undertaking issued in the cases of the *Satamaru*, *Yousef*, *Diamond Reefer*, *Ocean Ice* and *Pacific Queen*. The security can be provided by way of payment into court, bank guarantee or any other means which the parties may agree or which, in the absence of agreement, the court considers acceptable. I will hear counsel on this before finally settling the terms of the order.

Finally, before leaving this matter I should like to express my gratitude to both counsel for the admirable quality of their arguments and the assistance which they have given me.

Order accordingly.

Solicitors: Mishcon de Reya; Richards Butler.

[Reported by SIMONE GREAVES, Barrister]

[COURT OF APPEAL]

MULCAHY v. MINISTRY OF DEFENCE

1996 Jan. 30, 31; Feb. 21

Neill and McCowan L.JJ., and Sir Iain Glidewell

Negligence—Duty of care to whom?—Serviceman—Soldier injured serving in war zone—Injury caused by negligence of fellow soldier—Whether duty of care owed by one soldier to another in battle conditions—Whether duty to maintain safe system of work

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.

On appeal by the defendants:—

Held, allowing the appeal, that the pleaded facts clearly established that the plaintiff was in a war zone taking part in warlike operations and were sufficient for decision of the question whether the claim should be struck out; that a soldier did not owe a fellow soldier a duty of care in tort when engaging the enemy in battle conditions in the course of hostilities, nor was

A there any duty on the defendants in such a situation to maintain a safe system of work; that, therefore, the plaintiff did not have a cause of action in negligence against the defendants; and that, accordingly, his statement of claim should be struck out and the action dismissed (post, pp. 739H–740B, 748F–749A, F–750B, 751B–C).

Shaw Savill and Albion Co. Ltd. v. The Commonwealth (1940) 66 C.L.R. 344 applied.

B *Burmah Oil Co. Ltd. v. Lord Advocate* [1965] A.C. 75, H.L.(Sc.); *Groves v. Commonwealth of Australia* (1982) 150 C.L.R. 113 and *Hughes v. National Union of Mineworkers* [1991] I.C.R. 669 considered.

The following cases are referred to in the judgments:

C *Burmah Oil Co. Ltd. v. Lord Advocate* [1965] A.C. 75; [1964] 2 W.L.R. 1231; [1964] 2 All E.R. 348, H.L.(Sc.)

Canterbury (Lord) v. The Queen (1843) 12 L.J.Ch. 281

Dorset Yacht Co. Ltd. v. Home Office [1970] A.C. 1004; [1970] 2 W.L.R. 1140; [1970] 2 All E.R. 294, H.L.(E.)

Dyson v. Attorney-General [1911] 1 K.B. 410, C.A.

E. (A Minor) v. Dorset County Council [1995] 2 A.C. 633; [1994] 3 W.L.R. 853; [1994] 4 All E.R. 640, C.A.; [1995] 2 A.C. 633; [1995] 3 W.L.R. 152; [1995] 3 All E.R. 353, H.L.(E.)

Groves v. Commonwealth of Australia (1982) 150 C.L.R. 113

Hedley Byrne & Co. Ltd. v. Heller & Partners Ltd. [1964] A.C. 465; [1963] 3 W.L.R. 101; [1963] 2 All E.R. 575, H.L.(E.)

Hill v. Chief Constable of West Yorkshire [1989] A.C. 53; [1988] 2 W.L.R. 1049; [1988] 2 All E.R. 238, H.L.(E.)

E *Hughes v. National Union of Mineworkers* [1991] I.C.R. 669; [1991] 4 All E.R. 278

Knightley v. Johns [1982] 1 W.L.R. 349; [1982] 1 All E.R. 851, C.A.

Lonrho Plc. v. Fayed [1992] 1 A.C. 448; [1991] 3 W.L.R. 188; [1991] 3 All E.R. 303, H.L.(E.)

Marais (D. F.), Ex parte [1902] A.C. 109, P.C.

Marc Rich & Co. A.G. v. Bishop Rock Marine Co. Ltd. [1996] 1 A.C. 211; [1995] 3 W.L.R. 227; [1995] 3 All E.R. 307, H.L.(E.)

F *Shaw Savill and Albion Co. Ltd. v. The Commonwealth* (1940) 66 C.L.R. 344

Thomas v. The Queen (1874) L.R. 10 Q.B. 31

Weaver v. Ward (1616) Hob. 134

The following additional cases were cited in argument:

G *Caparo Industries Plc. v. Dickman* [1990] A.C. 605; [1990] 2 W.L.R. 358; [1990] 1 All E.R. 568, H.L.(E.)

Murphy v. Brentwood District Council [1991] 1 A.C. 398; [1990] 3 W.L.R. 414; [1990] 2 All E.R. 908, H.L.(E.)

Rowling v. Takaro Properties Ltd. [1988] A.C. 473; [1988] 2 W.L.R. 418; [1988] 1 All E.R. 163, P.C.

Spring v. Guardian Assurance Plc. [1995] 2 A.C. 296; [1994] 3 W.L.R. 354; [1994] 3 All E.R. 129, H.L.(E.)

H *Tilling v. Whiteman* [1980] A.C. 1; [1979] 2 W.L.R. 401; [1979] 1 All E.R. 737, H.L.(E.)

Yuen Kun Yeu v. Attorney-General of Hong Kong [1988] A.C. 175; [1987] 3 W.L.R. 776; [1987] 2 All E.R. 705, P.C.

APPEAL from Judge Walker sitting in the Dewsbury County Court. A

By particulars of claim dated 26 February 1993 the plaintiff, Richard Mulcahy, claimed against the defendants, the Ministry of Defence, damages for negligence as a consequence of which he suffered personal injury. On 22 September 1994 the judge refused the defendants' application to strike out the plaintiff's claim as disclosing no reasonable cause of action.

By notice of appeal dated 30 November 1994 the defendants appealed B on the grounds, inter alia, that (1) one soldier owed another no actionable duty of care whilst engaged in actual operations against the enemy; and (2) the judge erred in dismissing the defendants' 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.

The facts are stated in the judgment of Neill L.J. C

Philip Havers Q.C. and *Ian Burnett* for the defendants. Before 1947 it was generally impossible to sue the Crown directly in tort: see *Thomas v. The Queen* (1874) L.R. 10 Q.B. 31; *Lord Canterbury v. The Queen* (1843) 12 L.J.Ch. 281 and *Weaver v. Ward* (1616) Hob. 134. The effect of section 2 of the Crown Proceedings Act 1947 was to make the Crown liable in D tort to its own employees, except those in the armed forces: see section 10 of the Act of 1947. Section 1 of the Crown Proceedings (Armed Forces) Act 1987 suspended the operation of section 10 of the Act of 1947 but section 2 of the Act of 1987 gave the Secretary of State for Defence power to revive section 10 in specified circumstances. He did not do so for any purpose connected with the Gulf War. For present purposes, the plaintiff must demonstrate that a duty of care was owed by the defendants. E

There is now a clear trend in the jurisprudence of the House of Lords and Privy Council (i) to confine the boundaries of the law of negligence (see the cases summarised in *Murphy v. Brentwood District Council* [1991] 1 A.C. 398); (ii) to apply a triple test of (a) whether there was proximity between the parties; (b) whether the damage was foreseeable; and (c) whether it is fair, just and reasonable to impose a duty of care; (iii) to F develop the law by analogy with precedent (see *Caparo Industries Plc. v. Dickman* [1990] A.C. 605 and *Murphy v. Brentwood District Council* [1991] 1 A.C. 398; (iv) expressly to consider the policy implications of extension (see *Yuen Kun Yeu v. Attorney-General of Hong Kong* [1988] A.C. 175; *Rowling v. Takaro Properties Ltd.* [1988] A.C. 473; *Hill v. Chief Constable of West Yorkshire* [1989] A.C. 53; *Murphy v. Brentwood District Council* [1991] 1 A.C. 398 and *Spring v. Guardian Assurance Plc.* [1995] 2 A.C. G 296) and (v) to consider all relevant circumstances (see *Rowling v. Takaro Properties Ltd.* [1988] A.C. 473 and *Caparo Industries Plc. v. Dickman* [1990] A.C. 605). [Reference was also made to *Hedley Byrne & Co. Ltd. v. Heller & Partners Ltd.* [1964] A.C. 465; *Dorset Yacht Co. Ltd. v. Home Office* [1970] A.C. 1004 and *Marc Rich & Co. A.G. v. Bishop Rock Marine Co. Ltd.* [1996] 1 A.C. 211.] The main authority in point is *Shaw Savill and Albion Co. Ltd. v. The Commonwealth* (1940) 66 C.L.R. 344, in which H the High Court of Australia held that no action in negligence lay against the Commonwealth when it was engaged in "actual operations against the enemy." In *Ex parte D. F. Marais* [1902] A.C. 109 it was decided that

such operations were not justiciable. [Reference was also made to *Groves v. Commonwealth of Australia* (1982) 150 C.L.R. 113; *Burmah Oil Co. Ltd. v. Lord Advocate* [1965] A.C. 75 and *Hughes v. National Union of Mineworkers* [1991] I.C.R. 669.] It would be against public policy to impose a duty of care on soldiers engaged in actual operations against the enemy. It is not appropriate for the courts to investigate actions taken in the heat of battle, and those engaged in fighting the enemy should not have to concern themselves with the possibility of actions against them for negligence.

The judge was wrong to dismiss the defendants' application since (a) the material facts are set out in the re-amended particulars of claim; (b) this is an appropriate case in which to consider whether an actionable duty of care exists and (c) this is a plain and obvious case which should be struck out: see *E. (A Minor) v. Dorset County Council* [1995] 2 A.C. 633. The judge wrongly relied on *Tilling v. Whiteman* [1980] A.C. 1 in reaching his decision since that case concerned a preliminary point of law based on hypothetical facts.

Simon Hawkesworth Q.C. and *David Gripton* for the plaintiff. It is not clear beyond doubt on the facts pleaded that the defendants owed no duty of care to the plaintiff and, therefore, this is not a plain and obvious case suitable for striking out. [Reference was made to *Dyson v. Attorney-General* [1911] 1 K.B. 410 and *Lonrho Plc. v. Fayed* [1992] 1 A.C. 448.] A full investigation of both the surrounding circumstances and background is appropriate to determine whether a duty of care did exist and was breached.

Prior to the passing of the Crown Proceedings Act 1947 a claim in tort did not lie against the Crown, and a member of the armed forces was subject to the civil and criminal law in relation to his conduct towards an ordinary citizen, but subject to military law in relation to his conduct towards a fellow member of the armed forces. A soldier who was subject to military discipline was not barred from bringing a civil claim against a fellow soldier, save under the doctrine of common employment, which was abolished by the Law Reform (Personal Injuries) Act 1948. A serviceman ought now to have a general right of action equivalent to that existing in private employment: see *Groves v. Commonwealth of Australia,* 150 C.L.R. 113. The effect of section 2 of the Act of 1947 is to make the Crown liable to the same extent as any other employer at common law. Section 10 of the Act of 1947, however, exempts the Crown and members of the armed forces from liability for negligence while on duty.

Section 1 of the Crown Proceedings (Armed Forces) Act 1987 suspended the operation of section 10. In relation to members of the armed forces, while section 10 remains suspended, the Crown is liable (a) vicariously, for torts committed by its servants or agents and (b) for breach of duty qua employer as if it were a private person. A duty of care owed by the defendants cannot therefore be excluded towards a member of the armed forces during hostilities. Further, section 10 may be revived by the Secretary of State for Defence in specified circumstances, under section 2 of the Act of 1987. The Crown's vicarious liability under section 2(1)(*a*) of the Act of 1947 would depend upon whether the servant or agent alleged to render the Crown vicariously liable would himself have

been personally liable at common law. It would be anomalous and artificial, in interpreting the provisions of the Act of 1947, to draw any distinction between vicarious and direct liability in respect of the Crown's liability to servicemen.

The fact that servants of the Crown are on active service does not negative their liability to third parties: see *Shaw Savill and Albion Co. Ltd. v. The Commonwealth,* 66 C.L.R. 344. That case, however, supports the proposition that a claim in negligence will not succeed if the claim arose directly out of the conduct of hostilities against the enemy. On the pleaded facts it is for the court to determine whether (i) at the material time the firing of the howitzer into Iraq constituted hostilities against the enemy and (ii) the order of the gun commander to go to the front of the gun and its firing at that time directly arose out of the conduct of hostilities or were simply a collateral act on his part, unaffected by the exigencies of war. If either question is answered in the plaintiff's favour he is, prima facie, entitled to succeed.

If the plaintiff is unable to rely on the employer/employee relationship a duty of care can be established by showing that (a) there was proximity between the parties; (b) the damage was foreseeable and (c) it is fair, just and reasonable to impose a duty of care: see *Caparo Industries Plc. v. Dickman* [1990] A.C. 605 and *Spring v. Guardian Assurance Plc.* [1995] 2 A.C. 296. The defendants have conceded that both proximity and foreseeability existed. *Hughes v. National Union of Mineworkers* [1991] I.C.R. 669 is no authority beyond its particular facts. It is plainly arguable that in the circumstances a flagrant disregard of basic procedures amounted to negligence: see *Knightley v. Johns* [1982] 1 W.L.R. 349.

Given the power of the Secretary of State for Defence in section 2 of the Act of 1987 to revive section 10 of the Act of 1947, the court should be slow to negative liability on the ground of public policy.

Havers Q.C. replied.

Cur. adv. vult.

21 February. The following judgments were handed down.

NEILL L.J.

Introduction

This is an appeal by the defendants (the Ministry of Defence) from the order dated 22 September 1994 of Judge Walker sitting in the Dewsbury County Court refusing the defendants' application to strike out the plaintiff's claim. The application was made on the basis that the plaintiff's claim as formulated disclosed no cause of action. Leave to appeal to this court was given by Rose L.J. on 25 November 1994.

In view of the nature of the application it is necessary to refer to the plaintiff's pleaded case, because for the purpose of an application to strike out, the facts alleged by the plaintiff are assumed to be true. I should therefore start by referring to parts of the amended particulars of claim, which were further amended by leave of the Court of Appeal during the

course of the hearing. The re-re-amended particulars of claim are in these terms:

"1. At all material times the plaintiff (Richard Mulcahy) was a serving soldier in the employ of the defendant, being a member of 32 Heavy Artillery Regiment, 74 Battalion.

"2. In or about February/March 1991 during the course of his employment with the defendant, the plaintiff was part of a team manning an M110 8 inch howitzer gun and his particular job was to swab out the breech of the gun after each firing and, for that purpose, he was provided with a bucket and a mop.

"3. One Sergeant Warren was in charge of the team and was the only person in the team allowed to fire the gun.

"4. (a) At the time of the matters hereinafter complained of the gun was deployed at a location in Saudi Arabia and was firing into Iraq. (b) The plaintiff does not know the date on which he was injured but recalls that, on that day, his unit was visited by Kate Adie and a B.B.C. television crew. (c) No return fire from any quarter had been experienced in the days leading up to the day of the plaintiff's injury, none was experienced on that day or on any of the days thereafter.

"5. (a) At a time when the gun was ready for firing, the gun commander—the said Sergeant Warren—ordered the plaintiff to fetch a jerrican of water for the mop bucket which required him to go from the position where he stood when the gun was about to be fired to the front of the gun carriage where the jerricans were stored. (b) The plaintiff was to the front of the gun when the gun commander negligently caused the gun to fire and the discharge knocked the plaintiff off his feet whereafter he was temporarily unable to focus properly, was disorientated and his hearing was adversely affected. (c) The plaintiff says res ipsa loquiter. (d) Further, or in the alternative, by causing or permitting the gun to be fired while the plaintiff was not standing in the safety position required by gun drill the defendants were in breach of their duty to adopt and maintain a safe system of work. . . ."

Before turning to the judge's judgment and to the questions of law which were argued before us it is first necessary to deal with two preliminary matters. This is an application to strike out pursuant to Ord. 13, r. 5(1)(*a*) of the County Court Rules 1981 (S.I. 1981 No. 1687 (L. 20)). The principles on which an order can be made are the same as in the High Court. It is therefore important to remember that the summary procedure for striking out pleadings is only to be used in plain and obvious cases. One must also take account of the fact that in *Dyson v. Attorney General* [1911] 1 K.B. 410, 414 Sir H. H. Cozens-Hardy M.R., in a passage approved by Lord Bridge of Harwich in *Lonrho Plc. v. Fayed* [1992] 1 A.C. 448, 469, said that the procedure "ought not to be applied to an action involving serious investigation of ancient law and questions of general importance . . ." At the same time it is necessary to have regard to some recent statements as to the correct approach. In *E. (A Minor)*

v. Dorset County Council [1995] 2 A.C. 633, 693–694 Sir Thomas Bingham M.R. said:

> "I share the unease many judges have expressed at deciding questions of legal principle without knowing the full facts. But applications of this kind are fought on a ground of a plaintiff's choosing, since he may generally be assumed to plead his best case, and there should be no risk of injustice to plaintiffs if orders to strike out are indeed made only in plain and obvious cases. This must mean that where the legal viability of a cause of action is unclear (perhaps because the law is in a state of transition), or in any way sensitive to the facts, an order to strike out should not be made. But if after argument the court can be properly persuaded that no matter what (within the reasonable bounds of pleading) the actual facts the claim is bound to fail for want of a cause of action, I can see no reason why the parties should be required to prolong the proceedings before that decision is reached."

When the *Dorset* case reached the House of Lords, together with other cases (reported compendiously as *X (Minors) v. Bedfordshire County Council*) Lord Browne-Wilkinson expressed his approval of this approach. He said, at pp. 740–741:

> "Actions can only be struck out under R.S.C., Ord. 18, r. 19 where it is clear and obvious that in law the claim cannot succeed. Where the law is not settled but is in the state of development (as in the present cases) it is normally inappropriate to decide novel questions on hypothetical facts. But I agree with Sir Thomas Bingham M.R. . . . that there is nothing inappropriate in deciding on these applications whether the statutes in question confer private law rights of action for damages: the answer to that question depends upon the construction of the statutes alone. Much more difficult is the question whether it is appropriate to decide the question whether there is a common law duty of care in these cases. There may be cases . . . where it is evident that, whatever the facts, no common law duty of care can exist. But in other cases the relevant facts are not known at this stage. . . . I again agree with Sir Thomas Bingham M.R. that if, on the facts alleged in the statement of claim, it is not possible to give a certain answer whether in law the claim is maintainable then it is not appropriate to strike out the claim at a preliminary stage but the matter must go to trial when the relevant facts will be discovered."

It follows therefore that before a court can consider whether a claim should be struck out on the ground that it discloses no cause of action the court must first be satisfied that all the relevant facts are before it. Furthermore, save perhaps in an exceptional case, the court should give the plaintiff an opportunity to amend his claim to include any other appropriate cause of action. In addition, the court will want to consider whether the parties have had a proper opportunity to put before the court any arguments or authorities on which they may wish to rely. Where, however, the court is satisfied that additional facts will not change the framework of the claim and that the opposing arguments have been fully

deployed the court should not shrink from deciding whether the application to strike out is well founded in law. At the same time the court must take account of Lord Browne-Wilkinson's admonition that it is normally inappropriate to decide novel questions on hypothetical facts. But the novelty of the question of law is not an absolute barrier. It is to be remembered that the resolution of a question of law at an early stage in proceedings may result in a very substantial saving of costs.

I turn therefore to the second preliminary matter. It was argued on behalf of the plaintiff that an application to strike out was in any event inappropriate because further facts needed to be elucidated. It was said that the exact circumstances in which the gun was being fired should be investigated. Indeed at one stage in the course of the argument it was suggested that the firing of the gun might have been part of a training exercise. It is therefore necessary to look at the pleaded facts and at any explanations which were given to the judge.

It is common ground that the plaintiff's battalion formed part of the allied forces in what is known as the Gulf War. The plaintiff formed part of a gun crew at a location in Saudi Arabia. At the moment when he sustained his injury and for some days before the gun was firing live rounds into Iraq. Furthermore, it was accepted by counsel for the plaintiff before the judge that the Gulf War involved warlike operations.

The judge accepted the argument that further facts had to be established. He said:

> "it has to be established on the basis of [the facts pleaded in paragraphs 4(a) and 4(c) of the particulars of claim] whether the degree of involvement in warlike activities was such as to allow the Crown to argue that it was in fact a heat of battle situation. The Crown says, 'Well, this is precisely the situation where there should be no investigation because it is contrary, in a sense, to public policy to be investigating the circumstances on the field of battle.' But that begs the question. The question is was it the field of battle? The plaintiff will seek to argue that it was not the field of battle, although it was firing at the enemy. There are obviously degrees of involvement in warlike activities, some of which have been canvassed by me to counsel on a hypothetical basis. What is the situation of somebody involved in firing a guided missile a hundred miles? What is the situation in somebody arming a bomber? All that has to be determined and . . . I am not going to confuse the issue by having this strike out taken on appeal returned here for a finding of the facts."

It is right to say that counsel for the plaintiff did not persist in his suggestion that the gun might have been fired as part of a training exercise. But he said that this case was plainly distinguishable from a case of hand-to-hand combat. He also said that the precise circumstances in which Sergeant Warren had given the order to fire the gun should be determined by the calling of evidence.

I have come to the conclusion that the facts are sufficiently clear to enable one to decide whether or not on those facts Sergeant Warren owed a duty of care to the plaintiff or whether the defendants were in breach of their duty to adopt and maintain a safe system of work.

I do not consider that it is necessary to examine whether a duty would be owed when someone was involved in firing a guided missile over a distance of a hundred miles or when someone was arming a bomber. These were two situations mentioned by the judge in the course of his judgment. Nor do I consider it to be necessary to reach a conclusion as to what if any duty would be owed by a driver of a vehicle bringing ammunition to the front line from a rear echelon. The plain facts of this case were that the plaintiff was in a war zone taking part in warlike operations and he was a member of a gun crew which was engaged in firing shells on enemy targets. It is on that substratum of fact that I approach this application to strike out.

The liability of the Crown in tort

It is to be remembered that the primary claim by the plaintiff against the defendants is on the basis that the defendants are liable vicariously for the negligence of Sergeant Warren. Nevertheless it is necessary to consider the law relating to the liability of the Crown in tort because the relevant legislation and the decided cases may throw light on the questions raised in this appeal and because the plaintiff's alternative claim is a direct claim against the defendants.

Until 1947 actions against the Crown were inhibited by two principles of ancient though doubtful origin. The first was that the King could not be impleaded in his own courts. The effect of the application of this principle was that until the 19th century proceedings against the Crown, so far as they were available at all, had to be brought by various complicated procedures including a petition of right. These procedures were simplified by the Petitions of Right Act 1860 (23 & 24 Vict. c. 34) and it was held in *Thomas v. The Queen* (1874) L.R. 10 Q.B. 31 that proceedings by way of petition of right were available to recover unliquidated damages against the Crown for breach of contract. But proceedings for damages for tort were inhibited or rather prevented by the application of the second ancient principle, the principle that the King could do no wrong. It may be that at one time the maxim "the King can do no wrong" meant that the King was not privileged to commit illegal acts, but it came to be understood to be a rule barring actions in tort against the Crown. Thus in *Lord Canterbury v. The Queen* (1843) 12 L.J.Ch. 281 an ex-Speaker failed in his claim for compensation from the Crown for damage done to his furniture in the fire which destroyed the Houses of Parliament in 1834 caused, it was alleged, by the negligence of certain Crown servants.

The consequences of the immunity of the Crown against proceedings in tort were mitigated by the practice whereby, for example, if a claim were brought for damages for negligent driving against a Crown servant acting in the course of his employment, the Crown, in what were considered to be appropriate cases, would pay the damages on an ex gratia basis. But the system attracted widespread criticism and both Lord Haldane and Lord Birkenhead made proposals for reform. Furthermore, in Australia and New Zealand the matter was largely rectified by statute by the beginning of this century.

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

I must turn therefore to the Crown Proceedings Act 1947.

C *The Crown Proceedings Act 1947*

The immunity of the Crown against proceedings in tort was fundamentally changed by section 2 of the Crown Proceedings Act 1947. Section 2 so far as is material, is in these terms:

> "(1) Subject to the provisions of this Act, the Crown shall be subject to all those liabilities in tort to which, if it were a private D person of full age and capacity, it would be subject:—(*a*) in respect of torts committed by its servants or agents; (*b*) in respect of any breach of those duties which a person owes to his servants or agents at common law by reason of being their employer; . . . Provided that no proceedings shall lie against the Crown by virtue of paragraph (*a*) of this subsection in respect of any act or omission of a servant or agent of the Crown unless the act or omission would apart from the E provisions of this Act have given rise to a cause of action in tort against that servant or agent or his estate."

The Act of 1947, however, contained special provisions relating to the armed forces. These provisions were set out in section 10, which so far as is material was in these terms:

> F "(1) Nothing done or omitted to be done by a member of the armed forces of the Crown while on duty as such shall subject either him or the Crown to liability in tort for causing the death of another person, or for causing injury to another person, in so far as the death or personal injury is due to anything suffered by that other person while he is a member of the armed forces of the Crown if—(*a*) at the time when that thing is suffered by that other person, he is either on G duty as a member of the armed forces of the Crown or is, though not on duty as such, on any land, premises, ship, aircraft or vehicle for the time being used for the purposes of the armed forces of the Crown; and (*b*) [the Secretary of State] certifies that his suffering that thing has been or will be treated as attributable to service for the purposes of entitlement to an award under the Royal Warrant, Order in Council or Order of His Majesty relating to the disablement or H death of members of the force of which he is a member: Provided that this subsection shall not exempt a member of the said forces from liability in tort in any case in which the court is satisfied that the act or omission was not connected with the execution of his duties

as a member of those forces. . . . (3) . . . a Secretary of State, if satisfied that it is the fact:—(*a*) that a person was or was not on any particular occasion on duty as a member of the armed forces of the Crown; or (*b*) that at any particular time any land, premises, ship, aircraft, vehicle, equipment or supplies was or was not, or were or were not, used for the purposes of the said forces; may issue a certificate certifying that to be the fact; and any such certificate shall, for the purposes of this section, be conclusive as to the fact which it certifies."

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

The Crown Proceedings (Armed Forces) Act 1987

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

In 1987 the Crown Proceedings (Armed Forces) Act 1987 was passed to remove the blanket protection of section 10 of the Act of 1947. Section 1 of the Act of 1987 was in these terms:

"Subject to section 2 below, section 10 of the Crown Proceedings Act 1947 (exclusions from liability in tort in cases involving the armed forces) shall cease to have effect except in relation to anything suffered by a person in consequence of an act or omission committed before the date on which this Act is passed."

Provision was made, however, for the revival of section 10 in certain circumstances. Thus section 2 of the Act of 1987 provided:

"(1) Subject to the following provisions of this section, the Secretary of State may, at any time after the coming into force of section 1 above, by order—(*a*) revive the effect of section 10 of the Crown Proceedings Act 1947 either for all purposes or for such purposes as may be described in the order; or (*b*) where that section has effect for the time being in pursuance of an order made by virtue of paragraph (*a*) above, provide for that section to cease to have effect either for all of the purposes for which it so has effect or for such of them as may be so described. (2) The Secretary of State shall not make an order reviving the effect of the said section 10 for any purpose unless it appears to him necessary or expedient to do so—(*a*) by reason of any imminent national danger or of any great emergency that has arisen; or (*b*) for the purposes of any warlike operations in any part of the world outside the United Kingdom or

A of any other operations which are or are to be carried out in connection with the warlike activity of any persons in any such part of the world. (3) Subject to subsection (4) below, an order under this section describing purposes for which the effect of the said section 10 is to be revived, or for which that section is to cease to have effect, may describe those purposes by reference to any matter whatever and may make different provision for different cases, circumstances or B persons. (4) Nothing in any order under this section shall revive the effect of the said section 10, or provide for that section to cease to have effect, in relation to anything suffered by a person in consequence of an act or omission committed before the date on which the order comes into force. (5) The power to make an order under this section shall be exercisable by statutory instrument subject to annulment in C pursuance of a resolution of either House of Parliament."

It will be seen that under section 2(2)(*b*) the Secretary of State is empowered to make an order reviving the effect of section 10 of the Act of 1947 for "the purposes of any warlike operations in any part of the world outside the United Kingdom." It will also be seen that under section 2(3) an order reviving section 10 can be restricted to any particular D circumstances or persons which the Secretary of State considers appropriate. Accordingly it seems plain that the Secretary of State *could* have made an order reviving section 10 for the purposes of the Gulf War and have restricted the operation of section 10 to certain specified areas in the Middle East or to certain specified activities. But no order was made under section 2 of the Act of 1987.

E

The appeal

It was accepted on behalf of the defendants that there was no direct English authority to support the proposition that no duty of care in tort is owed by one soldier to another when engaging the enemy in battle conditions. Reliance was placed, however, on (a) the decisions of the High F Court of Australia in *Shaw Savill and Albion Co. Ltd. v. The Commonwealth* (1940) 66 C.L.R. 344 and *Groves v. Commonwealth of Australia* (1982) 150 C.L.R. 113; (b) dicta in *Burmah Oil Co. Ltd. v. Lord Advocate* [1965] A.C. 75; (c) cases involving injuries to police officers while engaged on operational duty. These cases included *Hughes v. National Union of Mineworkers* [1991] I.C.R. 669.

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

H "The plaintiff's supposed cause of action consisted solely in acts, matters and things done or occurring in the course of active naval operations against the King's enemies by the armed forces of the Commonwealth."

The Commonwealth sought to set the service of the writ aside or, in the alternative, an order that the action should be stayed. The High Court refused to dismiss or stay the action and held that the question whether at the time of the collision the warship was engaged in active operations against the enemy was an issue which the court could decide for itself. In the course of the judgments, however, consideration was given to whether a duty of care was owed if the warship had been engaged on active operations. Dixon J. said, at pp. 361–362:

> "Outside a theatre of war, a want of care for the safety of merchant ships exposes a naval officer navigating a King's ship to the same civil liability as if he were in the merchant service. But, although for acts or omissions amounting to civil wrongs an officer of the Crown can derive no protection from the fact that he was acting in the King's service or even under express command, it is recognised that, where what is alleged against him is failure to fulfil an obligation of care, the character in which he acted, together, no doubt, with the nature of the duties he was in the course of performing, may determine the extent of the duty of care. . . . It could hardly be maintained that during an actual engagement with the enemy or a pursuit of any of his ships the navigating officer of a King's ship of war was under a common law duty of care to avoid harm to such non-combatant ships as might appear in the theatre of operations. It cannot be enough to say that the conflict or pursuit is a circumstance affecting the reasonableness of the officer's conduct as a discharge of the duty of care, though the duty itself persists. To adopt such a view would mean that whether the combat be by sea, land or air our men go into action accompanied by the law of civil negligence, warning them to be mindful of the person and property of civilians. It would mean that the courts could be called upon to say whether the soldier on the field of battle or the sailor fighting on his ship might reasonably have been more careful to avoid causing civil loss or damage. No one can imagine a court undertaking the trial of such an issue, either during or after a war. To concede that any civil liability can rest upon a member of the armed forces for supposedly negligent acts or omissions in the course of an actual engagement with the enemy is opposed alike to reason and to policy. But the principle cannot be limited to the presence of the enemy or to occasions when contact with the enemy has been established. Warfare perhaps never did admit of such a distinction, but now it would be quite absurd. The development of the speed of ships and the range of guns were enough to show it to be an impracticable refinement, but it has been put out of question by the bomber, the submarine and the floating mine. The principle must extend to all active operations against the enemy. It must cover attack and resistance, advance and retreat, pursuit and avoidance, reconnaissance and engagement. But a real distinction does exist between actual operations against the enemy and other activities of the combatant services in time of war. For instance, a warship proceeding to her anchorage or manoeuvring among other ships in a harbour, or acting as a patrol or even as a convoy must be navigated with due regard to the safety of other

A shipping and no reason is apparent for treating her officers as under no civil duty of care, remembering always that the standard of care is that which is reasonable in the circumstances. Thus the commander of His Majesty's torpedo-boat destroyer *Hydra* was held liable for a collision of his ship with a merchant ship in the English Channel on the night of 11 February 1917, because he failed to perceive that the other ship, which showed him a light, was approaching on a crossing
B course. . . . obviously the *Hydra* was on active service and war conditions obtained (*H.M.S. Hydra* [1918] P. 78). It may not be easy under conditions of modern warfare to say in a given case upon which side of the line it falls. But, when, in an action of negligence against the Crown or a member of the armed forces of the Crown, it is made to appear to the court that the matters complained of formed
C part of, or an incident in, active naval or military operations against the enemy, then in my opinion the action must fail on the ground that, while in the course of actually operating against the enemy, the forces of the Crown are under no duty of care to avoid causing loss or damage to private individuals."

Rich A.C.J. and McTiernan J. agreed with the judgment of Dixon J.
D Starke J. and Williams J. concurred in the result. Starke J. said, at pp. 355–356:

"there is no doubt that the executive government and its officers must conduct operations of war, whether naval, military, or in the air, without the control or interference of the courts of law. Acts done in the course of such operations are not justiciable and the courts of law
E cannot take cognizance of them. In my judgment, the case of *Ex parte D. F. Marais* [1902] A.C. 109 so decided."

Williams J. reached a similar conclusion. He too referred to *Ex parte D. F. Marais* [1902] A.C. 109 and said, at p. 366, that if it were proved that actual hostilities were in progress at the time "the alleged cause of action would not be justiciable."

F It is apparent from the later decision of the High Court of Australia in the *Groves* case, 150 C.L.R. 113 that when the claim by Shaw Savill came to trial the action succeeded on the ground that the captain of the *Adelaide* had steered a wrong course: see 150 C.L.R. 113, 123. Presumably the trial judge found that at the material time the warship was not engaged in actual operations against the enemy. But Gibbs C.J., at p. 117, affirmed as correct what had been said by Dixon J. in the *Shaw Savill* case,
G 66 C.L.R. 344. Gibbs C.J. added: "To hold that there is no civil liability for injury caused by the negligence of persons in the course of an actual engagement with the enemy seems to me to accord with common sense and sound policy."

The plaintiff in the *Groves* case, 150 C.L.R. 113 was an airman in the R.A.A.F. who was injured when leaving a stationary aircraft being used
H to transport civilians in a time of peace. The accident occurred when a folding ladder collapsed beneath him as a result of the absence of locking pins. The High Court held that as the case arose out of routine duties in time of peace the plaintiff was entitled to the same protection of the common law as would protect other members of the community, and that

the Commonwealth were vicariously liable for the negligence of other members of the crew. In a joint judgment of four members of the court led by Stephen J. references were made to the *Shaw Savill* decision, 66 C.L.R. 344. As I read the judgment, however, the support given to *Shaw Savill* was less emphatic than in the judgment of Gibbs C.J. It was said, at p. 134:

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

On the other hand in other passages in the judgment, at p. 125, and in the judgment of Murphy J., at p. 136, there seems to have been a recognition of the fact that warlike activities fell into a special category. Looking at the case as a whole I do not consider that it throws any doubt on the proposition affirmed in the *Shaw Savill* case, 66 C.L.R. 344 that no duty exists where a serviceman is engaged in actual operations against the enemy.

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

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

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

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

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

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

It was therefore submitted in this court that the decision in the *Burmah Oil* case, though it was concerned with compensation for loss of property, was some support for the proposition that a claim could not be based on damage sustained in the course of military operations against the enemy.

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

> "In my judgment . . . as a matter of public policy, if senior police officers charged with the task of deploying what may or may not be an adequate force of officers to control serious public disorder are to be potentially liable to individual officers under their command if those individuals are injured by attacks from rioters that would, in my judgment, be significantly detrimental to the control of public order. It will no doubt often happen that in such circumstances

critical decisions have to be made with little or no time for considered thought and where many individual officers may be in some danger of physical injury of one kind or another. It is not, I consider, in the public interest that those decisions should generally be the potential target of a negligence claim if rioters do injure an individual officer, since the fear of such a claim would be likely to affect the decisions to the prejudice of the very tasks which the decisions are intended to advance."

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

It was argued on behalf of the plaintiff on the other hand that until the facts had been fully investigated it was not possible to say whether "battle conditions" existed at the relevant time. One of the matters which would have to be investigated was whether, in allowing the plaintiff to go forward, Sergeant Warren had been in breach of some recognised rule or standing instruction. Thus, as was demonstrated by the decision of the Court of Appeal in *Knightley v. Johns* [1982] 1 W.L.R. 349, a police officer might be held liable in negligence to one of his subordinates if, even in an emergency, he acted in breach of an explicit standing order.

It was further submitted on behalf of the plaintiff that some passages in the judgments in the *Shaw Savill* case, 66 C.L.R. 344 went too far. Attention was drawn to the criticisms of the decision by Professor Hogg in his work *Liability of the Crown*, 1st ed. (1971), at p. 95. The right approach, it was suggested, was to allow the claim to proceed and then to have an investigation at the trial into the particular circumstances surrounding the firing of the gun to see whether there had been any breach of a duty of care. The exigencies of battle might well provide an excuse for what in other circumstances would constitute a breach of duty.

Furthermore, it was submitted, it would be wrong to invoke public policy to provide the defendants with a defence. Parliament had empowered the Secretary of State to reintroduce the immunity conferred by section 10 of the Act of 1947 to cover hostilities in a particular war zone. No action had been taken under section 2 of the Act of 1987 and the common law had no part to play.

Conclusions

In my judgment the circumstances in which the plaintiff was injured clearly constituted "battle conditions" in the sense contemplated by Lord Reid, Lord Pearce and Lord Upjohn in the *Burmah Oil* case [1965] A.C. 75. Furthermore, I consider that an English court should approach this claim in the same way as the High Court of Australia in the *Shaw Savill* case, 66 C.L.R. 344. I do not accept Professor Hogg's criticisms of that decision. Moreover, I would observe that in the second edition (1989) of his book Professor Hogg acknowledged that his earlier criticism did not "seem to have won any converts:" see p. 137. As I said earlier, I do not find it necessary to explore the territorial limits of this immunity. It is sufficient to say that in my view it covers the present situation where in the course of hostilities against an enemy a howitzer of the plaintiff's

A battalion was engaging the enemy and the plaintiff was a member of the gun team.

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

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

In the present case it is accepted on behalf of the defendants that two of these components of a duty of care—proximity and foreseeability of D damage—are present. The issue to be determined is whether it is fair, just and reasonable that a duty of care should be imposed on one soldier in his conduct towards another when engaging the enemy during hostilities. In the light of the recent amendment to the plaintiff's pleading the same question has to be asked in relation to the alleged duty to maintain a safe system of work.

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

I am satisfied that in a hypothetical case a court would require proof G that the injury was sustained in battle conditions. But here, as it seems to me, the plaintiff's pleaded case makes the position clear. The question then becomes: "Is a duty of care to be imposed in such conditions so as to make one serviceman liable for his negligent act towards another?" In my opinion, despite the careful arguments addressed to us on behalf of the plaintiff, there is no basis for extending the scope of the duty of care so far. I would echo the words of Gibbs C.J. in the *Groves* case, 150 H C.L.R. 113, 117: "To hold that there is no civil liability for injury caused by the negligence of persons in the course of an actual engagement with the enemy seems to me to accord with common sense and sound policy." I reach the same conclusion on the plaintiff's alternative claim. In my

opinion there was no duty on the defendants in these battle conditions to maintain a safe system of work.

I would therefore allow the appeal and make an order to strike out the statement of claim and to dismiss the action.

McCowan L.J. I entirely agree with the judgment of Neill L.J. and have nothing to add.

Sir Iain Glidewell. I have had the advantage of reading the judgment of Neill L.J. in draft. For the reasons he gives, I agree that this appeal should be allowed, the statement of claim struck out and the plaintiff's action dismissed. As, however, we are differing from the decision of Judge Walker, I think it right to express my own views shortly.

Mr. Havers, for the defendants, defined the issue before the court in these words: "Does one soldier owe to another a duty of care when engaging the enemy in the course of hostilities?" I agree that, on the pleadings and in the argument before the judge, this is a correct formulation of the issue.

It may seem surprising that this question has not previously been decided by a court in this country, but the reason is not far to seek. An action in negligence by one member of the armed forces of the Crown against another would have been barred by the doctrine of common employment until that doctrine was abolished by the Law Reform (Personal Injuries) Act 1948. When that happened, the Crown Proceedings Act 1947 was already in force. Neill L.J. has set out in his judgment the terms of section 10 of that Act. The terms of that section clearly required the question posed by Mr. Havers to be answered "No." Thus it was not until section 10 of the Act of 1947 was itself suspended by section 1 of the Crown Proceedings (Armed Forces) Act 1987 that the answer to the question depended, for the first time, on the general common law principles of the law of negligence.

Mr. Havers accepts that, if the plaintiff proves the facts alleged in his statement of claim (as, for the purposes of this appeal, we must assume he can do) the first two criteria for establishing that Sergeant Warren owed the plaintiff a duty of care, namely, proximity between the parties and foreseeability of damages, are satisfied. Thus, such a duty of care would be owed unless considerations of public policy require that, in the course of hostilities, it should not.

Like Neill L.J., it is in my judgment clear that public policy does require that, when two or more members of the armed forces of the Crown are engaged in the course of hostilities, one is under no duty of care in tort to another. Indeed, it could be highly detrimental to the conduct of military operations if each soldier had to be conscious that, even in the heat of battle, he owed such a duty to his comrade. My reasons are thus in essence those expressed by Dixon J. in the passage from his judgment in *Shaw Savill and Albion Co. Ltd. v. The Commonwealth*, 66 C.L.R. 344 which Neill L.J. has quoted. If during the course of hostilities no duty of care is owed by a member of the armed forces to civilians or their property, it must be even more apparent that no such duty is owed to another member of the armed forces. This

conclusion is wholly consistent with, and supported by, the decision of the House of Lords in *Burmah Oil Co. Ltd. v. Lord Advocate* [1965] A.C. 75, and depends upon similar reasoning to that adopted by May J. in relation to police officers in *Hughes v. National Union of Mineworkers* [1991] I.C.R. 669. In my judgment, therefore, at common law, one soldier does not owe to another a duty of care when engaging the enemy in the course of hostilities.

Mr. Hawkesworth, for the plaintiff, sought to amend his pleading to allege that the defendants were not merely vicariously liable for any breach of duty (if duty there was) by Sergeant Warren, but also directly liable for failure to maintain a safe system of work. I agree with Neill L.J. however that such an amendment makes no difference. The reasons which result in the first question being answered "No" result in the same answer to the second issue. Having reached this decision as a matter of principle, I agree with Neill L.J. that the plaintiff's claim is pleaded with sufficient clarity to make it clear that no further process of fact-finding could result in success in his action.

For these reasons, which do no more than underline the detailed reasoning of Neill L.J., I agree that this appeal should be allowed and the plaintiff's claim be struck out.

Appeal allowed.
No order for costs.
Leave to appeal refused.

Solicitors: Treasury Solicitor; Wilkinson Woodward & Ludlam, Halifax.

M. F.