Combat Immunity and the Duty of Care

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Abstract

While members of the UK armed forces presently suffer injury in numerous theatres of conflict around the world, this paper examines the circumstances in which they might successfully sue the Crown in negligence; and where the Crown might successfully make out a defence of *common law combat immunity*.

Let us consider first, then, the benefits common to all
Military men. Not least is the fact that no civilian
Would dare to give you a thrashing – and if beaten up himself
He'll keep quiet about it, he'd never dare show any magistrate
His knocked-out teeth, the blackened lumps and bruises
All over his face, that surviving eye which the doctor
Offers no hope for. And if he seeks legal redress,
The case will come up before some hobnailed centurion
And a benchful of brawny jurors, according to ancient
Military law: no soldier, it's stated, may sue or be tried
Except in camp, by court-martial. 'But still, a centurion's
Tribunal sticks to the rule-book. So if my complaint is legitimate
I'm sure to get satisfaction.' But the whole regiment
Is against you, every company unites, as one man, to ensure
That the 'redress' you get shall be something requiring a doctor,
And worse than the first assault. So since you've a pair of shins, it's
Stupidity past belief to provoke all those jackboots, and all
Those thousands of hobnails. Besides, what witness would venture
So far from the City, beyond the walls and the Embankment?
Have you anyone *that* devoted? Best dry your eyes at once, and
Stop importuning friends who will only make excuses.
When the judge says 'Call your witness', which of the onlookers
During that brawl will dare to stand up in court and say
'I saw it'? Find me one such, and I'll give him a place of honour
With our bearded and shaggy forebears. Easier find a witness
To perjure himself against a civilian than one who'll tell
The truth, if the truth's against a soldier's honour or interest.

Juvenal *Satire* XVI, 7-33
Translated by Peter Green

Introduction

A novel topic

The circumstances under which soldiers, sailors and airmen might sue the Crown in respect of personal injury suffered in a theatre of combat is a topic of recent interest only[1]. Prior to the Crown Proceedings Act 1947, it is not surprising that the suggestion had never been made: Great Britain had been engaged in two recent World Wars mobilising the whole population in different ways, the Doctrine of Common Employment had yet to be abolished in the workplace, and the Tort of Negligence was in its relative infancy. For the next 40 years, the Crown enjoyed a *statutory* immunity under the 1947 Act[2] until its repeal in May 1987[3]; while the modern law of Employer's Liability was developing apace, consideration of the question was otiose. It is only since the suspension of *statutory* immunity in 1987 that the scope of the duty of care has become an interesting issue and it is the topic for this paper. It is also a highly relevant one while our Forces remain deployed to the Gulf and Afghanistan, taking inevitable casualties, and the press regularly tells the stories of the injured and bereaved.

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[1] The situation in which injured foreign civilians may sue is not strictly within the scope of this paper but was considered recently by Elias J in *Bici & Bicic v MoD* [2004] EWHC 786 (QB). Soldiers on patrol in Kosovo during a UN peacekeeping operation after cessation of the main hostilities opened fire on a group of Kosovar Albanians. The principle defence was that the soldiers acted in self defence namely, in the civil context, that they had an honest and reasonable belief that they were going to be attacked. Elias J considered that the defence of *combat immunity* should be very narrowly construed on the facts; and in the course of the Judgment he cited without criticism the cases referred to in this paper. He found, however, that since he was rejecting self defence (there *was* no honest or reasonable belief that the soldiers were *going to be attacked*), there was similarly no *attack or threat of attack* / no *active operations against the enemy* (in the way in which this paper elaborates upon their definition) which could engage the doctrine of *combat immunity*. In the contest of this paper, the Court examined the circumstances to find that the threshold requirements for the defence to apply were not established.

[2] S.10 Crown Proceedings Act 1947

[3] S.1 Crown Proceedings (Armed Forces) Act 1987

This paper cannot address the practical difficulty of proof before the Courts to find the facts in favour of a Claimant; it remains a formidable hurdle, as it was in 1st Century Rome and the time of Juvenal. Nevertheless, the legal issue can be stated in the light of two cases which have considered the scope of the duty of care in a theatre of combat[4]. While the point is conveniently referred to as common law *combat immunity*, it is not strictly one of *immunity* (a duty of care being owed and a separate doctrine applying to negative a proved breach) but of the constricted scope of the duty of care (its absence) and lack of a breach in the first place.

Community Values

What are the issues at stake early in the 21st Century for a cause of action based in the Tort of Negligence, in respect of personal injury, in a relationship which, in peacetime at least, bears most of the hallmarks of that between employer and employee? There has been a plethora of recent cases on the existence of a duty of care in novel situations (see the PIBA Annual Lecture delivered by Latham LJ *Public Policy and the Duty of Care* – PIBA *Newsline* [2004] 1) and there is no uniformity of approach. However it is put (and posing the right question is often more difficult than arriving at the correct answer once it is posed), the answer is ultimately by reference to what the Courts consider to be *Community Values*, or policy or some other convenient label.

Community Values change with time. Prior to 1948 and the abolition of the Doctrine of Common Employment[5], civilian employment was often hazardous and left the workman with little common law redress in the event of injury. Now, the law of Employer's Liability is largely based on Statutory Regulations and a strict framework of European Directives, aimed at preventing all accidents through risk assessment and, to a greater or lesser extent, providing *strict* liability and satisfaction of liabilities through compulsory insurance[6]. In the years prior to 1948, our Services were large, conscripted, mostly fighting in defence of the very soil and people of the Realm, in the context of *total war*. Now, our

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[4] *Mulcahy v MoD* [1996] QB 732 CA; *Multiple Claimants v MoD – The PTSD Group Actions* [2003] EWHC/1134 QB

[5] Law Reform (Personal Injuries) Act 1948

[6] Employers' Liability (Compulsory Insurance) Act 1969

Services are small, made up of volunteer, professional, career-minded personnel including reservists called back from civilian employment, deployed mostly to fight on foreign soil in defence of international, economic and humanitarian interests. Ultimately, the issue is how far Community Values in the UK will allow service personnel, because of the particular nature of combat, to lose the rights which attach to all other members of Society, even in dangerous employment.

Welfare subsidiary to military role / no duty

In one sense the nature of the role of service personnel in combat does not need stating. However, some brief discussion will serve to focus what is at stake. Even in 21st Century warfare, which is many times more automated and remote than at the end of WW2, service personnel remain the prime resource and the means by which the battle is won (or at any rate the means by which the *peace* is won through the physical occupation of often hostile territory.) In winning the battle or the peace, the welfare of service personnel remains subsidiary to their military and tactical role. It cannot be otherwise; and it would be a startling departure if service personnel were to be able to sue each other and their commanders for decisions and actions taken under those conditions.

Peacetime welfare / duty of care

The role of service personnel in peacetime is entirely different. While lip service has sometimes been paid to it because of lack of resource, the corollary to service personnel being *the prime resource and the means by which the battle is won* is that their welfare in time of peace is of *paramount importance in preparation for battle*. This notion that the military is something special, to be given resource above the civilian population, is obvious in many less developed societies where military personnel enjoy higher standards of living, food and healthcare than the rest of society. At any rate in the UK, the MoD has now accepted that, in peacetime, it owes the usual duty between employer and employee to take care for the health and safety of personnel, covering premises, equipment, personnel, systems of work including supervision and, where appropriate, medical supervision, care and support[7].

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[7] *Multiple Claimants v MoD – The PTSD Group Actions* supra at 2.A.1 – 2.A.5

The boundaries – temporal, geographical and operational

This paper is content to leave to others an attempt to push back the boundaries at either extreme, and to accept that the usual duty of care between employer and employee is owed in time of peace but that no duty of care is owed in true combat conditions. But armies do not move instantaneously from the parade ground to actual fighting: there is an inevitable period of mobilisation. When does preparation for war become war itself [the *temporal* question]? How are the boundaries to be drawn to define the *theatre* of combat when campaigns on the other side of the world are planned, and to some extent executed, from an HQ in Northwood [the *geographical* question]? Much that is done, even in a theatre of combat where war is taking place, is unrelated to actual fighting[8]: it has often been said that war is made up of short periods of intense activity interspersed with long periods of boredom and inactivity. What activities in the conduct of the war qualify for immunity [the *operational* question]?

Single, unitary duty if it exists

The issue, then, for discussion in the remainder of this paper is where the line is to be drawn, where the duty of care is to be switched off. If the duty of care exists, it can only be the single, unitary duty to take *reasonable care in all the circumstances*: that may dictate a very low practical standard of care in particular circumstances at the margins of the existence of the duty, but such considerations can only be considered on a case by case basis.

Mulcahy v MoD

In *The PTSD Group Actions*, Owen J considered the Court of Appeal decision in *Mulcahy* on the duty of care between [1] the Crown and service personnel [2] in respect of personal injury [3] on active service. This was the only previous authority on this specific

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[8] That the soldiers in *Bici v MoD* (see footnote 1) opened fire did not necessarily mean that they were engaged in actual fighting within the scope of the defence. On those facts, Elias J found that they were not.

relationship and type of damage; and it was binding on him at first instance. He quoted most of it in large sections.

The facts of *Mulcahy* were straightforward and summarised by Owen J [paragraph 2.C.1.] Mr Mulcahy was a serving soldier in an artillery regiment deployed in Saudi Arabia during the first Gulf War. He was part of a team manning a howitzer, and brought a 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. The MoD applied to strike out the claim on the ground that it disclosed no reasonable cause of action. The application was dismissed on the basis there should be a trial to determine the facts before the court considered the nature and extent of any duty of care. The defendants appealed and the appeal was allowed, the Court of Appeal holding:

> …that the pleaded facts clearly established that the plaintiff was in a war zone taking part in warlike operations and were sufficient for decision of the question whether the claim should be struck out; that a soldier did not owe his fellow soldier a duty of care in tort **when engaging the enemy in battle conditions in the course of hostilities**[9], nor was there any duty on the defendants in such a situation to maintain a safe system of work; that, therefore, the plaintiff did not have a cause of action in negligence against the defendants; and that, accordingly, his statement of claim should be struck out and the action dismissed. [732H – 733A]

Mulcahy was decided expressly on its facts[10], without consideration of the precise ambit of the *immunity* which was left for consideration on the facts of each case. It was enough that the *immunity* clearly applied because Mr Mulcahy was injured through the breaches of a comrade (the gun commander) when *engaged in battle conditions in the course of hostilities*. The breaches *occurred* under battle conditions; and it did not matter in those circumstances whether the claim was framed in vicarious liability or a co-extensive primary breach of a safe system of work as a result of the failure of the individual commander.

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[9] Emphasis added here and in later quotations, in respect of phrases to be noted for later discussion.

[10] See Neill LJ at 748f – 749a

Dicta from the *property damage* cases – *Shaw Savill* approved

Having set out the brief facts and ratio of *Mulcahy*, together with quotations from it as to the historical position [2.C.2 – 2.C.7], Owen J then went on to quote at length the dicta cited with approval in *Mulcahy* from a series of older property damage cases in time of war, which the Court of Appeal said formed the basis of their decision in the PI context in *Mulcahy* [see the Judgment at 2.C.8.] At 2.C.9 he set out the conclusions of Neill LJ who gave the leading judgment:

> In my judgment the circumstances in which the plaintiff was injured clearly constituted "battle conditions" in the sense contemplated by Lord Reid, Lord Pearce and Lord Upjohn in the Burmah Oil case [1965] A.C. 75. Furthermore, **I consider that an English court should approach this claim in the same way as the High Court of Australia in the Shaw Savill case**, 66 C.L.R. 344.…As I said earlier, I do not find it necessary to explore the territorial limits of this immunity. It is sufficient to say that in my view it covers the present situation where in the course of hostilities against an enemy a howitzer of the plaintiff's battalion was engaging the enemy and the plaintiff was a member of the gun team. …
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> **I am satisfied that in a hypothetical case a court would require proof that the injury was sustained in battle conditions.** But here, as it seems to me, the plaintiff's pleaded case makes the position clear. The question then becomes: "Is a duty of care to be imposed in such conditions so as to make one serviceman liable for his negligent act towards another?" In my opinion, despite the careful arguments addressed to us on behalf of the plaintiff, there is no basis for extending the scope of the duty of care so far. I would echo the words of Gibbs C.J. in the Groves case, 150 C.L.R. 113,117: "To hold that there is no civil liability for injury caused **by the negligence of persons in the course of an actual engagement with the enemy** seems to me to accord with common sense and sound policy." …In my opinion there was no duty on the defendants in **these** battle conditions to maintain a safe system of work."

There is a tension between the emphasised passages in the final section of 2.C.9. What governs the application of the *immunity*? Is it the breach, or the damage, or both which have to occur under battle conditions? The strict ratio of *Mulcahy* itself does not tell us expressly how to treat a breach by a commander (or by anyone) occurring *not* under battle conditions, but happening to cause damage later while the battle is raging. Similarly, it tells us nothing of a previous systemic breach in peacetime unravelling to cause injury in time of war. As Owen J himself said at 2.C.11, after discussing the short judgment of Sir Iain

Glidewell in 2.C.10, these were important questions in the PTSD Group Actions (and he gave some examples of relevant situations.) The same questions are no less important now for Gulf 2 and Afghanistan.

In the PTSD Group Actions

Basis of combat immunity

Following his review of the authorities, Owen J summarised the basis of the combat immunity at 2.C.12:

> The basis of combat immunity emerges clearly from the judgments in Mulcahy and from the authorities cited with approval by Neill LJ, in particular the decision of the High Court of Australia in Shaw Savill. In the course of hostilities service personnel will be exposed to the risk of death and of injury, both physical and psychological. That is the nature of warfare. But the welfare of the soldier, sailor or airman must be subordinated to their combat role. The military objective must override the interests of the individual. As Dixon J said in Shaw Savill –
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> > "To concede that any civil liability can rest upon a member of the armed forces for supposedly negligent acts or omissions in the course of an actual engagement with the enemy is opposed alike to reason and to policy." Per Dixon J in Shaw Savill.
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> > "…there is no doubt that the executive government and its officers must conduct operations of war, whether naval, military or in the air, without the control or interference of the courts of law." Per Starke J in Shaw Savill

Scope – *geographical* or *operational* ?

Owen J then went on to consider [2.C.13] the scope of the *immunity*, the crucial question for the theme of this paper.

> 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. Given the nature of modern warfare, which may be conducted **at a considerable distance** from the enemy, Dixon J was in my judgment correct in holding in Shaw Savill that –

> "The principle must extend to all active operations against the enemy. It must cover attack and resistance, advance and retreat, pursuit and avoidance, reconnaissance and engagement."

Owen J treated the question of the scope of the duty of care by reference to the interpretation of a true immunity, reminding himself that, as an exception, the restriction to the usual duty should be no wider than necessary. It covers the blindingly obvious case such as *Mulcahy*, which this paper does not set out to undermine. The *geographical* question was touched upon but not answered by reference to any physical proximity; rather by reference to the *operational* question. It does not matter how close or far; rather what you are doing. He approved Dixon J's list of examples of *active operations against the enemy* to include attack, resistance, advance, retreat, pursuit, avoidance, reconnaissance and engagement.

Scope – *temporal* or *operational* ?

In the next paragraphs [2.C.14-16] Owen J considered the temporal question (in terms of planning and preparation), again answering it in terms of *operational* factors:

> 2.C.14Does the immunity extend to acts or omissions in the course of planning and preparation for operations in which service personnel **may engage in hostilities**? Where is the line to be drawn? Some assistance is to be derived from the decision of the House of Lords in Burmah Oil to which Neill LJ made extensive reference in Mulcahy, and in particular to the passage from the speech of Lord Pearce at p162. The decision in Burmah Oil was concerned with damage to property, the destruction of installations near Rangoon to prevent them falling into enemy hands in the course of the Second World War. The House of Lords held that the destruction of the installations was not **so intimately tied up with the actual fighting** as to be regarded as battle damage. Lord Pearce posed the question of where the line was to be drawn –
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> > "**Cases which lie close to that line, wherever it be drawn, must depend on fact and degree**…..I would define the line as excluding **damage done in battle or for the necessities of battle**."
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> 2.C.15As Dixon J said in Shaw Savill in the passage cited by Neill LJ in Mulcahy –

> "… **a real distinction does exist between actual operations against the enemy and other activities of the combatant services in time of war**."

> 2.C.16In **aggressive operations** the objective will be defeat of the enemy; in **defensive operations** the successful repulse of the enemy. In the planning of and preparation for **such operations** the interests of service personnel must be subordinate to the attainment of the military objective. In my judgment the military cannot be constrained by the imposition of civil liability in the planning of and preparation for such operations any more than in their execution. The planning of and preparation for military operations will include decisions as to the deployment of resources.

Owen J explicitly followed the distinction between *things done in battle or for the necessities of battle / other things* (the *Burmah Oil* formulation) and the similar distinction, differently phrased, *actual operations against the enemy / other activities of the combatant services in the time of war* (the *Shaw Savill* formulation.) The *immunity* only covers the former aspect of the two distinctions; so too it only covers planning and preparation for the former aspect. Just as activites which are not *actual operations against the enemy* do not attract *immunity*, so planning and preparation for those other activities are not covered. Where the planning and preparations are related to actual operations against the enemy, it does not matter when any potential breach occurs, whether in planning, preparation or execution.

Actual operations against the enemy – what qualifies?

It is instructive now to refer to the context of the quotation from Dixon J at 2.C.15 (set out in full in 2.C.8) because of the example it gives of something which does not constitute *actual operations against the enemy*.

> But a real distinction does exist between actual operations against the enemy and other activities of the combatant services in time of war. For instance, a warship proceeding to her anchorage or manoeuvring among other ships in harbour, or acting as a patrol or even as a convoy must be navigated with due regard to the safety of other shipping and no reason is apparent for treating her officers as under no civil duty of care, remembering always that the standard of care is that which is reasonable in the circumstances. Thus the commander of His Majesty's torpedo-boat destroyer Hydra was held liable for a collision of his ship with a merchant ship in the English Channel on the night of 11 February 1917, because he failed to perceive that the other ship, which showed him a light, was approaching on a crossing course… obviously the Hydra was on

> active service and war conditions obtained - H.M.S. Hydra [1918] P.78). It may not be easy under conditions of modern warfare to say in a given case upon which side of the line it falls. But, when, in an action of negligence against the Crown or a member of the armed forces of the Crown, it is made to appear to the court that the matters complained of formed part of, or an incident in, active naval or military operations against the enemy, then in my opinion the action must fail on the ground that, while in the course of actually operating against the enemy, the forces of the Crown are under no duty of care to avoid causing loss or damage to private individuals."

Sailing/driving without due care and attention

The negligent navigation of a ship (the Hydra) did not attract *immunity*, even at night in the English Channel during the 1914-1918 war, because there was no pressure of engagement or threat of attack,. The *Hydra* was evidently approved by Dixon J and, by implication, by the Court of Appeal in *Mulcahy*. This was a case, effectively, of driving without due care and attention: the fact that it occurred in an active theatre of war was incidental. Driving without due care and attention leading to an RTA in the Gulf, similarly without the pressure of engagement or threat, will not attract *immunity*. If occurring during the push to Baghdad in a sand storm because of the operational necessity to press on, it should attract immunity. If occurring incidentally while moving forces into position before crossing the start line, it should not. Negligent discharge of a weapon (which happens all too frequently in barracks in peacetime conditions) happening in the Gulf should not be covered by immunity unless part of an *active operation against the enemy*. If occurring on active patrol through Basra, it should be covered; if happening incidentally during the unloading of ships in port, or in camp, it should not. Where the line should be drawn will require the Court to hear the basic facts (if they cannot be agreed) to form a judgment as to which side of the line the case falls; and it will be a matter of fact and degree (Lord Pearce).

Winning the *peace* qualifies for *immunity*

In 2.C.17 Owen J considered the application of the *immunity* to anti-terrorist, policing and peace keeping operations, concluding with little difficulty that all operations in which service personnel come under attack or threat of attack are to be covered. The *peace* has to

be won as much as the battle; and recent campaigns have lead to greater losses after supposed victory than before it.

Breach occurring other than in *active operation*…

In 2.C.18 Owen J considered an important issue between the parties in the PTSD Group Actions, namely what effect *immunity* may have when the injury was suffered in active operation against the enemy but the breach leading to the injury occurred at a different time outside the operation of the immunity. He said:

> In this context there is a further important issue between the parties. It is submitted on behalf of the MoD that –
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> "Claims for personal injuries sustained in combat are not justiciable and so compensation for damage suffered during combat is not recoverable."
>
> It is implicit in that submission that no cause of action can arise in relation to injury sustained in combat irrespective of whether the acts or omissions to which such injury is attributable fall within the combat immunity. In my judgment that submission is misconceived, and confuses the issue of the existence of the duty of care with the causation of injury. The issue is whether the MoD is under a duty of care in a particular set of circumstances. If the restriction to the duty of care does not arise on the facts, and a Claimant is able to demonstrate breach of duty resulting in injury and consequential loss and damage, it is immaterial that the injury was sustained in the course of combat. The question with regard to the injury is then simply one of causation; is it attributable to the breach of duty?

Breaches, not damage, attracting *immunity*

Many of the breaches alleged in the PTSD Group Actions went to systems devised and trained for (or not devised and not trained for) in peacetime, outside the scope of planning and preparation for any specific active operation against the enemy. Owen J clearly rejected the MoD's argument that the immunity attaches simply by reason of the injury occurring at a time when the *immunity* conditions attached. It is the breaches which count, not the occasioning of the damage, for the purposes of deciding if the immunity attaches. Indeed it would not be hard to construct facts in which a decision taken in active

operations against the enemy lead to injury after the operation had finished: such decisions must attract immunity. Personnel with injuries which can be traced back as a matter of causation to breaches which do not attract *immunity* have a valid cause of action.

The irregular supply of body armour in Gulf 2 has been a topic of discussion in the press and there has been at least one tragic case. Immunity would surely attach to the decision of a commander who required personnel to give up their armour for others in pursuance of the operational imperative. A Court would be most unlikely to look behind his judgment on the best deployment of his limited resources. At 2.C.16 Owen J found:

> The planning of and preparation for military operations will include decisions as to the deployment of resources.

A Court might be reluctant to look at how the planners decided to obtain and deploy body armour once the decision actually to deploy to the Gulf had been made. However, if a real, effective breach was the peacetime decision not to issue personnel with *personal* protective body armour (in a wider context there are, after all, the *Personal* Protective Equipment at Work Regulations 1992 and the *Personal* Protective Equipment Regulations 2002) it is difficult to see how *immunity* could defeat the cause of action on that score.

Owen J finished his discussion of this topic at 2.C.19:

> I therefore see no basis for holding that as a matter of principle all claims for personal injuries sustained in combat are not justiciable. Nor do I find support for the proposition in the authorities upon which the MoD sought to place reliance. *D.F.Marais v The General Officer Commanding the Lines of Communication and the Attorney-General of the Colony ex p. Marais* [1902] AC 109 is simply authority for the proposition that "Where actual war is raging, acts done by the military authorities are not justiciable by the ordinary tribunals." In *Burmah Oil Co v Lord Advocate* [1965] AC 75 the House of Lords was concerned with the issue of compensation for the destruction of oil installations. It was held that (per the headnote at p 76) –
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> "The taking or the destruction of property in the course of actually fighting the enemy does not give rise to any claim for compensation, but these demolitions did not fall under the head of battle damage, because, although the enemy was approaching, they did not arise out of the military operations."

> The distinction drawn by the majority in the House between battle damage and damage that did not arise out of military operations, does not bear on the issue of the recoverability of damages at common law for injury sustained in the course of combat, but attributable to breach of duty not occurring in combat.

Summary of propositions – Owen J

Owen J concluded the section of his Judgment on *combat immunity* with a series of propositions flowing from his previous analysis [2.C.20]:

> Accordingly in my judgment the application of the immunity can be resolved by reference to the following propositions.
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> 1. A soldier does not owe a fellow soldier a duty of care in tort when either (one or other or both) are engaged with an enemy in the course of combat.
>
> 2. The MoD is not under a duty to maintain a safe system of work for service personnel engaged with an enemy in the course of combat.
>
> 3. In relation to both (1) and (2) the term combat has an extended meaning in that-
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> a. the immunity is not limited to the presence of the enemy or the occasions when contact with the enemy has been established. It extends to all active operations against the enemy in which service personnel are exposed to attack or the threat of attack. It covers attack and resistance, advance and retreat, pursuit and avoidance, reconnaissance and engagement.
> b. the immunity extends to the planning of and preparation for operations in which the armed forces may come under attack or meet armed resistance.
> c. the immunity will apply to peace-keeping/policing operations in which service personnel are exposed to attack or the threat of attack.

Misinterpretation

There is always a risk in summarising a difficult subject, very obviously depending to a large extent on fact and degree, to a series of propositions which the reader may latch on to and misinterpret without reading the full analysis. Some have contended that Owen J, in this series of propositions, expanded the scope of *combat immunity* beyond that previously to

have been found in the *Mulcahy* decision and the passages quoted within it. In fact nothing can be further from reality, as we have seen from a careful reading of the detailed reasoning. As long as the propositions are read with [1] the distinction in mind between *active operations against the enemy* and *other activites of the combatant forces in time of war* and [2] an understanding that it is the breaches which must occur in the course of *active operations against the enemy* (and not the damage), no one will go wrong.

Developed propositions

At the same risk of misinterpretation (and no disrespect to Owen J, the overall effect of whose Judgment is entirely clear and sensible on the premise that *combat immunity* is indeed a sound policy) one could tentatively offer to simplify the propositions in format, and incorporate some of the important aspects from the detailed discussion which do not presently feature in the list. The suggestion is to focus on the phrase *active operations against the enemy*[11] without importing the additional elements of *engaged with an enemy in the course of combat* in the first two propositions. With that phrase given an extended definition, there is no need to incorporate the additional concept. Further, given that the rationale focuses on the circumstances of the breach and not the damage, it is difficult to understand the presence of the words *either (one or other or both)* in the first proposition. The doctrine applies, if at all, to the soldier in breach and not the soldier injured. The suggested developed propositions are:

1. A soldier does not owe a fellow soldier a duty of care in tort when in active operations against the enemy.

2. The MoD is not under a duty to maintain a safe system of work for service personnel in active operations against the enemy in respect of breaches occurring during active operations.

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[11] The same could be done using the phrase *battle conditions or the necessities of battle* (to use the alternative phrase *in Burmah Oil* rather than the one in *Shaw Savill* which Owen J and Neill LJ in *Mulcahy* evidently preferred.)

3. In relation to both (1) and (2) the phrase "active operations against the enemy" has an extended meaning in that-

a. it is not limited to the presence of the enemy or the occasions when contact with the enemy has been established. It extends to all active operations against the enemy in which service personnel are exposed to attack or the threat of attack. It covers attack and resistance, advance and retreat, pursuit and avoidance, reconnaissance and engagement.

b. it extends to the planning of and preparation for such active operations.

c. it applies to peace-keeping/policing operations in which service personnel are exposed to attack or the threat of attack.