficiencies have led to cases coming before the courts which have revealed the Ministry of Defence's (MoD) reliance on civil combat

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<sup>1</sup> Anon, 'UK military deaths in Afghanistan' (*BBC News*, 27 March 2013)  
<<http://www.bbc.co.uk/news/uk-15188729>> accessed 12 June 2013

<sup>2</sup> *Ibid*

<sup>3</sup> [2013] UKSC 41

immunity in the event that a claim in negligence is brought against them by a member of the armed forces. Combat immunity, an aspect of what was previously known as Crown immunity provides that, ‘unless Parliament intends otherwise, the usual law of tortious negligence does not apply to the Crown and its bodies’<sup>4</sup> in the event that the death or serious injury of a member of the armed forces is a result of combat. Does this then mean that the deaths or serious injuries as a result of combat will automatically be immune from tort resulting in a member of the armed forces being unable to make a claim against the MoD? This question has been argued and interpreted in the English courts and is the foundation for discussing liability for the deaths and injuries which have occurred on operations caused by inadequate equipment.

Britain has long acknowledged a duty of care in a non-legal sense to its armed forces that dates back to the 1593 Act for the Necessary Relief of Soldiers and Mariners passed by parliament under Queen Elizabeth I.<sup>5</sup> This non-legal duty of care is now embedded in the Military Covenant, defined as a ‘mutual agreement between the nation, the Government and each individual soldier’.<sup>6</sup> The covenant stated that military service ‘imposes certain limitations on freedom and requires a degree of self-sacrifice’ and in return for surrendering these liberties, soldiers should ‘always expect fair treatment’ from the Government.<sup>7</sup>

This thesis proceeds on the assumption that service personnel are not able to rely upon a legal duty of care against the MoD when injured in combat, and where a failure of this duty of care has occurred, service personnel are being deployed on operations

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<sup>4</sup> Select Committees on Home Affairs and Work and Pensions, *Crown Immunity: removal of Crown immunity* (HC 2005-06, 540-II)

<sup>5</sup> ‘A broken covenant’ [2011] Defence Management Journal  
<[http://www.defencemanagement.com/feature\\_story.asp?id=15915](http://www.defencemanagement.com/feature_story.asp?id=15915)> accessed 2 March 2013

<sup>6</sup> A Sparrow, ‘What is the military covenant?’ *Guardian* (London, 4 March 2008)  
<<http://www.guardian.co.uk/politics/2008/mar/04/defence.military>> accessed 2 March 2013

<sup>7</sup> General Sir R Dannatt, ‘Values and standards of the British army’ (Army. MoD, January 2008)  
< [http://www.army.mod.uk/documents/general/v\\_s\\_of\\_the\\_british\\_army.pdf](http://www.army.mod.uk/documents/general/v_s_of_the_british_army.pdf)> accessed 4 March 2013

with inadequate equipment with no legal remedies available to them if they were seriously injured, nor to their dependants if they are killed as a result of operational service.

Chapter one establishes a number of combat-related equipment and psychological problems which service personnel face in combat. This chapter will set the scene to discuss whether the MoD should be held legally liable for the deaths or injuries of service personnel as a result of inadequate equipment.

Chapter two will review the duty of care, in tort, generally focusing on the three stage test set out in *Caparo v Dickman*,<sup>8</sup> of foreseeability, proximity and fair, just and reasonableness and will suggest whether a duty of care would be owed by the MoD to service personnel injured or killed in combat due to inadequate equipment if there was no combat immunity.

Chapter three then turns to the current law of combat immunity and will discuss the effect of combat immunity in situations of armed conflict and post-traumatic stress. Relevant sections of the Crown Proceedings Acts 1947 and 1987 will be evaluated in relation to three influential cases; *Mulcahy v Ministry of Defence*<sup>9</sup>, *Multiple Claimants v Ministry of Defence*<sup>10</sup> and *Bici v Ministry of Defence*.<sup>11</sup> These will be analysed in order to consider whether the MoD benefits from the defence of combat immunity in situations where inadequacies in the supply of equipment have led to death or injury as opposed to deaths of service personnel following a reckless order to attack.

Chapter four will discuss the public policy arguments which the MoD rely upon to negate the existence of a duty of care in combat. The overall purpose of this chapter is

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<sup>8</sup> [1990] 2 AC 605 HL

<sup>9</sup> [1996] QB 732

<sup>10</sup> [2003] EWHC 1134 QB

<sup>11</sup> [2004] EWHC 786 QB

to address the question of whether service personnel are able to succeed in a claim against the MoD for a breach of duty of care with regard to equipment deficiencies or whether public policy considerations enable the MoD to be free from liability.

The fifth chapter explores the standard of care in that if the MoD is found to owe a duty of care, is that duty of care breached by the supply of inadequate equipment and care?

Chapter six will concentrate on the principles of causation to establish whether roadside bombs such as Improvised Explosive Devices (IED) and enemy fire break the chain in causation so that it is deemed that the MoD are not responsible for the deaths of service personnel, even if they are supplied with inadequate equipment.

Chapter seven turns to another area of law which the public might expect would afford some protection to service personnel, specifically, the Human Rights Act 1998. British military interventions in Iraq and Afghanistan have given rise to important judicial examinations of the jurisdiction question and whether service personnel are able to rely upon the protections set out within the Human Rights Act when on combat operations overseas. The application of article 6 of the European Convention on Human Rights (ECHR) to personnel will be discussed in relation to three main cases; *Osman v Ferguson*,<sup>12</sup> *Osman v United Kingdom*<sup>13</sup> and *Smith and Others v Ministry of Defence*.<sup>14</sup> These cases will give insight into whether by the MoD relying on combat immunity in times of war, it has breached a member of the armed forces ECHR to a fair trial under article 6. Article 2 of the ECHR will then be discussed in relation to the following cases;

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<sup>12</sup> (1993) 4 All ER 344

<sup>13</sup> (2000) 29 EHRR 245

<sup>14</sup> [2012] EWCA CIV 1365

*R (on the application of Smith) v Oxfordshire Assistant Deputy Coroner*,<sup>15</sup> *Smith and Others v Ministry of Defence*,<sup>16</sup> *Albutt and others v Ministry of Defence*,<sup>17</sup> *Bankovic v Belgium*<sup>18</sup> and *R (Al Skeini) v Secretary of State for Defence*.<sup>19</sup>

Chapter eight takes up the baton where traditional legal remedies end and focuses on whether members of the armed forces are able to make a ‘no-fault’ compensation claim in the event of injury due to service, including combat operations. These claims can be made under the Armed Forces Compensation Scheme and although service personnel are able to rely upon the scheme to obtain some form of compensation for their injuries, there is unsurprisingly still concern over levels of compensation payments they typically receive. This chapter will therefore discuss the tariff levels of the scheme and whether this ‘no-fault’ approach produces practical financial support to those suffering with life changing injuries.

This thesis will carry out a close textual analysis of current legislation, case law and legal remedies in order to determine which of these, if any, service personnel are able to rely upon in the event of serious injury due to combat and separately whether the MoD can be held liable for supplying inadequate equipment. It is arguable that a duty of care ought to be owed to service personnel in combat if they are provided with inadequate equipment. In order to evaluate this argument the thesis will first set out the physical and psychological issues surrounding the conflict in Afghanistan and Iraq.

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<sup>15</sup> [2008] EWHC 694

<sup>16</sup> [2013] UKSC 41

<sup>17</sup> [2013] UKSC 41

<sup>18</sup> (2007) 44 EHRR SE5

<sup>19</sup> (2007) UKHL 26

## **Chapter One**

### **Physical and psychological problems of combat**

This chapter will set out the problems surrounding the Iraq and Afghanistan wars in relation to the equipment that has been deployed and also to psychological problems that service personnel have faced. These problems highlight the main argument present in this thesis, whether the MoD owe a legal duty of care to service personnel in combat and whether by deploying inadequate equipment they have allegedly failed in their duty of care. Firstly the chapter will underline the main equipment problems, turning then to the psychological problems which service personnel may face.

#### **1.1. Is military equipment adequate for the battlefield?**

It is perhaps a given that when a state enters into armed conflict there will be a loss of life and injury to service personnel, and the conflicts in Iraq and Afghanistan are no exception. The risk of death or serious injury should not be increased by the failure to provide adequate equipment. However, numerous cases have been highlighted by the media, such as the deaths of service personnel in the Nimrod aircraft and the Snatch Land Rover, which have emphasised the contribution of inadequate equipment to military deaths.<sup>20</sup> From the beginning of the Afghanistan war in 2001 until January 2013, 596 service personnel have been very seriously injured and 440 have suffered fatalities.<sup>21</sup> Service personnel are prepared to risk their lives in the service of their country and in return for their service and commitment; it could be argued that it is only reasonable for them to expect adequate support from the Government, such as the timely provision of vital equipment.

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<sup>20</sup> R Norton-Taylor, 'Not all deaths in Afghanistan are down to the enemy' *Guardian* (London, 10 June 2008)

< <http://www.guardian.co.uk/uk/2008/jun/10/military.afghanistan>> accessed 3 March 2013

<sup>21</sup> Afghanistan casualty and fatality table, Available on the MoD website.

<[https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/82766/20130213\\_Op\\_Herrick\\_to\\_31\\_Jan\\_13.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/82766/20130213_Op_Herrick_to_31_Jan_13.pdf)> accessed 6 March 2013

Two well documented cases which have been highlighted by the media concerning the deaths of service personnel in the Nimrod aircraft and the Snatch Land Rover, have been argued to have been caused by inadequate equipment. The Nimrod was not deemed to be air-worthy as a result of problems with air-to-air refuelling and the design of the Land Rovers was criticised for not providing adequate protection against roadside bombs as a consequence of its light armoury.<sup>22</sup>

The RAF Nimrods were deployed to Afghanistan to be used by service personnel on operations. Tragically in 2006 one aircraft exploded in mid-air killing the entire crew on board. The cause of the explosion was found to be leaked fuel during air-to-air refuelling igniting following contact with an exposed electrical element.<sup>23</sup> There had been previous incidents and warning signs of some problems which were relevant to the Nimrod explosion, such as potential fuel leaks and the risk of fuel igniting.<sup>24</sup> In his 2009 report, Charles Haddon-Cave QC, (now Haddon-Cave J) noted that failure to learn from previous warning signs to ensure that the aircraft was safe indicated a failure of the MoD, adding that; 'rarely did anyone attempt to grasp the wider implications of a particular incident for the future, or spot trends or patterns, or read across the issues to other aircraft's.'<sup>25</sup> As there seem to have been no efforts made to take the previous risks into account, it could be argued that the MoD are legally accountable for the deaths of the 14 service personnel, and that this failure could be seen as a breach of the MoD's moral and legal duty of care towards service personnel. If the courts were to find

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<sup>22</sup> Anon, 'Q and A: Snatch Land Rovers' (*BBC News*, 10 July 2009)

< <http://news.bbc.co.uk/1/hi/uk/7703703.stm> > accessed 3 March 2013

<sup>23</sup> A Stickler, 'An RAF officer faces court martial over Nimrod deaths' (*The Bureau of Investigative Journalism*, 27 March 2011)

< <http://www.thebureauinvestigates.com/2011/03/27/an-raf-officer-faces-court-martial-over-nimrod-deaths/> > accessed 3 March 2013

<sup>24</sup> C Haddon-Cave QC, 'The Nimrod Review: An independent review of the broader issues surrounding the loss of the RAF Nimrod MR2 Aircraft XV230 in Afghanistan in 2006' (HC 1025, 28 October 2009) ch 8  
< <http://www.official-documents.gov.uk/document/hc0809/hc10/1025/1025.asp> > accessed 3 March 2013

<sup>25</sup> *Ibid* Para 8.5

that the deaths of the service personnel were a direct result of the MoD's failure to make the aircraft airworthy, then would this be a significant element in establishing negligence, and whether or not the existence of a legal duty of care is owed by the MoD? The existence here of a judicially recognised legal duty of care, however, will be explored in chapters two and three when the common law and its consequences are considered and evaluated in relation to military operations.

The following case of the Snatch Land Rover also involved the deaths and serious injuries of a number of service personnel. The Land Rovers were originally deployed as a cheap and quick way of transporting troops in Northern Ireland, and were not seen by service personnel as being adequate protection against roadside bombs.<sup>26</sup> Steve McLoughlin, a former member of the Royal Green Jackets who served in Iraq, said with reference to the Snatch Land Rover:

You drive over a landmine in a very lightly-armoured Land-Rover Snatch and it is not much different than driving over it in a Ford Escort. At the very least you are going to lose limbs, horrific injuries if you survive, you are probably going to get killed outright.<sup>27</sup>

It could be argued that a heavily armoured vehicle could be severely damaged by a powerful Improvised Explosive Device (IED) as seen in the recent case of the Mastiff armoured vehicle which resulted in the loss of three servicemen. However, unlike the Mastiff the Snatch Land Rover is not made to withstand powerful blasts from IED's as they were mainly for the use of transportation for service personnel in Iraq and Afghanistan, whereas heavily armoured vehicle's are built to be able to withstand such explosions and therefore should be more suitable for combat operations.

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<sup>26</sup> M Bulstrode, 'Snatch Land Rovers blamed for dozens of deaths' *Independent* (London, 9 March 2010) < <http://www.independent.co.uk/news/uk/home-news/snatch-land-rovers-blamed-for-dozens-of-deaths-1918732.html>> accessed 3 March 2013

<sup>27</sup> Anon, 'UK SAS Commander quits, citing inadequate equipment' (*Defence Industry Daily*, 17 December 2008) < <http://www.defenseindustrydaily.com/UK-SAS-Commander-Quits-Citing-Inadequate-Equipment-05141/>> accessed 3 March 2013

The failure of the Land Rover to protect service personnel against roadside bombs resulted in open disapproval by a military figure, SAS commander, Major Morley. He announced his resignation as a result of the Government allegedly repeatedly ignoring warning signs that the vehicles were not adequate enough for operations in Afghanistan. Morley stated that in his opinion 'chronic underinvestment by the MoD' was to blame for the deaths of those travelling in the Land Rovers.<sup>28</sup> Although the majority of the blame for service personnel deaths as a result of equipment failure is on the MoD, it is difficult for service personnel to bring a negligence claim against the MoD as there is a wider question of causation, that is, whether the MoD's breach was a direct cause of the deaths or injuries. However this will be explored in more detail in chapter six.

While the loss of lives as a result of the Nimrod explosion and the IED effects on the Land Rover has been well documented in the media, it falls into a wider, concerning picture of equipment deficiencies. Not dissimilar to the Snatch Land Rover issue, concerns about service personnel travelling in Challenger tanks came before the courts. The case facts demonstrated that one of the tanks had fired upon the other during the confusion of battle as a result of the fitting of inadequate surveillance devices.<sup>29</sup> The Defence Analytical Services Agency (DASA) has revealed that as a result of the perceived lack of adequate equipment the majority of service personnel in 2008 were dissatisfied with the standard of equipment, with one in two respondents saying that

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<sup>28</sup> T Harding, 'Exclusive: SAS Chief quits over "negligence that killed his troops"' *Daily Telegraph* (London, 31 October 2008)

< <http://www.telegraph.co.uk/news/newstoppers/onthefrontline/3332417/Exclusive-SAS-chief-quits-over-negligence-that-killed-his-troops.html>> accessed 4 March 2013

<sup>29</sup> N Hopkins, 'High Court ruling opens way for MoD to be sued over soldiers deaths' *Guardian* (London, 20 June 2011)

< <http://www.guardian.co.uk/uk/2011/jun/30/high-court-mod-sued-soldiers-deaths>> accessed 4 March 2013

they 'simply did not have enough equipment to do their jobs properly'.<sup>30</sup> It also found that when surveying 10,500 service personnel only 31% were satisfied with the main equipment at their disposal.<sup>31</sup> Soldiers have also repeatedly complained about the lack of key personal equipment, such as standard night vision kits and weaponry.<sup>32</sup> One example of this lack of equipment was the serious failure of the MoD to provide night vision goggles which resulted in the death of Lance Corporal Jake Alderton as the truck he was travelling in drove off a bridge into a river as a result of ineffective night vision equipment.<sup>33</sup>

In effect it seems that there were two major problems with equipment. Firstly there is not enough equipment to give to all service personnel on operations and secondly the equipment deployed is not adequate enough for the conditions of battle. However, inadequate equipment is not the only issue that arises when confronted with service personnel on operations. There are also concerns with mental health issues such as Post-Traumatic Stress Disorder (PTSD) to which this thesis will now turn.

## **1.2. Post-Traumatic Stress Disorder**

Post-Traumatic Stress Disorder (PTSD) is an anxiety disorder caused by a very stressful, frightening or distressing event such as military combat. It can develop immediately after experiencing a disturbing event or it can occur weeks, months or even

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<sup>30</sup> T Harding, 'Armed forces survey reveals poor equipment and morale' *Daily Telegraph* (London, 9 July 2008) < <http://www.telegraph.co.uk/news/newsttopics/onthefrontline/2276421/Armed-forces-survey-reveals-poor-equipment-and-morale.html> > accessed 4 March 2013

<sup>31</sup> M Townsend, 'Troops say they lack the right kit to fight in Helmand' *Guardian* (London, 9 August 2009) < <http://www.guardian.co.uk/uk/2009/aug/09/afghanistan-soldiers-deaths-compensation-equipment> > accessed 4 March 2013

<sup>32</sup> *Ibid*

<sup>33</sup> T Harding, 'Soldier dies in Afghanistan due to failure of night vision goggles' *Telegraph* (London, 12 January 2009) < <http://www.telegraph.co.uk/news/uknews/defence/4224412/Soldier-died-in-Afghanistan-due-to-failures-with-night-vision-goggles.html> > accessed 4 March 2013

years later.<sup>34</sup> Symptoms of PTSD often include reliving the traumatic event through nightmares and flashbacks, with the sufferer feeling isolated, irritable and guilty.<sup>35</sup> Joining the armed forces exposes service personnel to increased risk of death or serious injury, whether that injury be physical or psychiatric, this is the nature of the military role.<sup>36</sup> The relationship between combat and psychiatric breakdown has been well recognised and attempts at preventing psychiatric injury, by screening before deployment or debriefing after, have been disappointing.<sup>37</sup> This was highlighted in the high profile case of *Multiple Claimants v Ministry of Defence*<sup>38</sup> where a group action was unsuccessfully raised against the MoD for failing to detect and prevent psychiatric injury.<sup>39</sup>

The extent of the PTSD problem among service personnel is considerable and it is clear that the current approach does not provide service personnel suffering from PTSD with the effective treatment they deserve.<sup>40</sup> An example of this is the case of Liam Smith who upon joining the British Army did a six-month tour in Afghanistan in which his best friend and platoon sergeant was killed. When he returned home he developed a drink problem and became violent and withdrawn. Despite showing classic symptoms of PTSD he received no help or counselling from the Army and instead was sent back to Helmand both in 2009 and 2011 after the first tour. It was not until he suffered a

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<sup>34</sup> Anon, 'Post Traumatic Stress Disorder' (*NHS Choices*, 12 December 2011) <<http://www.nhs.uk/Conditions/Post-traumatic-stress-disorder/Pages/Introduction.aspx>> accessed 1st June 2012

<sup>35</sup> *Ibid*

<sup>36</sup> C Dandeker, 'On the need to be different: military uniqueness and civil military relations in modern society' (2001) 146 *RUSI Journal* 4

<sup>37</sup> S Wessely, 'Risk, psychiatry and the military' (2005) 186 *The British Journal of Psychiatry* 459

<sup>38</sup> *Multiple Claimants v Ministry of Defence* [2003] EWHC 1134 (QB)

<sup>39</sup> *Ibid*

<sup>40</sup> Defence Committee, *Defence- Seventh report* (HC 2007-08)

complete psychosomatic breakdown on duty in 2011 that he was finally diagnosed with PTSD, two years after first showing symptoms.<sup>41</sup>

Is there not a legal or moral duty on the MoD to proactively detect and treat PTSD in much the same way as they would treat a physical injury? It seems that the question of whether a proactive moral or legal duty is to be imposed on the MoD is a difficult question for the courts to consider as in order for a successful claim to be made against the MoD in relation to failing to detect and treat PTSD, service personnel have to identify a negligent failure on part of the MoD.<sup>42</sup> The difficulties in identifying such negligence will be discussed further in chapters two and three.

David Modell who was interviewed by the BBC after making a documentary for Channel Four's Dispatches programme named 'Battle Scarred' about soldiers struggling with PTSD, stated that; 'there is urgent need of help that kicks in as soon as the soldier comes back off tour' as 'soldiers coming out of the Army have no idea how to access help groups, and the responsibility is put on the person who is suffering to seek help'.<sup>43</sup> It is important that service personnel feel that there is support available to them should they suffer psychiatric or physical injury. However service personnel and their families say they are not getting the help and support they need.<sup>44</sup> Imposing a moral or legal duty of care upon the MoD to care for service personnel during and after combat could see a change in the way that PTSD is detected and treated and could result in less severe cases of the condition.

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<sup>41</sup> S Rayment, 'Army failed my Soldier son over breakdown, claims father' *Telegraph* (London, 25 February 2012) <<http://www.telegraph.co.uk/news/uknews/defence/9105823/Army-failed-my-soldier-son-over-breakdown-claims-father.html>> accessed 5 March 2013

<sup>42</sup> R Scorer, 'Casualties of War' (2009) 159 *New Law Journal* 1

<sup>43</sup> Anon, 'MoD fails traumatised soldiers' (*BBC News*, 8 September 2009) <<http://news.bbc.co.uk/1/hi/health/8242465.stm>> accessed 5 March 2013

<sup>44</sup> A Stickler, 'Injured veterans criticise lack of help' (*The Bureau of Investigative Journalism*, 9 August 2012) <<http://www.thebureauinvestigates.com/2012/08/09/help-for-heroes-and-mod-criticised-by-injured-troops/>> accessed 5 March 2013

The only assured form of help injured service personnel will receive is that from the Armed Forces Compensation Scheme (AFCS) which seeks to compensate those injured as a result of conflict operations. However, the AFCS has also received wide criticism from service personnel, their families and charities, such as the Royal British Legion. The criticisms of the AFCS will be analysed in Chapter 8.

### **1.3. Conclusion**

It is clear that there are many complaints against the MoD in relation to the safety, care and support that service personnel receive during and after combat. Inadequate or lack of equipment can lead to the deaths and serious injuries of service personnel that could have been avoided had the correct equipment been supplied. 'The best possible equipment and care should be made available, and no life should be lost through an avoidable logistic failing.'<sup>45</sup> This is embedded as part of the military covenant, which is the Government's moral duty of care to service personnel. Arguably, and this is the central question for the present thesis, the Government and the MoD may well have failed in this moral duty of care in instances where they have not supplied enough body armour or sent service personnel out in Snatch Land Rovers or in the Nimrod aircraft. It could be argued that instances where service personnel have suffered PTSD, the MoD have failed to detect and provide treatment for it. In order to determine whether the MoD can be held liable for such failures we must now turn to examining the law on the duty of care.

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<sup>45</sup> 'Army Doctrine Publication: Operations' (*Ministry of Defence*, 2000) ch2 pg 9-2  
<[https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/33695/ADPOperationsDec10.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/33695/ADPOperationsDec10.pdf)> accessed 5 March 2013

## Chapter Two A Duty of Care

The purpose of this chapter is to analyse the English law of negligence with respect to how we approach the question of whether a duty of care exists. A three-stage test needs to be established in order for a duty of care to be placed upon a defendant. The third test i.e. of fair, just and reasonableness, is particularly relevant in cases where a negligence claim arises against a public body including the MoD as it is harder to establish, and has been subject to legal debate in the courts. Does the third test make it difficult for a duty of care to be established by the MoD in combat operations or in the planning and preparation of such operations? In order to answer this question the aspects needed to establish a duty of care must be considered.

### **2.1. Establishing a duty of care**

The idea of a duty of care refers to the circumstances and relationships which the law recognises as giving rise to a legal duty of care. If a defendant is proven to have broken that duty of care, then they could be liable in negligence law for damages to the claimant.<sup>46</sup> Therefore, it is necessary for the claimant to show that the defendant breached the duty of care.

In order for an action in negligence to succeed the claimant must satisfy three elements that; the defendant owes the claimant a duty of care; the defendant has breached that duty of care and that, as a result of the defendant's breach, the claimant has suffered damage.<sup>47</sup>

Whether it is 'just' for a duty of care to be imposed upon the defendant depends not only on the concepts of foreseeability and proximity but also the concept of

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<sup>46</sup> C Elliott and F Quinn, *Tort Law* (8<sup>th</sup> edn, Pearson Education Limited, 2011)

<sup>47</sup> P Giliker and S Beckwith, *Tort* (4<sup>th</sup> edn, Sweet and Maxwell, 2011) p.22

reasonableness, which recognises that it is necessary to take into account other considerations of justice between the parties.<sup>48</sup> These additional factors under the reasonableness concept concern the relationship between the parties and the risk in question, such as whether it is clear from the relationship between the defendant and the claimant that a duty of care would bear an unreasonable burden on the defendant.<sup>49</sup> One such relationship that may provide for such a duty to arise is that of employer and employee, as an employer owes his employees a duty to take reasonable care to protect them from a foreseeable risk of injury.<sup>50</sup> Whether a duty of care may arise in such a relationship in special cases such as police and the armed forces will be analysed later in chapters 3 and 4, but in order for such an analysis to be clear the thesis must first set out the essential elements for establishing a duty of care in negligence.

The famous case of *Donoghue v Stevenson*<sup>51</sup> established the liability of a manufacturer in negligence for injury sustained by the consumer of a product. The case formulated a general principle, namely the ‘neighbour principle’ in which a legal duty to take care could be determined.<sup>52</sup> Lord Atkin set out the concept of the neighbour principle, stating that;

You must take reasonable care to avoid acts or omissions which you can reasonably foresee would be likely to injure your neighbour. Who then in law is my neighbour? The answer seems to be persons who are so closely and directly affected by my act that I ought reasonably to have them in contemplation as being so affected when I am directing my mind to an act or omission which are called in question.<sup>53</sup>

Lord Atkin’s account of the scope of negligence identifies two of the three key concepts mentioned previously, foreseeability and proximity. This meant that a duty of care

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<sup>48</sup> A Robertson, ‘Justice, community welfare and the duty of care’ [2011] Law Quarterly Review 370

<sup>49</sup> A Robertson, ‘Justice, community welfare and the duty of care’ [2011] Law Quarterly Review 370

<sup>50</sup> P Barrie, *Personal Injury Law: Liability, Compensation and Procedure* (2<sup>nd</sup> edn, Oxford University Press, 2005) p. 116

<sup>51</sup> [1932] A.C. 562

<sup>52</sup> [1932] A.C. 562

<sup>53</sup> P Barrie, *Personal Injury Law: Liability, Compensation and Procedure* (2<sup>nd</sup> edn, Oxford University Press, 2005) p.117

could be owed where the defendant ought to have reasonably foreseen that his failure to take care may cause injury to another, and that a duty of care would be owed if the claimant was directly affected by the defendant's conduct, therefore showing a degree of proximity.<sup>54</sup> The neighbour principle, established in *Donoghue*, was the basis in which a duty of care was to be decided by the courts and was reformulated by the later case of *Anns v Merton LBC*.<sup>55</sup>

The case of *Anns* produced a two-stage test in which to establish whether a duty of care is owed;

A *prima facie* duty of care is owed if the harm suffered by the claimant was a reasonably foreseeable consequence of the defendant's conduct and there was a relationship of proximity between the defendant and those to whom a duty of care is claimed to be owed<sup>56</sup>

This two-stage test changed the applicability of the neighbour principle as after *Anns* the neighbour test would apply unless there were policy reasons for excluding it, whereas *Donoghue* used the test to justify new areas of liability where there were policy reasons for creating them.<sup>57</sup> *Donoghue* was criticised for its simplicity in its approach to a duty of care and for not considering the problematic principle of policy.<sup>58</sup> However, *Anns* fared less well than *Donoghue* and was denounced as judicial legislation. This was because the court in *Anns* created an entirely new principle in the form of a two-stage test, which is parliament's function, rather than merely interpreting it, which is the court's function. Effectively this resulted in *Anns* being overruled by the House of

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<sup>54</sup> P Giliker and S Beckwith, *Tort* (4<sup>th</sup> edn, Sweet and Maxwell, 2011) p. 27

<sup>55</sup> [1978] A.C. 728 HL

<sup>56</sup> A Robertson, 'Justice, community welfare and the duty of care' [2011] *Law Quarterly Review* 370

<sup>57</sup> C Elliott and F Quinn, *Tort Law* (5<sup>th</sup> edn, Pearson Education Limited, 2005) p. 17

<sup>58</sup> K Patten, 'Snail Trail' (2012) 7513 *New Law Journal*

< <http://www.newlawjournal.co.uk/nlj/content/snail-trail>> accessed 22 June 2013

Lords in *Murphy v Brentwood District Council*,<sup>59</sup> and was replaced as the test for the duty of care by *Caparo Industries v Dickman*.<sup>60</sup>

The *Caparo* case is now the leading case for deciding whether a duty of care would be owed and introduced a new three-stage test for establishing liability; foreseeability, whether the damage or loss was foreseeable; proximity, whether the relationship between the wrongdoer and the victim was sufficiently close; and fair, just and reasonableness, whether it is just and reasonable to impose a duty of care in the circumstances.<sup>61</sup> If all three stages of *Caparo* can be established then it will be recognised that a duty of care does exist and therefore the defendant would be liable in tort for negligence. The thesis will now turn to the three-stage test in more detail.

## 2.2 Foreseeability

As already discussed the elements of the foreseeability test have their foundations in the *Donoghue* case in which the court developed the neighbour principle for establishing a duty of care. This was later replaced by the three-stage test set out in *Caparo v Dickman*<sup>62</sup> in which Lord Justice Bingham, in relation to the first test of foreseeability, said; 'it is common ground that reasonable foreseeability, although a necessary, is not a sufficient condition of the existence of a duty of care.'<sup>63</sup> Essentially it is not for the courts to ask what the defendant actually did see but whether a person in the defendant's position would have foreseen the risk of damage.<sup>64</sup> Therefore, the standard of conduct in negligence is measured by what the reasonable prudent man would do under the

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<sup>59</sup> [1991] 1 A.C. 398 HL

<sup>60</sup> [1990] 2 A.C. 605 HL

<sup>61</sup> J Lee, 'Much obliged' (2011) 161/7480 New Law Journal

<<http://www.newlawjournal.co.uk/nlj/content/much-obliged>> Accessed 20 February 2013

<sup>62</sup> [1990] 2 AC 605 HL

<sup>63</sup> *Ibid*

<sup>64</sup> C Elliott and F Quinn, *Tort Law* (8<sup>th</sup> edn, Pearson Education Limited, 2011) p. 22

circumstances.<sup>65</sup> The reasonable person by whom the standard of care in negligence is established is based upon all the characteristics of the person who has allegedly caused the conduct, which in essence brings the reasonable person in closer alignment with the actual person.<sup>66</sup> The development of the reasonable person analogy enables fault to be determined and sets a threshold for liability to arise in negligence and enables the foreseeability test to be judged by some standard.

A fundamental element of liability for negligence is the knowledge of which the defendant had or ought to have had at the time. It is presupposed that the defendant either foresees a risk of injury, or could foresee it if he had conducted himself as a reasonable prudent man would have done in the circumstances.<sup>67</sup> Therefore, the foreseeability of harm must depend on the knowledge which the defendant had or ought to have had at the time. This was recognised by the court in the case of *Vaughan v Menlove*<sup>68</sup> where the defendant (Menlove) built a hayrick near the boundary of his property close to the claimant's cottages. Menlove was warned on several occasions that the hayrick was a fire hazard but ignored all warnings and built a chimney through the rick. As a result the rick ignited by the heat generated and consequently spread and set fire to the claimant's cottages.

The court found that as a landowner Menlove had a duty of care to enjoy his property ensuring that it did not injure that of his neighbour, and according to that rule Menlove would be liable for the consequences of his own negligence.<sup>69</sup> Although Menlove did not himself light the fire he was still negligent as he had been warned and had

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<sup>65</sup> J Flemming, 'The qualities of the reasonable man in negligence cases' (1951) 16 Missouri Law Review 1 p.1

<sup>66</sup> M Moran, *Rethinking the reasonable person: An egalitarian reconstruction of the objective standard* (Oxford University Press, 2003) p. 3

<sup>67</sup> J Flemming, 'The qualities of the reasonable man in negligence cases' (1951) 16 Missouri Law Review 1 p.5

<sup>68</sup> (1837) 132 E.R. 490

<sup>69</sup> *Vaughan v Menlove* (1837) 132 E.R. 490

knowledge that hay will ferment and ignite if not carefully stacked.<sup>70</sup> This case is an example of both concepts of foreseeability and knowledge as the defendant had knowledge of what would happen if the hayrick was not properly stacked and should have therefore foreseen the consequences of his actions.

As Lord Oliver explained in *Caparo v Dickman*, foreseeability ‘is not only a duty to take care, but a duty to avoid causing to the claimant damage of the particular kind which he has in fact sustained.’<sup>71</sup> Providing the defendant would not reasonably foresee the damage or have knowledge that could have prevented the damage, a duty of care would not be established under the first test of foreseeability. The Court of Appeal was faced with this issue in *Bhamra v Dubb*<sup>72</sup> where the claimant’s husband, who had a severe allergy to eggs, collapsed and died after unknowingly eating a dish containing eggs at a Sikh wedding. The Sikh religion bans its followers from eating certain foods including eggs. The defendant, who was a caterer, knew this but it appeared that the food ran out and the defendant had sourced extra food from another supplier, which contained eggs. The Court of Appeal held that the defendant was under a duty not to serve food with eggs, as it was a Sikh event and that the defendant should have known that some people would be allergic to eggs and would suffer serious injury if they ate foods containing them,<sup>73</sup> therefore finding that a duty of care was owed by the defendant not to cause physical harm by serving eggs to Sikhs.

With regard to establishing the foreseeability test, when the claimant is a serving soldier in the armed forces and the negligence claim is against the MoD, the legal case of Sergeant Steven Roberts will be considered. Sergeant Steven Roberts was killed on patrol in Iraq in 2003 after he was told to hand over his body armour to a fellow

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<sup>70</sup> *Ibid*

<sup>71</sup> C Elliott and F Quinn, *Tort Law* (8<sup>th</sup> edn, Pearson Education Limited, 2011) p. 22

<sup>72</sup> [2010] EWCA Civ 13

<sup>73</sup> *Ibid*

serviceman. The MoD recognised that supply failures were to blame for Sergeant Robert's death, as if there had been enough body armour for all service personnel Sergeant Robert's death would have been avoided. As the MoD had admitted liability for not providing sufficient body armour in this case, there was no need to establish any test for negligence.<sup>74</sup> However what if the MoD had not admitted liability?

It is reasonably foreseeable that while out on patrol in Iraq, without body armour, there is an increased risk of death or serious injury if a member of the armed forces was to be hit by a bullet. Pathologists found that had Sergeant Roberts been wearing the body armour he would have survived, therefore the act of the MoD not to supply enough body armour created a real and immediate risk to life by exposing Sergeant Robert's to increased danger.<sup>75</sup>

A reasonable prudent man would have foreseen that while out on patrol a serving soldier would be more vulnerable against a bullet if they had no body armour. Service personnel have every reason to rely upon the MoD to provide them with adequate equipment where practicable and to care and support them both on and off the battlefield. The MoD should have foreseen that the likelihood of not providing sufficient body armour would result in a member of the armed forces being seriously injured or killed. Thus the test for foreseeability would be established in these circumstances. Once foreseeability has been recognised it is necessary to turn to the second test of proximity to see if the claimant was so closely affected by the defendant's conduct that liability could arise.

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<sup>74</sup> Anon, 'Kit delays led to soldier's death' (*BBC News*, 18 December 2006)  
<<http://news.bbc.co.uk/1/hi/england/bradford/6190337.stm>> accessed 5 March 2013

<sup>75</sup> Anon, 'Kit delays led to soldiers death' (*BBC News*, 18 December 2006)  
<<http://news.bbc.co.uk/1/hi/england/bradford/6190337.stm>> accessed 5 March 2013

### 2.3. Proximity

The concept of the second test in *Caparo* of proximity is essentially concerned with the relationship between the defendant and the claimant in order to answer the question of whether the claimant was so closely and directly affected by the defendant's conduct.<sup>76</sup> In identifying proximity, Chris Whitting suggested that 'proximity seeks to determine whether, prior to the defendant's failure in care, there existed between the parties "significant causal pathways" by which the defendant's conduct "might have resulted in harm to the claimant."<sup>77</sup> Therefore the degree of closeness the law requires before imposing a duty of care depends on what type of damage the claimant suffers. The courts require a closer relationship between the defendant and the claimant in cases such as psychiatric injury, whereas in cases of physical injury the degree of proximity is more easily satisfied.<sup>78</sup>

An example of a relationship that would satisfy the closeness the law requires between the defendant and the claimant is that of employer and employee discussed earlier in this chapter. A breach of an employer's duty to take reasonable care of their employees by providing adequate equipment under the Health and Safety at Work Act 1974, may give rise to a claim against them in negligence.<sup>79</sup>

An example of a case that satisfies the relationship of proximity is that of *Watson v British Boxing Board of Control*<sup>80</sup> where the claimant was a professional boxer who suffered severe brain damage after being injured during a bout. He sued the board on the basis that if they had made sufficient safety arrangements and made immediate medical

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<sup>76</sup> A Robertson, 'Justice, community welfare and the duty of care' [2011] Law Quarterly Review 370

<sup>77</sup> C Whitting, 'Duty of care: An analytical approach' (2005) 25 Oxford Journal of Legal Studies 33 at 37

<sup>78</sup> P Giliker and S Beckwith, *Tort* (4<sup>th</sup> edn, Sweet and Maxwell, 2011) p. 36

<sup>79</sup> Anon, 'An employer's duty of care: what is it?' (*Osborne Clarke*, 19 October 2012)

< <http://www.osborneclarke.co.uk/publications/services/regulation/update/2012/an-employers-duty-of-care.aspx>> accessed 21 June 2013

<sup>80</sup> [2001] QB 1134

attention available at ringside then his injuries would have been less severe. It was held by the Court of Appeal that there was sufficient proximity between Watson and the board to give rise to a duty of care as the board had almost complete control and responsibility for a situation that could result in harm to Watson and that the board did not exercise such reasonable care.<sup>81</sup>

As long as there is a sufficient closeness between the defendant and the claimant, the test for establishing proximity will always be satisfied.

Referring the test of proximity back to the case example above of Sergeant Roberts, would the MoD be in close enough proximity in order for a duty of care to be established?

As a serving soldier Sergeant Roberts was under the employment of the MoD, on active duty in Iraq. This establishes a contractual relationship of that of an employer and employee in which the MoD has a legal duty to protect, like any other employer. The failure of the MoD to provide sufficient equipment contributed to the death of Sergeant Roberts and thus there is sufficient proximity between Sergeant Roberts and the MoD. Cases that arise from inadequate equipment within the armed forces may be able to satisfy the requirements of proximity because of the employer, employee relationship but immunities put in place for the MoD make it difficult for a duty of care to be established in relation to the third test of *Caparo*.

The third test set out in *Caparo* of fair, just and reasonableness seems to be the test that may be particularly challenging for service personnel as it is likely to hinder any prospects of the MoD being held liable in tort for a breach of a duty of care. This is because whilst most cases are able to satisfy the first and second tests of foreseeability

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<sup>81</sup> *Ibid*

and proximity, the courts may hold that there are sound public policy reasons for denying the claim and hence the third test must be satisfied.

## **2.4. Fair, Just and Reasonable**

Although foreseeability and proximity are central issues in deciding whether a duty of care should be established, it is not always just for a duty to be imposed which is where the third test of fair, just and reasonable comes in. In some cases, it may not be deemed to be just to impose a duty of care upon the MoD even though the tests of foreseeability and proximity have been established.<sup>82</sup> This was recognised by Lord Bridge of Harwich in *Caparo*, that in addition to foreseeability and proximity; ‘the situation should be one in which the court considers it fair, just and reasonable that the law should impose a duty of a given scope upon the one party for the benefit of the other’.<sup>83</sup> This requirement often overlaps with the previous two tests. For example, in the *Watson* case discussed above, it was just and reasonable to hold the boxing board liable for failing to supervise a match properly and to provide reasonable care in the event of an injury, therefore satisfying all three tests.

The courts are hesitant to impose a duty of care if it would impose an unreasonable and unfair burden on any defendant. The prospect of damage i.e. harm, is weighed against the preventative measures needed in order to reduce the risk of the harm occurring, thus taking a cost/benefit analysis in establishing whether or not a duty of care should be owed. If the courts are of the view that imposing a duty of care would lead to a ‘flood’ of claims against the defendant then policy may dictate that a duty of care should be denied so that the defendant can continue to function.<sup>84</sup> Generally, there

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<sup>82</sup> A Robertson, ‘Justice, community welfare and the duty of care’ [2011] Law Quarterly Review 370

<sup>83</sup> *Caparo Industries v Dickman* [1990] 2 A.C. 605 HL at 618

<sup>84</sup> J Hartshorne, N Smith and others, ‘Caparo under fire: a study into the effects upon the fire service of liability in negligence’ (2003) 63/4 Modern Law Review 502

are two justifications for the third test of *Caparo*, the first being the ‘floodgates argument’ where imposing a duty of care in certain situations may lead to a sharp rise in negligence claims contrary to policy imperatives including the interest in avoiding excessive levels of litigation; the second being that imposing a duty of care may lead to the rendering of certain operations and activities ineffective as the fear of a negligence claim hinders appropriate military decision making.

This chapter has shown that it is straightforward in most cases to establish foreseeability and proximity in order for a duty of care to arise. However the third test of fair, just and reasonableness is much harder to establish. This is especially the case if a negligence claim is against a public body as the courts do not wish to place unreasonable burden on the defendants of such cases.

Again taking the case of Sergeant Roberts, the absence of the protection from the body armour exposed him to a greater risk of injury or death from an attack or threat of attack. However as Sergeant Roberts was working in Iraq taking part in combat operations at the time he was killed, he automatically fell within the legal definition of combat as stated in *Bici v Ministry of Defence*, which will be discussed in chapter three. As a consequence of Robert’s falling into this definition, the MoD was covered by the doctrine of combat immunity. This meant that no claim in tort can arise against them for injuries sustained in combat. The restriction of the third test i.e. fair, just and reasonable, will be examined in more detail in chapter four when the thesis will discuss public liability in relation to the armed forces and how this affects a soldier’s claim against the MoD.

## **2.5. Conclusion**

In order for any negligence claim to succeed it must be shown that there was a duty of care owed by the defendant and that the duty of care had been breached causing damage to the claimant. To establish these concepts of a duty of care the three stage test in *Caparo* was analysed in order to show whether there was foreseeability, proximity and if it was fair, just and reasonable for a duty of care to be owed by the defendant. It seems from analysing the three tests that there would be no duty of care, in tort, owed by the MoD to service personnel on operations as the courts do not find it fair, just or reasonable to impose such a duty.

The impositions of the third stage test have been the reason for the MoD not being liable for negligence as the courts allow for the blanket defence of combat immunity. It is to this legal doctrine that this thesis will now turn, commencing with consideration of the nature of this doctrine in conflict operations.

## **Chapter Three**

### **The limitations of Combat Immunity**

To recap, while it may be straightforward to establish foreseeability and sufficient proximity for a duty of care to arise against the MoD, the third test of fair, just and reasonable has not been explored because of the effects combat immunity has on conflict operations. Combat immunity has been granted to the MoD under the Crown Proceedings (Armed Forces) Act 1987 and the Crown Proceedings Act 1947. This doctrine enables the Crown and its bodies to be immune from a negligence action arising as a result of combat. However despite this, a question arises as to whether the MoD could successfully be held liable for negligent acts arising from combat in certain situations or whether the defence of combat immunity proves fatal to all negligence actions against the MoD in times of conflict. This legal issue of combat immunity will be examined in the light of three influential cases which have considered the scope of the duty of care in actual combat.

### **3.1. Legal position of the Crown and its bodies**

The legal position of the Crown and its bodies such as the MoD has been criticised for allowing the MoD to avoid legal responsibility for service personnel being injured during combat operations. The defence of combat immunity means that the MoD will have immunity from liability for damages for injuries or deaths sustained in combat laid out in the provisions of the Crown Proceedings (Armed Forces) Act 1987, which will be set out later in the chapter.

Crown immunity originally derived from the saying that ‘the king can do no wrong’ which was taken by judges to mean that the Crown was not bound by statute.<sup>85</sup> This was

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<sup>85</sup> A Gray, ‘Immunity of the Crown from statute and suit’ (2010) Canberra Law Review 4

the approach the courts took prior to the Crown Proceedings Act 1947 in which it was not possible for individuals to sue the Crown and its bodies based on the above principle. The enactment of the 1947 Act enabled the Crown to be held generally liable in tort for acts of negligence. However, immunity was retained through section 10 (1) of the 1947 Act in relation to members of the armed forces.<sup>86</sup> It provided that:

No act or omission by a member of the armed forces will render either the individual or the Crown liable in tort for the death or serious injury of another member of the armed forces.<sup>87</sup>

The effect of section 10 is clear in that where a member of the armed forces injures or kills another member of the armed forces while on duty, or is injured or killed as a result of any 'land, aircraft or vehicle used by the armed forces, no liability in tort shall arise against the Crown'.<sup>88</sup> This led to growing dissatisfaction given that the provisions set out in section 10 were acting as a bar to claims in tort, making it impossible for service personnel to formulate a claim against the MoD, even under peacetime conditions.<sup>89</sup>

This position remained until the enactment of the Crown Proceedings (Armed Forces) Act 1987, which removed the blanket protection of section 10. Section 1 of the 1987 Act abolished the effect of section 10 in respect of injuries and deaths suffered as a result of acts or omissions committed after the date of the new 1987 Act. Subject to combat immunity, this enabled service personnel, like any other employee, to be able to sue the MoD for compensation when they have been injured as a result of negligence.<sup>90</sup>

The Act stated:

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<sup>86</sup> A W Bradley and K D Ewing, *Constitutional and Administrative Law* (15<sup>th</sup> edn, Pearson Education Limited, 2011)

<sup>87</sup> Crown Proceedings Act 1947, s10

<sup>88</sup> *Matthews v Ministry of Defence* [2003] UKHL 4 (HL) Para 8

<sup>89</sup> *Mulcahy v Ministry of Defence* [1996] Q.B. 732

<sup>90</sup> Claims Annual Report 2005/06. Available on the MoD website.

< <http://www.publications.parliament.uk/pa/cm200607/cmselect/cmdfence/57/57.pdf>> accessed 21 June 2013

The Crown shall be subject to all those liabilities in tort, in respect of torts committed by its servants or agents and in respect of any breach of those duties which a person owes to his servants or agents at common law by reason of their employment.<sup>91</sup>

Effectively the provision meant that where no order was made to revive section 10, the Crown could be liable for negligence or for the failure to provide a safe system of work.<sup>92</sup> The effect of section 2 of the 1987 Act, however, provided for the revival of section 10 in times of ‘immediate national danger’ or ‘for the purposes of any warlike operations in any part of the world outside the United Kingdom’.<sup>93</sup> This section was introduced with a comment by Winston Churchill MP (Davyhulme) that it would be ‘unrealistic to expect servicemen engaged in battle to have the right to sue their fellow servicemen or officers for negligence’.<sup>94</sup>

The consequence of this is that successful applications for a negligence claim by injured service personnel have been very few in number and the implications of this effective legal bar will require exploration and evaluation. To understand the development and current definition of combat immunity, this thesis will now analyse the judgments in three influential cases, namely, *Mulcahy v Ministry of Defence*<sup>95</sup>, *Multiple Claimants v Ministry of Defence*<sup>96</sup> and *Bici v Ministry of Defence*.<sup>97</sup> Each will now be examined in turn to clarify important doctrinal questions on how far the defence of combat immunity extends and why.

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<sup>91</sup> *Mulcahy v Ministry of Defence* [1996] Q.B. 732

<sup>92</sup> C Vincenzi, *Crown Powers, subjects and citizens* (A Cassell Imprint, 1998)

<sup>93</sup> Crown Proceedings (Armed Forces) Act 1987, s2 (2)

<sup>94</sup> HC Deb 13 February 1987, Vol 110, Col 571

<sup>95</sup> [1996] Q.B. 732

<sup>96</sup> [2003] EWHC 1134 (QB)

<sup>97</sup> [2004] EWHC 786 (QB)

### 3.2. Combat Immunity

In *Mulcahy v Ministry of Defence*,<sup>98</sup> the claimant was a serving soldier in the Royal Regiment of Artillery. He was part of a team manning a Howitzer gun in the course of the Gulf War. Mulcahy brought a tortious claim against the MoD, alleging that he had suffered personal injury as a result of the negligence of the gun commander while the gun was firing live rounds into Iraq.<sup>99</sup> The action was subsequently struck out on the ground of combat immunity. Until the decision in *Mulcahy* there had been no discussion of combat immunity in English law.<sup>100</sup> Hence it is worth discussing the use of authority in this case.

The MoD sought to establish the principle of combat immunity by referring to three cases, namely, *Shaw Savill and Albion Co. Ltd v The Commonwealth*<sup>101</sup>, *Burmah Oil Co. Ltd v Lord Advocate*<sup>102</sup> and *Hughes v National Union of Mineworkers*.<sup>103</sup>

The primary claim made by Mulcahy was that the defendants were liable for the negligence of the commander, Sergeant Warren. In respect of the relevant legislation of the Crown Proceedings Act 1947 and the Crown Proceedings (Armed Forces) Act 1987, section 10 was not revived for the purposes of the Gulf War in this case.<sup>104</sup> Hence, since no statutory immunity, Mulcahy now had to demonstrate that a duty of care at common law was owed to him by the MoD and that no common law combat immunity existed. It had to be established by the courts whether the firing of the Howitzer gun into Iraq constituted hostilities against the enemy, and ‘whether the degree of involvement in

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<sup>98</sup> [1996] Q.B. 732

<sup>99</sup> *Ibid*

<sup>100</sup> H Grimberg and M Brown, ‘The Human Rights Act at war’ (*Law Society Gazette*, 9 August 2010) <<http://www.lawgazette.co.uk/in-practice/practice-points/the-human-rights-act-war>> Accessed 25 February 2013

<sup>101</sup> (1940) 66 C.L.R. 344

<sup>102</sup> [1965] A.C. 75

<sup>103</sup> [1991] I.C.R. 669

<sup>104</sup> C Vincenzi, *Crown Powers, subjects and citizens* (A Cassell Imprint, 1998)

warlike activities was such to allow the Crown to argue that it was in fact a heat of battle situation, and if it was the question would then be whether there was onus of proof at civil law.<sup>105</sup> This raised the question of interpretation as to the meaning of what would constitute a heat of battle situation, and hence those situations that fall inside, outside and on the borders of the applicable legal test.

Mulcahy argued that a duty of care owed by the MoD should not be precluded from applying to a member of the armed forces in wartime given that the Secretary of State had not revived section 10 for the purposes of the Gulf War. Support for such an approach had previously been expressed by Lord Browne-Wilkinson in *E (A Minor) v Dorset County Council*<sup>106</sup> where he stated; ‘where the law is not settled but is in a state of development it is normally appropriate to decide novel questions on hypothetical facts’.<sup>107</sup> The purpose of section 10 was to prevent proceedings being brought in respect of death or serious injury at any time to a member of the armed forces caused by negligence of another member of the armed forces. The Secretary of State did not revive section 10 and therefore the argument was that the MoD should not be able to rely upon section 10 for the purposes of the Iraq war.

The trial judge concluded that Mulcahy was in a war zone taking part in warlike operations and was a member of the gun crew engaged in firing shells on enemy targets. It was accepted by the MoD that there was no direct English common law to support the proposition that no duty of care in tort is owed by one soldier to another when engaging the enemy in battle conditions.<sup>108</sup> Therefore in the absence of English case law the courts chose to rely upon decisions by the High Court in earlier Commonwealth law in

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<sup>105</sup> *Mulcahy v Ministry of Defence* [1996] Q.B. 732

<sup>106</sup> [1995] 2 AC 633

<sup>107</sup> *Ibid*

<sup>108</sup> *Mulcahy v Ministry of Defence* [1996] Q.B. 732

*Shaw Savill*, the dicta in the Scottish case of *Burmah Oil* and the *Hughes* case which involved a police officer who was injured while on operational duty.

The first case which was relied upon by the MoD was *Shaw Savill*. Here the claimant sued the Commonwealth of Australia for damages as a result of a collision that occurred between H.M.A.S. Adelaide and a motor vessel owned by the claimants during active naval operations. The Commonwealth in their defence pleaded that ‘the claimants’ supposed cause of action consisted solely in acts, matters and things done or occurring in the course of active naval operations against the King’s enemies by the armed forces of the Commonwealth’.<sup>109</sup> The essence of the Commonwealth’s claim was that they were engaged in a state of war at the time of the collision, following from which they did not owe a duty of care to the claimants.

In the course of judgments on whether a duty of care was owed if the warship was engaged on active operations, Dixon J suggested:

It could hardly be maintained that during an actual engagement with the enemy the navigating officer of a King’s ship of war was under a common law duty of care to avoid harm to such non-combatant ships as might appear in the theatre of operations.<sup>110</sup>

Therefore, if this interpretation is accepted and is interpreted as laying down a general rule that goes beyond the specific facts of the case and their immediate context, then it would undermine any claim that civil liability can arise for acts of negligence when engaged with the enemy by a member of the armed forces.<sup>111</sup> Consequently, this would mean that the Crown and its bodies should not be held liable for negligence in combat situations, as it would be unjust to afford such a duty of care when operational decisions are made in the heat of battle.

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<sup>109</sup> *Shaw Savill Albion Co. Ltd v The Commonwealth* (1940) 66 C.L.R. 344

<sup>110</sup> *Ibid*

<sup>111</sup> *Ibid*

However, in modern conflicts there are significant differences between actual operations against the enemy and other combatant services in times of war, such as peacekeeping and policing operations. In *Shaw Savill*, Dixon J appeared to accept a broad interpretation of military engagement with the enemy. Thus Dixon J further stated in his judgment that; ‘the principle of combat immunity cannot be limited to the presence of the enemy or to occasions when contact with the enemy has been established’.<sup>112</sup> This meant that in *Mulcahy* the MoD could now rely upon the defence of combat immunity where there was no immediate contact or presence of the enemy i.e. firing practice before engagement, in situations such as the one set out in *Mulcahy*. This developed the law well beyond the point which had been made at first instance in *Mulcahy* suggesting that the claimant was not in an actual engagement with the enemy, as in *Shaw Savill*, and thus there was no hand to hand combat enabling the defendants to rely upon combat immunity. At first instance the court in *Mulcahy* adopted the principle laid out in *Shaw Savill* which extended to ‘attack and resistance, advance and retreat, pursuit and avoidance, reconnaissance and engagement’.<sup>113</sup> This broad definition, involving a wide range of military activities falling short of actual armed conflict, had negative implications for Mulcahy’s claims. This was because the firing of the gun was held to constitute battle conditions as they were firing into Iraq even though there was no immediate presence or contact with the enemy.

It was submitted on behalf of the claimant that some of the judgments in *Shaw Savill* went far beyond that which was justifiable in law. The claimant argued that the right approach would be to allow the claim to proceed and then, at trial, investigate the

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<sup>112</sup> *Ibid*

<sup>113</sup> *Ibid*

particular circumstances surrounding the firing of the gun to ascertain whether there had been a breach of a duty of care.<sup>114</sup>

As the soldiers were firing live rounds into Iraq the judge concluded that this constituted battle conditions for the purposes of the principle laid down in *Shaw Savill* and a further hearing of the facts at trial was not necessary. Since *Shaw Savill* was relied upon by the defendants, the Crown was not under a duty of care to the claimant.

An alternative strand of authority which the MoD relied upon was the case of *Hughes v National Union of Mineworkers*.<sup>115</sup> This case was tendered to support the proposition that no duty of care should be owed where critical decisions are made with little or no time for considered thought.<sup>116</sup> The claimant in this case was a police officer posted in a support unit to assist the maintenance of public order where mineworkers on strike were picketing working miners. The claimant was injured as a result of a number of pickets falling on top of him. As a result of his injury the claimant brought an action against the Chief Constable of North Yorkshire for ‘negligence in causing, permitting or requiring the claimant to take up an unsupported and unprotected position as well as failing to operate a safe system of work’.<sup>117</sup> The judge in his conclusions stated that in high-pressure circumstances, which involve physical danger where instant decisions have to be made, it would be unreasonable under public policy to ascribe tortious liability:

... Critical decisions have to be made with little or no time for considered thought and where many individual officers may be in some sort of danger of physical injury of one kind or another.<sup>118</sup>

This is part of a wider public policy argument as, for example, firemen who are in a rescue situation do not have time to stop and think and so they should not have to be

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<sup>114</sup> *Mulcahy v Ministry of Defence* [1996] Q.B. 732

<sup>115</sup> [1991] 4 All E.R. 278

<sup>116</sup> *Mulcahy v Ministry of Defence* [1996] Q.B. 732

<sup>117</sup> *Hughes v National Union of Mineworkers* [1991] 4 All E.R. 278

<sup>118</sup> *Ibid*

made liable for any actions made in that moment. However one issue is that if firemen were not supplied with adequate fire protective clothing and equipment, would it be reasonable then to impose a tortious liability on the employer? This issue will be examined in more detail in chapter four.

In considering the case law relied upon in the Court of Appeal in *Mulcahy* the court could have decided the case in three ways, firstly, that a serving soldier would be held liable to another serving soldier in the heat of battle, secondly the MoD could be held liable for the actions of a serving soldier and thirdly no duty of care can arise in battle conditions so as to render either a serving soldier or the MoD liable.

Neill LJ, in the Court of Appeal in the *Mulcahy* case, had accepted the interpretation of the precedent laid out in *Shaw Savill* that ‘during the course of hostilities no duty of care is owed by a member of the armed forces to civilians or their property, and so it must be even more apparent that no such duty is owed to another member of the armed forces’.<sup>119</sup>

Furthermore, Neill LJ accepted that the scope of the duty of care, during the course of hostilities, is based on similar reasoning laid out in the *Hughes* case in that the ‘fear of a negligence claim would be likely to affect the task which the decisions intended to advance’.<sup>120</sup> To hold that a member of the armed forces is negligent when engaging with the enemy could potentially undermine the running of operations. There is a similar argument made in favour of public bodies such as the police, that to impose a duty on them would make it difficult for them to exercise their duties properly. The judge in *Hughes* held that it would not be reasonable to hold a member of the armed forces liable in negligence while taking part in hostilities against the enemy, stating; ‘it could be highly detrimental to the conduct of military operations if each soldier had to

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<sup>119</sup> *Shaw Savill and Albion Co. Ltd v The Commonwealth* (1940) 66 C.L.R. 344

<sup>120</sup> *Hughes v National Union of Mineworkers* [1991] 4 All E.R. 278

be conscious that, even in battle, he owed a duty of care to his comrade'.<sup>121</sup> Neill LJ in *Mulcahy* also drew parallels with the following comments made in the *Hughes* case:

If senior police officers are to be potentially liable to individual officers under their command if those individuals are injured by attacks from rioters, that would be significantly detrimental to the control of public order.<sup>122</sup>

The Court of Appeal in *Mulcahy* held that to hold the MoD or a commander liable for the injuries sustained by service personnel on active operations would hinder the effective running of defence operations.

Overall the judgments laid down in the *Mulcahy* case determined that the MoD were not to be held liable in tort for damages to the claimant. Neill LJ was clearly influenced by the Commonwealth case law and his conclusion referred to Gibbs C.J. in the *Groves*<sup>123</sup> case who had stated:

To hold that there is no civil liability for injury caused by the negligence of persons in the course of actual engagement with the enemy seems to me to accord with common sense and sound policy.<sup>124</sup>

Accordingly, there was no duty on the MoD, in the theatre of war, to maintain a safe system of work, in civil law, similar to that of a civilian employer within the UK. The *Mulcahy* case was the first common law case to embed the existence of combat immunity and create precedent that would bind future cases relating to negligence claims by service personnel.

The second influential case noted in respect of combat immunity and the duty of care was *Multiple Claimants v Ministry of Defence*.<sup>125</sup> This was a multi-party action brought by over 2000 personnel who claimed that the MoD was negligent in failing to take adequate steps to prevent the onset of psychiatric illness and to detect, diagnose and treat the illness. The claims were organised in two group actions, group one comprising

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<sup>121</sup> *Mulcahy v Ministry of Defence* [1996] Q.B. 732

<sup>122</sup> *Hughes v National Union of Mineworkers* [1991] 4 All E.R. 278

<sup>123</sup> *Groves v Commonwealth of Australia* (1982) 150 C.L.R. 113

<sup>124</sup> *Mulcahy v Ministry of Defence* [1996] Q.B. 732

<sup>125</sup> [2003] EWHC 1134 (QB)

cases in which the alleged failure of the MoD occurred before 15<sup>th</sup> May 1987, the date from which the immunity conferred by section 10 of the Crown Proceedings Act 1947 was repealed; and group two comprising cases where the alleged failure of the MoD occurred after 15<sup>th</sup> May 1987.<sup>126</sup> It was accepted by the MoD that they owed a duty prior to the 1987 Act except in relation to immediate operational decisions and actions taking place within a theatre of war.<sup>127</sup> The claimants, however, argued that the MoD should have proactively detected PTSD during and after conflict, even when a soldier did not specifically report it and provide treatment for it in much the same way as they would treat a physical injury sustained in the course of combat.<sup>128</sup> This proposition was rejected by the court which held that ‘the MoD owe a duty of care as an employer and as a provider of general and specialist medical services, but no higher standard of care was imposed’.<sup>129</sup>

The claimants did not accept that the MoD was immune from action in relation to injuries sustained before 15<sup>th</sup> May 1987. The claimants contended first that statutory immunity did not extend to breaches of the duty owed to service personnel by the MoD as their employer, and secondly the injury suffered within the meaning of section 10(1) ‘was not suffered wholly or exclusively on Crown land or while the claimants were on duty.’<sup>130</sup> It was decided at first instance that the claimant’s failed in this argument on the basis of the House of Lords decision in *Matthews v Ministry of Defence*.<sup>131</sup> Here it was stated that ‘section 10, in very many cases before 1987 and in cases of latent injury sustained before 1987, substituted a no-fault system of compensation for a claim for

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<sup>126</sup> R Jay and J Glasson, ‘The PTSD litigation’ [2004] Journal of Personal Injury Law 120

<sup>127</sup> *Ibid*

<sup>128</sup> R Scorer, ‘Casualties of war’ (2009) 159/7390 New Law Journal

<sup>129</sup> R Jay and J Glasson, ‘The PTSD litigation’ [2004] Journal of Personal Injury Law 120

<sup>130</sup> *Multiple Claimants v Ministry of Defence* [2003] EWHC 1134 (QB)

<sup>131</sup> [2003] UKHL 4

damages'.<sup>132</sup> The purpose of section 10, stated in the 1947 Act, was therefore to provide a system of compensation to service personnel which excluded a common law claim for damages against the MoD. The judge held that; 'it would not have been wholly anomalous for employer's liability to be excluded from that scheme'.<sup>133</sup> This was because the Crown can only act by its servants or agents and therefore it is necessary to include employer's liability in such situations.<sup>134</sup>

Considerations of the general scope of section 10 immunity comprised a significant part of the judgment of Owen J. He approached this interpretive issue differently from the previous courts in *Mulcahy*, insisting the immunity was an exception to a generally valid principle of tortious liability. Hence it would seem that immunity had to be interpreted narrowly and not expansively. He stated; 'it should of course be no wider than is necessary. It plainly applies when service personnel are engaged with the enemy in the course of hostilities'.<sup>135</sup> Thus he decided that the judgment in the *Shaw Savill* case was correct in holding that the principle of combat immunity should cover 'attack and resistance, advance and retreat, pursuit and avoidance, reconnaissance and engagement'. Each of these activities constituted engagements with the enemy during a period of active hostilities with the exception of the *Shaw Savill* case.

The extent or ambit of combat immunity was of central importance in this case as it was in the previous cases, and as a result Owen J considered some of the issues which arose in relation to the Falklands War in order to consider whether immunity should be extended to the planning and preparation of operations. The claimants by now claimed that the MoD failed in briefing the soldiers adequately on what to expect, en route to the

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<sup>132</sup> *Ibid* [143]

<sup>133</sup> R Jay and J Glasson, 'The PTSD litigation' [2004] *Journal of Personal Injury Law* 120

<sup>134</sup> J Rowley and M Seaward, 'All you ever wanted to know about military claims but were too afraid to ask' (*Byrom Street Chambers*) < <http://www.byromstreet.com/news/wp-content/uploads/2010/12/All-you-ever-wanted-to-know-about-military-claims-J-Rowley-QC.pdf> > accessed 26 February 2013

<sup>135</sup> *Multiple Claimants v Ministry of Defence* [2003] EWHC 1134 (QB)

Falkland Islands and failed to carry out operational debriefing on the result of the operation 'at the earliest reasonable opportunity, whether in lull during battle, or following battle, campaign, attack or patrol'.<sup>136</sup>

The court concluded that immunity did cover the MoD's negligence in the planning and preparation of operations otherwise its removal would prevent the effective functioning of operations. Dixon J in *Shaw Savill* identified that the 'military objective must override the interest of the individual' so as not to prevent the effective functioning of operations.<sup>137</sup> Owen J thus reaffirmed the pragmatic policy argument already noted when he stated that the 'military cannot be constrained by the imposition of civil liability in the planning and preparation for such operations any more than in their execution'.<sup>138</sup> The decision to include the 'planning and preparation of operations' within the immunity further limited members of the armed forces in their ability to make a claim in negligence. Importantly, to include 'planning and preparation' meant that all decisions on deployment of equipment came within the scope of the immunity. As a result any negligence claim made against the MoD that has arisen through the use of inadequate or defective combat-related equipment could be unsuccessful. This has proved to be an extension of huge significance in the context of the recent Iraq and Afghanistan conflicts.

In practice, this resort to a policy justification widened the scope of combat immunity, ensuring that the MoD could not be held liable in tort for damages which occurred either during combat in the immediate theatre of war, nor during the planning and preparation of such operations.

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<sup>136</sup> J Rowley and M Seaward, 'All you ever wanted to know about military claims but were too afraid to ask' (*Byrom Street Chambers*) < <http://www.byromstreet.com/news/wp-content/uploads/2010/12/All-you-ever-wanted-to-know-about-military-claims-J-Rowley-QC.pdf>> accessed 26 February 2013

<sup>137</sup> *Shaw Savill and Albion Co. Ltd v The Commonwealth* (1940) 66 C.L.R. 344

<sup>138</sup> *Multiple claimants v Ministry of Defence* [2003] EWHC 1134 (QB)

In summary, whilst the *Mulcahy* case could be seen as having developed the doctrine of combat immunity from a Commonwealth precedent, this case certainly extended its scope to include even acts of planning and preparation, for merely potential or hypothetical future engagements such as training exercises.

The third key development in the definition of combat immunity arose in the case of *Bici v Ministry of Defence*.<sup>139</sup> It is important to discuss this case as it reduced the scope of the immunity which had previously been so heavily extended in the *Multiple Claimants* case. The High Court in *Bici* determined that the MoD would surely be held liable for negligence claims, made against them by service personnel who were injured, where they did not arise out of a 'serious and imminent threat'.<sup>140</sup> The judgment of Elias J in the *Bici* case rejected, for the first time, the MoD's reliance on the defence of combat immunity.

The case concerned personal injury claims made by Kosovo civilians against British soldiers. The soldiers were involved in a peacekeeping operation in Kosovo in respect of which they were welcomed by the inhabitants of Kosovo and were seen as liberators. It was the first Independence Day for eight years and crowds had gathered to celebrate the city's liberation and were firing guns in celebration. The soldiers mis-read the situation and consequently fired upon the claimant's car. This resulted in two of the passengers being killed and the remaining passengers claiming damages for their injuries.<sup>141</sup>

It was alleged that the soldiers owed a duty of care to the injured Kosovo claimants to prevent personal injury and failed because they did not exercise reasonable care. The soldiers claimed to have acted in self-defence as they claimed they genuinely perceived

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<sup>139</sup> [2004] EWHC 786 (QB)

<sup>140</sup> *Bici v Ministry of Defence* [2004] EWHC 786 (QB)

<sup>141</sup> *Ibid*

a threat of attack from one of the car's occupants. The judge considered Lord Diplock in *Attorney General for Northern Ireland's Reference No 1*<sup>142</sup> in which he observed that a soldier has to act intuitively in high-pressure circumstances and to recognise that their actions are:

Not undertaken in the calm and analytical atmosphere of the court room with the benefit of hindsight expounded at length the reasons for and against the kind and degree of force that was used by the accused.<sup>143</sup>

These observations by Lord Diplock were similar to May J's concluding judgment in the *Hughes* case where it was stated that public servants such as the police have to make decisions in high-pressure circumstances equivalent to that of a member of the armed forces on operations and therefore they should not be held liable in tort for damages.

In relation to the defence claim that Fahri Bici was aiming a gun at the soldiers and therefore that they fired in self-defence, Mr Justice Elias concluded that the defendants could not rely on self-defence as neither the forensic nor witness evidence on the position of the gun supported the soldiers' claim that Fahri Bici was facing them and aiming at them. This evidence was, therefore, fatal to the defendants argument that they believed themselves to be in danger as expert evidence showed that Fahri Bici was shot in the back and was not therefore facing the soldiers, suggesting that the threat of being shot by the claimant was not credible in the circumstances.

In response to their claims the MoD raised two defences, combat immunity and no duty of care. The basis of combat immunity had been set out in the *Shaw Savill* case and broadened later in *Mulcahy*. However, the scope of combat immunity had been further widened by the *Multiple Claimants* case to cover the planning and preparation of operations. In his judgment Elias J held that combat immunity 'is relied upon when a person is injured or their property is damaged or destroyed in circumstances where they

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<sup>142</sup> [1997] AC 105

<sup>143</sup> *ibid*

are the innocent victims of action arising out of combat'<sup>144</sup> as in *Mulcahy*. The soldiers in *Bici* had already been found to have acted unlawfully; therefore where self-defence failed as a defence was the court going to sanction the MoD's reliance on combat immunity?

Whilst the soldiers were essentially carrying out policing and peacekeeping functions and might, from time to time, still become engaged in attack or threat of attack, Elias J found that; 'any such threat in my view must be serious and imminent'<sup>145</sup> in order for the defence of combat immunity to arise. This interpretation of the legal requirements or test reduced the scope of combat immunity closer to that which was first established in *Mulcahy*. Under this interpretation even where members of the armed forces are under attack, it would not necessarily follow that the doctrine of combat immunity would apply as a defence for the MoD unless such an attack was 'serious and imminent'. This narrowed the scope of immunity which had previously been extended in the *Multiple Claimants* case. The *Mulcahy* case had established a legal foothold upon which cases such as *Multiple Claimants* and *Bici* then drew in this development of the doctrine.

### **3.3. Conclusion**

To summarise, in the *Mulcahy* case the MoD still owed a duty of care to the claimant because section 10 of the Crown Proceedings Act 1947 had not been revived for the purposes of the Gulf War. The MoD then relied upon the authorities of *Shaw Savill*, and the *Hughes* case in order to establish combat immunity notwithstanding the non-revival of section 10. *Shaw Savill* concluded that a duty of care was not owed in time of actual engagement with the enemy and that the principle extended to 'attack and resistance, advance and retreat, pursuit and avoidance, reconnaissance and engagement'. This

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<sup>144</sup> *Bici v Ministry of Defence* [2004] EWHC 786 (QB) at 101

<sup>145</sup> *Ibid* [102]

broad definition was adopted by the trial judge in *Mulcahy* and had negative implications for the claimant's claim as the firing of the gun was held to constitute battle conditions.

The trial judge also accepted that the scope of the duty of care was also dependent on similar reasoning laid out in the *Hughes* case that; 'fear of a negligence claim would be likely to affect the decisions of the task which the decisions are intended to advance'.<sup>146</sup> Based on this interpretation, the trial judge in *Mulcahy* concluded that it would not be fair, just and reasonable to impose a duty of care between fellow servicemen operating in warlike conditions even though injury might be foreseeable.<sup>147</sup> Thus the claims by *Mulcahy* failed.

The definition of combat immunity had been extended in the *Multiple Claimants* case to provide the MoD with immunity in relation to the planning and preparation for combat. It was held that the MoD did not owe a duty to maintain a safe system of work when engaged with the enemy or in the planning and preparation of war.<sup>148</sup>

However it could be said that the extension of this immunity was taken too far as it covered the planning and preparation of operations and police and peacekeeping operations so stated in *Multiple Claimants*. Mr Justice Elias in *Bici* narrowed the scope of immunity so that it would only apply if there was an attack or threat of attack which was 'serious and imminent'.<sup>149</sup> No legal definition of these words was given and it is assumed that their normal meanings apply.

The duty of care issue discussed in the relevant case law of this chapter has been through a complex process of common law determination and the result is a tortious immunity which made it impossible for a member of the armed forces to bring a claim

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<sup>146</sup> *Hughes v National Union of Mineworkers* [1991] ICR 669

<sup>147</sup> *Mulcahy v Ministry of Defence* [1996] QB 732

<sup>148</sup> *Multiple Claimants v Ministry of Defence* [2003] EWHC 1134 QB

<sup>149</sup> *Bici v Ministry of Defence* [2004] EWHC 786 (QB) at 102

against the MoD in relation to deaths or serious injuries sustained as a result of armed conflict.

Because of the significant effect of combat immunity it is necessary to turn to public policy arguments which drove the developments of combat immunity and see if they stand up to scrutiny.

## **Chapter Four**

### **Public Policy Issues**

As shown in the previous chapters where negligence is concerned the English courts have been protective of the MoD in relation to claims made against them by members of the armed forces. This protective barrier to claims of negligence exists in other public services because the common law has resorted to a public policy based protection of the police, fire service and emergency services. Many arguments rooted in public policy concerns have sought to significantly limit liability, but would increased liability in fact lead to a defensive approach?

This chapter will analyse these public policy issues and determine whether it is fair, just and reasonable to impose a duty of care on the armed forces where it could be argued that they have failed to provide adequate equipment.

#### **4.1. Defensive practice argument**

The extent to which public bodies are to be held liable in negligence has been regularly revisited by the English courts. However the courts have yet to provide clarity and consistency to the principles.<sup>150</sup> While the courts acknowledge that the principal obligation when dealing with a negligence claim is to provide a remedy to the victim, there are a number of public policy arguments set against this. The public policy arguments are as follows; liability would lead to the inefficient use of public resources, time and money; it would lead to a flood of claims against the public body and it would lead to the public body acting in a defensive frame of mind. These public policy arguments have been deployed to deny public body liability as they set a demanding

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<sup>150</sup> S Bailey, 'Public authority liability in negligence: the continued search for coherence' (2006) 26:2 Legal Studies 155

standard for demonstrating that a public body has acted negligently.<sup>151</sup> The latter of the policy arguments above concerns two arguments on the impact of liability. Firstly, there is the argument that liability would lead public bodies to act in a detrimental frame of mind when carrying out their functions and secondly, in contrast to the first argument, it could be argued that liability would improve performance and lead to a higher standard of performance by public bodies.

The courts have adopted different methods for limiting public authority liability in negligence, and the issue of public policy first emerged as a significant limitation in *Hill v Chief Constable of West Yorkshire*<sup>152</sup> where the mother of the latest victim of the serial killer, the ‘Yorkshire Ripper’, brought an action against the police for negligently failing to identify and capture the killer before he had chance to murder her daughter.<sup>153</sup> The claim failed for two reasons; firstly there was not sufficient proximity between the police and her daughter; secondly the claim was defeated by public policy arguments of the need to avoid defensive practice and diversion of police resources.<sup>154</sup> Giving the leading speech of the House in *Hill*, Lord Keith of Kinkel acknowledged that liability could improve the standards of public bodies, stating:

Potential existence of such liability may in many instances be in the general public interest, as tending towards the observance of a higher standard of care in the carrying on of various types of activity.<sup>155</sup>

However he later rejected this possibility on the basis that:

‘it would be contrary to public policy to allow the action to proceed because the imposition of a duty of care would not be in the public interest; the imposition of liability may lead to the exercise of a function being carried out detrimentally; and a

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<sup>151</sup> A Marsh, ‘The impact of liability on public bodies: lessons from the literature’ (Socio-Legal Studies Association Conference, University of Bristol, March 2008)

<sup>152</sup> [1989] AC 53

<sup>153</sup> *Ibid*

<sup>154</sup> C McIvor, ‘Getting defensive about police negligence: The Hill principle and the Human Rights Act 1998 and the House of Lords’ (2010) 69 Cambridge Law Journal 133

<sup>155</sup> *Hill v Chief Constable of West Yorkshire* [1989] AC 53

great deal of police time and expense would have to be invested in the preparation of a defence in action’<sup>156</sup>

Lord Keith did not think that imposing liability in those circumstances on the police force would improve the standard of care or motivation when carrying out police functions and therefore the police should be immune from such action.

The *Hill* case was interpreted as a doctrine of immunity for the police from negligence actions arising from activities aimed at the suppression and investigation of crime and was later extended in the *Hughes*<sup>157</sup> case to include operational decisions. The *Hill* case represented an illustration of tension between the broad issues of policy and the imposition of a duty of care, and consequently deterred the majority of actions made against the police.

The reasoning of Lord Keith in the *Hill* case can be appreciated upon the facts as it would be undesirable to subject the police to a complex police investigation if every family member of people killed by a serial killer were to bring a case against them (and succeed). However, it has not been made clear that the imposition of negligence liability would result in investigations being conducted in a detrimental manner or that it would open up a potential ‘flood’ of claims, arguments which will be examined later on in this chapter.

Nevertheless, Lord Keith’s public policy principle has been applied throughout the courts, even in cases where police negligence was more apparent. In *Brooks v Commissioner of Police*<sup>158</sup> the claimant was a black youth who had witnessed the murder of his friend, Stephen Lawrence. A subsequent police enquiry found that the police had not properly dealt with the claimant as the claimant had been; ‘stereotyped as a young black man exhibiting unpleasant hostility and agitation, and whose condition

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<sup>156</sup> J Hartsthorne, N Smith and R Everton, ‘Caparo under fire: the study into the effects upon the fire service of liability in negligence’ (2000) 63:4 Modern Law Review 502

<sup>157</sup> *Hughes v National Union of Mineworkers* [2001] 4 All ER 278

<sup>158</sup> [2005] UKHL 24

and status simply did not need further examination or understanding.’<sup>159</sup> As such the claimant brought a negligence claim against the police, alleging that they owed him a duty of care to take reasonable steps to assess whether he had been a victim of a crime and afford him appropriate support and assistance.<sup>160</sup>

However, upon the reasoning of *Hill*, Lord Steyn held that no such duty of care could be owed to the claimant, as although it is desirable for the police to treat victims of crime appropriately, ‘to convert that ethical value into general legal duties of care ... would be going too far.’<sup>161</sup>

The *Brooks* case should not have been dealt with under the *Hill* principle as there were strong reasons for imposing a duty of care based on the *Caparo* principles of foreseeability, proximity and fair, just and reasonableness. Furthermore the *Hill* case stemmed from a third party liability action and the statements made on public policy reasoning were specific to that case, and should not have been used to illuminate a duty of care in the *Brooks* case where it was clear that the police had acted negligently towards the claimant.

The public policy arguments set out in *Hill* are just that, arguments, as the court did not base its decisions on factual evidence, but upon the legal submissions of counsel and the comments of the judges, all based on speculation.<sup>162</sup> Public policy arguments are all aspects of the third limb of the *Caparo* test on whether it would be fair, just and

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<sup>159</sup> Home Affairs Committee, Twelve Report of Session 2008-09, *The Macpherson Report- Ten years on*, HC 427 para.5.12  
<<http://www.archive.official-documents.co.uk/document/cm42/4262/sli-05.htm>> accessed 22 March 2013

<sup>160</sup> P Giliker and S Beckwith, *Tort* (4<sup>th</sup> edn, Sweet and Maxwell, 2011) p.55

<sup>161</sup> *Brooks v Commissioner of Police* [2005] UKHL 24 para 30

<sup>162</sup> J Hartsthorne, N Smith and R Everton, ‘Caparo under fire: the study into the effects upon the fire service of liability in negligence’ (2000) 63:4 *Modern Law Review* 502

reasonable to impose a duty of care and these arguments include whether the imposition of a duty of care would lead to defensive practices and a diversion of resources.<sup>163</sup>

There is nothing wrong with somebody acting more cautiously, thus improving the standard of care and avoiding unnecessary harm to others. Questions could be raised as to why a duty of care would make public bodies act in a unnecessarily careful manner instead of encouraging them to exercise the ordinary standard of care which would be sufficient and protect them from liability. On the other hand it could also be said that not holding a public body liable for negligent conduct could make them more complacent in the exercise of their duties and therefore their standard of care could deteriorate.<sup>164</sup> One idea of the defensive practice argument is that it will take extra time and resources to illuminate the risks that could lead to a negligence claim arising against a public body.

The courts will not generally interfere with the decisions public bodies make when weighing up public policy issues as the courts are not competent to determine whether policy matters have been assessed with proper care, as those issues are non-justiciable.<sup>165</sup> Lord Browne-Wilkinson in *X (Minors) v Bedfordshire County Council*<sup>166</sup> said that non-justiciable issues would include; ‘... the allocation of finite financial resources ... or ... the balance between pursuing desirable social claims as against the risk of the public inherent in doing so.’<sup>167</sup> The MoD have argued that equipment procurement decisions include matters of public policy and as such are non-justiciable and therefore it should not be for the courts to decide on such matters.<sup>168</sup> However

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<sup>163</sup> *Ibid*

<sup>164</sup> B Markesinis and S Deakin, *Tort Law* (4<sup>th</sup> Edn, Clarendon Press, 1999) pg 97

<sup>165</sup> J George and A Lidbetter, ‘Negligent public authorities and convention rights- the legacy of Osman’ [2001] *European Human Rights Law Review* 599

<sup>166</sup> [1995] 2 AC 923

<sup>167</sup> [1995] 2 AC 923 at 953

<sup>168</sup> *Smith v Ministry of Defence* [2012] EWCA Civ 1365

would a duty of care in such circumstances impose an unreasonable burden on the MoD?

#### **4.2. Would a duty of care impose an unreasonable burden on the Ministry of Defence in combat?**

The main issues that arise when discussing the imposition of negligence liability on public bodies and particularly upon the MoD is whether imposing a duty of care would create an unreasonable burden on the defendant, so much so, that it affects the diversion of resources, time and money and leads to public bodies carrying out their functions in a defensive frame of mind. The diversion of resources argument suggests two ways in which a public body could lose assets, firstly, by taking defensive measures to avoid litigation and secondly, by having to pay actual damages as a result of negligent conduct.

In regard to the latter public policy argument Lord Neuberger in *Smith v Ministry of Defence*<sup>169</sup> was of the opinion that the policy argument established in the *Hill* case 'affords no warrant for denying the existence of a duty of care,'<sup>170</sup> further stating that:

The fact that policy considerations and the scarcity of resources will arise in relation to allegations of negligence against the MoD provides no basis for distinguishing the MoD from any other public body in relation to the duty it owes to its employees...<sup>171</sup>

The MoD have argued both in this case and previous cases already discussed in chapter three that they owe no duty of care to members of the armed forces for deaths or injuries arising out of combat. However it should not be disputed that the MoD owes a duty of care at common law to members of the armed forces as their employer. The Health and Safety at Work Act 1974 and subsequent secondary legislation impose statutory duties

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<sup>169</sup> [2011] EWHC 1676 (QB)

<sup>170</sup> *Ibid* [50]

<sup>171</sup> *Ibid* [52]

upon the MoD to provide a 'safe system of work',<sup>172</sup> and to construct or adapt work equipment so that it is fit for purpose under the Provision and Use of Work Equipment Regulations 1998 (PUWER).<sup>173</sup> The territorial scope of these regulations however is limited to Great Britain and therefore they do not extend to operational conflicts abroad. Therefore would these regulations apply to the MoD in relation to equipment decisions made long before any battle?

Two main cases came before the Court of Appeal in October 2012. The first claim, known as the Challenger claims, was brought by Deborah Albutt for the death of Steven Albutt, and by Daniel Twiddy and Andrew Julian who were both injured in the same incident as Steven Albutt.<sup>174</sup> The second case was brought by Courtney Ellis, a minor, by her litigation friend Karla Ellis, and by Karla Ellis on her own behalf for the death of Private Ellis, known as the Ellis claims.<sup>175</sup> The Challenger claims alleged that the MoD was in breach of a duty of care as an employer to provide safe equipment and technology, while the Ellis claims allege that the MoD failed to provide better armoured vehicles and failed to ensure that element A had been fitted to the Snatch Land Rover. As the claims related to inadequate equipment they gave rise to the issues of procurement.

As such the MoD argued that no duty of care should be imposed on them in relation to the procurement of equipment as such issues were not justiciable, stating;

'Such issues involve consideration of questions as to the scarcity and allocation of resources and questions of policy... The courts ought not to trespass into such territory, which is the province of those in command, and of politicians answerable to parliament.'<sup>176</sup>

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<sup>172</sup> Available on the Parliament Publications website.

<<http://www.publications.parliament.uk/pa/cmselect/cmdfence/63/6305.htm>> Accessed 08 May 2013

<sup>173</sup> The Provision and Use of Work Equipment Regulations Act 1998, Regulation 4.

<sup>174</sup> *Albutt and others v Ministry of Defence* [2012] EWCA Civ 1365

<sup>175</sup> *Ellis and Another v Ministry of Defence* [2012] EWCA Civ 1365

<sup>176</sup> *Albutt and others v Ministry of Defence* [2012] EWCA Civ 1365; *Ellis and Another v Ministry of Defence* [2012] EWCA Civ 1365 [41]

The MoD also sought to rely on combat immunity to argue that the courts could not adjudicate on decisions made in active operations. However the question as to whether decisions on equipment procurement made long before any battle could fall within the scope of combat immunity is one to be determined on the facts at trial, and therefore the MoD's appeal to strike out the equipment claims was dismissed.<sup>177</sup> The facts of each case were determined by the Supreme Court in their judgment on the 19<sup>th</sup> June 2013, in which the majority held:

The question which these claims raise is whether the doctrine of combat immunity should be extended from actual or imminent armed conflict to failures at that earlier stage. I would answer it by saying that the doctrine should be narrowly construed. To apply the doctrine of combat immunity to these claims would involve an extension of that doctrine beyond the cases to which it has previously been applied. That in itself suggests that it should not be permitted....<sup>178</sup>

Although the Supreme Court's decision is a landmark ruling in that the government and the MoD have a legal duty of care to protect service personnel in combat, it only allows for cases to be pursued in the courts and does not mean that damages will definitely be awarded.<sup>179</sup>

The closest analogy to the armed forces when considering the employer/employee relationship are cases relating to duties of care owed by employers to their staff in relation the emergency services. The Court of Appeal in *King v Sussex Ambulance Service NHS Trust*<sup>180</sup> held that:

An ambulance service owes the same duty of care towards its employees as does any other employer. There is no special rule in English law qualifying the obligations of others towards fire fighters, or presumably police officers, ambulance technicians and others whose occupations in the public service are inherently dangerous.<sup>181</sup>

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<sup>177</sup> *Ibid*

<sup>178</sup> *Smith and Other v Ministry of Defence* [2013] UKSC 41

<sup>179</sup> Tom Whitehead, 'Landmark ruling for military families paves the way for damages claims' *Telegraph* (London, 19 June 2013)

< <http://www.telegraph.co.uk/news/uknews/law-and-order/10130490/Landmark-ruling-for-military-families-paves-way-for-damages-claims.html>> accessed 21<sup>st</sup> June 2013

<sup>180</sup> [2002] ICR 1413

<sup>181</sup> *Ibid* [21]

It further stated that:

Such public servants accept the risks which are inherent in their work, but not the risks which the exercise of reasonable care on the part of those who owe them a duty of care could avoid. An employer owes his employees a duty to take reasonable care to provide safe equipment and a safe system of work, which includes assessing the tasks to be undertaken, training in how to perform those tasks as safely as possible, and supervision in performing them.<sup>182</sup>

Therefore taking the Court of Appeals judgment in the *King* case and applying it to current armed forces equipment cases, could it not be argued that although service personnel are aware of the risks they face in combat, there should still be a duty of care on the MoD to ensure that such risks are avoided as far as reasonably possible by providing suitable equipment?

As the MoD have argued, issues of procurement may give rise to complex questions of political nature or to decisions in which caution must be accorded when addressing the fair, just and reasonable test of *Caparo*. Yet this should not afford to it a blanket exclusion of liability. This point was addressed by Lord Nicholls in *Stovin v Wise and Norfolk County Council*<sup>183</sup> in which he stated:

He (the individual) must act as would a reasonable person in his position. The standard of reasonableness is to be measured by what may reasonably be expected of the defendant in his individual circumstances. Where action calls for expenditure, the court if necessary will have regard to the financial resources of the defendant.<sup>184</sup>

The allocation of resources argument is often deployed by the MoD to deny any existence of a duty of care in relation to the procurement of equipment, whether or not the decisions on such equipment are made long before the heat of any battle. But the mere fact that policy questions may arise as to the allocation of resources should not in itself preclude the existence of a legal duty of care. In support of this, Moses LJ relied

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<sup>182</sup> *Ibid* [23]

<sup>183</sup> [1996] AC 923

<sup>184</sup> *Ibid*

upon the House of Lords decision in *Barrett v Enfield London Borough Council*<sup>185</sup> which accepted that the existence of a duty of care owed by a local authority to a child in care was unclear, even though the case raised policy questions as to the defensive conduct by care authorities.

The fact that equipment claims may give rise to policy issues of procurement is not persuasive enough to result in the claimant failing the third limb of the *Caparo* test. The MoD do not put forward any empirical evidence to suggest that imposing a duty of care upon them in relation to procurement issues would place an unreasonable burden on resources.

In addition to the argument that the imposition of a duty of care would raise procurement issues, it is also submitted by the MoD that in negligence liability claims the imposition of a duty of care is not in the wider interests of the community since it would mean that the armed forces would go into action subject to the law of civil negligence. In the *Hill* case Lord Keith raised this public policy issue stating that it would result in operations being conducted in a detrimentally defensive frame of mind.<sup>186</sup> This would be afforded some truth if the courts were saying that individual soldiers could be found liable if the decisions they made in the heat of battle resulted in the harm of another soldier. However this is not the case as was established in chapter three in the judgment of Neill LJ in the *Mulcahy* case.

Combat immunity was adopted as a way of dismissing this negligence liability for deaths and injuries arising out of conflict as it would be unreasonable to impose a duty of care on members of the armed forces when they have to make quick decisions in the heat of battle.

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<sup>185</sup> [2001] 2 AC 550

<sup>186</sup> D P.J. Walsh, 'Police liability for a negligent failure to prevent crime: Enhancing accountability by clearing the public policy fog' (2011) 22 Kings Law Journal 27

Even if it is unreasonable to impose a duty of care in battle situations does this mean that it is also unreasonable to impose a duty of care in relation to the procurement of equipment long before any battle?

As a result of the judgments handed down in *Mulcahy v Ministry of Defence*,<sup>187</sup> *Multiple Claimants v Ministry of Defence*<sup>188</sup> and *Bici v Ministry of Defence*<sup>189</sup> the scope of combat immunity emphasis is on ‘actual engagement’ and the ‘heat of battle’. The procurement of equipment on the other hand is related to acts or omissions which may occur many years before any active operations and therefore it seems arguable that equipment claims fall outside of the scope of combat immunity. Combat immunity should be narrowly construed as expressed by Elias J in the *Bici* case, that to apply the immunity to equipment procurement would involve an extension of the doctrine beyond cases to which it had previously been applied. If such claims are to fall within the scope of combat immunity it would seem that this would be because equipment decisions relate to future active operations, but if combat immunity is to extend so far, it is difficult to see how anything done by the MoD will fall beyond it.

While the MoD will continue to adopt combat immunity to repudiate a negligence claim arising out of combat because of issues arising from policy, decisions that are made in the UK before any combat should not attach to them any immunity.

The question of liability for public authorities and the MoD for the decisions which they make on procurement has its foundations in the principles of Crown immunity. Decisions on public authority and MoD liability often involve arguments as to the operational and policy issues.

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<sup>187</sup> [1996] QB 732

<sup>188</sup> [2003] EWHC 1134 (QB)

<sup>189</sup> [2004] EWHC 786 (QB)

A distinction is often made between activities involving matters of ‘policy’ and activities which are regarded as ‘operational’ and are in many cases a persistent feature of reasoning in public policy cases. This was explored in *Anns v Merton LBC*.<sup>190</sup> In *Anns* the way in which buildings were inspected was seen to be an ‘operational’ activity to which negligence liability may attach itself, but the decision to allocate financial resources would be immune from suit as such policy decisions are not justiciable.<sup>191</sup> The problem with this distinction, however, is that it is difficult to identify operational matters that do not involve any element of policy.<sup>192</sup> An example of a non-justiciable claim would be where a duty of care is said to be owed by a branch of the Government or police, in making a policy decision regarding the allocation of resources. It was suggested by Cory J in *Just v British Columbia*<sup>193</sup> that; ‘policy decisions should be exempt from tortious claims so that Governments are not restricted in making decisions based upon social, political or economic factors’.<sup>194</sup> Decisions made on the policy issue focus on the scrutinising of a decision which has already been made and not decisions which may be made in the future. The courts therefore persistently disallow public negligence liability to arise in such circumstances. Decisions on liability with regard to the operational and policy issues for public authorities such as the fire brigade differ from those made for MoD liability. When firemen go to fight fires they are on the operational plane and can be held liable for any negligent decisions made whereas if questions of policy arise it will be difficult to establish liability. This point was established by Lord Wilberforce in the *Anns* case in which he stated that there is a

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<sup>190</sup> [1978] A.C. 728 HL

<sup>191</sup> P Giliker and S Beckwith, *Tort* (4<sup>th</sup> edn, Sweet and Maxwell, 2011) p.46

<sup>192</sup> *Ibid*

<sup>193</sup> [1989] 2 SCR 1228

<sup>194</sup> *Ibid* [1240]

distinction between operational and policy areas and that it was only the latter which should provide immunity for public authorities.<sup>195</sup>

In contrast, through the judgments of cases which have come before the courts in relation to deaths and injuries of service personnel on the battlefield, it was held in the *Mulcahy* case that a duty of care would not be owed for negligent actions which arise as a result of combat. However, decisions made with regard to resources and equipment have been brought before the courts in cases such as *Albutt and others v Ministry of Defence*<sup>196</sup> discussed earlier in this chapter, to argue that liability should attach itself where a member of the armed forces has been killed or seriously injured as a result of negligent decisions that have been made long before any conflict. In the *Albutt* case Mr Justice Owen rejected the MoD's claim that it did not owe a duty of care towards soldiers, in relation to equipment, due to combat immunity. In considering whether to impose liability for negligence would be fair, just and reasonable would depend on the nature of each case, the equipment and its availability and a risk/benefit analysis.<sup>197</sup> The MoD has not provided any compelling arguments for a negligence claim to be struck out in relation to the procurement of equipment.

### **4.3. Conclusion**

This chapter has sought to demonstrate the inadequate response of English law in the difficult area of cases arising from negligence against public bodies and the MoD. The MoD has argued that they do not owe a duty of care in combat for equipment failings due to public policy arguments. However it seems that such arguments are not persuasive. Matters of policy bear up for errors in battle but not for equipment decisions made long before any battle which have time for considered thought and exercise of

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<sup>195</sup> *Anns v London Borough Council* [1978] AC 728 at 968-70

<sup>196</sup> [2012] EWCA Civ 1365

<sup>197</sup> *Ibid*

judgment. While negligence liability should not attach itself to soldiers making decisions in the heat of battle, there should at least be a duty of care owed in relation to equipment decisions made months or even years before any conflict operations. Liability placed upon the MoD for supplying inadequate equipment which has led to deaths and injuries of service personnel in combat would mean more efficiency in the procurement of equipment and would not lead to a defensive approach as suggested.

Ignoring combat immunity for now, if a hypothetical injured soldier was able to proceed with a tort claim, what would be the courts findings in terms of tortious hurdles of the standard of care, proximity and causation? These issues are not normally considered as combat immunity inhibits common law considerations. This thesis will now turn to examine the three issues starting with the standard of care.

## Chapter Five Standard of Care

The standard of care which a defendant will owe is one that is set by law, but the question as to whether the defendant fell below that standard of care is set by the facts of each case. Once it has been established that the defendant owes a duty of care, it must then be established whether that duty of care has been breached. This chapter will deal with the general principles the courts employ when setting a standard of care and whether these principles show the MoD being in breach of its duty of care to service personnel. By examining the standard of care would this mean that as a result of the public policy issues examined in the previous chapter, a lower or no standard of care will be placed upon public bodies such as the MoD? With this in mind will the MoD meet the necessary standard of care so as not to be held negligently liable for the deaths or serious injuries of service personnel in combat?

In order to approach this, the degree of proportion between the costs of preventative measures that would need to be taken if a duty of care were recognised must be weighed against the prospect of harm.<sup>198</sup>

### **5.1. General principles for establishing a standard of care**

The standard of care requirement operates as an additional limiting factor to the finding of liability for a negligence claim. Liability can arise in negligence only if a public body's acts or omissions fall below or breach the required standard of care that would normally be exercised by that of 'the reasonable person.' This was confirmed by Alderson B in *Blyth v Birmingham Waterworks Co*<sup>199</sup> who said:

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<sup>198</sup> A Robertson, 'Justice, community welfare and the duty of care' [2011] Law Quarterly Review 370

<sup>199</sup> (1856) 11 Ex 781

Negligence is the omission to do something which a reasonable man, guided upon those considerations which already regulate the conduct of human affairs, would do, or doing something which a reasonable and prudent man would not do.<sup>200</sup>

If the standard of care is not fulfilled to the reasonable and prudent man standard then the defendant would have been adjudged to have acted negligently.<sup>201</sup> Primarily the standard of care will determine performance standards expected of a public body in order for them to avoid liability.<sup>202</sup> Unfortunately the aspect of standard of care has received little attention from the courts in respect of the MoD in the context of operational activities, presumably because of the focus on policy issues and combat immunity that prevent cases involving operational activities getting as far in the courts so as to discuss the standard of care issue. The continued existence of combat immunity is evidence that there is a certain category of cases such as those discussed in chapter 3 involving operational activities, in which the courts will say that there is no duty of care owed by the MoD to soldiers in such circumstances, rather than to say that there is a duty but the standard of care is so low in combat that the MoD have not breached it. It would seem that by drawing analogy with established approaches in previous cases involving the exercise of professional competences, a claim will only proceed where the MoD performance has fallen below the standard of care reasonably expected.

On the matters relevant to prove a defendant's breach of a standard of care two main factors must be established; whether there was foreseeability of harm; and secondly assessing the magnitude of risk.

If the harm suffered by the claimant was not foreseeable then the defendant will not be deemed to be negligent. This is because the reasonable person cannot be expected to

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<sup>200</sup> *Ibid*

<sup>201</sup> M.J. Poelle, 'The foreseeability concept and strict products liability: The odd couple of tort law' [1976-77] 8 Rutgers Camden Law Journal 101

<sup>202</sup> D P J. Walsh, 'Police Liability for a negligent failure to prevent crime: Enhancing accountability by clearing the public policy fog' (2011) 22 Kings Law Journal 27-55

take precautions against unforeseeable risks.<sup>203</sup> For example, in *Roe v Minister of Health*<sup>204</sup> the defendant was not held liable for the paralysis of the claimant after a spinal anaesthetic was contaminated with phenol. The reason for this was that it was not known at the time that contamination could occur through invisible cracks in the glass when the anaesthetic was stored in phenol. Therefore without prior knowledge of this the defendant could not have taken any precautions against the risk of contamination.

To take the foreseeability factor and compare it to situations in which service personnel have died or been seriously injured in combat as a result of allegedly inadequate equipment, could it not be argued that the MoD have knowledge that service personnel run a high risk of being shot at, or being exposed to IED's and therefore can reasonably foresee that to deploy service personnel on operations with inadequate equipment might result in a high risk of death or serious injury?

There is no doubt that the MoD owes members of the armed forces a duty of care at common law to provide a safe system of work and safe equipment under the Health and Safety at Work Act 1974. However no such duty arises in battlefield situations.<sup>205</sup> The MoD has argued that in extreme battlefield conditions they cannot be expected to maintain a level of care similar to that of a regular employer, but what amounts to reasonable care in the circumstances? As Lord Hoffman stated in *Tomlinson v Congleton BC*:<sup>206</sup>

The question of what amounts to reasonable care depends upon assessing not only the likelihood of injury and the seriousness of the potential injury, but also the social value of the activity which gives rise to the risk and cost of preventative measures. These factors have to be balanced against each other.<sup>207</sup>

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<sup>203</sup> P Giliker and S Beckwith, *Tort* (4<sup>th</sup> edn, Sweet and Maxwell, 2011) p.140

<sup>204</sup> [1954] 2 Q.B. 66

<sup>205</sup> R Scorer, 'Casualties of war' (2009) *New Law Journal* 7390

<sup>206</sup> [2003] 2 WLR 1120

<sup>207</sup> *Ibid*

The main context relating to the standard of care which the MoD should owe to service personnel relates to equipment decisions made long before any combat and within the baseline of Great Britain. It is reasonably foreseeable that a member of the armed forces will be at a high risk of death or serious injury during combat operations abroad and therefore the MoD must provide adequate equipment that will protect soldiers against such risks. The MoD should take reasonable steps by analogy to the reasonable person test, by providing sufficient body armour and vehicles to minimise the risk of injury or death to service personnel. This was established by Aikens LJ in *Whippy v Jones*<sup>208</sup> who stated; ‘The court must be satisfied that a reasonable person in the position of the defendant would contemplate that injury is likely to follow from his acts or omissions.’<sup>209</sup>

One of the most prominent cases concerning a breach of a statutory duty was that of the Nimrod aircraft explosion which killed all 16 service personnel on board. The families of those 16 service personnel killed sought to sue the MoD for failing to minimise risk. The MoD owed a duty of care to the 16 deceased to ensure that the aircraft was safe to fly, and failed in that duty of care by carrying out an inferior safety review of the aircraft.<sup>210</sup> In a landmark legal admission the MoD admitted that they had breached a duty of care when they failed to ensure the safety of 16 service personnel who were killed when their Nimrod aircraft exploded during air-to-air refuelling.<sup>211</sup> This out of court admission by the MoD has been the only case in which they have taken full responsibility and adequately compensated the victim families without their having to go through the Armed Forces Compensation Scheme (AFCS) or the courts.

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<sup>208</sup> [2009] EWCA Civ 452

<sup>209</sup> *ibid*

<sup>210</sup> C Hadden-Cave, ‘The Nimrod Review: an independent review into the broader issues surrounding the loss of the RAF Nimrod MR2 Aircraft XV230 in Afghanistan 2006’ (28 October, 2006)

<sup>211</sup> J Doward and M Townsend, ‘MoD takes blame for 14 military deaths in Nimrod blast’ *Guardian* (29 March 2009)

<<http://www.guardian.co.uk/uk/2009/mar/29/nimrod-legal-admission>> accessed 1st April 2013

Taking the second factor, of assessing the magnitude of risk, into account involves the consideration of two elements; firstly if there is a likelihood that harm will occur; and secondly the seriousness of the consequences if harm did occur.<sup>212</sup> The case of *Walker v Northumberland County Council*<sup>213</sup> relates to the first element on whether there is a likelihood of harm. The claimant in the case suffered a nervous breakdown due to considerable stress and pressure from work. After returning to work on the agreement that he would be assisted with the workload, which was withdrawn within a month, the claimant suffered a second mental breakdown and was diagnosed with stress related anxiety.<sup>214</sup> The court found that it was reasonably foreseeable that the claimant would suffer a mental breakdown as a consequence of not being able to cope with his work, and that there was a risk of repetition if he was exposed to the same workload.<sup>215</sup> Thus there was a likelihood that harm would occur as a result of the stress of the workload.

Taking the armed forces into account when assessing the likelihood of harm it could be argued that the risk of harm occurring is high given the exposure to violence on the battlefield.

In *Multiple Claimants v Ministry of Defence*,<sup>216</sup> combat immunity proved to be a barrier to establishing whether the standard of care exercisable by the MoD would require the detection and treatment of PTSD. There is clear evidence that symptoms similar or equal to those established with PTSD have occurred in a number of service personnel in nearly every major conflict since WWI.<sup>217</sup> It is legitimate to argue in

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<sup>212</sup> P Giliker and S Beckwith, *Tort* (4<sup>th</sup> edn, Sweet and Maxwell, 2011) p.141

<sup>213</sup> [1995] 1 All ER 737

<sup>214</sup> *Ibid*

<sup>215</sup> K Seward, 'Employers' liability in the United Kingdom: Walker v Northumberland County Council - flee or fight?' (1995) *International Insurance Law Review* 107

<sup>216</sup> [2003] EWHC 1134 (QB)

<sup>217</sup> Dr S Wilson, 'Synopsis of causation: Post traumatic stress disorder' (*Ministry of Defence*, September 2008) < <http://www.veterans-uk.info/pdfs/synopsis/ptsd.pdf> > accessed 17 May 2013

principle that the MoD knew that there is significant risk of personnel contracting PTSD and that the MoD should embed processes that detect and treat it.

The second element of the magnitude of risk involves the seriousness of the consequences that arise from not taking appropriate steps to ensure an adequate standard of care. To look towards the armed forces it is clear that the consequences of not providing an appropriate standard of care would result in death or serious injury to service personnel or to on-going mental health issues. Nevertheless the doctrine of combat immunity remains a firm barrier to negligence claims against the MoD; the result is that the MoD has thus avoided meaningful common law review of the standard of care it should employ in regard to service personnel employed in varied and diverse conflict theatres.

While assessing the magnitude of risk and foreseeability of harm occurring the courts also take into account the social utility of the act in order to determine whether the cost of reducing or eliminating the risk outweigh the benefits of not doing so. The courts will deem some risks worth taking if the defendant's purpose has social utility, which is particularly relevant in times of war and emergency.<sup>218</sup>

## **5.2. The Burden of taking precautions**

The cost of taking precautions balanced against the probability of risk of harm will be taken into account by the courts when assessing whether a defendant has been negligent.

If the burden of steps taken to eliminate the risk is far greater than the benefit of eliminating it, then a failure to take those steps will not amount to negligent liability.<sup>219</sup>

In *Latimer v AEC Ltd*<sup>220</sup> the defendant's factory was flooded leaving a slippery residue on the floor. The defendants put sawdust on most of the floor but could not cover the

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<sup>218</sup> A Mitchell, *AS Law* (3<sup>rd</sup> edn, Routledge-Cavendish, 2009)

<sup>219</sup> P Giliker and S Beckwith, *Tort* (4<sup>th</sup> edn, Sweet and Maxwell, 2011)

<sup>220</sup> [1952] 2 QB 710

whole floor as they did not have enough. The claimant consequently slipped on the part of the floor where there was no sawdust and it was argued by the claimant that the factory should have been closed to prevent injury. In his judgment Denning LJ held that:

The employers knew the floor was slippery and that there was some risk in letting the men work on it; but still they could not be reasonably expected to shut down the whole works and send all the men home ... it is quite clear the defendant did everything they could have reasonably expected to do ... therefore there was no negligence at common law.<sup>221</sup>

However there was only a minimal risk that an employee would slip and injure them whereas the risk of death or injury in the armed forces is extremely high. The MoD set their level of required safety risks for both peacetime and wartime on ALARP, which means that risks should be reduced to a level that is 'As Low As Reasonably Practicable'.<sup>222</sup> A risk is deemed to be ALARP when:

It has been demonstrated that the cost of any further risk reduction, where the cost includes the loss of defence capability as well as financial or other resource costs, is grossly disproportionate to the benefit obtained from that risk reduction.<sup>223</sup>

It could be argued that the cost of supplying more body armour or better armoured vehicles would not outweigh the benefit of reducing the risk of death or serious injury for service personnel. The more deaths and injuries that occur from combat, however, the more compensation claims will be made. Thus it would benefit the MoD to provide sufficient equipment to reduce the risk of death or serious injury. This was referred to in the case of *Edwards v National Coal Board*<sup>224</sup> in which the Court of Appeal held in respect of a duty of care at common law that:

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<sup>221</sup> *Ibid*

<sup>222</sup> C Hadden-Cave, 'The Nimrod Review: an independent review into the broader issues surrounding the loss of the RAF Nimrod MR2 Aircraft XV230 in Afghanistan 2006' (28 October, 2006)

<sup>223</sup> Ministry of Defence, 'MoD SMS Procedures SMP07: Risk and ALARP evaluation' (November 2007) <[https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/27580/SMP07v22final.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/27580/SMP07v22final.pdf)> accessed 17 May 2013

<sup>224</sup> [1949] 1 KB 704

... In every case it is the risk that has to be weighed against the measures necessary to eliminate the risk. The greater the risk, no doubt, the less will be the weight given to the factor of the cost.<sup>225</sup>

If the MoD believes that deploying equipment such as the Snatch Land Rover is a smaller risk than not supplying them at all, then they would have complied with the level of safety risk by the ALARP principle. However in the more recent case of *Albutt and Others v Ministry of Defence*<sup>226</sup> the MoD had failed in fitting the Challenger tanks with technology which would protect them adequately against the risk of friendly fire. The risk of death and serious injury in the *Albutt* case was far greater than the cost of fitting the technology which would have protected them. The impact of equipment shortages and inadequate equipment has increased combat operations litigation against the MoD which in turn has led to more compensation payments under the Armed Forces Compensation Scheme. The cost of buying adequate equipment surely outweighs the cost of defending litigation claims as with proper equipment service personnel will be at a reduced risk of death or serious injury and therefore this would result in a decrease in litigation claims.

Other factors such as decisions made in an emergency or in the ‘heat of the moment’ can determine the standard of care. Where decisions are made in the ‘heat of the moment’ the standard of care is often relaxed as decisions often have to be made without considered thought. This was emphasised in *Hughes v National Union of Mineworkers*<sup>227</sup> where it was held that in high-pressure circumstances, which involve physical danger where instant decisions have to be made, it would be unreasonable to ascribe tortious liability. However decisions over the procurement of military equipment

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<sup>225</sup> *Ibid*

<sup>226</sup> [2012] EWCA Civ 1365

<sup>227</sup> [1991] 4 All ER 278

are not made in the 'heat of the moment' and therefore the courts should ascribe liability to them.

### **5.3. Conclusion**

The standard of care requirement is not widely spoken of in cases involving deaths and serious injuries in the course of combat; this is because the MoD relies upon combat immunity to negate a duty of care even existing in such situations. As a result, analogy was instead drawn from established approaches to determine what standard of care the MoD should have towards service personnel.

Applying cases such as *Edwards* to active service leads to the conclusion that it is likely that the MoD would not meet the necessary requirements of the standard of care. Providing inadequate equipment when the risk of death or injury to service personnel is high falls below the necessary standard of care. Therefore if the courts were to take this into account when establishing liability they would find the MoD in breach of their duty of care.

If the MoD are deemed to have fallen below the necessary standard of care the question then turns to whether the deaths or injuries of service personnel were a direct result of inadequate equipment or whether the equipment was just a contribution. The thesis will now turn to the next issue of causation.

## Chapter six

### Causation in negligence

In order to prove that a defendant is liable for damages in negligence, causation has to be established. Two conditions must be satisfied in order for causation to be established, firstly, that the defendant exercised less than due care, and secondly that the defendant's negligence caused the injury. In applying the normal common law principles, would the courts find that the inadequate supply of equipment contributed to or was the main cause of injury and death to the hypothetical soldier?

In order to assess whether equipment is a causal link to service personnel deaths and injuries each case will need to be assessed on their own circumstances. If it can be shown that the deaths or injuries would not have occurred if service personnel had been provided with better armoured vehicles or more body armour then a causal link to the deaths and injuries of service personnel could be found.

### **6.1. Causation**

Causation focuses on the cause and effect of an action, where every effect is produced by the coming together of one or many causes of action. In order to establish the chain of causation the law takes a pragmatic approach. As Lord Wright said in *Yorkshire Dale Steamship Co Ltd v Minister of War Transport*;<sup>228</sup> 'causation is to be understood as the man in the street, and not as either the scientist or the metaphysician, would understand it.'<sup>229</sup> However, the court's legal language can produce confusion as to what extent the defendant will be liable in causation.

Two things need to be considered when assessing whether the defendant's action was a legal cause of the claimant's loss; firstly was what the defendant did a factual cause of

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<sup>228</sup> [1942] AC 691

<sup>229</sup> *Ibid* [706]

loss; secondly was the type of harm caused to the claimant reasonably foreseeable. Negligence law distinguished between the two and will be discussed below.

The starting point for determining causation is the ‘but for test’ which asks the question ‘can it be said that but for the defendant’s conduct, the claimant’s loss would not have occurred?’ In other words would the claimant have suffered a loss in any event without the defendant’s conduct?<sup>230</sup> An illustration of the application of the ‘but for’ test is the case of *Barnett v Chelsea and Kensington Hospital Management Committee*<sup>231</sup> where the claimant went to a casualty department feeling unwell after having drunk some tea. The doctor in charge sent him away without treatment and subsequently the claimant died of arsenic poisoning. It was held that even though the doctor was in breach of his duty of care for not examining the claimant, he had not caused the claimant’s death as having drunk the arsenic the claimant was beyond help when he arrived.<sup>232</sup>

In applying the ‘but for’ test the claimant must prove on the balance of probabilities that the defendant’s breach caused or materially contributed to the harm. In *Bonnington Castings v Wardlaw*<sup>233</sup> the claimant sought damages after contracting pneumoconiosis as a result of accumulation of silica particles in his lungs while working for the defendant. There were two possible sources from which the claimant could have accumulated the particles; pneumatic hammer and swing grinders. As the two sources had both led to the contraction of the disease, Lord Reid in the House of Lords held that:

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<sup>230</sup> P Giliker and S Beckwith, *Tort* (4<sup>th</sup> edn, Sweet and Maxwell, 2011)

<sup>231</sup> [1969] 1 QB 428

<sup>232</sup> *Ibid*

<sup>233</sup> [1956] 1 All ER 615

‘It appears to me that the source of his disease was the dust from both sources, and the real question is whether the dust from the swing grinders materially contributed to the disease. What is a material contribution must be a question of degree.’<sup>234</sup>

In his judgment Lord Reid found that the swing grinders did materially contribute to the disease as the ventilation was not adequate enough to carry away the dust to prevent it from being inhaled by the claimant and therefore the dust from the grinders had contributed to the disease.

To take the ‘but for’ test and apply it to a situation such as those involving the Snatch Land Rover the question to be asked would be, ‘but for’ the MoD’s conduct in supplying a vehicle that was not suitable for the conditions in Iraq, would the claimants injury have occurred? The family of Private Lee Ellis, who was killed when his Snatch Land Rover struck a roadside bomb, argued that he would not have died if the MoD had procured mine-protected vehicles.<sup>235</sup> However on the 1<sup>st</sup> May 2013 three soldiers were killed and a further six were injured as a result of a roadside bomb while they were travelling in a Mastiff armoured patrol vehicle. Before this incident service personnel and their dependants argued that the inadequacy of the Snatch Land Rover as a patrol vehicle was the cause of service personnel deaths and if they had been given better armoured vehicles the deaths of those servicemen would not have occurred. However, this most recent incident throws an interesting perspective on equipment claims and the issues of causation as the Mastiff has been described by the Prime Minister, David Cameron, as being ‘the best known protection against bombs.’<sup>236</sup> If this is the case it

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<sup>234</sup> *Ibid*

<sup>235</sup> Anon, ‘MoD negligent over vehicle deaths, families claim’ (*Channel Four News*, 26 November 2012) < <http://www.channel4.com/news/mod-negligent-over-vehicle-deaths-families-claim>> accessed 10 April 2013

<sup>236</sup> J Ensor and M Hall, ‘Three British soldiers killed by roadside bomb in Afghanistan’ *Telegraph* (London, 1<sup>st</sup> May 2013) < <http://www.telegraph.co.uk/news/worldnews/asia/afghanistan/10029511/Three-British-soldiers-killed-by-roadside-bomb-in-Afghanistan.html>> accessed 18 May 2013

would seem that the Snatch Land Rover was not the cause of the deaths of the service personnel but only a contributing factor. On the other hand where the lack of body armour has led to the death of a member of the armed forces causation should be considered more carefully. The board of inquiry in the case of Sergeant Steven Roberts, who died from a gunshot wound as he was told to give up his body armour to a fellow soldier, found that the bullet proof plates that were on the body armour would have saved his life had he been wearing it.<sup>237</sup> Each case must be established on its own merits and the fact that service personnel are injured or killed in combat should not mean that enemy fire or roadside bombs automatically rule out the liability of the MoD in the procurement of defective equipment.

On the other hand, even if it is found that the MoD has caused injury or death it does not automatically mean that they are liable either. This was highlighted in the case of *McGhee v National Coal Board*<sup>238</sup> where the claimant contracted dermatitis as a result of his job and argued that because the defendant had not provided washing facilities it had increased his risk of contracting the disease. The defendant had admitted that he had breached his duty of care towards the claimant by not providing washing facilities, but contended that the claimant had not proved on the balance of probabilities that he would not have contracted the disease even if washing facilities were available. In the House of Lords judgment Lord Simon of Glaisdale stated that; ‘failure to take steps which would bring about a material reduction of the risk involves a substantial contribution to the injury.’<sup>239</sup> In other words the fact that the defendant had not provided washing facilities that would have reduced the risk of contracting dermatitis meant that the

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<sup>237</sup> Anon, ‘Iraq death due to kit shortage’ (*BBC News*, 31 July 2006)

< <http://news.bbc.co.uk/1/hi/uk/5232212.stm> > accessed 28 June 2013

<sup>238</sup> [1973] 1 WLR 1

<sup>239</sup> *McGhee v National Coal Board* [1973] 1 WLR 1

defendant had made a contribution to the contraction of the disease. Yet Lord Reid in his judgment found in favour of the claimant stating:

From a broad point and practical viewpoint I can see no substantial difference between saying that what the defender did materially increased the risk of injury to the pursuer and saying that what the defender did made a material contribution to his injury.<sup>240</sup>

The fact that the claimant had to cycle home 'caked with grime and sweat' added materially to the risk that the disease might develop.<sup>241</sup> Therefore the claimant could recover damages in respect of the defendant's inability to provide washing facilities and in light of the defendant's admittance of this failure.<sup>242</sup>

Taking account of the causal issues discussed above it would be difficult for a member of the armed forces to establish in some cases that the injury occurred was a direct cause of inadequate equipment. However in the case of Sergeant Roberts who was shot and killed after he was told to give up his body armour to another member of the armed forces, a MoD enquiry into his death confirmed he would have survived if he was wearing the body armour.<sup>243</sup>

## 6.2. Conclusion

In applying common law principles and related case law on causation it would be upon the individual court to find whether the inadequate supply of equipment contributed to or was responsible for causing injury or death to a member of the armed forces. Nevertheless, if a hypothetical soldier is not given body armour to wear on the battlefield and is shot dead then the issue of causation is simple to establish. If the

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<sup>240</sup> *Ibid*

<sup>241</sup> *Ibid* (Lord Reid)

<sup>242</sup> *Ibid*

<sup>243</sup> T Helm, 'Geoff Hoon denied Iraq soldiers equipment that could have saved lives' *Guardian* (London, 17 January 2010)  
<<http://www.guardian.co.uk/uk/2010/jan/17/geoff-hoon-body-armour-iraq>> accessed 18 May 2013

soldier had been wearing the body armour he would not have died from his injury, the lack of body armour would be the direct cause of his death and not a contributory factor.

Under current civil law bringing a negligence claim against the MoD is challenging and there are many legal hurdles including that a member of the armed forces must prove that the injuries were a significant contributing factor of inadequate equipment. In the absence of civil law the thesis will turn to the question of whether service personnel are able to rely upon their human rights set out within the Human Rights Act 1998.

## Chapter 7

### Human Rights on the Battlefield

There seems to be no legal duty placed upon the MoD to protect soldiers on the battlefield by providing them with adequate equipment as the defence of combat immunity means that where a death or injury has resulted from armed conflict, then the MoD will not be legally liable and therefore service personnel cannot claim damages against them. It is arguable, however, that this position is incompatible with both Article 6 and Article 2 of the Human Rights Act 1998.

This chapter will consider to what extent the MoD has a legal duty under the HRA 1998 to provide adequate equipment and ensure the safety of service personnel on military operations. Furthermore, it will examine whether a legal remedy under the Human Rights Act is applicable to service personnel and if so whether service personnel are able in practice to rely upon their rights set out in the Convention in the event of death or serious injury in combat operations.

#### **7.1. Human Rights**

Cases that have failed under common law and have been brought under the Human Rights Act 1998 (HRA) have highlighted the significance and controversial role of the third limb of *Caparo* in establishing a duty of care. The *Mulcahy* case discussed in chapter three showed that as a result of public policy considerations, the MoD are not liable in tort for deaths or injuries that arise out of combat. Furthermore the police under the same public policy considerations are not liable for failing to take action in the investigation or suppression of crime.<sup>244</sup>

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<sup>244</sup> *Osman v Ferguson* (1993) 4 All ER 344

Human rights law however has added an additional layer of control over public authorities and brought about a more intense scrutiny of public authorities functioning.<sup>245</sup> This is because human rights law goes well beyond the prohibiting of infliction of harm as the Convention rights impose extensive duties on states to take positive measures to ensure the rights of individuals. These extensive duties should also be extended to protect members of the armed forces on combat operations. Human rights legislation was established to give protection only to the most vulnerable and disadvantaged. To British armed forces personnel 'it imposes an obligation to establish an appropriate framework of legal protection to protect life to the greatest extent reasonably practicable.'<sup>246</sup> Essentially, this means that the rights and lives of service personnel will be protected as long as it is practical to do so in the circumstances. Would this legal protection place an obligation on the MoD to ensure that all equipment that it deployed on operations is suitable for the conditions and is adequate so as not to risk the lives of service personnel further? The answer to this will be discussed later in this chapter when article 2 of the Convention is considered.

Firstly, before considering the scope of article 2 it is necessary to establish cases that have raised questions under Article 6 of the ECHR in relation to the discussion of immunity from suit in negligence. Article 6 (1) provides that; '... everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law.'<sup>247</sup> The thrust of the article 6 argument is that the conferment of immunity from negligence liability amounts to a restriction upon the right to access to a tribunal.

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<sup>245</sup> F Du Bois, 'Human Rights and the tort liability of public authorities' [2011] *Law Quarterly Review* 589

<sup>246</sup> S Jolly, 'Human rights still matter on the battlefield' *Guardian* (London, 30 June 2010) <<http://www.guardian.co.uk/commentisfree/libertycentral/2010/jun/30/human-rights-act-soldiers-battlefield>> accessed 9 April 2013

<sup>247</sup> A J. Bowen, 'A terrible misunderstanding: Osman v UK and the law of negligence' [2001] *Scots Law Times* 59

There is a difference between the HRA and the tort of negligence reflected in the European Court of Human Rights (ECHR) jurisprudence about liability for the breach of a state's positive human rights obligations.<sup>248</sup> The restriction imposed by Article 6 was demonstrated by the decisions of the Court of Appeal and the ECHR in *Osman*.<sup>249</sup> The *Osman* case concerned the extent to which Article 6 (1) of the Convention has been regarded as being inconsistent with the UK courts' practice of striking out negligence claims.

In *Osman v Ferguson*<sup>250</sup> Mr Osman was killed and his son wounded in a shooting incident. Mr Osman's son and widow alleged that the police had been negligent in failing to apprehend the attacker, as he was already known to be a danger to the family. The claim was struck out by the Court of Appeal on the application of the *Hill* principle of immunity<sup>251</sup> in which McCowan LJ stated that; 'in the light of the *Hill v Chief Constable of West Yorkshire*, their case was doomed to fail.' This was because the police enjoyed immunity from negligence claims in respect of the investigation and suppression of crime.<sup>252</sup> As a result of the striking out of the claim, the claimants applied to the ECHR arguing that the police immunity from liability for a negligent failure to prevent crime breached the claimants' right to a fair trial under Article 6 of the Convention.<sup>253</sup> The UK however argued that Article 6 was not applicable as the third

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<sup>248</sup> T R. Hickman, 'The reasonableness principle: reassessing its place in the public sphere' (2004) 63:1 Cambridge Law Journal 166 at 189-192

<sup>249</sup> F Du Bois, 'Human Rights and the tort liability of public authorities' [2011] Law Quarterly Review 589

<sup>250</sup> *Osman v Ferguson* (1993) 4 All ER 344

<sup>251</sup> J George and A Lidbetter, 'Negligent public authorities and convention rights- the legacy of Osman' [2001] European Human Rights Law Review 599

<sup>252</sup> *Osman v Ferguson* (1993) 4 All ER 344

<sup>253</sup> D PJ. Walsh, 'Police liability for a negligent failure to prevent crime: enhancing accountability by clearing the public policy fog' (2011) 22 Kings Law Journal 27-55

test of *Caparo* of 'fair just and reasonableness' did not exist in respect of the suppression and investigation of crime.<sup>254</sup>

In *Osman v United Kingdom*<sup>255</sup> the ECHR upheld the claim and found that there had been a violation of Article 6 as the *Hill* immunity acted as a bar to civil action by preventing them from having adjudication by a court on the merits of their case. There should have been proper considerations given to the arguments of liability and balanced against the arguments for immunity. The Commission noted that the; 'claimant's claim satisfied the proximity component of a duty of care, which had not been satisfied by the claimant in the *Hill* case',<sup>256</sup> and therefore the claimant's case did not fall short of the exclusionary rule formulated by the House of Lords in *Hill*.<sup>257</sup> Consideration of public policy issues should be examined on the merits and not automatically excluded as a result of immunity. The Government further argued that the case against the police should not be heard in the courts as this was not the only means of the claimant securing compensation. They stated that the claimant could bring an action in the court against Paget-Lewis, the man who had killed Mr Osman, or against Dr Ferguson, Paget-Lewis' psychiatrist. The European Court of Human Rights (ECHR) was not persuaded by this argument in stating that:

Neither an action against Paget-Lewis nor Dr Ferguson would have enabled the claimants to secure answers to the basic question which underpinned their civil action, namely why did the police not take action sooner to prevent Paget-Lewis from exacting a deadly retribution.<sup>258</sup>

The ECHR thus found in favour of the claimants and awarded compensation for loss of opportunity to have their case heard in the courts.

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<sup>254</sup> A J. Bowen, 'A terrible misunderstanding: Osman v UK and the law of negligence' [2001] Scots Law Times 59

<sup>255</sup> (2000) 29 EHRR 245

<sup>256</sup> *Osman v United Kingdom* [146]

<sup>257</sup> *Ibid* [148]

<sup>258</sup> *Ibid* [153]

Immunities available against civil law claims of negligence have been an issue in many cases of negligence against the MoD. The MoD has sought to have struck out many negligence claims arising out of combat by arguing that combat immunity prevents negligence claims from being made and therefore they should be struck out.<sup>259</sup>

In the case of *Mulcahy v Ministry of Defence*,<sup>260</sup> discussed in chapter three, the MoD sought to have struck out the claim on the basis that the injuries were sustained under combat conditions and therefore under the principles of combat immunity no cause of action should be allowed. The more recent cases of *Smith and others v Ministry of Defence*<sup>261</sup> which involved separate claims made against the MoD for deaths arising from the Snatch Land Rovers and Challenger tanks, also highlighted the attempt of the MoD to have struck out their claim as a result of the deaths arising out of combat and therefore being covered by combat immunity. The starting point for Moses LJ, in the *Smith* case, was the MoD's duty as employer to provide a safe system of work for the claimant soldiers. The question was whether the duty yielded to the combat immunity principle relied upon in the *Mulcahy* case. It was held by the Court of Appeal that this question would have to be determined at trial. In his judgment Moses LJ gave guidance on the correct approach of combat immunity, stating; 'It is not sufficient that the injuries sustained were in battle. The question was whether the supposedly negligent decisions were taken while in active operations.'<sup>262</sup> This is taken to mean that training and equipment decisions taken some time before conflict could not enjoy combat immunity, but would fall outside of the immunity. If all MoD decisions regarding combat operations were to benefit from the blanket protection of combat immunity then this

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<sup>259</sup> K Dowell, 'CA rejects MoD strike out on soldier compensation battle' (*The Lawyer*, 19 October 2012) < <http://www.thelawyer.com/coa-rejects-mod-strike-out-on-soldier-compensation-battle/1015046.article>> accessed 9<sup>th</sup> April 2013

<sup>260</sup> [1996] QB 732

<sup>261</sup> [2012] EWCA Civ 1365, *Albutt and others v Ministry of Defence* [2012] EWCA Civ 1365

<sup>262</sup> *Ibid*

would surely be a violation of a soldier's right to a fair trial, as each case would be struck out before the facts could be examined by the courts.<sup>263</sup> Although attempts were made by the MoD to get negligence claims struck out on the basis of combat immunity, the courts held in favour of the claimants and allowed the Challenger tank case to go before the courts to be judged on the individual circumstances.

In addition to article 6 arguments there appear to be possible violations of article 2 of the ECHR as it is arguable that combat immunity is not compatible with article 2 of the HRA 1998. Article 2 provides that:

'Everyone's right to life shall be protected by law. No one shall be deprived of his life intentionally save in the execution of a sentence of a court following his conviction of a crime for which this penalty is provided by law.'<sup>264</sup>

Where article 2 applies, a claimant may claim on the basis that a public body did not do all that could be reasonably expected of them to avoid a real and immediate risk to life of which they had or ought to have had knowledge.<sup>265</sup> This was emphasised in the case of *R (on the application of Smith) v Oxfordshire Assistant Deputy Coroner*<sup>266</sup> which concerned a British soldier who had complained that he could not cope with the heat and subsequently died as a result of heatstroke on a UK military base in Iraq. An inquest found that Private Smith's death was a result of a failure to address the difficulty he had in adjusting to the climate. In his judgment Collins J identified that the circumstances of Private Smith's death gave rise to the issue of law whether there was a failure by the Army to provide an adequate system to protect his life.<sup>267</sup> Where there is a known risk to life the MoD should take appropriate steps to avoid or minimise such a risk and it is

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<sup>263</sup> J Morgan, 'Negligence into battle' [2013] Cambridge Law Journal 14

<sup>264</sup> Human Rights Act 1998, Schedule 1, Article 2.

< <http://www.legislation.gov.uk/ukpga/1998/42/schedule/1> > accessed 9<sup>th</sup> April 2013

<sup>265</sup> C Payling and M Sanderson, 'Smiths shilling' 42 (*Defence Management Journal*)

<[http://www.defencemanagement.com/article.asp?id=354&content\\_name=Human%20Resources%20and%20Welfare&article=10799](http://www.defencemanagement.com/article.asp?id=354&content_name=Human%20Resources%20and%20Welfare&article=10799)> accessed 9<sup>th</sup> April 2013

<sup>266</sup> [2008] EWHC 694 (Admin)

<sup>267</sup> *Ibid* [23]

clear in this case that the MoD ignored Private Smith's difficulty in adjusting to the climate. The Court of Appeal concluded that:

On the basis of Strasbourg jurisprudence there is no doubt that it would apply to Private Smith if he were a conscript. It would therefore not be right to draw a distinction between a regular soldier and a conscript.<sup>268</sup>

On this conclusion would a member of the armed forces be able to rely upon article 2 when on combat operations abroad? The Court of Appeal held that service personnel are 'under the control of and are subject to Army discipline. They must do what the Army requires them to do. In that respect they are in the same position as a conscript.'<sup>269</sup> Therefore soldiers should be allowed to rely upon their rights under the Convention as could a conscript. This was an important landmark ruling in the application of human rights to service personnel on combat operations outside of the UK. The ruling meant that if a member of the armed forces was injured while within or outside a British Army base, then they could successfully seek to rely upon the rights set out in article 2. However, the MoD challenged this ruling and took the case further to the Supreme Court.

The Supreme Court's judgment determined that a British soldier cannot rely upon the Convention unless he is on the premises of a military base. The majority judges based their opinions on the fact that the death of a serviceman on active service did not automatically give rise to the obligation of article 2. Soldiers were at risk of death and serious injury as part of their job, therefore the death of a soldier in combat did not raise a case to say that the MoD had failed in their obligation to protect Private Smith, and that there had been a breach of article 2.<sup>270</sup>

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<sup>268</sup> *Ibid* [95]

<sup>269</sup> *Ibid* [105]

<sup>270</sup> *Ibid*

In *Smith and others v Ministry of Defence*,<sup>271</sup> which involved multiple cases against the MoD for service personnel deaths in Snatch Land Rovers and Challenger tanks, the question of whether article 2 could be relied upon by members of the armed forces, in relation to deaths or injuries arising from inadequate equipment, was considered. Moses LJ was of the view that the case of *R (on application of Smith) v Oxfordshire Assistant Deputy Coroner*<sup>272</sup> was not binding and therefore ‘the conclusion must be that the armed forces operating outside their base are within the United Kingdom Convention jurisdiction,’<sup>273</sup> and therefore presuming that the *Smith*<sup>274</sup> case is inconsistent with the *Al-Skeini* ruling.

The claimants’ pleaded case in *Smith and others v Ministry of Defence* was that article 2 imposed a positive obligation on the MoD to ‘take appropriate steps to protect life by providing suitable armoured equipment for use by soldiers on active service in Iraq.’<sup>275</sup> The allegations of breach fell into two categories; firstly the failure to provide better/medium armoured vehicles, and secondly breaches that relate to operational decisions made by commanders including procurement issues.

It was submitted by Mr Eadie on behalf of the MoD that article 2 of the Convention cannot and should not be interpreted so broadly as to give rise to the duties with which the claimants contend, further stating that previous case law has made it clear that an implied operational obligation has only been imposed upon a state in certain circumstances. Mr Eadie took as his starting point the decision of the European Court of Human Rights in *Renolde v France*<sup>276</sup> in which they stated:

Article 2 may apply in well-defined circumstances a positive obligation on the authorities to take preventative operational measure to protect an individual ...

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<sup>271</sup> [2012] EWCA Civ 1365, *Albutt and others v Ministry of Defence* [2012] EWCA Civ 1365

<sup>272</sup> [2008] EWHC 694 (Admin)

<sup>273</sup> *Smith v Ministry of Defence* [2012] EWCA Civ 1365

<sup>274</sup> *R (on the application of Smith) v Oxfordshire Assistant Deputy Coroner* [2008] EWHC 694 (Admin)

<sup>275</sup> *Smith v Ministry of Defence* [2012] EWCA Civ 1365

<sup>276</sup> (2009) 48 EHRR 42

However, this obligation must be interpreted in such a way which does not impose an impossible or disproportionate burden on the operational choices which must be made in terms of priorities and resources.<sup>277</sup>

Thus he was arguing that placing such an obligation upon the MoD to take operational measures to protect soldiers in times of combat would impose an unreasonable burden upon the MoD and may affect the choices they make in the procurement of equipment. In response to the MoD's argument that an obligation cannot arise under Article 2, Mr Robert Weir QC, acting on behalf of the Snatch Land Rover claimants, demonstrated that the article 2 obligation may apply to soldiers on active service. Relying upon the speech of Baroness Hale in *Savage v South Essex Partnership NHS*,<sup>278</sup> that the state is under an obligation to protect soldiers from harm; 'the state must not only refrain from taking life but also take positive steps to protect the lives of those within its jurisdiction.'<sup>279</sup> If there is an allegation that military authorities have failed to protect the right to life, 'the court must examine whether the military authorities knew of or ought to have known of the real and immediate risk, and whether they had done everything that could be reasonably expected of them to do to prevent that risk.'<sup>280</sup> A 'real and immediate risk' is likely to be met in combat operations as service personnel are exposed to dangerous and volatile situations and therefore an article 2 obligation to take all reasonable and preventative measures to protect life should be placed upon the MoD in combat operations so as to ensure the best possible protection for service personnel.

However, in his counter-argument Mr Edie on behalf of the MoD was of the opinion that questions regarding the military equipment provided by the state should fall outside

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<sup>277</sup> *Ibid* [81] [82]

<sup>278</sup> [2009] 1 AC 681

<sup>279</sup> *Ibid* [76] (Baroness Hale)

<sup>280</sup> *Ibid* [82] (Baroness Hale)

the scope of any article 2 investigation, relying upon Lord Rodger in *Smith v Oxfordshire Assistant Deputy Coroner*:<sup>281</sup>

Of course it will often be possible to say that the death might well not have occurred if the soldier had been in a vehicle with thicker armour-plating ... Even if this is correct, it does not point to any failure of the relevant authorities to do their best to protect soldiers' lives.<sup>282</sup>

Further, Lord Kerr observed that:

Deaths and injuries of soldiers in a combat situation are inevitable. There is no reason to anticipate that a similar level of scrutiny to that suitable to the death of a civilian will be required or appropriate where a soldier has been killed in the course of military operations.<sup>283</sup>

However, this should not mean that the MoD will be free from liability where a soldier has not been given protective body armour or where military vehicles have not been fitted with Target Identity Devices so that service personnel can distinguish between enemy vehicles and their own. It is true that deaths and injuries of soldiers on active service are inevitable but numerous deaths could have been avoided if the MoD had provided adequate equipment. It must not be overlooked that many cases occur where the deaths and serious injuries of soldiers indicate a systematic or operational failing on behalf of the MoD for failing to provide soldiers with equipment which is needed to protect lives.

In considering the Supreme Court's decision in *Smith v Oxfordshire Assistant Deputy Coroner*,<sup>284</sup> that a soldier was within the United Kingdom's jurisdiction while on a UK military base but not while on patrol outside of a UK military base, the Court of Appeal in *Smith v Ministry of Defence*<sup>285</sup> considered the territorial and extra-territorial notion of jurisdiction. To extend Convention jurisdiction beyond the territorial jurisdiction of the High Contracting Parties is exceptional and requires special justification. The Grand

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<sup>281</sup> [2009] EWCA Civ 441

<sup>282</sup> *Ibid* [125] (Lord Rodger)

<sup>283</sup> *Ibid* [339]

<sup>284</sup> [2011] 1 AC 1

<sup>285</sup> [2012] EWCA Civ 1365, *Albutt and others v Ministry of Defence* [2012] EWCA Civ 1365

Chamber in *Bankovic v Belgium*<sup>286</sup> essentially reaffirmed and refined the categories of exceptions for extra-territorial jurisdiction first set out in *Loizidou v Turkey*,<sup>287</sup> stating that extra-territorial jurisdiction may apply ‘where acts of state authorities produced effects or were performed outside their own territory’<sup>288</sup> or cases ‘where as a consequence of military action a contracting party exercised effective control of an area outside its national territory.’<sup>289</sup> The majority in *Smith v Oxfordshire* found no sufficient reason for such an extension in relation to the UK armed forces operating outside of their base, basing their reasoning on their opinion that issues relating to armed hostilities were essentially non-justiciable.<sup>290</sup> The Supreme Court in *Smith v Oxfordshire* found support in *R (Al Skeini) v Secretary of State for Defence*<sup>291</sup> in which the Court of Appeal stated:

The Article 1 jurisdiction does not extend to a broad, worldwide extraterritorial personal jurisdiction arising from the exercise of authority by party states' agents anywhere in the world.<sup>292</sup>

It further stated:

To broaden the exception currently under discussion into one which extends extraterritorial jurisdiction to the situations concerned in the case of the first five claimants would be illegitimate in two respects: it would drive a coach and horses through the narrow exceptions illustrated by such limited examples, and it would sidestep the limitations we have found to exist under the broader doctrine of “effective control of an area.”<sup>293</sup>

However, the Court of Appeal’s decision in *Al-Skeini* was overturned by the Grand Chamber so as to allow the first 5 claimants to come within the jurisdiction of the UK outside of a military base through the state’s jurisdiction of ‘authority and control over

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<sup>286</sup> (2007) 44 EHRR SE5

<sup>287</sup> (1995) 20 EHRR 99

<sup>288</sup> *Ibid* [69]

<sup>289</sup> *Ibid* [70]

<sup>290</sup> [2011] 1 AC 1

<sup>291</sup> (2007) UKHL 26

<sup>292</sup> *Ibid*

<sup>293</sup> *Ibid*

an individual.’<sup>294</sup> The Grand Chamber came to this conclusion as the UK assumed in Iraq the exercise of some of the public powers normally to be exercised by a sovereign government following the removal of power from the Ba’ath regime.<sup>295</sup> In these circumstances the court considers that the UK, through its soldiers engaged in security operations in Basra, exercised authority and control over individuals killed in the course of such operations, so as to establish a jurisdictional link between the deceased and the UK.<sup>296</sup>

It could be argued that the Grand Chamber’s decision in *Al-Skeini* contradicts the Supreme Court judgment in *Smith v Oxfordshire Assistant Deputy Coroner*<sup>297</sup> that the state’s armed forces abroad are not within its jurisdiction outside of a military base and therefore the decision in *Smith* can no longer be maintained. If this position is adopted then it would mean that the Court of Appeal in *Smith v Oxfordshire* were correct in their judgment and subsequently service personnel are able to rely upon their rights under the Convention.

The claimant in *Smith and others* contended that this reliance on the Grand Chamber’s decision in *Al-Skeini* offered an opportunity for the Court of Appeal in *Smith v Others* to disagree with *Smith v Oxfordshire* and grant service personnel a remedy under the HRA. However the Grand Chambers reference to authority and control is a reference to bringing individuals within the power and control of a state in circumstances similar to detention and imprisonment.<sup>298</sup> Therefore although the armed forces are under the authority and control of the MoD, they are not in the sense

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<sup>294</sup> *Al-Skeini v United Kingdom* (2011) 53 EHRR 18

<sup>295</sup> *Ibid* [149]

<sup>296</sup> *Ibid* [149]

<sup>297</sup> [2010] UKSC 29

<sup>298</sup> *Smith and Others v Ministry of Defence* [2012] EWCA Civ 1365, *Albutt and others v Ministry of Defence* [2012] EWCA Civ 1365

described by the Grand Chamber in *Al-Skeini* and so the Court of Appeal in *Smith and Others* ruled that article 2 could not apply to soldiers outside of a UK military base.

It is difficult to see how the physicality of a military base makes any difference as to whether or not a soldier is subject to UK jurisdiction. If service personnel are not under the jurisdiction of the UK when outside of a military base then whose jurisdiction do they come under? This is a serious concern for service personnel as the current law is essentially declaring that off a UK military base soldiers are in a legal no-mans land.

## **7.2. Conclusion**

Through analysis of the doctrinal test for establishing jurisdiction under the HRA previous cases that have come before the Supreme Court such as *Smith v Oxfordshire Assistant Deputy Coroner* and *Al-Skeini* in the Court of Appeal had failed to establish a jurisdictional link in order for the service claimants to be able to rely on their rights set out within the Convention. However the Grand Chamber ruling in *Al-Skeini* offers a positive application of jurisdiction in favour of service personnel on conflict operations through basing its jurisdictional test on authority and control, which means that any members of the armed forces and members of respondent states are able to be brought within the UK's ECHR jurisdiction, both inside and outside a UK military base.

This could potentially lead to service personnel in future cases before the courts being able to rely upon their fundamental rights and freedoms set out within the European Convention on Human Rights when on conflict operations. In turn this could have future implications for the MoD in that their defence of combat immunity might no longer apply in relation to the planning and preparation for operations, as liability could be placed upon them through a jurisdictional link.

The thesis will now turn towards the Armed Forces Compensation Scheme to evaluate whether the scheme offers an adequate remedy for injured service personnel should they not succeed in a claim at common law.

## **Chapter 8**

### **The Armed Forces Compensation Scheme**

The concept of a compensation scheme requires the Government to place a value on the quality of life of a soldier through the sacrifices they make to their country. This has resulted in the Government putting a price on the UK's obligation to service personnel through compensating members of the armed forces who have suffered injury as a result of military deployment. This chapter will examine the Armed Forces Compensation Scheme to assess whether it values members of the armed forces.

#### **8.1. The history of the armed forces compensation Scheme**

Under contemporary personal injury law compensation is designed to reimburse the victim for the pain and injury that have been suffered and attempts to put the person injured in a position similar to which they were prior to their accident. Therefore if an individual is severely injured during their employment and unable to work then the damages they receive should ensure that they are compensated for both their pain and suffering and also that their needs are met in the future. The mechanism through which the state affords damages to injured service personnel is known as the Armed Forces Compensation Scheme (AFCS). Conflict operations may often require service personnel to bear a high risk of death or serious injury.<sup>299</sup> They should expect in return to always be cared for by the Government if they are severely injured during service, this should include adequate compensation.

The AFCS, which is a no-fault compensation scheme, first came into effect on the 6<sup>th</sup> April 2005 through the exercise of powers conferred by Section 1(2) of the Armed Forces (Pensions and Compensation) Act 2004. It allowed for service personnel or their

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<sup>299</sup> P Tripodi and J Wolfendale (eds) *New Wars and New Soldiers: military ethics in the contemporary world* (Ashgate Publishing Limited, 2011)

dependents to make a claim against the scheme should injury, illness or death occur as a result of service, whether that service be abroad on combat operations or during training for such operations in the UK.<sup>300</sup> The AFCS was a replacement scheme for attributable benefits awarded under the War Pensions Scheme and Armed Forces Pension Scheme 1975 for injuries, illnesses or deaths that arose as a result of service after the 6<sup>th</sup> April 2005. Significantly, for the first time, it enabled injured service personnel to make a compensation claim without having to wait until they had left service, as previously under the War Pensions Scheme claims could not be made until a member of the armed forces had been discharged from service.<sup>301</sup> Although the War Pensions and Armed Forces Pensions schemes have been replaced by the AFCS they are still available for service personnel to claim under for injuries and illnesses that occurred before 6<sup>th</sup> April 2005.

As a no-fault compensation scheme, the AFCS means that a member of the armed forces does not have to show that they were a victim of a tort to qualify for compensation, making it easier for service personnel to receive recompense for their injuries and illnesses.<sup>302</sup> However, other requirements such as the burden and standard of proof fall upon service personnel to prove that their injuries were a direct result of service; this will be discussed in further detail later on in this chapter. As it is a no-fault scheme it also means that service personnel still have the option to sue the MoD for negligence through the civil courts and receive a higher payment of compensation. As discussed in the previous chapters it is difficult for service personnel or their dependants

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<sup>300</sup> Available on the HM Revenues and Customs website.

<<http://www.hmrc.gov.uk/manuals/eimanual/eim74302.htm>> accessed 19 May 2013

<sup>301</sup> Armed Forces Compensation Scheme frequently asked questions, available on the Ministry of Defence website.

<<http://www.mod.uk/NR/rdonlyres/788611E3-4FE9-4E63-A525-D19815121B3A/0/afcsfaq1.pdf>> accessed 19 May 2013

<sup>302</sup> N J McBride and R Bagshaw, *Tort Law* (3<sup>rd</sup> edn, Pearson Education Limited, 2008)

to bring a claim against the MoD for death or injuries arising from combat. An exception to this was the Nimrod case which saw the families of the 16 service personnel killed receive a large six figure pay-out as a result of the MoD's negligence; however the Nimrod was an isolated case in which the MoD accepted that the deaths were a result of their negligence.<sup>303</sup> There have been a number of issues connected with the scheme which bear examination. Some of these relate to how the compensation is calculated in respect of multiple injuries or the worsening of an initial injury, to the burden of proof and to the tariff levels.

## **8.2. Criticisms of the Compensation Scheme**

In 2007, the Royal British Legion, under their 'Honour the Covenant' campaign, argued for changes to be made to the AFCS. One of the changes which were suggested was that the onus should be put on the Government to prove that military service was not responsible for the causing or worsening of service personnel's injury and illness. Under the previous War Pensions Scheme (WPS) the onus was on the Secretary of State to show beyond reasonable doubt that service did not play a part in causing or worsening a condition.<sup>304</sup> However the AFCS claims are based on the balance of probabilities in that the onus is on the claimant to prove that service caused or worsened injury or illness. The MoD maintains that this is a widely accepted approach to compensation claims as it is applied in other schemes such as the Criminal Injuries Compensation Scheme.<sup>305</sup> The MoD argue that the burden of proof should remain unchanged from the WPS as the nature of service involves taking special risks and it can have uncertain effects on the

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<sup>303</sup> J Bingham, 'MoD admits responsibility for Afghanistan Nimrod deaths' *Telegraph* (London, 30 March 2009)

< <http://www.telegraph.co.uk/news/uknews/defence/5071466/MoD-admits-responsibility-for-Afghanistan-Nimrod-explosion-deaths.html>> accessed 19 May 2013

<sup>304</sup> House of Commons Defence Committee, *The Ministry of Defence reviews of armed forces pension and compensation arrangements* (HC 2001-02, 1115)

<sup>305</sup> HL Deb 2009, Vol 711, col 219

health and well-being of service personnel, which in some cases may be hard to prove were a result of service, for example Gulf War Syndrome. But because this is an accepted approach in the civil courts it does not mean that it is the correct approach to use in personal injury cases arising from military service, and as we have already seen liability claims against the MoD in the civil courts are difficult to establish. It could be said that the AFCS imitation of the civil claims system is a result of the MoD's desire to reduce the amount of civil claims for negligence which would minimise liability and could save money.<sup>306</sup>

Another criticism of placing the burden of proof on service personnel is that it can be problematic for them to supply the evidence needed to make a claim as they are not always able to provide full medical records. The Royal British Legion voiced their concerns over the ability of service personnel to prove that their injuries were a result of service in their Honour the Covenant Campaign which they stated; 'Armed forces personnel are in an unusual position in that their medical records are in the hands of the employer against whom a compensation claim will be made.'<sup>307</sup> It is wrong in principle to put a member of the armed forces in a position where they have to obtain their own medical records from their employer to whom they are making a compensation claim against, while at the same time relying upon employment from them. The question then arises as to what happens if the MoD as an employer fails to keep accurate medical records of service personnel or loses the medical records altogether. It has been reported that out of 150 Veterans from the 1991 war between Iraq and Kuwait, 32% have reported inaccurate medical records and 19% reported missing or lost medical

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<sup>306</sup> J Marriot and J McSweeney, 'The Armed Forces Compensation Scheme: a sheep in wolfs clothing?' [2010] 5 Web Journal of Current Legal Issues

<sup>307</sup> The Royal British Legion, 'Honour the covenant: The Armed Forces Compensation Scheme' (*British Legion*, September 2007)  
<[http://www.britishlegion.org.uk/media/7765/RBL\\_Campaign\\_HTC\\_ArmedForcesCompensationScheme.pdf](http://www.britishlegion.org.uk/media/7765/RBL_Campaign_HTC_ArmedForcesCompensationScheme.pdf)>

records.<sup>308</sup> Without adequate medical records service personnel will find it difficult if not impossible to make a claim under the AFCS as they will not have the evidence to show that their injuries were due to service. Christopher DeLara, a member of the United States (U.S.) Army, filed for disability benefits after his tour in Iraq. However the U.S. army had no records showing that he had been overseas or of any incidents in combat that could have affected him. DeLara appealed, fighting for 5 years before a judge accepted the testimony of an officer in his unit, but this came too late as DeLara was already briefly homeless and had turned to drugs and alcohol to cope with the effects of his tour in Iraq.<sup>309</sup> The effects of the DeLara case show the complications in claiming for benefits or help of any kind after service in the event that medical or field records are lost and bear reason as to why the burden of proof should be on the MoD to prove that injuries were not a result of combat.

Service personnel are no different to an employee of the NHS in which the NHS hold their employees medical records or to employees whose employers are in charge of their safety reports. Therefore this burden of proof could prove detrimental for those desiring to make a claim against the MoD. For this reason it was argued that the ‘balance of probabilities’ test might not be appropriate for the armed forces and that because of the special risks that the armed forces are required to take the onus should be placed back on the Government and the benefit of the doubt, such as believing that their injury was a direct result of combat, should be given to the claimant.<sup>310</sup> If the Government favour placing the burden of proof on the claimant, imitating the civil claims system, then for

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<sup>308</sup> J Riley, ‘Gulf war veteran and the military medical establishment’ (*Gulf War Veterans*, 2012)  
< <http://www.gulfwarvets.com/ijom.htm>> accessed 25 June 2013

<sup>309</sup> P Sleeth, ‘Lost to history: missing war records complicate benefit claims by Iraq, Afghanistan veterans’ (*Pro Publica*, 9 November 2012)  
<<http://www.propublica.org/article/lost-to-history-missing-war-records-complicate-benefit-claims-by-veterans>> accessed 21 June 2013

<sup>310</sup> S Kennedy, ‘Armed Forces Compensation Scheme’ (Social Policy Section, HC 2010)

the sake of consistency, the amount of compensation paid to service personnel should be equivalent to that paid to a private citizen. However comparison of the payments under the AFCS and compensation payments under the civil claims system shows that this is not the case.

A civilian who is injured as a result of armed conflict stands to receive as a legal entitlement a substantially higher compensation payment than a member of the armed forces injured in conflict. This was shown in the case of an Iraqi teenager who suffered serious spinal injuries and was paralysed after a British soldier dropped his gun, discharging it in the process. The Iraqi received a £2 million payment from the MoD. In contrast a member of the armed forces would receive less than a quarter of this amount from the AFCS for identical injuries.<sup>311</sup> The MoD effectively places a higher value on civilian casualties than on military ones, evidence of which can be shown from the MoD's pay-out to a civilian suffering from PTSD compared to the pay-out to a member of the armed forces for the same injury. One civilian was paid £52,000 for suffering PTSD as a result of jets undertaking low flying exercises over Devon. Under the AFCS service personnel that can show they have suffered a service related mental disorder lasting at least 6 weeks will only receive £3,000, if they can show that the mental injury lasted for 5 years or more then they are entitled to £23,000, and those service personnel who have permanent mental injury can receive up to £48,000.<sup>312</sup> Lance Bombardier Kerry Fletcher who was awarded £186,895 by an employment tribunal in a claim against the MoD for sexual discrimination commented on how disgusted she was by the

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<sup>311</sup> C Gammell, 'Controversial payouts by the Ministry of Defence' *Telegraph* (London, 26 November 2008) <<http://www.telegraph.co.uk/news/uknews/defence/3527470/Controversial-payouts-by-the-Ministry-of-Defence.html>> accessed 24 August 2012

<sup>312</sup> D Harney, 'PTSD- A mental conflict without end' (*David Harney 67- Personal Political comment*, 27 October 2011) <<http://davidharney67.blogspot.co.uk/2011/10/ptsd-mental-conflict-without-end.html#!/>> accessed 21 June 2013

meagre compensation that injured soldiers receive, saying that she was ‘embarrassed that the MoD have given injured service personnel such a low sum’<sup>313</sup> The criticism of the MoD and the AFCS has been highlighted by both ministers and the judiciary, in which Lord Tunnicliffe argued that the comparison between civil awards and awards under the AFCS was ‘inappropriate’ and ‘illegitimate’<sup>314</sup> as the AFCS was based upon providing compensation to those injured due to service and not on fault finding; the AFCS is a ‘no-fault scheme and it is not necessary to prove negligence to receive an award.’<sup>315</sup> The AFCS has proved unsatisfactory in adequately compensating injured service personnel and as a result two major changes were made to the scheme; firstly the lump sum payments were increased and secondly anyone suffering from more than one injury as a result of a single incident would receive the full reward for each injury.<sup>316</sup>

The support of the Royal British Legion’s ‘Honour the Covenant’ campaign aided the changes to the tariff levels and lump sum payments which were amended in 2008 as part of a review by the MoD who published ‘The Nations Commitment: cross-Government support to our Armed Forces, their families and veterans.’ The report set out the principles that members of the armed forces should not be disadvantaged because of service, and looked at how injured soldiers could be better supported. It contributed directly to changes being made to the AFCS which included raising the lump sum payments. Before this amendment the lump sum payment available to service personnel with the highest level of injury in tariff one was only £285,000. This has now

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<sup>313</sup> M Taylor, ‘Soldier who won army sex case hits out at low payouts to injured’ *Guardian* (London, 27 August 2009)

< <http://www.guardian.co.uk/uk/2009/aug/27/army-payouts-criticised>> accessed 25 June 2013

<sup>314</sup> HL Deb, 12 November 2008, vol 705, col 652

<sup>315</sup> HL Deb, 12 November 2008, vol 705, col 651

<sup>316</sup> The Armed Forces and Reserve Forces (Compensation scheme) (Amendment) Order 2008 No. 39

doubled to £570,000.<sup>317</sup> Under the terms of the scheme a lump sum is now payable to service and ex-service personnel based on a 15 level tariff system if they are severely injured due to military service.<sup>318</sup> The AFCS enables service personnel to an ex-gratia payment of a maximum of £570,000 under tariff level one for the most horrific injuries or a combination of injuries, such as the loss of both legs and arms, and a minimum of £1,155 under tariff level 15 which would cover injuries such as the loss of a toe.<sup>319</sup> For those with more serious injuries in tariff levels one to eleven, there is an additional payment in the form of Guaranteed Income Payment (GIP) as a means of offsetting loss of earnings.<sup>320</sup> The GIP is also calculated by severity of injury, with those coming within tariff levels one to four receiving the full GIP payment, along with the full lump sum at the relevant tariff level for each compensable injury.<sup>321</sup> Those suffering injuries at tariff levels five and six have their GIP reduced by 75%, tariff levels seven and eight are reduced by 50% and tariff levels nine to eleven are reduced by 30%.<sup>322</sup> In practice, an injury included within the tariff level 5 for example, would be the loss of a leg while an injury included within tariff level 7 would be the loss of a foot.<sup>323</sup> There is a 25% difference between the two tariff levels for the GIP payment and yet both injuries would mean the use of prosthetic limbs and difficulty in mobility.

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<sup>317</sup> The Nations commitment: cross Government support to our armed forces, their families and veterans, available on the Ministry of Defence website.  
 < <http://www.mod.uk/NR/rdonlyres/415BB952-6850-45D0-B82D-C221CD0F6252/0/Cm7424.pdf>> accessed 24 August 2012

<sup>318</sup> S Kennedy, 'Armed Forces Compensation Scheme' (Social Policy Section, HC 2010)

<sup>319</sup> M Weaver, 'Armed Forces Compensation Scheme' *Guardian* (London, 28 July 2009)  
 < <http://www.guardian.co.uk/uk/2009/jul/28/armed-forces-compensation-scheme>> accessed 24 August 2012

<sup>320</sup> Armed Forces Compensation Scheme frequently asked questions, available on the Ministry of Defence website.  
 < <http://www.mod.uk/NR/rdonlyres/788611E3-4FE9-4E63-A525-D19815121B3A/0/afcsfaq1.pdf>> accessed 24 August 2012

<sup>321</sup> J Marriot and J McSweeney, 'The Armed Forces Compensation Scheme: a sheep in wolfs clothing?' [2010] 5 Web JCLI

<sup>322</sup> S Kennedy, 'Armed Forces Compensation Scheme' (Social Policy Section, HC 2010) pg 5

<sup>323</sup> *Ibid*

Although the scheme has made vast improvements since its introduction in 2005 there is still heavy criticism from both members of the armed forces and the media over the level of compensation awarded and how claims are assessed and awards calculated.<sup>324</sup> The advancement of medical treatment means that service personnel are more likely to survive serious injuries resulting from combat which would have previously been fatal to them and therefore the compensation scheme should reflect this.

Speaking on Channel 4 News, Falkland's War veteran Simon Weston, who was injured in the line of duty, thought the MoD's actions towards compensating those who have been injured in service was "quite appalling",<sup>325</sup> stating that:

What it says to them (service personnel) is that you are not going to be looked after properly; you are not going to get the appropriate amount of compensation, regardless of what type of complications you suffer<sup>326</sup>

The concerns highlighted by Simon Weston have been emphasised by another of the AFCS deficiencies in that it did not take into account complications that can occur after the initial injury. This has resulted in injured service personnel sometimes receiving a low level of compensation for the initial injury and no compensation for complications which arise afterwards. This was highlighted in the case of *Secretary of State for Defence v Duncan*.<sup>327</sup> Corporal Duncan was originally awarded £9,250 for a fracture to his femur which was later increased to £46,000 by the Pensions Appeal Tribunal (PAT) as the complications which arose after the initial injury were to be seen as part of the injury. The second claimant, Marine McWilliams, was originally awarded £8,250 for a similar injury which was also later increased to £28,750 as his injury would affect him

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<sup>324</sup> J Marriot and J McSweeney, 'The Armed Forces Compensation Scheme: a sheep in wolf's clothing?' [2010] 5 Web JCLI

<sup>325</sup> Anon, 'MoD criticised for soldiers compensation cut' (*Channel four news*, 28 July 2009) <<http://www.channel4.com/news/articles/uk/mod%2Bcriticised%2Bfor%2Bsoldier%2Bcompensation%2Bcut/3286557.html>> accessed 24 August 2012

<sup>326</sup> *Ibid*

<sup>327</sup> [2009] EWCA Civ 1043

for the rest of his life.<sup>328</sup> The Secretary of State appealed to reduce the compensation payments, stating that there should be a distinction between the original injury and later complications.<sup>329</sup> However the MoD denied that this was the objective in the Court of Appeal and stated that they had taken the cases to court to seek clarity on the schemes basic principle, that the most severely injured would receive the highest compensation.<sup>330</sup> The appeal was upheld as the Court of Appeal accepted the MoD's submission that 'medical treatment designed to cure or alleviate pain should not be seen as creating a separate injury'.<sup>331</sup> It is artificial to conclude that members of the armed forces cannot be compensated for later complications arising from the initial injury because of the effects of medical treatment. The medical treatment would not have otherwise been carried out if it were not for the initial injury occurring and therefore any treatment is a result of the initial injury and should be compensated for. The major problem with the assessment of awards is 'the formulaic way in which compensation is pegged ignores the fact that a broken body is so much more than the sum of constituent injuries.'<sup>332</sup> As a result of the media and public criticism of the treatment of the two soldiers Defence Secretary Bob Ainsworth brought forward the review of the AFCS to determine whether members of the armed forces were being properly supported by the scheme.<sup>333</sup> Speaking to the Daily Telegraph he stated; 'As Defence Secretary I cannot allow this situation to continue that leaves the public in any doubt over my or the

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<sup>328</sup> *Ibid*

<sup>329</sup> M Weaver, 'Veterans criticise 'petty' MoD appeals against injured soldiers compensation' *Guardian* (London, 28 July 2009)  
< <http://www.guardian.co.uk/uk/2009/jul/28/mod-appeal-injured-soldiers-compensation>> accessed 24 August 2012

<sup>330</sup> *Secretary of State for Defence v Duncan* [2009] EWCA Civ 1043

<sup>331</sup> *Secretary of State for Defence v Duncan* [2009] EWCA Civ 1043

<sup>332</sup> HC Deb 16 October 2007, vol 464, col 790

<sup>333</sup> J Bingham, 'Justice for wounded: injured servicemen in compensation limbo after court ruling' *Telegraph* (London, 13 October 2009)  
< <http://www.telegraph.co.uk/news/uknews/defence/6309108/Justice-for-Wounded-injured-servicemen-in-compensation-limbo-after-court-ruling.html>> accessed 24 August 2012

Government's commitment to servicemen and women'.<sup>334</sup> Furthermore, he stated that the scheme was not fully equipped to deal with 'anomalies, legal complexities and wider issues' relating to compensating injured troops.<sup>335</sup> Certainly the comments of Bob Ainsworth are correct in that the AFCS is not equipped to deal with the wider issues of compensating injured service personnel as the scheme does not take into account the difficulties that are faced when living with a serious injury. In an attempt to deal with the wider issues of the AFCS a review of the scheme was brought forward by a year.

## **8.2. The Lord Boyce Review**

In 2009, Bob Ainsworth asked Lord Boyce to conduct an independent review on the AFCS. In Lord Boyce's report on the 10<sup>th</sup> February 2010, while he found the scheme to be "fundamentally sound" he still made a number of recommendations for improvement.<sup>336</sup> These improvements included; raising by about one-third the annual payment made to the youngest and most seriously injured personnel throughout their lives to help them deal with the on-going effects of their injuries; retaining the top award level of more than £500,000 for the lump sum payments but increasing all other levels by up to two-thirds; and increasing the maximum award for those suffering from mental illness as a result of their service.<sup>337</sup> These proposals were accepted by the Government and endorsed by the Coalition administration.<sup>338</sup> The Armed Forces and Reserve Forces (Compensation scheme) (Amendment) Order 2008 No. 39 came into

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<sup>334</sup> Anon, 'Justice for wounded: Defence Secretary announces review of compensation for injured soldiers' *Daily Telegraph* (London, 20 July 2009)  
< <http://www.telegraph.co.uk/news/uknews/defence/5934375/Justice-for-Wounded-Defence-Secretary-announces-review-of-compensation-for-injured-soldiers.html>> accessed 24 August 2012

<sup>335</sup> Anon, 'MoD payout review to start early' (*BBC News*, 29 July 2009)  
< <http://news.bbc.co.uk/1/hi/uk/8175598.stm>> accessed 21 May 2013

<sup>336</sup> Lord Boyce, *The Review of the Armed Forces Compensation Scheme* (CM7798, 2010)  
< <http://www.official-documents.gov.uk/document/cm77/7798/7798.pdf>> accessed 21 May 2013

<sup>337</sup> HC Deb 10 February 2010, Vol 505, Col 926

<sup>338</sup> J Marriot and J McSweeney, 'The Armed Forces Compensation Scheme: a sheep in wolfs clothing?' [2010] 5 Web JCLI

force to amend the Armed Forces and Reserve Forces Compensation Scheme 2005 in respect of its treatment of claims where more than one injury has been sustained in one incident and to make amendments to the tariff level.

One year on from the Lord Boyce report amendments were made that are still in place today. The lump sum tariff levels were increased apart from tariff level 1 which had previously been doubled in 2008 to £570,000, this meant that for those suffering in tariff level 5 for example, were previously awarded £115,000 and now after the amendments to the scheme they can receive up to £175,000.<sup>339</sup>

The issues raised in the Court of Appeal in *Secretary of State for Defence v Duncan*,<sup>340</sup> as to incident related injuries and how the AFCS should take into account the prognosis of an injury, how a disorder develops over time and the treatment for the injury resulted in the Lord Boyce report making two recommendations that have now been implemented. Firstly, providing a greater clarity of the tariff and secondly, implementing new procedures so that medical advisors have an opportunity to comment on evidence before a tribunal.<sup>341</sup> Up until the amendments to the scheme the payment for benefit for the effects of medical treatment were excluded, unless the treatment that occurred was overseas where medical facilities are limited. This was because, as the MoD argued in the *Duncan* case, further implications as a result of or after any medical treatment were not part of the initial injury and therefore should not be compensated for

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<sup>339</sup> Ministry of Defence, 'Review of the Armed Forces Compensation Scheme- One year on' (*Government*, 1 March 2011)  
<[https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/27368/LordBoyceReport.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/27368/LordBoyceReport.pdf)> accessed 28 June 2013

<sup>340</sup> [2009] EWCA Civ 1043

<sup>341</sup> Ministry of Defence, 'Review of the Armed Forces Compensation Scheme- One year on' (*Government*, 1 March 2011)  
<[https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/27368/LordBoyceReport.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/27368/LordBoyceReport.pdf)> accessed 28 June 2013

under the scheme. This exclusion has now been removed and the scheme will take into consideration injuries that arise after the initial injury.

With regard to the burden of proof the review recommended that the onus should stay on service personnel to prove, on the balance of probabilities, that their injuries were a result of service. However, the review did make a further recommendation that should be made regarding the burden of proof, and has been implemented, in cases where the MoD has lost service personnel's records. These modifications will give the individual service personnel the benefit of presumption in relation to the material fact that would have been determined by that record.<sup>342</sup> Therefore service personnel do not have to worry about the complications of making a claim if the MoD has lost their records.

The review acknowledged that multiple injuries were not adequately compensated for with Lord Boyce recommending that; 'all injuries should not necessarily be paid at their full tariff value to ensure that those with lesser multiple injuries do not receive more than someone with a single more serious injury.'<sup>343</sup> In doing so a revised approach was based on the assessment of the injuries received to each principle body zone, identifying the following body zones; head and neck, torso, upper and lower limbs, the senses and mental health. The tariff amount should then be combined, with the 'most serious injured zone compensated at 100% at the total tariff level, and then 80%, 60%, 40% and 20% for each lesser zone retrospectively.'<sup>344</sup>

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<sup>342</sup> Ministry of Defence, 'Review of the Armed Forces Compensation Scheme- One year on' (*Government*, 1 March 2011)  
<[https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/27368/LordBoyceReport.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/27368/LordBoyceReport.pdf)> accessed 28 June 2013

<sup>343</sup> *Ibid* pg 22

<sup>344</sup> *Ibid* pg 22

These breakthrough amendments to the scheme will make a significant difference to service personnel injured in combat, making sure that they are compensated not only for their injury but for lifetime care. It means the most seriously injured service personnel will see an increase of hundreds of thousands of pounds to their compensation, making a more generous reflection on the old scheme.

### **8.3. Conclusion**

The 2005 incarnation of the AFCS received considerable criticism from both the media and injured service personnel for failing to compensate injured service personnel. The scheme was often compared to the civil claims system and cases had arisen where the MoD had paid civilians significantly higher levels of compensation for the same injuries. These criticisms forced the MoD and the Government to review and make changes to the scheme, which resulted in the initial increase to the tariff levels in 2008. However, this increase in tariff levels did little to assure personnel that they were receiving adequate compensation. Criticisms of the scheme continued and were heightened by the MoD's treatment of Corporal Duncan and Marine McWilliams, which resulted in the review of the AFCS being brought forward by a year.

The review implemented numerous changes to the tariff levels, multiple injuries, burden of proof and how injuries were to be assessed making a significant change to the way service personnel are compensated. These changes are yet to receive criticism and are a huge step forward in the MoD's moral duty of care towards service personnel. While the changes to the scheme are welcomed in enabling service personnel to obtain a degree of financial compensation for injuries suffered due to service, it should not deter attention away from how the injuries were sustained to begin with. The scheme does not prevent the MoD from being held liable for deploying inadequate equipment or

provide justice for those that blame the MoD for providing such equipment for the deaths or injuries of service personnel.

## Conclusion

The aim of the thesis was to consider whether the MoD is liable in tort for equipment deficiencies that have led to the deaths and serious injuries of service personnel in the course of combat. Equipment deficiencies have been well documented in the media and through the courts where questions have been raised as to whether the MoD owed a legal duty of care in combat to protect soldiers.

The starting point of the thesis considered what legal aspects needed to be established for a duty of care to arise, concentrating on the three-stage test set out in *Caparo v Dickman*<sup>345</sup> of foreseeability, proximity and fair, just and reasonableness. Considering previous cases with regard to claims being made against the MoD for injuries or deaths arising from combat the first two stages of foreseeability and proximity were not difficult to establish. For example, in *Mulcahy v Ministry of Defence*<sup>346</sup> it was foreseeable that service personnel will be at high risk of death or serious injury in combat and if they are not provided with adequate equipment the foreseeability of such risks becomes greater. Proximity was also established in this case through the employer/employee relationship. The third test however is more difficult to establish, as to whether it is fair, just and reasonable for a duty of care to be applied in combat. Before the third test of *Caparo* is considered the MoD invoke the doctrine of combat immunity in order to remove the issue of liability for negligence from the jurisdiction of the court altogether. However the question was how far this immunity should apply?

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<sup>345</sup> [1990] 2 AC 605 HL

<sup>346</sup> [1996] QB 732

The court extended combat immunity to cover the planning and preparation of operations in the *Multiple Claimants*<sup>347</sup> case which meant that equipment decisions were to fall within the scope of combat immunity so as to negate any claim of negligence against the MoD. However this is too loosely expressed and could include decisions of equipment made long before any battle commenced to which the fair, just and reasonable test of *Caparo* would be inappropriate to consider. The doctrine of combat immunity should not be extended to the extent that it was in the *Multiple Claimants* case and the MoD should be held liable in negligence if inadequate equipment contributes to death or serious injury. Elias J in *Bici v Ministry of Defence*<sup>348</sup> noted that combat immunity was exceptionally a defence to the Government, and to individuals, who take action in the course of actual or imminent armed conflict and cause death or injury to soldiers or civilians.<sup>349</sup> Equipment claims are directed to things that should have been done before any armed conflict, and to extend combat immunity from actual and imminent armed conflict to failures made at an earlier stage would be to extend it far beyond cases to which it had previously been applied. Therefore combat immunity should not apply to equipment decisions and any claims arising as a result of equipment decisions made before combat should proceed before the courts to be considered on their individual facts. Nevertheless the thesis showed that the doctrine of combat immunity allows the MoD to repudiate most claims in negligence against them for deaths or injuries arising from combat. Questions as to whether the MoD should be held responsible for deaths and injuries arising from combat include questions of public policy and whether it would be fair, just and reasonable to impose a duty of care on the MoD in combat.

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<sup>347</sup> *Multiple Claimants v Ministry of Defence* [2003] EWHC 1134 QB

<sup>348</sup> [2004] EWHC 786 (QB)

<sup>349</sup> *Ibid*

Arguments that claims should be struck out on the grounds that it would not be fair, just and reasonable to impose a duty have been emphasised in cases such as *Hill v Chief Constable*<sup>350</sup> and *Brooks v Commissioner of Police*<sup>351</sup> in which they stated that to impose a duty of care on the police would lead to the diversion of resources, time and money and lead to a defensive approach to policing, arguments which the MoD have sought to rely upon in combat-related claims. The *Mulcahy* case applied the test of fair, just and reasonableness by which Neill J held that there was no duty on the defendant to maintain a safe system of work, and that one soldier did not owe another soldier a duty of care in battle.<sup>352</sup> To impose a duty of care on each individual soldier in battle could lead to military operations being carried out in a detrimental frame of mind as they would be worried about a claim being made against them leading them to be overly cautious. A finding of negligence liability for equipment decisions, however, would not raise any issues of public policy or lead to operations being carried out detrimentally. Each case must be established on its own merits as not all claims arising from combat can be grouped together as they are all open to different risks depending of the nature and circumstances of the claim. If the MoD fail to provide the best possible equipment at their disposal and this leads to the death or serious injury of a member of the armed forces then a decision of negligence liability should be made.

If it can be established that a duty of care is owed by the MoD to service personnel the question would be whether the MoD have breached that duty of care. The issue of the standard of care has received little attention from the courts in respect of the MoD in the context of operational activities. To prove a breach of standard of care, foreseeability of harm and the magnitude of risk must be established. It was determined

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<sup>350</sup> [1989] AC 53

<sup>351</sup> [2005] UKHL 24

<sup>352</sup> *Mulcahy v Ministry of Defence* [1996] QB 732

that the MoD would be in breach of its duty of care and therefore not satisfy the elements of standard of care if it is foreseeable that the lack of adequate equipment would result in death or serious injury and there is a strong likelihood of harm. The consequences of such harm are life-threatening and therefore a standard of care should be placed upon the MoD to ensure the safety of service personnel on operations.

Whether the equipment deployed contributed to the deaths and injuries of service personnel is a matter of causation and as chapter six established, this depends upon the circumstances of each case. Although the issue of causation has not been explored in relation to claims being made against the MoD for injuries sustained in combat it is apparent from the analysis of case law that inadequate equipment could be found to be the direct cause of death or injury and not just an intervening factor.

The lack of a civil law remedy and the ability of the MoD to ask the court to strike out negligence claims on the basis of combat immunity were found to be incompatible with article 6 of the Human Rights Act 1998. The MoD in previous cases had relied upon combat immunity to have struck out any negligence claim against them arising from combat. However, relying upon previous case law such as *Osman v United Kingdom*,<sup>353</sup> the courts have started to favour service personnel and have allowed claims arising from combat to go before the court and be decided on their individual merits. In relation to article 2 of the ECHR the Grand Chamber ruling in *Al-Skeini* has effectively over turned the Supreme Court's ruling in *Smith v Oxfordshire Assistant Deputy Coroner*<sup>354</sup> and therefore could enable service personnel to bring a claim against the MoD for failing to protect the right to life through providing inadequate equipment.

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<sup>353</sup> (2000) 29 EHRR 245

<sup>354</sup> *R (on the application of Smith) v Oxfordshire Assistant Deputy Coroner* [2008] EWHC 694

Article 2 imposes a positive obligation on the MoD to take appropriate steps to protect life by providing adequate armoured equipment for use by soldiers on active service.<sup>355</sup>

In conclusion under current civil law the MoD are not liable in tort for equipment deficiencies as their reliance on combat immunity and the difficulties in establishing the third test of *Caparo* of fair, just and reasonableness make it difficult for a member of the armed forces to bring a claim against the MoD for deaths or injuries that occur as a result combat. On the other hand service personnel are able to rely upon their rights under the Human Rights Act 1998 after the land mark rulings from the Grand Chamber in *Al-Skeini* and the Supreme Court in *Smith and Others v Ministry of Defence* resulting in service personnel being able to rely upon some form of legal remedy.

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<sup>355</sup> *Smith and Other v Ministry of Defence* [2013] UKSC 41

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