

Smith v Ministry of Defence; Ellis v Ministry of Defence;
Allbutt v Ministry of Defence
[2013] UKSC 41, [2013] 3 WLR 69

Summary

The Supreme Court dealt with several claims arising from incidents involving British soldiers serving in Iraq. In the incident that led to one group of claims ('the Challenger claims') a British Challenger II tank mistakenly fired two high explosive shells at another British Challenger II tank. In this incident Corporal Stephen Allbutt was killed and two other claimants were seriously injured. The second group of claims ('the Snatch Land Rover claims') arose out of the deaths of Private Phillip Hewett and Private Lee Ellis, who were each killed by an improvised explosive device (IED) whilst they were driving lightly-armoured Snatch Land Rovers.

The claims relied on two distinct legal bases. In the Snatch Land Rover cases the claimants invoked the Human Rights Act 1998 and alleged that there had been breaches of Private Hewett's and Private Ellis's rights to life under article 2 of the European Convention on Human Rights (ECHR). Their rights were alleged to have been violated by the Ministry of Defence's failure to ensure that better-armoured and equipped vehicles were provided and used. In the Challenger cases the claimants relied on the common law tort of negligence and alleged that the Ministry of Defence had been negligent in failing to ensure that the tanks were equipped with technology that would confirm the identity of targets and improve situational awareness, and also negligent in failing to provide adequate target-recognition training. One of the Snatch Land Rover claims also included allegations of common law negligence on the part of the Ministry of Defence.

The case before the Supreme Court arose out of an application by the Ministry of Defence to have all of these claims struck out. At first instance Owen J had struck out the claims that relied on the Human Rights Act 1998 because – following the decision of the Supreme Court in *R (Smith) v Oxfordshire Assistant Deputy Coroner (Equality and Human Rights Commission intervening)* [2010] UKSC 29, [2011] 1 AC 1 – the soldiers were not within the jurisdiction of the United Kingdom for the purposes of the ECHR when they died, and the Court of Appeal had upheld his decision on this point. But Owen J had also held that *most* of the claims in negligence should not be struck out but could go to trial, and had been upheld by the Court of Appeal on this point as well. (Indeed the Court of Appeal had even held that one additional element in the negligence claim made by one of the Snatch Land Rover claimants should be allowed to proceed to trial.) Neither the Ministry of Defence nor the claimants were content with the Court of Appeal's conclusions. Consequently, the claimants appealed to the Supreme Court against the striking out of their claims under the Human Rights Act 1998 and the Ministry of Defence cross-appealed against the negligence claims being allowed to proceed to trial.

The Supreme Court unanimously held that the claims under the Human Rights Act 1998 should not have been struck out on the basis of the soldiers being outside the jurisdiction of the United Kingdom under the ECHR. The Court departed from its previous decision in *R (Smith) v Oxfordshire Assistant Deputy Coroner* and declared that the jurisdiction of the United Kingdom under article 1 of the ECHR extends to securing the protection of article 2 to members of the armed forces when they are serving outside its territory. The Court split, however, on the question whether it was sufficiently arguable that there had actually been a breach of the article 2 rights of the soldiers concerned. There was general agreement between the Supreme Court Justices that in working out what article 2 demands from a state that is planning for or conducting military operations in situations of

armed conflict a court must avoid imposing unrealistic or disproportionate positive obligations. But whilst a majority thought that the judgment whether the claimants in the Snatch Land Rover claims are seeking to impose too exacting a standard ought to be determined at trial in the light of the precise facts, a minority was ready to hold without further argument that article 2 does not impose the sorts of obligations that the claimants are seeking to have recognised. The result was that the claimants' appeal with respect to the claims under the Human Rights Act 1998 was allowed and the claims can proceed to trial.

A similar division between the Supreme Court Justices was apparent in their conclusions as to the scope of the tort of negligence. The majority judgment (written by Lord Hope) discussed separately whether the claims should be struck out because of a doctrine of 'combat immunity', which ensures that tort obligations do not interfere with decisions and actions on the battlefield, and whether they should be struck out because it would not be 'fair, just and reasonable' to treat the Ministry of Defence as owing a duty of care to the soldiers with regard to the quality of equipment and training for active service. They (the majority) held that the doctrine of 'combat immunity' should be construed narrowly and should not be extended to prevent claims alleging negligence in the planning of and preparation for operations where the relevant steps were taken far away in place and time from the operations themselves. Moreover, they held that the question whether the duties of care put forward by the claimants are 'fair, just and reasonable' cannot be decided before the precise facts behind the claims are determined at trial. Thus the Court of Appeal's decision not to strike out the negligence claims was upheld, though the majority emphasized that the judge who decides what is 'fair, just and reasonable' at trial will have to be very careful to avoid recognising any duty which is 'unrealistic or excessively burdensome'. Lord Mance, who was in the minority, and whose judgment was agreed with by Lord Wilson, would have gone further and struck out the negligence claims on the basis that they were founded on duties of care that it would not be 'fair, just and reasonable' to recognise. He thought that 'combat immunity' could best be understood not as a separate doctrine, but as description for one group of cases where there is little doubt that it is not be "fair, just and reasonable" to recognise a duty of care. (Lord Carnwath largely agreed with Lord Mance's analysis and would have struck out the Challenger claims. But he would have allowed the negligence claims relating to the use of Snatch Land Rovers to go to trial because they involved an incident that took place during a period of military occupation after major combat operations had ceased.)

Comments

(1) *Overview*. Clearly military personnel, given that they are regularly asked to risk their lives and well-being in the national interest, ought to be properly equipped and trained. But there is a tension between the idea that accountability through tort law (including claims for damages under the Human Rights Act 1998) can help to ensure that soldiers are suitably protected and the concern that lengthy legal proceedings conducted with the advantage of hindsight might end up wasting resources and promulgating standards that prove unrealistic given the exigencies of engagement with the enemy and the political realities of defence procurement. The primary decision that the Supreme Court had to make was how to address this tension. In more practical terms, the Court had to decide how far English law should be willing to go in setting enforceable standards for the equipping and training of soldiers for active operations.

(2) *Jurisdiction of the United Kingdom for the purposes of the European Convention on Human Rights (ECHR)*. Before deciding how far article 2 of the ECHR (through the Human Rights Act 1998) could properly be used to set standards for the protection of military

personnel serving in Iraq the Supreme Court had to confront the preliminary issue of how far the Convention protects UK citizens when they are overseas. This was in doubt because article 1 of the ECHR only obliges states to secure the rights and freedoms found in the ECHR to 'everyone within their jurisdiction', and in this context the scope of a state's jurisdiction is primarily territorial, i.e. it has jurisdiction over events occurring within the state's borders. The European Court of Human Rights in Strasbourg has ruled that in some circumstances a state can also 'exceptionally' exercise jurisdiction beyond its borders, such as where it takes effective control of some area of land beyond its borders. But this particular exception could not help the Snatch Land Rover claimants because by the time of the incidents that gave rise to their claims, 2005 and 2006, the British forces were in Iraq to provide security and help with reconstruction pursuant to a request from the Iraqi Government, so the United Kingdom could not be said to be in effective control of the territory.

There is, however, a further exceptional situation where the Strasbourg Court has held that a state can be found to be exercising extra-territorial jurisdiction, which is where its agents exert physical power and control over a particular person beyond its borders, for example by seizing them and holding them in detention. Such cases are unusual, because this sort of exercise of extra-territorial jurisdiction does not bring with it an obligation to secure *all* the Convention rights for people living in the place where the state agents exert power, or even to secure *all* the Convention rights for the person subject to agents' control. Thus if State A's agents physically detain B in the territory of State C then State A might be obliged to respect B's right to life (article 2) and right to be free from cruel treatment (article 3), but not obliged to secure B's right to have his children educated in accordance with his religious views (Protocol 1, article 2) or his right to regular, free and fair elections (Protocol 1, article 3). This is important because it means that the question whether a state has jurisdiction under the ECHR for events beyond its borders is not always an 'all-or-nothing' question.

The key move in the reasoning in the Snatch Land Rover claims was to decide that if a state can exercise extra-territorial jurisdiction through its state agents exerting power over someone overseas then it can also exercise extra-territorial jurisdiction through the power that it exerts *over its own state agents* when they are operating overseas. Of course, the United Kingdom exercises considerable power over British servicemen and women wherever they are serving. Indeed, Lord Hope noted (at [52]), in a judgment that all the other justices accepted on this point, that 'Servicemen and women relinquish almost total control over their lives to the state.' Given this it seemed appropriate to conclude, at [55], that 'the jurisdiction of the United Kingdom under article 1 of the Convention extends to securing the protection of article 2 to members of the armed forces when they are serving outside its territory'.

(3) *Scope of the substantive obligations under article 2.* The Snatch Land Rover claims raised questions about the substantive obligations that states have under article 2. (States are also subject to an implied procedural obligation under article 2 to investigate deaths, but this was not what was in issue in the Snatch Land Rover claims.) In general terms these substantive obligations require 'the state not to take life without justification and also, by implication, to establish a framework of laws, precautions, procedures and means of enforcement which will, to the greatest extent reasonably practicable, protect life' (*per* Lord Hope at [57], citing *R (Middleton) v West Somerset Coroner* [2004] UKHL 10, [2004] 2 AC 182, [2]). But the detail of what a state must do requires careful consideration of the particular context. One complexity is that obligations can be recognised at more than one level. Thus in the context where citizens within a state's borders are at risk of being killed by criminals article 2 requires the state at a *systemic* level 'to secure the right to life by putting in place effective criminal law offences backed up by law-enforcement machinery', but also at an *operational*

level to 'ensure that, where there is a real and immediate risk to life, preventative operational measures of whatever kind are adopted to safeguard the lives of those involved so far as this is practicable' (at [67]-[68]).

Lord Hope, with the agreement of Lord Walker, Lady Hale and Lord Kerr, accepted that courts would not find it easy to regulate military decision-making using article 2. Thus he insisted that a key constraint when defining the obligations of the state with regard to protecting the lives of its soldiers in the course of 'the planning for and conduct of military operations in situations of armed conflict' was that the obligations must not be 'unrealistic or disproportionate' (at [76]). In particular, he thought that it would be very difficult to establish that decisions about military training, procurement and the conduct of operations were in violation of article 2 if either they were decisions taken 'at a high level of command and closely linked to the exercise of political judgment and issues of policy' or made by decision-makers 'actively engaged in direct contact with the enemy' (at [76]). But he concluded that not all decisions with regard to the provision of training and equipment to protect life were likely to involve either high politics or responses to immediate military threats, so there might be a middle ground where substantive obligations under article 2 to protect military personnel might be properly recognised. Moreover, he thought that it would not be fair to the claimants to decide whether they had identified a violation of article 2 or not before the precise facts were established at trial with regard to who made the decisions about the procurement, deployment and use of the Snatch Land Rovers.

The minority were far more reluctant to leave it to trial judges to work out on a case-by-case basis what article 2 demands with regard to the protection of front-line soldiers. Indeed the minority's approach, best-expressed by Lord Mance, seemed to exhibit some sympathy for the view that 'it would have been better if the Strasbourg court had left the development and application of the law of tort to domestic legal systems, subject to clearly defined criteria, rather than set about creating [through its caselaw relating to article 2] what amounts in many respects to an independent substantive law of tort, overlapping with domestic tort law, but limited to cases involving death or the risk of death.' (Strictly speaking Lord Mance only identified this view as one that someone might possibly hold (at [142]).) The minority thought that the common law of tort would not recognise a duty of care and was very reluctant to treat article 2 as mandating a contrary conclusion. Thus Lord Mance concluded (at [146]) that 'this Court should proceed on the basis that the policy considerations which guide its domestic law in the present area of national interest will find an echo in Strasbourg, and not invade a field which would involve, in the context of claims for civil compensation, extensive and highly sensitive review with the benefit of hindsight the United Kingdom's country's policies, strategy and tactics relating to the deployment and use of its armed forces in combat.' (Of course, as we will discuss below, the majority was also not convinced that the claims relying on the common law of negligence could be decided without a trial.)

(4) *Negligence: when to decide whether a duty would be 'fair, just and reasonable'*. In the 4th edition of McBride & Bagshaw we provide a list of some of the more important factors that a court will take into account when deciding whether it is 'fair, just and reasonable' to find that a duty of care was owed in a particular case. We do not, however, discuss the question which seems to have divided the Supreme Court Justices in the Challenger and Snatch Land Rover cases: Is it best to assess whether a duty of care is 'fair, just and reasonable' after seeing how the claimants have framed their claim, and what the defendants have said in response to it, or only after seeing what facts are proved at trial? One reason for neglecting this question (though perhaps not a *sufficient* reason for having done so!) is that it simply isn't a question that can receive a general answer. Sometimes it will be obvious long before trial that the duty that the claimant is seeking to invoke is not 'fair, just and

reasonable' – perhaps its recognition would clearly undermine Parliament's intentions or run counter to basic notions of individual responsibility – but sometimes the significance of the factors that the defendant identifies will be difficult to assess until the precise facts emerge at trial. For example, it might be difficult for a judge to decide whether recognition of a particular duty will unhelpfully divert resources into wasteful defensiveness on the part of decision-makers until the judge has learnt exactly who makes the decisions in question and under what sorts of pressures.

The majority in the Supreme Court identified two groups of cases where they thought that a duty of care on the part of the Ministry of the Defence, or the commanders that it was responsible for, could not be recognised despite the fact that their decisions might lead to the death or serious injury of a military employee – those where the decision was in the course of active hostilities and would consequently be covered by 'combat immunity' and those high-level 'political' decisions about procurement of military equipment and deployment which it would be inappropriate for a judge to second-guess. They thought that there would be a middle range of decisions between these two extremes where there might be no objection to a court asking whether reasonable steps had been taken to protect the health and safety of military personnel. For the majority a trial of the facts would be necessary before it would become clear whether the decisions with regard to the equipping of Challenger tanks and training of their crews were ones that a court could safely evaluate or not.

By contrast, the minority apparently believed that it was already clear that the sort of middle range decisions that the majority believed could be properly regulated by the tort of negligence would be inseparably entwined with either high-level policy decisions or ground-level tactical decisions. Thus they thought that the majority's approach was bound to require trial judges to assess whether it was really a middle range decision rather than a tactical misjudgement or political choice that *caused* a claimant's injury. Moreover, the minority suggested that the process of sifting and classifying the decisions that might be regarded as responsible for a claimant's death or serious injury would itself damage the public interest by diverting time and resources into wasteful litigation. Thus the minority thought that there was no need to wait until trial in order to decide that public policy opposed the recognition of the sorts of duties of care that the claimants were seeking to invoke.

(5) *Combat immunity*. The majority was inclined to treat the doctrine of 'combat immunity' as a *rule* separate from the ordinary requirement not to recognise a duty where it would not be 'fair, just and reasonable'. Some of their reasoning, however, was not, with respect, entirely easy to follow. At one point in his judgment Lord Hope (who Lord Walker, Lady Hale and Lord Kerr agreed with) said, at [83], that: 'combat immunity is best thought of as a rule, because once a case falls within it no further thought is needed to determine the question whether a duty of care was owed to the claimant.' This tends to suggest that the effect of 'combat immunity' is that *no duty* is owed to the claimant. But, if so, what is the distinction from the rule that a duty will not be recognised if it is not 'fair, just and reasonable'? It may be that what Lord Hope was seeking to highlight by drawing a distinction is that in 'combat immunity' cases there does not seem to be any *weighing* of factors leaning against recognition of a duty of care against those supporting such a duty. But we think that any supposed distinction based on the *absence of a weighing up* of factors – 'no further thought' – in 'combat immunity' cases is probably just an illusion caused by the fact that in true cases of 'combat immunity' the public policy factors which weigh against the recognition of a duty of care are so weighty that it is pointless to conduct any 'balancing' of relevant factors.

Later in his speech, however, there is a passage where Lord Hope seems to identify a different distinction. Here, at [90], he described 'combat immunity' as 'an exception to the principle that was established in *Entick v Carrington* (1765) 19 State Tr 1029 that the

executive cannot simply rely on the interests of the state as a justification for the commission of wrongs.’ This reasoning really does invoke a difference from cases where it is decided that it would not be ‘fair, just and reasonable’ to hold the defendant to have owed a duty to the claimant *because* in the latter type of case, where it is not ‘fair, just and reasonable’ for the claimant to expect the defendant to be looking after his or her interests, there is no ‘wrong’ that needed justifying. To spell the point out: suppose that during hostilities *Infantryman* becomes aware that a foot patrol outside the base needs urgent support, dashes to his armoured personnel carrier and starts its engine without checking whether *Military Mechanic* is working underneath the vehicle. If *Military Mechanic* is injured as a result of this, but prevented from suing by ‘combat immunity’, then this may be because: (1) *Infantryman* committed a wrong (the tort of negligence?) vis-à-vis *Military Mechanic* but can rely on a special defence (‘combat immunity?’); or (2) in the circumstances (those falling within the doctrine of ‘combat immunity’) *Infantryman* committed no wrong to *Military Mechanic* in failing to concern himself with looking after *Military Mechanic*’s health and safety.

With respect, the existence of these two contrasting passages suggests that the majority may not have appreciated the significance of the distinction between a doctrine that establishes that the defendant committed no wrong to the claimant and a doctrine that relieves the defendant of the consequences of having committed a wrong, perhaps by preventing courts from looking into the matter. But is the distinction significant? Does it really matter what sort of doctrine ‘combat immunity’ is? One reason for thinking that it matters is that some people want to know what it is their duty to do, so that they can act accordingly, regardless of whether that duty will ever be enforced by a court. So a military commander might want to know whether it is his or her duty to take reasonable steps to look after other soldiers when making battlefield decisions, even if courts will not become involved in assessing whether such duties have been breached. A second reason it matters is that those who treat the two doctrines as equivalent, or interchangeable, often find themselves thinking about ‘legal duties’ in a rather *cynical* manner. Such a person might say: ‘There’s no real difference between a situation where the law says that a person is not subject to a legal duty at all and a situation where the law says that a person is subject to a legal duty but can rely on an immunity *because* the legal duty in the second situation is not really a duty at all, it’s just an artificial thing that tort lawyer’s conjure up when they’re talking about whether a defendant is liable to pay compensation.’

On balance we think that in situations covered by ‘combat immunity’ it is probably better to think of the defendant as someone who did not commit a wrong at all. Thus we think that in situations covered by ‘combat immunity’ the law is acknowledging that it was not wrong for the alleged defendant to have been focusing entirely on achieving defeat of the enemy, and to have not treated it as his or her duty to take care also to look after the claimant’s welfare or property. But equally, we think that the majority was right to seek to confine the circumstances where a defendant can rely on ‘combat immunity’: clearly a court should not be too ready to conclude that it was wholly acceptable for a defendant to have acted without regard for the safety and property of others.

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