SUING PRIVATE RYAN

THOUGHTS ON PERSONAL INJURY CLAIMS AND COMPLAINTS AGAINST THE MINISTRY OF DEFENCE

PRIVATE BRIEFING MIL SIG

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The Law stated is that believed to apply in May 2008

Introduction

2,500 years ago a Chinese warrior and philosopher named Sun Tzu became a grand master of strategy and captured the essence of his philosophies in a book called, by English speaking nations, Sun Tzu on the Art of War. To this day, military strategists around the world have used Sun Tzu's philosophies to win wars and have made Sun Tzu on the Art of War a staple of their military education.

Those seeking to understand strategy in business, law, and life have also turned to Sun Tzu on the Art of War for the wisdom therein. For at the heart of Sun Tzu's philosophies are strategies for effective and efficient conflict resolution useful to all who wish to gain advantages over their opposition.

These supporting materials are intended to offer similar advantages and insights to those wishing to achieve effective conflict resolution in personal injury and clinical negligence cases involving the Ministry of Defence. It is not intended as a complete guide to personal injury litigation, of course, but to highlight the subtleties of claims involving a juggernaut that can be both utterly frustrating and eminently beatable.

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Jonathan Dingle

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(1) FORWARD THE LIGHT BRIGADE!

1.1 The MOD is one of the largest single employers in the UK. As any other employer, it is usually ultimately responsible for the health and safety of those engaged in its service while they are at work, both at home and abroad. With some important exceptions, anyone suffering illness or injury caused by negligence or breach of statutory duty whilst working for the MOD can make a claim against the MOD, whether they're currently serving or not.

1.2 The scope of the duty of care, both to civilians and service personnel, is (with some exceptions in wartime and like activities) the same as with a civilian employer. This is sometimes difficult to project to a court where the injury is in training or the activity is a traditional high risk demonstration, such as the White Helmets or the parachute team.

Does your client need to sue the MOD?

1.3 Armed Forces Compensation Scheme - The injured person must be serving or have served in HM Forces (including Reserve Forces and Brigade of Gurkhas) and their illness or injury was caused by their service on or after 6 April 2005. If they are no longer serving and their illness or injury was caused by service before 6th April 2005, they may be considered under the War Pensions Scheme. Service in the MOD must have been the cause, or the main cause of injury, and the claim must be within five years from the earliest of the day:

- the injury occurred;
- the condition was made worse by service;
- they first sought medical advice for an illness contracted through service; or
- they leave the services.

Awards may be by a lump sum against the tariff which is less than the CICA scheme in many instances. Low back pain may result in an award of £2,625. There may also be a Guaranteed Income Payment (GIP) for serious injuries where the person has left the armed forces. The GIP is a tax free monthly payment based on earnings, age and severity.

If the injured person is medically discharged or dies, then the claim will be automatically assessed. Otherwise they must complete and submit the AFCS application form to the Veteran's Agency www.veteransagency.mod.uk .

The scheme does not act as a bar to a civil claim if there is negligence. The advantage of the AFCS is that no negligence or breach of statutory duty need be proved. The disadvantages include the tariff system, limited special damages, and no legal costs. Solicitors can advise under private arrangements.

Tactically - it may be worth making an immediate claim under the AFCS and using that to put the client in funds whilst a negligence claim is investigated, either under a CFA or private retainer. While credit will be given for like payments the AFCS is relatively quick and a useful interim payment.

1.4 Criminal Injuries (Overseas) Scheme - This scheme mirrors the CICA Civilian Scheme and applies where service personnel are injured overseas due to the criminal acts of other service personnel or third parties such as terrorists - but not the enemy in the course of a war or peacekeeping. See: R v MOD (ex parte Walker) [2000] 2 All ER 917 HL. The tariff scheme was introduced in 1997. There is no need to prove negligence. The claims are dealt with by:

Ministry of Defence Service
Personnel Policy Pensions
3a1 Room 5/84 Metropole Building
Northumberland Avenue London WC2N 5BL.

1.5 ToPaS Scheme - an interesting development since 2000 was the Jeff Mitchell (Chief Claims Officer, MOD) endorsed scheme referring claims by MOD personnel caused by negligence other than by MOD tortfeasors to a single firm of solicitors, Betesh Fox (now Ralli Solicitors).

1.6 Others - Many have insurance from pay deduction schemes (PAX). Irwin Mitchell have a contract with PAX for referrals but, of course, the Ombudsman's decision on BTE insurance will apply. More beneficially, the Royal British Legion offers access and advice on pensions, grants and loans: see - http://www.britishlegion.org.uk/contact/Contact-Us-509170.shtml

Crown Proceedings

1.7 It used to be important to distinguish between service personnel and civilians. Incidence of the Crown Proceedings Acts 1947 and 1987. A key example is asbestos/mesothelioma:

1.8 Civilian Employees of the MoD - Asbestos has excellent heat insulation properties which encouraged it to be widely used in the defence industry, particularly to protect ships from the risk of fire. Many claims have been successfully brought against the MoD on behalf of civilian employees who have suffered from asbestos related disease and who were exposed to asbestos products. This is particularly the case in naval dockyards where the use of asbestos was prolific. Where the person claiming was a civilian employee of the MoD, the same principles apply in bringing a claim as they would against any employer.

1.9 People who served in the armed forces - Very different considerations apply to a person who was employed by the MoD in active service and who may have been exposed to asbestos and developed an asbestos related disease. Until the Crown Proceedings Act 1987 it has not been possible for any ex-servicemen or women to bring a claim against the MoD. This is because the MoD has been able to claim "crown immunity" which provides them with immunity from being sued for damages. The present state of the law is that any ex-serviceman or woman who was exposed to asbestos prior to 15th May 1987 is unable to claim for damages. They may, however, be entitled to a war pension under the pre-2005 scheme.

Pre-15th May 1987 Cases

1.10 In Derry v MOD [1999] PIQR P204 - the claimant had been a sergeant in the Royal Artillery. In 1985 he was referred to a military hospital where he was seen by a specialist. It was claimed, and accepted for the purposes of the preliminary issue only, that there was an adenoid cystic carcinoma in his left orbit. The carcinoma was undiagnosed between 1985 and 1987. Then, on a visit to a civilian hospital it was recognised and treated. Section 10 applied to clinical negligence as much as personal injury and negligent treatment by surgeons was "due" to the claimant's service. The Section 10 bar was held not incompatible with ECHR Article 6 in Matthews v MOD [2003] UKHL 4 where Bond Pearce were for the unsuccessful appellant serviceman.

Limitation Act issues

1.11 Many service personnel mistakenly believe that they can only sue once they have left the forces, despite Defence Council Instructions and official communications stating otherwise. This can obviously be very important, given the three year limit under section 11 of the 1980 Act. Do note, however, that where there is some kind of deliberate assault the six year limit may apply.

1.12 The effect of section 11/14 and the objective test was seen in McCoubrey v Ministry of Defence [2007] EWCA Civ 17 M had suffered an impairment to his hearing in 1993, when he was on a training exercise and a thunderflash exploded near him. He noticed immediate ringing in his ears and within a day or two the hearing in his left ear deteriorated. A consultant who saw M in early 1994 noted that he had marked sensorineural hearing loss. Audiograms over the years showed that the damage to M's hearing remained fairly consistent. However, it did not affect his military career until 2001, when his status was temporarily downgraded. He was formally downgraded in 2003 and told by his colonel that he was likely to be permanently excluded from active service. In 2004 M issued the instant proceedings for damages.

1.13 CA held that the proper approach to the question raised by the Limitation Act 1980 s.14(2) in relation to a claimant seeking to bring a personal injury claim outside the three-year period specified in s.11(4)(a) was to consider the reaction to the injury, as opposed to its possible consequences, of a reasonable person in the objective circumstances of the actual claimant, while disregarding his actual personal attributes. But the case was remitted to the judge below to determine whether M could bring his claim under s.33 of the Act.

1.14 Section 33 can come to the rescue in many circumstances. The balancing exercise worked in favour of the Claimant in an asbestosis case in Smith v MOD [2005] EWHC 682 (QB). This case repays study where the widow succeeded where the balance of prejudice against the MOD was wholly outweighed by that against the claimant if she were prevented from proceeding.

(2) CANNONS TO THE RIGHT OF THEM!

2.1 There are instances where post-May 1987 negligence will not found a claim as a matter of public policy. These include cases where the claimant is physically injured in the course of action or fighting in a war zone. There may also be difficulties where the claimant is psychologically affected by lawful service during a wartime campaign but properly medically treated thereafter.

2.2 This is not new law. The point has been around for at least a century. 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. 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.

2.3 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. 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: see - HMS Hydra [1918] P.78.

2.4 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 MOD, it is made to appear to the court that the matters complained of formed part of active operations against the enemy, then the action must fail on the ground that the forces of the Crown are under no duty of care to avoid causing loss or damage to private individuals. This was certainly the case in the Australian High Court matter of *Shaw Savill* (66 CLR 344) per Dixon J.

2.5 The question is - what are war zone cases, and how far does the war zone extend, physically and psychologically?

Recent War Zone cases

2.4 The modern starting point is Mulcahy v Ministry of Defence [1996] Q.B. 732 CA. In 1991 the plaintiff was a serving soldier in an artillery regiment and part of a team manning a howitzer deployed in Saudi Arabia in the course of the Gulf War. He brought a claim against the defendants 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 defendants made an application pursuant to Ord. 13, r. 5(1)(a) of the County Court Rules 1981 to strike out the plaintiff's claim on the ground that it disclosed no reasonable cause of action. The judge dismissed the application on the ground that there should be a trial to determine the facts before the court considered the nature and extent of any duty of care.

2.5 The Court of Appeal held, allowing MOD's appeal that the pleaded facts clearly established that the plaintiff was in a war zone taking part in warlike operations. There a soldier did not owe a 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. The claimant did not have a cause of action in negligence against the defendants as a result and accordingly his statement of claim should be struck out and the action dismissed.

2.6 Mr Mulcahy was, of course, firing howitzer rounds into Iraq from Saudi Arabia in 1991 whilst Operation Desert Storm was in full flood. The rounds were live. There were, on the pleaded case, battle conditions in very much in existence. It is worth referring to the Particulars of Claim in that case because these cases are fact sensitive. The pleaded case was of live firing against Iraqi targets, of the claimant going on orders to the front of the gun to collect water, and of the gun commander Sergeant Warren firing the gun whilst the claimant was in front.

2.7 In Multiple PTSD Claimants v MOD [2003] EWHC 1134 (QB) Owen J dealt with a range of issues. His lengthy judgment has been construed as extending the meaning of combat conditions to include attack and the threat of attack. It is important, however, to understand that the learned judge was dealing with the stresses and strains of combat conditions (or the preparation or training for the same) which led to an inorganic injury namely PTSD. He did not, so far as I can see in the judgment, deal with physical injuries. There is an arguable distinction. Owen J found 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.

2.8 In my opinion, articulated in a number of cases, the propositions advanced by Owen J are in some respects open to challenge. I have argued successfully with the MOD and its legal advisers in pleadings and negotiations that the context of the activities and the nature of the illness is crucial. PTSD could emerge from a variety of circumstances connected with trauma both on the battlefield and in the context of the battlefield. It depended on the sufferer reacting to incidents including the threat of death or serious injury in conflict.

2.9 Specifically, it has been advanced that Owen J did not refer to road traffic accidents which could have happened anywhere and whose cause was not in any sense related to combat or hostilities. The MOD took the point in just one case - Nicholson v MOD (2004 - unreported).

2.10 On 11th November 2003, Remembrance Day, the Claimant was a soldier riding as a passenger in a MOD road-tanker being driven by a Private Johnstone between two bases in Iraq. For reasons unconnected with any insurgency or hostilities, Johnstone lost control of the tanker causing it to roll on its side. As a result, the Claimant was seriously injured. The MOD argues that this was a case of battlefield conditions.

2.11 Saddam had, however, been deposed some months earlier. British troops were engaged in peacekeeping, albeit in somewhat difficult circumstances. The convoy in which the tanker was in was not under-fire nor was there a contact in progress. To complicate matters slightly, however, a contact did occur later, whilst the Claimant was in an ambulance. Shots were reportedly exchanged, but this appears to have been an isolated incident.

2.12 I argued that the accident did not have the hallmarks or imprimatur of battlefield conditions. It was a routine incident whose only unusual feature was the location (ie: Iraq). The road traffic accident could just have easily have taken place on Salisbury plain or in Germany. I contended that in those circumstances, despite limb 3(c) of Owen J's propositions, immunity cannot and could not be appropriate in the case of the Claimant's injuries.

2.13 The matter was run on a 100% success fee CFA with 51% prospects of success by committed solicitors. Quantum would be substantial and the risk was taken. The MOD conceded the point and the Claimant ultimately received several hundred thousand pounds in damages.

2.14 Thereafter, so far as I am aware, the Defendant has not taken the *Mulcahy* immunity point in any case where there was no actual firing or fighting in progress. Cases where liability has been conceded (where the facts shewed negligence or breach of statutory duty, and subject to any contributory negligence) have been varied. They include: (a) a serviceman injured in a fall from a Virgin 747 at Basra; (b) a Lieutenant injured when a Land Rover rolled due to excessive speed on a slip road; (c) a sergeant shot in a negligent discharge by a colleague on an Iraq rifle range; (d) a soldier falling from an observation tower he was building without experience; (e) a soldier falling while standing on guard in a moving Land Rover; and (f) aircrew injured killed in Puma and Chinook helicopter accidents en route to/from operations.

(3) CANNONS TO THE LEFT OF THEM!

3.1 Injuries arising from illegal acts - assaults and beatings, for example - figure in claims. Typically these are training incidents but may also involve exposure to the excesses of enthusiasm or misjudgement in operations situations which amount to a crime in their own right.

3.2 An example was Brosnan v MOD (2005 - unreported) - a former army corporal from Northumberland brought a claim against the MoD for a serious shoulder injury sustained after he was told to 'act like a psycho' during a training exercise. The claimant was serving in Northern Ireland in with the Second Battalion Royal Fusiliers and dislocated his shoulder in a riot control training exercise at a police facility in November 2003. During the drill, Mr Brosnan was put in a cell and told to pretend he had been drinking and to act like a psycho, while the rest of his company took turns to enter the cell in groups of three and restrain him. The claimant feared he had broken his arm after he felt it 'pop' when members of his company jumped on him but the exercise was allowed to continue despite the claimant asking for it to be halted and the injury was made worse when he was later kicked in the same arm.

3.3 "Resistance To Interrogation" courses, survival course, escape and evasion courses and prisoner handling courses have all led to claims in which the MOD has been found liable for the excesses of its instructors or staff. Where there is a deliberate assault there may be a six year limitation period. Equally, the nightclub bouncer principles in Hawley v Luminar Leisure Ltd & others [2006] EWCA Civ 18 can be supplied.

(4) INTO THE VALLEY OF DEATH

4.1 The spate of suicides and suspicious deaths at Princess Margaret Barracks, Deepcut in Surrey was used by some to suggest that the Army had a lax attitude to death of personnel in service. By contrast it was said that the Royal Navy and Royal Air Force did not have a suicide problem amongst recruits - at least not one above the national average for young people. The evidence of sustained abuse leading to suicides is at best ephemeral. It is however interesting to note that Deepcut is to be razed to make way for housing.

4.2 In June 1995 Private Sean Benton, from Hastings, East Sussex, was found dead at the Deepcut Princess Royal Barracks. He had five bullet wounds to his chest. Ballistics tests suggested that only one bullet was fired from close range and the others from a distance, but the Army claimed he had committed suicide

4.3 In November 1995 Private Cheryl James, 18, of Llangollen, Gwent, was found dead with a single bullet wound to the head at the barracks which is the headquarters of the Royal Logistical Corps. The coroner recorded an open verdict but an Army inquiry concluded she had committed suicide. Surrey Police said they were not looking for anyone else in connection with the Private James' death.

4.4 In September 2001 Private Geoff Gray, 17, from Hackney, east London, was found dead with two gunshot wounds to his head while on guard duty. A coroner recorded an open verdict after hearing from witnesses that during a search after the shots were fired a figure was seen running away. In total five shots were fired; three bullets have not been found. His parents have a web site devoted to discovering the truth about his death.

4.5 On 23 March 2002, Private James Collinson, 17, from Perth, was found dead with a single gunshot wound while on guard duty at the Deepcut barracks. The Army said he shot himself, but his parents did not accept this, insisting he had been happy.

4.6 Despite Army denials, a leaked report reveals a culture of bullying, harassment, rape, racism and beatings at Deepcut Army Barracks. In October 2004, former Deepcut Army barracks training instructor Leslie Skinner was sentenced to four-and-a-half years in jail for sex attacks on young male soldiers. There was another death at Abingdon in Oxfordshire in October 2002. There have also been suspicious deaths at Catterick in North Yorkshire.

4.7 Suicide cases are notoriously difficult to pursue. The lack of evidence and the question of the duty of care in the absence of pre-existing clinical assessments are poor prognostic indicators for the claim. If, however, the deceased has consulted his or her sickbay then there may be a case for clinical negligence if the risk was or ought to have been detected. A lead case of this type is currently being pursued where the death involved a married man with a young child - and accordingly considerable dependency may be recovered.

4.8 Other cases must face a proportionality test - the claim for a 17 year-old son will usually be little more than the basic 1976 Act Section 1A bereavement award (now of course raised to £11,800 from 1st January 2008 as part of the government's new three yearly commitment to raise it in line with the RPI).

Funerals and inquests

4.9 As of June 2007, the MOD has made a number of improvements to the support it gives to all bereaved families. The number of family members who receive travel and accommodation expenses to attend repatriation ceremonies has been increased from five to seven. Two family members are able to reclaim the costs of their attendance at pre-inquest hearings. Funding is already provided for two family members wishing to attend the full inquest.

4.10 The tax free funeral grant offered to families who wish to hold a private funeral service has also been increased by £1,000 so that it ranges between £2,190 and £2,760. Should the family wish to hold a Service funeral, arrangements and funding are provided by the MOD.

4.11 A further tax free grant of £500 will be introduced for the next of kin to meet any personal costs they may occur as a result of their bereavement.

(5) HALF A LEAGUE HALF A LEAGUE!

5.1 Bullying may have been a feature of the Deepcut issue but it certainly remains a cause of some claims. Usually there is an associated harassment point and, of course, there is limited access to the employment tribunal.

5.2 Recent successful claims against the MOD have been brought for an officer who was allegedly caused a severe Adjustment Disorder following bullying and harassment, an officer who allegedly was not promoted, and a soldier who left the Army. The main problem is one of evidence but complaints are investigated by the Army's special teams whose reports can be obtained as part of disclosure.

(6) SOMEONE HAD BLUNDERED!

6.1 It remains, of course, essential to prove that there has been negligence or breach of statutory duty.

Negligence

6.2 The ordinary principles apply. For example, in Sharp v MOD [2007] EWCA Civ 1223 (handed down on 27th November 2007) was a fatal road traffic accident in a military convoy. It was held that whilst it might be negligent to drive so close to the vehicle in front that an emergency stop was required if that vehicle halted suddenly, provided there was no collision, then there would be no damage and therefore no actionable negligence. The judge found that although the drivers of the fifth and sixth vehicles had been negligent in driving so close to the vehicle in front that each had to make an emergency stop, they had not collided. The sole effective cause of the seventh vehicle's collision with the sixth vehicle was Sharp's own negligence in driving too close to it. The Court of Appeal agreed.

6.3 If convoys are dangerous, so it was often said were the Boots Combat High much favoured by the military in the 1980s and 1990s, but generally now replaced. They were alleged to caused tendon and medial tibial injuries or syndromes. In Hossack v MOD (1999 - unreported, see *Lawtel*) it was held that the boots were not negligently issued or used - but there had been a negligent lethargy in the medical response to the problem.

6.4 Drunks also give rise to liability. The author prosecuted the Commanding Officer in whose unit the serviceman died giving rise to Barrett v MOD [1995] 3 All ER 87 CA. The Court of Appeal held that Lt Commander Lomax's plea of guilty to a breach Article 1810 of Queen's Regulations was an acknowledgment that the responsible officer at the base had negligently performed his duty of actively discouraging drunkenness and over-indulgence in alcohol. The judge (who allowed the claim at first instance) was wrong to equate the Queen's Regulations and standing orders with guidance given in the Highway Code or pamphlets relating to safety in factories.

6.5 The judge was also wrong in finding that the appellant was under a duty to take reasonable care to prevent the deceased from abusing alcohol in the way he did. Until he collapsed, the deceased alone was responsible for his condition. Thereafter when the appellant assumed responsibility for him it accepted that the measures taken fell short of the standard to be reasonably expected because if failed to summon medical assistance and its supervision of him was inadequate. The immediate cause of death was suffocation due to inhalation of vomit. The amount of alcohol deceased had consumed not only caused him to vomit but also deprived him of the spontaneous ability to protect his air passages after he had vomited.

6.6 His fault was therefore a continuing and direct cause of his death. His lack of self-control in his own interest had caused the appellant to have to assume responsibility for him and but for his fault, they would not have done so. A greater share of the blame should rest on the deceased and the amount of damages recoverable should be reduced by two-thirds holding the appellant one-third to blame.

6.7 So do high jinks - providing the consequences are reasonably foreseeable. In Jebson v MOD [2000] 1 WLR 2055 CA it was held that the Ministry of Defence's duty as the carrier of off-duty soldiers on an organised evening out could include a duty to supervise drunken passengers. The foreseeable risk should be put in general terms, namely that it was foreseeable that injury (whether slight or serious) would occur as a result of the drunken and rowdy behaviour of the passengers, including the danger that someone would fall from the vehicle as a result.

6.8 The claimant, then a Grenadier Guardsman, had been travelling back to the military camp after a soldiers' night out organised by the Company Commander when the accident occurred. Most of the 20 soldiers being carried in the lorry were drunk, except the driver and a non-commissioned officer ('NCO') who was seated in the front with the driver and was a "Senior Passenger" in charge of all passengers under the Joint Service Road Transport Regulations. He had not however been formally appointed to supervise or given specific instructions to supervise in the back of the lorry. The cab was separate from the body of the lorry in which the men were transported, and there was no view from the cab into the rear of the lorry. There was no active supervision in the back of the lorry. The claimant tried to stop one of the other soldiers climbing from the tailgate onto the canvas roof and then got up onto the tailgate himself. After about five minutes of rowdy behaviour witnessed from a car behind he fell onto the road. The claimant recovered 25% of full damages.

Contributory negligence

6.9 As was seen in *Barrett* contributory negligence can apply in appropriate cases. This was seen in the asbestos and smoking matter (brought by Bond Pearce) in the case of Badger v MOD [2005] EWHC 2541 (QB). There, damages were reduced by 20% for the incidence of the Deceased's failure to cease smoking when recommended and the contribution it made to his untimely death.

Statutes and Regulations

6.10 The Occupiers' Liability Act 1957 application to ships and large structures around the world should not be overlooked. The HASAW Act and the secondary legislation apply within the United Kingdom to servicemen but only the principles of the Manual Handling Operations Regulations 1992, the Provision and Use of Work Equipment Regulations 1998 and so forth apply outside the UK. They are worth citing as evidence of negligence.

6.11 The Management of Health, Safety, and Welfare Regulations 1999 should not be forgotten. These were amended to import civil liability from 27th October 2003 and the failure to conduct a risk assessment before leaving the UK can be a useful fallback position if it is in any way causative.

6.12 Use the provisions of the Employer's Liability (Defective Equipment) Act 1969 where, in particular, the equipment is leased. For example, the Grob training aircraft used to teach RAF pilots to fly. In Vallance v MOD (2005 - unreported) the MOD resisted a claim where the engine explode din mid-air due to a cylinder failure. At about 2,800 just south of Loch Lomond, the engine suffered a catastrophic failure and C was forced to make an emergency landing without power. This he did with consummate skill, saving the lives of himself and his student, and those on the ground. C was later given formal recognition for his bravery and skill by D. C suffered injuries as a result of the heavy landing and these led to his medical discharge from the RAF. There was a consequent substantial loss of earnings and benefits.

6.13 C's case was that the accident was caused by the equipment supplied to him being defective. This was not disputed and this conclusion was adopted by D's own Air Accident Investigation Branch. D's Defence admitted the cause of the accident and that C was flying the aircraft provided to him by D in the course of his duties. D did not dispute that the Employer's Liability (Defective Equipment) Act 1969 or the Provision and Use of Work Equipment Regulations 1998 apply.

6.14 C brought an application for summary judgment against the MOD, the rules having changed on 1st October 2005 to permit such an application against the Crown. By the 40th amendment to the CPR RSC Order 77 which had previously acted as a bar to proceedings for summary judgment was revoked.

6.15 C argued that on the facts he was bound to succeed against D by virtue of the operation of section 1 of the 1969 Act. The application pointed out Section 1(4) expressly binds the Crown, Section 1(3) expressly includes aircraft, and there was no other escape for the MOD. C also contended on the facts that the provisions of the 1998 Regulations would, in the light of Stark v The Post Office, operate to make D strictly liable for the breach of its absolute obligation – notwithstanding the terms of any agreement between the MOD and its supplier of leased Grob aircraft.

6.16 The day before the application was heard, the MOD through its then favoured solicitors conceded liability and acceded to summary judgment.

(7) ONWARD! ONWARD THE 600!

7.1 Mention of the claims handlers and panel solicitors will bring discussion of the interplay between the Chief Claims Officer (Jeff Mitchell) and his department, the Treasury Solicitors, Beachcrofts, RSA, Prettys and the claims handlers. The general point here is that experience has shown that applications should be made promptly and with specifics, penal notices may be required, and that at every stage the Defendant should be invited to save costs by meeting. They will almost invariably refuse and cite all manner of difficulties with files and contacting witnesses.

7.2 In respect of disclosure, whilst the standard protocols apply, do not underestimate the importance of:

(a) Land Accident Investigation Team (LAIT) reports;

(b) Joint Service Transport Regulations;

(c) The Queen's Regulations

(d) Unit Inquiry reports and Boards of Inquiry reports and files

(e) Ships, Unit, CO's, Departmental and other Standing Orders

(f) Operation Orders (OpOrders)

(g) Disclosure of complete packs (files) including minute sheets

(h) Defence Council Instructions

(i) Temporary Memoranda; and

(j) Air Accident Investigation Branch reports.

7.3 So too be aware that parachuting takes place with reference to the British Parachute Association operations manual, that there are specific investigation and drop zone reports and planning forms to be completed and that each parachute has a record. Do not hesitate to seek the training records of the Claimant and any individual who may have caused the accident. Look to see whether the tortfeasor was an authorised driver, pilot, ship handler, boatman, or weapons handler. Other documents that should be generated in connection with any accidents include the MOD Form 298 reporting the injury (now replaced by MOD Form 2000) and documents from the Training Accident Investigation Team based at Upavon.

7.4 Note the responsibility of the medical branch, the regular PULHEEMS medical tests for service personnel and the annual diving and aircrew medicals that indicate fitness. The medical branch have a sophisticated series of medical categories of fitness that bear on promotion or retention in service.

(8) CHARGE!

8.1 Quantum issues are markedly different in many cases. An important factor is whether the injury caused the person to leave the services by:

(a) medical discharge,
(b) administrative discharge under Queens Regulations,
(c) their own choice after becoming ineligible for promotion in their previous trade.

8.2 In these circumstances it is obviously important to establish how long the person would have remained in the services injured. This depends on the time of their engagement, any mandatory control points, and whether or not they were commissioned. This information is now available from the services by means of a standard career forecast. This can often, however, be very statistically based and not make sufficient of an individual's unique attributes.

8.3 There are a number of ways to consider in challenging the career forecast - they include evidence from contemporaries, evidence from friends and family as to intention, direct consideration of the personal confidential report, evidence of the Claimant, evidence of superiors and other officers, and the evidence of an employment expert.

8.4 There are collateral claims for loss of travel warrants, loss of favourable accommodation, free food at sea, subsidised food ashore, loss of CILOCT (Council Tax contributions), loss of access to free sporting facilities, loss of free dental and medical facilities, subsidised childcare, boarding school allowance, access to NAAFI and local overseas allowance. Further allowances such as sea going pay, flying and diving pay, and submarine pay, boat pay, and other special forces allowances may considerably enhance the loss over basic pay. There is often merit in proportionate cases for instructing an expert in the subject to settle a report on the value of the lost collateral benefits. In recent times these have been almost as much as the loss of earnings and sometimes more where there is a residual earnings capacity.

Pension

8.5 Loss of pension is an important part of a damages claim. However service personnel who are injured whilst serving are entitled to service invalidity attributable pensions and war pensions from the DSS at Norcross. If the client receives compensation from the MOD in a personal injury claim they are obliged to notify the DSS and these pensions are usually reduced. The rules governing pensions are complex but unless the case involves contributory negligence, it is unlikely that the client will receive less money from the combined damages compensation and reduced pension.

8.6 Pensions are payable usually at 22 years service or age 40 for other ranks and after 16 years from age 21 for officers. They are generally not index linked until age 60 when the full value is restored. A lump sum of three times gross pension is payable tax free on retirement. Resettlement allowance is available.

Loss of a chance

8.7 There will be few certainties in the calculation of future loss which is very much a specialist area. It is strongly recommended that experienced practitioners, counsel, or accountants are used in this area where there is a long term and pension claim. There are important distinctions to be made where judges find that promotion will occur where the client is an experienced and long-serving individual, and cases of short service.

8.8 The case of Herring v MOD [2003] EWCA Civ 528 is a useful starting point. Traditionally, with the exception of special circumstances, the assessment of future loss of earnings had not necessitated the application of percentage assessment techniques for "loss of a chance" based on the likely actions of third parties. Where, however, the career model adopted by the judge had been chosen because it had in itself been the appropriate baseline and/or was one of a number of alternatives likely to give similar results, it was neither necessary nor appropriate to adopt the "percentage chance" approach. *Herring* has, however, been somewhat replaced by the new Ogden Tables. The effect of H's parachute accident upon him had been that he had been changed from being a supremely fit young man who had worked as a sports coach, been in the Territorial Army Special Air Service and contemplated an eventual career with the police, into someone who could not walk more than 500 metres without the aid of a stick and frequent rests. General damages had been agreed but the judge had had to assess the effect of H's accident and disability on his employment prospects on the basis that he was capable of full-time sedentary or semi-sedentary work. The judge had been wrong to discount the future prospects by 25%. If any discount were appropriate, 10% would have been applied at most.

8.9 Injured service personnel who have served but for a short time are considered in Brown v MOD [2006] EWCA Civ 546. There a young woman whose family were steeped in the Army joined and was almost immediately injured and invalided out. The judge had erred in holding that, since it was more likely than not that B would have remained in the Army for 22 years, her loss of future earnings and pension should be assessed without needing to make any separate assessment of her chances of serving for the 22 years for an immediate pension. The evidence needed to be considered. On the evidence B would have served more than the average period of six years and one month. The chance of her leaving the service in the first six years was negligible. The chance of her completing 12 years' service could not be put higher than 50 per cent. The chance of her completing a further ten years was 60 per cent. On that basis the chance of B obtaining the additional benefit represented by the right to an immediate pension on completing 22 years' service was 30 per cent. B would have been promoted to Staff Sergeant after the average period of service at which that was achieved, namely 14 years and 6 months and there was a 15 per cent chance that she would have been further promoted. On the basis of those findings the court set out the method to be adopted in calculating the amount to be paid in respect of B's claim.

8.10 In Hanks v MOD [2007] EWHC 966 (QB) loss of a chance was considered for a Royal Navy pilot who was under training and who had a pre-existing neck injury. Interestingly, Royce J held that it was not appropriate to ascribe future loss to loss of service bonuses and gratuities that might be obtained in the future as those who served in areas of substantial danger were at greater risk of having their careers cut short through death or injury.

Loss of congenial employment

8.11 Whilst the Directors of Recruiting for all three services work tirelessly to promote how congenial and wonderful, unique and exhilarating is life in the forces, on almost every occasion the panel solicitors for the MOD deny that service is so congenial as to merit an award! Happily most judges see the point sensibly where there is evidence that the claimant did enjoy the life.

8.12 It is no longer appropriate to think in terms of a standard £5,000 award. The recent awards seen have included the cases of *Hanks* and *Brown* above. In Hanks v MOD [2007] EWHC 966 (QB) Royce J considered the case of a naval pilot who sustained neck and back injuries in an accident during training for Royal Navy fast jet flying. The claimant was 27 years old at the time of the accident, before which he had been physically very active. He had anticipated a career flying jets for the Royal Navy and as a result had started training for fast jet flying but was injured in the course of the training by the defendant. As a result the claimant's service with the Royal Navy was later terminated on medical grounds. By the date of trial, he worked with a friend in their property development business. The judge said:

"43. At school he had joined the RAF section of CCF. When he joined the Royal Navy in 1997 he had set his heart on becoming a Sea Harrier pilot. It is clear that he was rated during his training very highly. The NAAB report of September 2002 concluded "during his time in the Royal Navy, Hanks has ably demonstrated he has excellent all round qualities and an abundance of potential. He is an officer that the Service can ill afford to lose." I accept his evidence that he was very much looking forward to sixteen years flying with the Royal Navy and thereafter working as a pilot in the civil aviation field. I take into account Willbye v Gibbons [2003] EWCA Civ 372. In my judgement the proper award for loss of congenial employment is £9,000."

8.13 In Brown v Ministry of Defence [2006] EWCA Civ 546 the claimant came from an Army family. As the Court of Appeal noted:

"3. Her father served for a full term of 22 years leaving with the rank of Staff Sergeant and her sister enlisted a few years before the claim. Although she had the Army in mind as a career from quite an early age, on leaving school the claimant took a job with Cumbria County Council for whom she worked for several years, during which time she also studied to obtain additional academic qualifications. It was not until September 1997, when she was 24 years of age that she felt she was ready to take the important step of committing herself to a life in the forces. She obtained strong personal references in support of her application and did very well in the examination

that all prospective recruits are obliged to take. As a result she was accepted and formally enlisted as a soldier in February 1998.

4. Unfortunately, Miss Brown's hopes were soon to be dashed. Eight weeks into her service she suffered a serious fracture of her left ankle in the course of basic training. Although she did her best to regain her fitness, it became clear that she would be unable to complete her training and she was eventually discharged on 16th October 1999."

8.14 The claimant was awarded £10,000 for loss of congenial employment by the District Judge at first instance. This was upheld on appeal to the Circuit Judge and not interfered with by the Court of Appeal. Typically awards will be in the range in 2008 terms of £7,500 to £10,000 unless there is a relatively short period of service lost. The failure to complete 22 years, to get the Long Service Medal or to command should not, however, be underestimated in this head of damage.

(9) THE COST OF BATTLE

9.1 For a final word of encouragement see Boyd v MOD (2003 - unreported, SCCO) (Deputy Master James) 16th December 2003. The case encompasses much of what this sort of personal injury and clinical negligence litigation is about: it is perhaps not surprising that it will cost the MOD over £150 million in 2007/2008 according to NAO estimates. The claimant (B) brought proceedings for medical negligence against the defendant (MOD). The case was contested. The medical experts were at complete odds with each other. The MOD's defence was only received after court intervention and the letter of response originally received was simply a blanket denial. There was no mediation until a very late stage. B thought that the case was heading for a fully contested trial. In the event, the MOD made interim payments only after interlocutory proceedings. Even after the MOD admitted liability, it still disputed both causation and quantum.

9.2 In due course, the case settled for £725,000. The MOD offered an uplift of 70 per cent. B contended that the uplift ought to be higher. The SCCO held that although B had retained leading counsel, that was only in respect of breach of duty. In effect, her solicitor ran the case solo for the rest of the time, including preparing the pleadings in-house without recourse to counsel. Also, she had higher rights of audience and intended to conduct the case herself. The facts showed that most of the factors for consideration under CPR r.44.5(3) were present and in a very high degree, so the case was approaching the exceptional. That the case settled did not detract from the fact that it was clearly heading for a contested trial. Based upon all the circumstances of the case, it was clear that an uplift of 85 per cent was appropriate. In addition, a success fee of 100 per cent was reasonable. It was clear that at the time the conditional fee agreement was entered into, the case was finely balanced. That fact was not helped by the diametrically opposed expert evidence. It would not have been reasonable to have revised the success fee after the MoD admitted liability as both causation and quantum were still in dispute.

JSP 831 - Redress of Individual Grievances - Service Complaints

Issued November 2007 - came into force 1st January 2008

JSP 831 became effective from 1st January 2008 and identifies the procedures to be followed to ensure that complaints submitted by service personnel are handled and resolved using a process that is (intended to be) efficient, fair, and transparent. This JSP deals with Service complaints seeking redress of individual grievance under sections 334 to 339 of the Armed Forces Act 2006 (The Act), the related Statutory Instruments and Defence Council Regulations 2007.

Arrangements for dealing with complaints of discrimination, harassment and bullying are contained in JSP 763 (The MOD Harassment Complaints Procedure), which covers both Service and civilian personnel.

The Act gives a person subject to Service law who thinks he has been wronged in any matter relating to his Service, a statutory right to make a Service complaint. It also gives such a right to a person who is no longer subject to Service law, who thinks that he was wronged in such a matter while he was subject to Service law. Under the Defence Council Regulations, a Service complaint can only be made by an individual; there is no procedure for group complaints.

Speed, the lowest level of redress, and the provision of information and disclosure are intended to be key principles. How this will differ from what was an exceptionally slow process remains to be seen. There is, however, an overarching exhortation -

> "11. **Delay.** Unreasonable delay is unacceptable. In minimising delay, all those involved in the Service complaints process should ensure that this is not achieved at the expense of justice or appropriate investigation. All those involved in the Service complaints process have a responsibility to be reasonable and to expedite the handling of the complaint by responding to correspondence and requests for information within the timescales specified in Chapters 3, 4 and 5."

Key Features

The key features of the Service complaints process are that:

a. complaints are resolved at one of three levels.

b. complaints may be dealt with by a Service complaint panel (SCP).

c. certain categories of complaint will have an independent person on the SCP.

d. the Service Complaints Commissioner (the Commissioner) may receive allegations and refer those of certain types to the chain of command for action as Service complaints, should the Service person alleged to have been wronged wish to make such a complaint. The Commissioner will report to Parliament annually on the efficiency, effectiveness, and fairness with which the complaints process has operated.

e. Service complaints will be submitted on a Service complaint form.

The standard of proof is the balance of probabilities. There is specific protection for "whistleblowers" - complainants are not to be victimised even if the complaint is not upheld. The complainant may request an Assisting Officer and should be offered one by the CO even if they do not request one.

Levels.

The Service complaints process has a maximum of 3 levels: the prescribed officer, usually the CO; the Superior Officer (SO); and the Defence Council level. The CO should consider carefully whether he can effectively deal with the complaint in reasonable time.

Should the CO not be able to do so or lack the authority to grant the desired or any other appropriate redress, he may refer the complaint to the SO. If the SO also does not have the authority to grant the required redress the CO may refer the complaint directly to the Defence Council, having consulted with the SO.

On receiving a complaint, the SO should make the same considerations as the CO. At each of the first two levels, if the complainant is not satisfied with the proposed resolution of the complaint or the redress to be granted he may apply to have the complaint referred to the next higher level for consideration.

The Service Complaint Panel

Once a complaint reaches the Defence Council level (Level 3) it will normally be considered by a Single Service Board or a SCP. A SCP will normally consist of 2 serving officers of at least 1* rank, usually of the same Service as the complainant. SCPs will operate with the full delegated powers of the Defence Council appropriate to the case being considered.

Independence

Although a SCP will normally consist of two serving officers, there will be an additional independent member to consider certain categories of complaint. The independent member must not be a member of the Armed Forces or the Civil Service. A SCP will include one independent member in any delegated case in which the complaint:

a. alleges discrimination;

b. alleges harassment;

c. alleges bullying;

d. alleges dishonest, improper, or biased behaviour;

e. alleges failure of health care professionals to provide medical, dental or nursing care where the Ministry of Defence was responsible for providing the relevant care;

f. alleges negligence in the provision by Ministry of Defence health care professionals of medical, dental or nursing care;

g. concerns the exercise by a Service policeman of his statutory powers as a Service policeman;

h. involves a Service complaint about a decision to reject a Service complaint for being out of time, that arose from a referral by the Commissioner of an allegation, and which related to any of the issues in sub paragraphs a to d above.

i. involves a complaint about a decision at Levels 1 or 2 not to allow a complaint to proceed following a referral by the Commissioner of an allegation of matters covered by sub paragraphs a to d above.

Time Limits for Stating a Service Complaint

Service complaints must normally be made within three months, beginning with the day the matter complained of occurred. If the matter complained about occurred over a period, the complaint should be submitted within three months of the latest incident or end of the period

There is no limit as to how far back a period can extend. An allegation submitted to the Commissioner, which subsequently results in a Service complaint being made by a Service person, is within the time limit if the Service complaint is received by the CO within three months of the date of the matter about which the complaint is being made.

Time limits may be varied if internal procedures are available in special types of complaint. Examples of these are: medical complaints for which the Services operate distinct informal procedures; housing complaints for which the review panel has been established by Defence Estates and housing contractors; pay and allowances complaints for which the Pay and Allowances Casework Cell has been established within the Joint Personnel Administration Centre; and financial compensation claims which should be addressed to the Directorate of Safety and Claims.

A Service person wishing to make a Service complaint about such matters should first pursue their complaint through the appropriate internal system. If the complainant remains dissatisfied after exhausting the internal system, a Service complaint may be made. Indeed, a Service complaint may be made at any time within the time limits and before the appropriate internal process has run its course, but it will not be considered until the result of the special to type process has been received.

In such cases, the three month period within which a Service complaint must be made will start on the date of completion of the appropriate informal process.

Complaints Made Outside the Time Limits

Service complaints received by the CO more than three months after the matter complained of occurred will generally be ruled out of time. However, in certain circumstances, the normal time limit will be extended if the decision maker considers that in all the circumstances it would be "just and equitable" to do so. The complainant will be expected to say why the complaint could not reasonably have been submitted in time.

There is a range of factors that might, for example, have delayed the making of the complaint; the complainant may have been hospitalised or deployed on operations and therefore unable to access the people, information, or IT necessary to make the complaint.

The CO will therefore have to decide if, given the prevailing circumstances, it would be "just and equitable" (fair and reasonable) to allow the complaint to proceed. The circumstances in which complaints can be considered outside the three month time limit are contained in Annex H to the JSP.

Complaints Made After Leaving the Armed Forces

Former members of the Armed Forces may submit Service complaints, provided that the wrong about which they are complaining relates to their Service, the wrong occurred while they were subject to Service law and the complaint is submitted within the time limits.

Such complaints will be referred to an appropriate officer nominated by the Service to fulfil the role of CO for former serving personnel or in the absence of such an appointment, to that person's last CO.

Employment Tribunals (ET)

Applications to an ET by Service personnel alleging unlawful discrimination must be made within six months of the incident or the latest in a series of incidents giving rise to the application (rather than three months for civilians).

In cases relating to the Equal Pay Act 1970, an application may be made at any time on or before the qualifying date provided for in that Act. Applications to an ET can only be made after a Service complaint has been made.

Allegations by a third party

Allegations may be made by a third party, such as a family member, guardian, or friend, about the treatment of a Service person or former member of the Armed Forces, because for example that person may be reluctant to make a complaint themselves. If making a verbal allegation, third parties should be encouraged to state the allegation in writing. Allegations may be made by a third party in a number of ways, including:

a. to the Service person's CO or unit;

b to the Service Chiefs (1SL, CGS or CAS) or the Service person's Principal Personnel Officer (PPO) (2SL, AG or AMP);

c. to Defence Ministers, the local MP or an interested Peer;

d. to the Commissioner.

Such allegations are not Service complaints. Written third party allegations addressed to Service Chiefs or PPOs, Ministers or Peers, or referred by the Commissioner will be dealt with through the appropriate secretariat staffs. Written correspondence received by the CO directly from Ministers, Peers or the Commissioner should be forwarded to the appropriate single Service secretariat. The CO may wish to seek advice from the single Service secretariat before proceeding to deal with an allegation received directly from a third party. On receipt of such allegations, the CO of the Service person involved should ascertain whether that Service person is aware of the allegation and what action they may wish to be taken.

The third party should be informed, through the secretariat that the matter will be passed to the chain of command for consideration. Written third party allegations addressed to the CO of a Service person or to a member of the CO's staff should be dealt with by the CO who may wish to seek single Service secretariat advice on doing so.

In addition to being informed that allegations will be considered by the chain of command, third party correspondents may also be advised through the secretariat of the outcome, except for allegations received directly by the CO or CO's staff when the CO should provide such advice.

However, the Service person should be advised of their right to submit a Service complaint at any time within the time limits, in accordance with this JSP or JSP 763, as appropriate. A record is to be kept if the Service individual in question decides not to pursue an allegation made by a third party.

Excluded complaints

These include compensation and criminal injuries compensation, pensions, discipline and security vetting.

The Service Complaints Commissioner

Dr Susan Atkins is the SCC. She established the Independent Police Complaints Commission and was the deputy chief executive of the EOC. She had no previous military knowledge or experience but a six week induction period. The postal address for the Service Complaints Commissioner is SCC; PO Box 61755; London SW1A 2WA

Service Complaints Form

Although a Service complaint can be submitted initially in any written format, the complaint should subsequently be submitted on the standardised Service complaint form at Annex F to the JSP to provide to officers dealing with the complaint clear information about the complaint and the redress sought.

Reference to the Sovereign

Where a complaint has been considered by a Service Board, an officer has the right to require a report on his Service complaint to be referred to the Sovereign in order to receive Her directions on the complaint.

Address

The MOD's Complaint's Secretariat is MOD (DG SP Pol).

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