Ministry of Defence

Legal protections for armed forces personnel and veterans serving in operations outside the United Kingdom

A response by the Association of Personal Injury Lawyers

October 2019

Introduction

APIL strongly disagrees with the assertion throughout the consultation, that the proposed civil litigation longstop is designed to protect Armed Forces Personnel/Veterans. This is not only misleading and false but contrary to the Armed Forces Covenant and the promise to treat service personnel fairly.

The ability of armed forces personnel to bring civil compensation claims against the Ministry of Defence (MoD) is key in helping to keep them safe, and to fetter this ability will reduce protection, not strengthen it. The current law of limitation has been carefully developed on a case by case basis, and balances the competing interests of the parties. There is no justification for the MoD to be treated differently to other defendants in respect of limitation.

We have responded only to those questions within our remit – namely the proposals relating to civil claims.

Initial comments

We are extremely concerned that the MoD appears to be proposing to limit the rights of armed forces personnel "through the backdoor", and under the guise of ensuring greater protection. If the rights of those injured by the MoD were restricted in the way proposed at section 3 of the consultation, armed forces personnel will not be protected, and in fact may suffer harm as a result. Civil actions currently allow armed forces personnel and veterans to hold the MoD to account for decisions made which lead to armed forces personnel suffering injury or loss of life. We challenge the assertion that the act of bringing civil litigation is "*lawfare*" or the "*judicialization of war*". The current law strikes the correct balance between:

(a) Holding the MoD to account (when a breach of duty of care is proven).

(b) Providing compensation to those service personnel who have been injured or the families of those service personnel who have lost their lives.

(c) Acknowledging that the 'heat of battle' is a unique circumstance.

(d) Allowing claimants to bring claims out of time where unique and special circumstances exist on the one hand, for example where they have been incapacitated, physically unable to take advice or deployed on operations; and also providing that defendants with strong arguments can counter so called 'late claims' by arguing prejudice.

The proposal to introduce a longstop on claims, and the rhetoric around the "judicialization of war" appears to be a 'reboot' of the much-criticised arguments previously raised by the MoD regarding "combat immunity", in the "Better Combat Compensation" consultation.

Negligence claims are an important mechanism for holding the MoD to account, highlighting issues relating to training and defective equipment, which ultimately leads to the prevention of injuries or death. For example, in the case of *Birch v MoD*[1] or *Smith and others v Ministry of Defence*[2]*. Smith and others* involved several cases relating to Snatch Land Rovers being jointly heard by the Court. If, as was proposed by the MoD, these claims had simply been barred from the courts because they fell within the legislative scope of 'combat immunity', the issues arising from the cases would have been swept under the carpet. Instead, the result was that the ineffectiveness of the vehicles was brought into the public eye, and the MoD was forced to acknowledge that there was a significant issue, regarding the use and unsuitability of Snatch Land Rovers.

Despite advances in technology, kit/equipment and health and safety improvements, the rate of injury and ill health for the UK Armed Forces has increased since 2013/2014[3]. This is unacceptable. While it is not clear what this increase is attributable to, there may be a correlation between budget cuts, fewer resources and a loss of senior personnel following enforced redundancies. There may also be an increase in the reporting of and recording of any injuries/incidents which – historically - the MoD has failed to do. It is more important than ever that the courts are allowed to continue to hold the MoD to account.

The balance struck by the current common law principle of combat immunity has ensured that injured personnel/veterans have been able to access justice, and the MoD can potentially be held to account for reckless or negligent decisions that have resulted in injuries and death. These are complex and challenging claims that are still being tested by the courts. The Challenger negligence claims for example, were upheld because they fell into the category of training and preparation, sufficiently far removed from the pressures and risks of active operations against the enemy. It was held that the Ellis negligence (Snatch Land Rover) claim was less obviously directed to things away from the theatre of battle, and that the issue should be open to further argument in the light of evidence.

The ability of the courts to assess each case individually ensures that the correct balance is struck between holding the MoD to account – which is paramount to protecting service personnel and veterans – and preserving the principle of "combat immunity". Whether discretion in relation to limitation under the Limitation Act 1980 should be exercised should also be decided on a case by case basis. The courts should be free to examine the facts and hear the arguments of both sides, with the well-equipped judiciary left to come to a decision based on their knowledge of the long-established body of case law in this area.

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[1] [2013] EWCA Civ 676
[2] [2013] UKSC 41
[3] https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/741286/Enclosure_1_MOD_Health_and_Safety_Statistics_Annual_Report_2017-18.pdf

To say that the proposal to impose an absolute long stop on claims is for the benefit of armed forces personnel is disingenuous. It would not benefit service personnel. The focus is on limiting the exposure of the MoD against claims brought by those service personnel, and the importance of such claims being brought is set out above.

The assertion throughout the consultation that the current system is "unfair to our personnel" gives the impression that it is personnel/veterans who are the defendants in civil claims, and that they will be financially liable. This is false - the MoD is the defendant in these cases. Further, our members report that the MoD often puts forward very few or no witnesses in these claims, so the assertion that the MoD does not want to "put Armed Forces personnel and veterans through the ordeal of giving evidence on its behalf" is also an inaccurate reflection of the reality.

Q 24) Whether it would be appropriate to impose an absolute limit (or "longstop") for bringing claims for personal injury and/or death seeking damages in respect of historical events which took place outside the UK? This would prevent claims being brought beyond that point, while still leaving the courts with discretion to allow claims that are brought outside the normal time limit but before the absolute limit.

It would not be appropriate to impose an absolute limit for service personnel/veterans bringing claims for personal injury and/or death seeking damages in respect of historical events which took place outside of the UK. There is no reason why the MoD, as a defendant, should benefit from particular protections over and above those already provided by the Limitation Act 1980 and/or pre Crown Proceedings Act 1987. The courts already balance the rights of the parties when considering whether to exercise the discretion to dis-apply limitation on a case by case basis. This will include the issue of the degree of prejudice to defendants and whether a fair trial is possible, if the evidence is stale. There is clear and established law setting out the circumstances in which the discretion to dis-apply the limitation period can be used.

Military claims may be brought outside of the limitation period for a variety of reasons, and the current system allows for these claims to be brought. If an absolute limit were introduced, those who are suffering, for example, as a result of PTSD and/or industrial disease may well, and we would argue will, be impacted. Those who bring claims for PTSD and/or industrial disease often do so years after the event that caused their illness, due to the latency of the conditions. For example, those exposed to asbestos in Sea King helicopters may not be diagnosed with any effects and/or any asbestos related illness for many years - sometimes decades after exposure.

The Government, in response to a parliamentary question on 5 September 2019, stated that the proposed civil litigation longstop will not preclude service personnel or civilians deployed on overseas operations from bringing a claim in relation to PTSD or other conditions that manifest or are diagnosed more than ten years after the incident which caused the condition, as section 11 of the Limitation Act calculates the time limits from the later of (a) the date on which the cause of action was accrued, or (b) the date of knowledge. We are concerned that the situation is not as straight forward as put forward by the Government, and s 11 and s14 are not a panacea. As was stated in the case of McCoubrey[4], there is an inter-play between sections 11 and 33 of the Limitation Act. "Further, there is the inter-relationship between sections 11 and 14 and section 33, discussed by Lord Hoffmann in the *Adams* case. Given that a claimant who can successfully invoke sections 11(1)(b) and 14 is able to extend his

[4] [2007] EWCA CIV 17

limitation period, possibly by many years (as this case shows) as of right, it seems to me that it should be relatively narrowly construed, bearing in mind that such *a claimant will always have the possibility of a fall-back position in the form of section 33.* (emphasis added)" Removing the right under s 33 to apply out of time after ten years is likely to prejudice claimants. Those involved in the Sea King scandal may have not yet received a diagnosis. They will not yet be in a position to bring a claim, but when they finally are in a position to do so, they may be unable to rely on s 11 or s 14, due to the particular facts of their case. Section 33 allows the courts to have a vital discretion to extend the limitation period, while ensuring that the competing interests of the parties are balanced. If the section 33 discretion simply stops applying after ten years, it will be even more difficult than at present to bring a claim after this period of time, even if there are very legitimate reasons for the claim to be brought late.

Additionally, and regretfully, it is not unusual for personnel/veterans to have been misinformed about their rights to bring a civil claim. Some are incorrectly told that they cannot bring a claim whilst they are still serving in the armed forces, and as such by the time they are discharged, they are out of time.

Often, armed forces personnel and veterans are misinformed that their only route to redress is through the armed forces compensation scheme (AFCS) which has a limitation period for bringing a claim of seven years. As the AFCS is administered by Veterans UK on behalf of the MoD it is farcical for them to argue at Section 3 that "records are rarely sufficiently detailed" and/or "memories…fade over time" in a civil claim when they are clearly not troubled by a seven year limitation period in an AFCS claim.

Often, when personnel or veterans realise that they could have brought a claim in the civil courts, they are already out of time. Members report that the MoD frequently misinforms service personnel as to their rights. It is not uncommon for solicitors to be contacted by armed forces personnel who have been told by their superiors that they have no civil claim, and/or that their only route to redress is either via the AFCS and/or service complaint route.

A member firm has confirmed that they were recently instructed on a serious sexual assault case where the claimant had been misinformed by the MoD that they had no grounds for bringing any claim. Upon seeking independent legal advice from the member firm, that claimant was advised that not only did they have a potential claim for compensation under the Criminal Injuries Compensation (Overseas) Scheme, but they also had a potential employer's liability civil claim against the Ministry of Defence.

Another member firm has confirmed that only last month they were approached by at least two veterans whose careers had ended as a result of non-freezing cold injuries in circumstances that were prima facie negligent. These complex injuries are often long term and disabling and the MoD accept that they should not happen where training is arranged appropriately and safely. Both individuals had suffered their injuries over three years ago and were time barred from bringing civil claims. Both had been informed (separately) that they could bring a civil claim after their service terminated, but having waited until then they found themselves without a civil remedy. They had both recovered sums through the Armed Forces Compensation Scheme, but these sums paled in comparison to what they might have secured in a civil claim, nor do these sums reflect their realistic and ongoing losses.

These are only a few examples of the misinformation that is often a theme in military claims and places veterans at a disadvantage.

Furthermore, the MoD's conduct in responding claims and their compliance with the Civil Procedure Rules (CPR) is poor, giving rise to delays in resolution of cases and unnecessarily

increasing costs. For example the MoD fails to provide documents which should be freely available to the claimant to assess and evidence their claim. As a result, the claimant representative is required to apply to court to force disclosure. This adds to the delay and ultimately eats into the three-year limitation period. Members report that it is common practice that they will be required to issue the claim – incurring a £10,000 court issue fee - to protect against limitation.

There is no justification for the MoD to have special protections, dispensation or exemptions in respect of limitation. It is vital that service personnel are able to bring cases to Court in accordance with civil law, without fear or favour, and that they are entitled to the same rights and considerations as the rest of the populace.

Additionally it is clear that allowing the MoD further exemptions from civil law by imposing a "longstop" breaches the spirit of the Armed Forces Covenant and would mean service personnel/veterans are actively prejudiced and/or negatively affected in relation to their rights to bring a civil claim when compared with a civilian.

Q25) Whether the "longstop" should be set at ten years, or some shorter or longer period?

As above, we do not believe that a longstop should be introduced. It is neither desirable nor necessary. The current law on limitation enables the courts to exercise a discretion to determine whether a particular case is permitted to be brought outside of the limitation period.

Q26) Whether there should be any exceptions to a "long stop"?

As above, we do not believe that there should be a long stop.

About APIL

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