

MULTIPLE CLAIMANTS

V

THE MINISTRY OF DEFENCE

[Extract from the Judgment of Owen J - [2003] EWHC/1134 (QB) - with original paragraph numbering.]

COMBAT IMMUNITY

2.C.1 As indicated above it is common ground that at common law no duty of care arises “*in a service setting when related to immediate operational decisions and actions within a theatre of war or analogous situation*”, the combat immunity. But there is an issue as to its ambit.

It is first necessary to consider the historical context, an exercise that was undertaken by Neill LJ in giving the principal judgment of the Court of Appeal in Mulcahy v Ministry of Defence [1996] QB 732. Mr Mulcahy was a serving soldier in an artillery regiment deployed in Saudi Arabia during the Gulf War. He was part of a team manning a howitzer, and brought a claim against the defendants alleging that he had suffered personal injury as a result of the negligence of the gun commander whilst 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 ground 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, 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.

- 2.C.2 In the course of his judgment Neill LJ considered the historical position of the Crown with regard to liability in tort. He summarised the position in a passage beginning at page 740D -

“Until 1947 actions against the Crown were inhibited by two principles of ancient though doubtful origin. The first was that the King could not be impleaded in his own courts. The effect of the application of this principle was that until the 19th century proceedings against the Crown, so far as they were available at all, had to be brought by various complicated procedures including a petition of right. These procedures were simplified by the Petitions of Right Act 1860 (23 & 24 Vict. C.34) and it was held in Thomas v The Queen (1874) L.R. 10 QB. 31 that proceedings by way of petition of right were available to recover unliquidated damages against the Crown for breach of contract. But proceedings for damages for tort were inhibited or rather prevented by the application of the second ancient principle, the principle that the King could do no wrong. It may be that at one time the maxim “the King can do no wrong” meant that the King was not privileged to commit illegal acts, but it came to be understood to be a rule barring actions in tort against the Crown...

The consequences of the immunity of the Crown against proceeding in tort were mitigated by the practice whereby, for example, if a claim were brought for damages for negligent driving against a Crown servant acting in the course of his employment, the Crown, in what were

considered to be appropriate cases, would pay the damages on an ex gratia basis. But the system attracted widespread criticism and both Lord Haldane and Lord Birkenhead made proposals for reform. Furthermore in Australia and New Zealand the matter was largely rectified by statute by the beginning of this century.

The pre-1947 law, however, throws little light on the rights of servicemen rather than civilians to make claims. It seems probable that, irrespective of the rule as to Crown immunity, if one serviceman had made a claim for damages for personal injuries against another serviceman the Crown could have resisted liability under the doctrine of common employment. The researches of counsel brought to our attention the decision in Weaver v Ward (1616) Hob. 134 where it was held on demurrer that an action of trespass would lie if in the course of military exercises a soldier were injured by another unless the latter could prove that the injury had been “utterly without his fault.” But it is clear that the military exercise was being undertaken in peacetime conditions.”

2.C.3 Neill LJ then turned to the Crown Proceedings Act 1947 (the ‘1947 Act’) and recited the material parts of sections 2 and 10. At 742 B he continued –

It will be seen that the effect of section 10 of the Act of 1947 was to prevent proceedings being brought in respect of the death of or personal injury to a member of the armed forces caused by the negligence of another member of the armed forces provided that the Secretary of State issued a certificate that the death or injury was attributable to service for the purposes of entitlement to a war pension.

The Crown Proceedings (Armed Forces) Act 1987
Few cases involving the operation of section 10 of the Act of 1947 came before the courts. As time passed, however there was growing dissatisfaction that section 10 acted as a bar to claims in tort even in peacetime conditions. A wide disparity was perceived between the level of pensions awarded and the sums that would have been obtained had action for damages been available. A further cause for concern was the restricted rights of dependent parents to make a claim for a war pension.

In 1987 the Crown Proceedings (Armed Forces) Act 1987 was passed to remove the blanket protection of section 10 of the Act of 1947.”

- 2.C.4 Section 2 of the 1987 Act gave the Secretary of State power to revive the effect of section 10 of the 1947 Act. Section 2(2) provided that –

*“The Secretary of State shall not make an order reviving the effect of the said section 10 for any purpose unless it appears to him necessary or expedient to do so –
(a) by reason of any imminent national danger or of any great emergency that has arisen; or
(b) for the purposes of any warlike operations in any part of the world outside the United Kingdom or of any other operations which are or are likely to be carried out in connection with the warlike activity of any persons in any such part of the world.”*

- 2.C.5 The Secretary of State has not exercised his powers under section 2 in relation to the operations the subject of the Group Actions and it is therefore necessary to consider the position at common law.

- 2.C.6 Until the decision in Mulcahy there was no direct English authority to support the existence of combat immunity at common law, notwithstanding the observation by Lord Walker of Gestingthorpe in his opinion in Mathews v Ministry of Defence [2003] UKHL 4 that –

“...it (the 1947 Act) left untouched the principle that in battlefield conditions (and because of the exigencies of battle) the common law does not impose on any soldier a duty of care towards his fellow soldiers (see Mulcahy v Ministry of Defence).”

- 2.C.7 But the absence of authority is readily explicable. As Sir Iain Glidewell said in his judgment in Mulcahy –

“An action in negligence by one member of the armed forces of the Crown against another would have been barred by the doctrine of common employment until that doctrine was abolished by the Law Reform (Personal Injuries) Act 1948. When that happened the Crown Proceedings Act 1947 was already in force. Neill LJ has set out in his judgment the terms of section 10 of that Act. The terms of that section clearly required the question posed by Mr Havers (Does one soldier owe to another a duty of care when engaging the enemy in the course of hostilities?) to be answered “No”. Thus it was not until section 10 of the Act of 1947 was itself suspended by section 1 of the Crown Proceedings Act 1987 that the answer to the question depended for the first time, on the general common law principles of the law of negligence.”

- 2.C.8 In Mulcahy the MoD sought to establish the principle by reference to three strands of authority, the decisions of the High Court of Australia in Shaw Savill and Albion Co Ltd v The Commonwealth (1940) 66 C.L.R. 344 and Groves v Commonwealth of Australia (1982) 150 C.L.R. 113; secondly the dicta in Burmah Oil Co Ltd v Lord Advocate [1965] AC 75; and thirdly cases involving injuries to police officers while engaged on operational duty. Neill LJ examined each strand in some detail in a passage beginning at 743G

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“I should refer first to the Shaw Savill case, 66 C.L.R. 344. In that case the plaintiff company sued the Commonwealth of Australia for damages in consequence of a collision which occurred between HMAS Adelaide and a motor vessel owned by the plaintiffs. In the defence the Commonwealth pleaded that at the time of the collision and at all material times there existed a state of war in which the Commonwealth of Australia was engaged. Paragraph 23 of the defence was in these terms, at page 348.

“The plaintiff’s 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”.

The Commonwealth sought to set the service of the writ aside or, in the alternative, an order that the action should be stayed. The High Court refused to dismiss or stay the action and held that the question whether at the time of the collision the warship was engaged in active operations against the enemy was an issue which the court could decide for itself. In the course of the judgments, however, consideration was given to whether a duty of care was owed if the warship had been engaged on active operations.

Dixon J said at pp.361-362:

“Outside a theatre of war, a want of care for the safety of merchant ships exposes a naval officer navigating a King’s ship to the same civil liability as if he were in the merchant service. But, although for acts or omissions amounting to civil wrongs an officer of the Crown can derive no protection from the fact that he was acting in the King’s service or even under express command, it is recognised that, where what is alleged against him is failure to fulfil an obligation of care, the character in which he acted, together, no doubt, with the nature of the duties he was in the course of performing, may determine the extent of the duty of care...It could hardly be maintained that during an actual engagement with the enemy or a pursuit of any of his ships 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. It cannot be enough to say that the conflict or pursuit is a circumstance affecting the reasonableness of the officer’s conduct as a discharge of the duty of care, though the duty itself persists. To adopt such a view would mean that whether the combat be by sea, land or air our men go into action accompanied by the law of civil negligence, warning then to be mindful of the person and property of civilians. It would mean that the courts would be called upon to say whether the soldier on the field of battle or the sailor fighting on his ship might reasonably have been more careful to avoid causing civil loss or damage. No one can imagine a court undertaking the trial of such an issue, either during or after a war. 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. But the principle cannot be

limited to the presence of the enemy or to occasions when contact with the enemy had been established. Warfare perhaps never did admit of such a distinction, but now it would be quite absurd. The development of the speed of ships and the range of guns were enough to show it to be an impracticable refinement, but it has been put out of the question by the bomber, the submarine and the floating mine. 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. 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."

Rich A.C.J. and McTiernan J. agreed with the judgment of Dixon J. Starke J. and Williams J. concurred in the result.

Starke J. said, at pp355-356:

“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. Acts done in the course of such operations are not justiciable and the courts of law cannot take cognizance of them. In my judgment, the case of Ex parte D.F. Marais [1902] A.C. 109 so decided.”

Williams J. reached a similar conclusion. He too referred to Ex parte D.F. Marais [1902] A.C. 109 and said, at p. 336, that if it were proved that actual hostilities were in progress at the time “the alleged cause of action would not be justiciable.”

It is apparent from the later decision of the High Court of Australia in the Groves case, 150 C.L.R. 113 that when the claim by Shaw Savill came to trial the action succeeded on the ground that the captain of the Adelaide had steered a wrong course: see 150 C.L.R. 113, 123. Presumably the trial judge found that at the material time the warship was not engaged in actual operations against the enemy. But Gibbs C.J. , at p. 117, affirmed as correct what had been said by Dixon J. in the Shaw Savill case, 66 C.L.R. 344. Gibbs J. added: “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.”

The plaintiff in the Groves case, 150 C.L.R. 113, was an airman in the R.A.A.F. who was injured when leaving a stationary aircraft being used to transport civilians in a time of peace. The accident occurred when a folding ladder collapsed beneath him as a result of the absence of locking pins. The High Court held that as the case arose out of routine duties in time of peace the plaintiff was entitled to the same protection of the common law as would protect other members of the community, and that the Commonwealth were vicariously liable for the negligence of other members of the crew. In a joint judgment of four members of the court led by Stephen J. references were made to the Shaw Savill decision, 66 C.L.R. 344. As I read the judgment, however, the support given to Shaw Savill was less emphatic than in the judgment of Gibbs C.J. It was said, at p.134:

“Nor do we have occasion to consider the position of servicemen engaged in combatant activities in time of war or in training for such activities. It would not be wise, in the abstract, to attempt to mark out whatever line may be thought to exist between one act of military duty and another. Public policy may require that, at some point in the continuum from civilian-like activities performed by servicemen in peacetime to active service in wartime, what would otherwise involve actionable negligence should not give rise to a cause of action. If so, the definition of liability would seem to be pre-eminently a case for legislation, preceded by evaluation and report by law reform agencies.”

On the other hand in other passages in the judgment, at p. 12, and in the judgment of Murphy J., at p.136, there seems to have been a recognition of the fact that warlike activities fell into a special category. Looking at the case as a whole I do not consider that it throws any doubt on the proposition affirmed in the Shaw Savill case, 66 C.L.R. 344 that no duty exist where a serviceman is engaged in actual operations against the enemy.

Counsel for the defendants also referred us to the decision in Burmah Oil Co. Ltd v Lord Advocate [1965] A.C.75. In that case installations belonging to the appellant companies near Rangoon had been destroyed by the army in order to prevent them falling into the hands of the enemy. It was held that as the demolitions had taken place otherwise than in the course of actual military operations compensation was payable. The speech of Lord Reid contains an interesting account of the general rule that where property was taken or destroyed in the exercise of the Royal prerogative compensation was payable. But Lord Reid recognised the exception of what had been called “battle damage”. He said, at p.110

“Such damage must include both accidental and deliberate damage done in the course of fighting operations. It cannot matter whether the damage was unintentional or done by our artillery or aircraft to dislodge the enemy or by the enemy to dislodge our troops. And the same must apply to destruction of a building or a bridge before the enemy actually capture it. Moreover, it would be absurd if the right to compensation for such a building or bridge

depended on how near the enemy were when it was destroyed.”

In the House of Lords the decision of the First Division of the Court of Session was reversed by a majority on the basis that the destruction of the installations was not so intimately tied up with the actual fighting as to be regarded as battle damage. It seems quite plain, however, that Lord Reid would have upheld the decision if he had reached the same conclusion as the Court of Session on the facts.

Lord Pearce adopted a similar approach to that of Lord Reid. He said, at p.162

“In respect of a house that has the misfortune to be in the centre of a battlefield and is inevitably demolished by the Crown’s artillery, it is clear, on the principles which have been almost unanimously set out, that the subject can have no claim. In respect of a house that is demolished by the Crown with wise forethought, long before any battle, to provide a fort or a clear field of fire in case of threatened invasion I think that is equally clear that the subject should obtain compensation. 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 the battle or for the necessities of the battle. If an evacuating army destroys as it goes, I would exclude from compensation any damage which it does for the purposes of its survival, for example, by destruction of ammunition which will be turned against it by the enemy, or petrol which would be sued by the enemy to pursue it, or food which will sustain the enemy during their attacks upon it.”

It is to be noted that, at p. 169B. Lord Upjohn too recognised the distinction between the taking of property to prevent it being of use to the enemy and the destruction of property caused by artillery in, for example, retaking a town from the enemy. The House accepted that the relevant law was the law of Burma but the case was decided on the basis that the law of Burma in 1941 had to be assumed to be the same as the law of England.

*It was therefore submitted in this court that the decision in the *Burmah Oil* case, though it was concerned with compensation for loss of property, was some support for the*

proposition that a claim could not be based on damage sustained in the course of military operation against the enemy.

The third strand of authority relied upon by the defendants related to actions against the police. In particular, our attention was directed to the decision of May J. in Hughes v National Union of Mineworkers [1991 I.C.R. 669]. In that case the plaintiff, who was a police officer, was injured during disturbances at a colliery in North Yorkshire in 1984. The plaintiff brought an action against the union and also against the Chief Constable or the North Yorkshire Police. He alleged that there had been a failure to provide him with adequate protection, that there had been inadequate co-ordination of the police forces available and that he had been exposed to the risk of injury. On the application by the Chief Constable to strike the action out the judge referred to a number of cases involving the police including Hill v Chief Constable of West Yorkshire [1989] A.C. 53. Having considered these authorities the judge expressed his conclusion, at p. 680:

“In my judgment ... as a matter of public policy, if senior police officers charged with the task of deploying what may or may not be an adequate force of officers to control serious public disorder are to be potentially liable to individual officers under their command if those individuals are injured by attacks from rioters that would, in my judgment, be significantly detrimental to the control of public order. It will no doubt often happen that in such circumstances critical decisions have to be made with little or no time for considered thought and where many individual officers may be in some danger of physical injury of one kind or another. It is not, I consider, in the public interest that those decisions should generally be the potential target of a negligence claim if rioters do injure an individual officer, since the fear of such a claim would be likely to affect the decisions to the prejudice of the very tasks which the decisions are intended to advance.”

It was said that the Hughes case was another illustration of the rule that in what may be called “battle conditions” those who take part in an attempt to control events should not be made liable for damages in civil proceedings.”

2.C.9 Neill L.J. set out his conclusions at 748 G –

“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.

In addition it may be helpful if I state what my conclusion would be even in the absence of the Australian decisions and the Burmah Oil case [1965] A.C. 75. It is true that the Secretary of State, by exercising his powers under section 2 of the Act of 1987 could have reintroduced the immunity conferred by section 10 of the Act of 1947. But, in the absence of this statutory protection one still has to consider the position at common law. It is therefore necessary to consider whether at the relevant time Sergeant Warren owed a duty of care to the plaintiff at common law.

In Marc Rich and Co. A.G. v Bishop Rock Marine Co. Ltd [1996] 1 A.C. 211, 235, Lord Steyn drew attention to the fact that since the decision in Dorset Yacht Co. Ltd v Home Office [1970] A.C. 1004 it has been settled law that the elements of foreseeability and proximity as well as considerations of fairness, justice and reasonableness are relevant to all cases of alleged negligence whatever the nature of the harm sustained by the plaintiff.

In the present case it is accepted on behalf of the defendants that two of these components of a duty of care - proximity and foreseeability of damage – are present. The issue to be determined is whether it is fair, just and reasonable that a duty of care should be imposed on one soldier in his conduct towards another when engaging the enemy during hostilities. In the light of recent amendment

to the plaintiff's pleading the same question has to be asked in relation the alleged duty to maintain a safe system of work.

It is plain from the decision of the House of Lords in the Marc Rich case [1996] 1 A.C. 211 that in order to decide whether it is fair, just and reasonable to impose a duty of care one must consider all the circumstances including the position and role of the alleged tortfeasor and any relevant policy considerations. In this context one should bear in mind the dictum of Lord Pearce in Hedley Byrne and Co. Ltd v Heller and Partners Ltd [1964] A.C.465, 536: "How wide the sphere of the duty of care in negligence is to be laid depends ultimately upon the courts' assessment of the demands of society for protection from the carelessness of others." This dictum was cited by Lord Diplock in the Dorset Yacht case [1970] A.C. 1004, 1058. In the absence of legislative guidance the question of policy has to be resolved by the courts.

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."

2.C.10 Sir Iain Glidewell gave a concurring judgment in which he said at 750G –
751 B –

"Like Neill L.J. it is in my judgment clear that public policy does require that, when two or more members of the armed forces of the Crown are engaged in the course of hostilities, one is under no duty of care in tort to another. Indeed it

could be highly detrimental to the conduct of military operations if each soldier had to be conscious that, even in the heat of battle, he owed such a duty to his comrade. My reasons are thus in essence those expressed by Dixon J. in the passage from his judgment in Shaw Savill and Albion Co. Ltd v The Commonwealth, 66 C.L.R. 344 which Neill L.J. has quoted. If during the course of hostilities no duty of care is owed by a member of the armed forces to civilians or their property, it must be even more apparent that no such duty is owed to another member of the armed forces. This conclusion is wholly consistent with, and supported by, the decision of the House of Lords in Burmah Oil co Ltd. v Lord Advocate [1965] A.C. 75, and depends upon similar reasoning to that adopted by May J. in relation to police officers in Hughes v National Union of Mineworkers [1991] 1 C.R. 669. In my judgment, therefore, at common law, one soldier does not owe to another a duty of care when engaging the enemy in the course of hostilities.”

- 2.C.11 It is to be noted that neither Neill LJ nor Sir Iain Glidewell sought to define the parameters of the immunity. It was not necessary for them to do so as at the material time Mr Mulcahy was part of a gun crew firing live rounds at the Iraqi enemy. The circumstances in which he was injured unquestionably constituted “*battle conditions*” in the sense contemplated by Lord Reid, Lord Pearce and Lord Upjohn in the *Burmah Oil* case. But the extent or ambit of the immunity is of central importance in this litigation as is readily apparent from a cursory consideration of some of the issues that arise in relation to the Falklands War. Three illustrations will suffice. The MoD are criticised for failing to make provision for forward psychiatry in the Falklands campaign. The Claimants contend that Field Psychiatric Units (FPU) ought to have been deployed. The decision not to deploy such units, or, if it be the case, the failure to address the question of whether to deploy such units, were acts or omissions on the part of those responsible for assembling the task force. It is submitted on behalf of the MoD that the relevant decisions were made or at least influenced by the operational and logistical considerations inherent in

mounting an amphibious invasion of heavily defended territory approximately 8000 miles from the United Kingdom. Does combat immunity apply to such decisions? Secondly criticism is made of the failure to brief troops adequately en route to the Falkland Islands. Do such alleged breaches of duty fall within the ambit of combat immunity? If it did not apply throughout the voyage, did there come a time when it did, eg when the troop ships came within range of the Argentine air force? Thirdly it is the Claimants' case that the MoD was in breach of duty in failing to carry out operational debriefing "*at the earliest reasonable opportunity whether in a lull during battle, following battle, campaign, attack or patrol*"; and that combat immunity does not apply to such periods, a contention with which the MoD takes issue.

- 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 –

"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.

"...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

2.C.13 What then is the scope of combat immunity? 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.”

2.C.14 Does 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 –

“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.”

2.C.15 As 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.16 In 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.
- 2.C.17 Does the immunity apply to anti-terrorist, policing and peace keeping operations of the kind in which British forces were engaged in Northern Ireland and in Bosnia? In my judgment it will apply to operations in which service personnel come under attack or the threat of attack. I derive support for that proposition from the judgment of May J in Hughes v National Union of Mineworkers [1991] I.C.R. 669, cited with approval by Neill LJ in Mulcahy. Mr Hughes was a police officer who was posted to a support unit whose role was to assist in the maintenance of public order at a colliery where mineworkers on strike were picketing working miners. He formed part of the front line of police officers outside the colliery entrance, and was injured when a large number of pickets surged forward knocking him to the ground. He brought an action inter alia against the Chief Constable of North Yorkshire for negligence in “*causing, permitting or requiring the plaintiff to take up an unsupported and unprotected position; failing to implement proper riot control and exercise proper co-ordination and in all the circumstances failing to operate a safe system of work*”. The Chief Constable applied to have the proceedings struck out as disclosing no reasonable cause of action. The district registrar dismissed the application. May J upheld an appeal by the Chief Constable. At the conclusion of his judgment he said –

“In my judgment, having considered Hill v Chief Constable of West Yorkshire [1989] AC 53 on the one hand and Knightly v Johns [1982] 1 WLR 349 and Rigby v Chief Constable of Northamptonshire [1985] 1 WLR 1242 on the other, as a matter of public policy, if senior police officers charged with the task of deploying what may or may not be an adequate force of officers to control serious public disorder are to be potentially liable to individual officers under their command if those individuals are injured by attacks from rioters that would, in my judgment, be significantly detrimental to the control of public order.

It will no doubt often happen that in such circumstances critical decisions have to be made with little or no time for considered thought and where many individual officers may be in some danger of physical injury of one kind or another. It is not, I consider, in the public interest that those decisions should generally be the potential target of a negligence claim if rioters do injure an individual officer, since the fear of such a claim would be likely to affect the decisions to the prejudice of a very task which the decisions are intended to advance. Accordingly, in my judgment, public policy requires that senior police officers should not generally be liable to their subordinates who may be injured by rioters or the like for on the spot operational decisions taken in the course of attempts to control serious public disorder. That, in my judgment, should be the general rule in cases of policing serious public disorders.”

2.C.18 In this context there is a further important issue between the parties. It is submitted on behalf of the MoD that –

“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? The point can be illustrated by reference to the Claimants' contention that the MoD was under a duty to devise and implement a system for screening recruits so as, and I paraphrase, to eliminate those vulnerable to stress, and that as a result of breach of that duty recruits who should have been rejected were enlisted, and subsequently sustained psychiatric injury when exposed to the trauma of battle. If that contention is well founded, it will obviously not be open to the MoD to argue that the combat immunity applies to the relevant acts or omissions. The injury will have been sustained in combat; but the exposure to stress in combat is simply the mechanism by which the breach causes injury.

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) –

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.

2.C.20 Accordingly in my judgment the application of the immunity can be resolved by reference to the following propositions.

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-
 - 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.