

**Pro Patria et Regina:  
Liability of the NZDF for Death  
and Injury of Service Personnel  
on Overseas Operations**

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## **ACRONYMS**

ACC Act	Accident Compensation Act 2001
ECHR	European Convention of Human Rights
ECtHR	European Court of Human Rights
ECM	Electronic counter measures (to an IED)
HRA (UK)	Human Rights Act (UK) 1998
HRC	United Nations Human Rights Commission
ICCPR	International Convention on Civil and Political Rights
IED	Improvised explosive device
NZBORA	New Zealand Bill of Rights Act 1990
NZDF	New Zealand Defence Force
NZ MOD	New Zealand Ministry of Defence
SA	Situational awareness
SLR	Snatch Land Rover
TID	Target identification
UK MOD	United Kingdom Ministry of Defence
UKSC	United Kingdom Supreme Court

## CHAPTER 1 – INTRODUCTION

### THE *SMITH* DECISION AND ITS IMPACT

On 19 June 2013 the Supreme Court of the United Kingdom (UKSC) issued its judgment in *Smith v Ministry of Defence*.<sup>1</sup> The case was a strike out appeal and subject matter was deaths of and injuries to British servicemen during the British deployment to Iraq from 2003 to 2007. There were three sets of claimants. The Albutt claim concerned a friendly fire incident that took place between two British Challenger tanks which killed one soldier and injured two others. The claim was brought in common law negligence and alleged the UK Ministry of Defence (UK MOD) had failed to provide suitable training and equipment to the personnel involved. The Smith and Ellis claims related to incidents in Iraq in 2005 and 2006 where lightly armoured Snatch Land Rovers (SLRs) had been attacked by Iraqi insurgents using improvised explosive devices (IEDs), killing British personnel. Both claims alleged that the UK MOD had breached the soldiers' art 2 right to life under the European Convention on Human Rights (ECHR) by failing to fit suitable electronic counter-measures (ECM) equipment to the vehicles to defeat IED attacks, and by failing to take other measures to limit how SLRs were used in Iraq. The Ellis claim was also framed in negligence. Details of each claim are contained in Annex A.

The issue before the UKSC under the human rights head was whether British service personnel in Iraq were within UK jurisdiction for the purposes of art 1 of the ECHR, and, if so, whether art 2 of the ECHR imposed a positive obligation on the UK to prevent the deaths. In the negligence claims the UKSC had to determine whether they should be struck out because they fell within the scope of combat immunity or because it would not be fair, just and reasonable to impose a positive duty on the UK MOD to protect personnel on operations to prevent death and injury of its personnel.

The UKSC held unanimously that the service personnel killed were within UK jurisdiction for the purposes of art 1 of the ECHR at the time of their deaths. The majority<sup>2</sup> also found that their claims could proceed to trial because they fell within

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<sup>1</sup> *Smith v Ministry of Defence* [2013] UKSC 41.

<sup>2</sup> Hope LJ on behalf also of Walker, Hale and Kerr LJ; minority judgments were given by Mance LJ on behalf also of Wilson LJ, and by Carnwath LJ.

the scope of art 2. Regarding the negligence claims, the majority held that both could proceed to trial because they could fall outside the scope of the doctrine of combat immunity.<sup>3</sup> Whether it would be fair, just and reasonable to impose a duty of care on the UK MOD should be determined at trial.

The *Smith* decision caused reaction in human rights blogs, think tanks, and law journals.<sup>4</sup> Since *Mulcahy v Ministry of Defence*<sup>5</sup> in 1996, case after case has been brought against the MOD, claiming breach of the ECHR and negligence in respect not only of British service personnel but also foreign civilians injured or killed by British forces.<sup>6</sup> In previous human rights claims inroads had been made in terms of ECHR jurisdiction, in that it was held that detainees in British detention facilities were under UK jurisdiction. On the other hand, British armed forces personnel were held not to be within the jurisdiction of the ECHR while they were outside a British controlled facility in Iraq, and if not all their ECHR rights could be protected.<sup>7</sup> On the negligence front, none of the previous claims had been decided in favour of the plaintiffs and many had foundered at the strike out application stage due to the doctrine of combat immunity.

*Smith* changed all that. The UKSC followed the *Al-Skeini*<sup>8</sup> decision in the European Court of Human Rights (ECtHR) and extended the jurisdiction of the ECHR to apply to British personnel outside a British base, even though not all their ECHR rights could

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<sup>3</sup> See Chapter 2 for a definition of the doctrine of combat immunity.

<sup>4</sup> See, for example, various articles on [ukhumanrightsblog.com](http://ukhumanrightsblog.com); Thomas Tugendhat and Laura Croft *The Fog of Law* (Policy Exchange, London, April 2013); Jonathan Morgan “Negligence: into Battle” (2013) 72 CLJ 14; Nick Bevan “*Smith v Ministry of Defence*: personal injury – armed forces personnel – human rights” (2013) 4 JPI Law 179; Duncan Fairgrieve “Suing the Military: the Justiciability of Damages Claims against the Armed Forces” (2014) 73 CLJ 18; and Alexia Solomou “*Smith v Ministry of Defence*” (2014) 108 American Journal of International Law 79.

<sup>5</sup> *Mulcahy v Ministry of Defence* [1996] QB 732 involved a British soldier who was injured in an accident on an artillery gunline firing from Saudi Arabia into Iraq during the First Gulf War. The Court of Appeal held that, due to the doctrine of combat immunity, the UK MOD was under no duty to maintain a safe system of work in battle.

<sup>6</sup> Tugendhat and Croft, above n 4, provide a timeline of these cases at Appendix B of their paper.

<sup>7</sup> See for example *R (Al-Skeini) and Others v The Secretary of State for Defence* [2005] A.C.D. 51, [2004] EWHC 2911 (Admin).

<sup>8</sup> *Al-Skeini v United Kingdom* (2011) 53 EHRR 589. This case involved Iraqi civilians killed or injured by British forces while being held in British detention facilities in Iraq.

be protected at the time of any harm. In negligence the UKSC departed from earlier decisions and interpreted the scope of combat immunity narrowly.<sup>9</sup>

The *Smith* decision has not gone unnoticed by the New Zealand Defence Force (NZDF). Here, as in the UK, the armed forces are questioning where the goalposts of liability for death and injury of service personnel on operations now stand. Under what circumstances could the NZDF be held liable in negligence? Could a death be the subject of a claim under s 8 of the New Zealand Bill of Rights Act 1990 (NZBORA)?

### AIM AND STRUCTURE OF THE DISSERTATION

This dissertation aims to explore issues surrounding whether the NZDF could owe a duty of care to service personnel killed or injured on overseas operations and whether the NZDF could be held to have breached s 8 NZBORA where a service person dies on an operation. The variety of scenarios of how injuries can occur on operations is wide, as is the variety of factors influencing decisions related to a deployment. The combination of the two leads to a large number of permutations of how things can go wrong and why. Therefore, to limit the scope of this dissertation, discussion will be based on the facts of the *Smith* claims. However, it should be remembered that *Smith* was a decision on strike out appeals and consequently it does contain enough detail on the claims and the UK MOD's defences to draw any definitive conclusions on possible liability of the NZDF in a similar situation under NZ law. For that reason, and because the NZDF has never faced *Smith*-like claims, *Smith* facts will be used in a generic way as representing causes of action based on impugned decisions on equipment and training for an operation that allegedly led to deaths and physical injuries caused directly by the actions of a third party.

Overall, the focus of this dissertation is liability, so other issues such as breach of a duty of care and remedies will be discussed in passing only. Chapter 2 will identify

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<sup>9</sup> The "narrowing" of the scope of combat immunity was also related to the fact that the *Smith* claims were framed to avoid invoking the doctrine. As can be seen from Annex A, the *Smith* claims avoided impugning decisions made in the operational theatre itself and focussed instead on equipment and training decisions made in the UK in preparation for and during the British operation in Iraq. The only exception to this was the vehicle recognition training in the Challenger claim, but it had been provided in a rear area immediately prior to deployment into Iraq.



the NZ courts' approach to duty of care in novel situations and apply it to explore the factors which would be used to determine whether a duty of care could be imposed on the NZDF in *Smith*-like claims. Chapter 3 will explore what could constitute a breach of the NZBORA s 8 right not to be denied life and the issues surrounding how a s 5 justified limitation of the right might be assessed in the *Smith* context. Conclusions will be drawn in Chapter 4.

Before proceeding to Chapter 2, some preliminary issues which affect both types of claim should be dealt with.

## **PRELIMINARY ISSUES**

### **Who would be Liable – NZDF or the NZ Ministry of Defence?**

The UK MOD comprises the British armed forces as well as public servants, whereas in NZ defence responsibilities and functions are divided between the NZDF and the NZ Ministry of Defence (NZ MOD).<sup>10</sup> The Chief of the Defence Force commands the NZDF and is responsible for minor equipment procurement.<sup>11</sup> The Secretary of Defence is responsible to procure, replace, or repair equipment used or intended for use by the Defence Force, where that equipment has major significance to military capability.<sup>12</sup> Thus, different equipment elements of the *Smith* claims could fall under the responsibility of either the NZDF or the NZ MOD. Training decisions, however, would be the preserve of the NZDF. For the sake of simplicity it will be assumed that the defendant in NZ in *Smith*-like claims would be the NZDF.<sup>13</sup>

### **Do Crown Immunities Apply?**

Crown immunity is based on the principle that “the King can do no wrong” and cannot be sued in his own courts. In the late nineteenth century the growing role of the state

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<sup>10</sup> See Defence Act 1990.

<sup>11</sup> Defence Act 1990 s 8. CDF commands the NZDF through the three Service Chiefs and the Joint Force Commander. “Command” in this context can be equated with raising, training, deploying and sustaining the armed forces of NZ.

<sup>12</sup> Defence Act 1990 s 24(2)(d).

<sup>13</sup> However, I do acknowledge that, as the Chief Justice pointed out in *Couch v Attorney-General* (on appeal from *Hobson v Attorney-General*) [2008] NZSC 45, the exact identity of the defendant in a negligence claim is important because it may affect the existence and scope of duties owed (at [30]).

meant that limits on immunity became necessary. In NZ, crown immunity is limited by the Crown Proceedings Act 1950 (CPA).<sup>14</sup>

**Vicarious Liability in Negligence.** Under s 6(1)(a) of the CPA the Crown cannot be directly liable in tort but it can be vicariously liable if commission of a tort by an agent is established.<sup>15</sup> Section 6(1)(a) refers to “servant or agent”. At s 2(1) “servant” is defined to include a member of the New Zealand armed forces. Section 86 of the State Sector Act 1988 (SSA) provides civil immunity to Public Service chief executives and employees for good-faith actions or omissions in pursuance or intended pursuance of their duties, functions, or powers, but s 6(4A) of the CPA provides that the Crown itself may be found liable in tort in respect of the actions or omissions of servants who enjoy immunity under s 86 SSA.<sup>16</sup> Thus, *Smith*-like negligence claims could be brought against the NZDF vicariously for the negligence of a military or civilian employee.

**Institutional Liability in Negligence.** Institutional liability in negligence arises where no one natural person has been negligent, but where a series of actions or decisions in combination comprise a breach of a duty of care by an organisation itself. Whether the NZDF can be institutionally liable is not clear. Because the Crown cannot be directly liable in tort, for the NZDF to be liable for institutional negligence it may be necessary to show that each individual who made a decision or act involved was negligent, which

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<sup>14</sup> See Stuart Anderson “ ‘Grave injustice’, ‘despotic privilege’: the insecure foundations of crown liability for torts in New Zealand” (2009-2012) 12 Otago L Rev 1 at 5. Also noteworthy in this context is that s 11(1) CPA preserves the exercise of prerogative power “for the purpose of the defence of the realm or of training, or maintaining the efficiency of, any of the armed forces of New Zealand”. Section 11(2) states that the Minister of Defence may issue a certificate to the effect that an act or omission at issue in a proceeding was necessary for the purpose of exercise of a prerogative power. However, this provision merely preserves prerogative powers; it does not provide immunity in respect of them. The situation is the same in the UK. Section 11 of the Crown Proceedings Act 1947 (UK), which is the same as s 11 of the CPA (NZ), was no bar to the *Smith* claims. By contrast, *Smith*-like claims were previously barred by s 10 of the CPA (UK), which was repealed by the by Crown Proceedings (Armed Forces) Act 1987. The NZ CPA has no such provision.

<sup>15</sup> The rationale for limit on crown immunity in civil proceedings was expressed by Elias CJ in *Couch*, above n 13, in the following terms: “If public bodies act to create danger or cause direct harm through the use of their powers, there is no impediment to their liability on ordinary principles, unless such liability is inconsistent with the statute conferring their powers” (at [55]). Section 27(3) of the New Zealand Bill of Rights Act 1990 also specifically protects the right of every person to bring civil proceedings against the Crown and to have those proceedings heard, according to law, in the same way as civil proceedings between individuals.

<sup>16</sup> Furthermore, s 6(4A)(b) states that “for the purpose of determining whether the Crown is so liable, the court must disregard the immunity in section 86”.

may be difficult in practice.<sup>17</sup> In *Couch*<sup>18</sup> the Crown made concessions to allow institutional liability to be pleaded and the Supreme Court approached the claim on that basis. So, a claim of institutional negligence against the NZDF may succeed despite s 6 of the CPA.<sup>19</sup>

**Liability under the NZBORA.** Section 6 of the CPA applies only to crown immunity in tort. The Court of Appeal in *Baigent's Case*<sup>20</sup> followed the Privy Council in *Maharaj v Attorney-General of Trinidad and Tobago (No 2)*<sup>21</sup> and held that liability of the Crown under the NZBORA is not tortious. The state accepts the obligations of the international treaties it signs, so the state is directly liable for a breach of the NZBORA.<sup>22</sup> Crown immunity does not apply.

### **Would *Smith*-Like Claims be struck out in NZ?**

As the UK MOD did in *Smith*, the NZDF could seek to have *Smith*-like claims struck-out before proceeding to a full trial, probably on the grounds of combat immunity and lack of extra-territorial jurisdiction of the NZBORA. I will briefly explain why such proceedings are unlikely to be successful.

**Negligence.** In *Couch* Elias CJ stated that the task facing the court in a novel area of negligence is determining “whether the circumstances relied on by the plaintiff are *capable* of giving rise to a duty of care”.<sup>23</sup> She also advised caution “in assuming there are policy considerations which should negative the existence of a duty of care”<sup>24</sup>

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<sup>17</sup> See Law Commission, *A New Crown Civil Proceedings Act for New Zealand* (Issues Paper 35, Wellington, 2014) at [1.6] and [3.7].

<sup>18</sup> *Couch*, above n 13.

<sup>19</sup> Examining the difference between vicarious and institutional liability is outside the scope of this dissertation, but the question of duty of care in Chapter 2 will be assessed mainly in terms of institutional liability. The issue is also addressed in Chapter 4 as it impacts on tenable claims in negligence for physical injury. For further discussion of the availability of institutional negligence against the crown see Stuart Anderson “‘Grave injustice’, ‘despotic privilege’: the insecure foundations of crown liability for torts in New Zealand” (2009-2012) 12 Otago L Rev 1 at 1.

<sup>20</sup> *Simpson v Attorney-General [Baigent's Case]* [1994] 3 NZLR 667.

<sup>21</sup> *Maharaj v Attorney-General of Trinidad and Tobago (No 2)* [1979] AC 385 at 399 cited in *Baigent's Case*, above n 20, at 677, 692, 700 and 718.

<sup>22</sup> McKay J pointed out in *Baigent's Case* that it is the Crown as the legal embodiment of the state which is bound by the International Convention of Civil and Political Rights CCPR and is therefore liable for NZBORA breaches (*Baigent's Case*, above n 20, at 718).

<sup>23</sup> *Couch*, above n 13, at [2].

<sup>24</sup> *Couch*, above n 13, at [24]. In *X v Bedfordshire County Council* [1995] 2 AC 633 at 741 Lord Browne-Wilkinson thought it was very important that, in cases where the law of negligence was unclear or

because at the strike out hearing little will be known about the facts from the defendant's point of view or the reasons the defendant acted as it did.<sup>25</sup> Moreover, the effect of ruling in favour of strike-out on policy grounds is to effectively provide blanket immunity to a public body, contrary to s 6 of the CPA and to s27(3) of the New Zealand Bill of Rights Act 1990.<sup>26</sup> Allowing a case of a novel duty to go to trial allows "a fair and fully informed policy determination to be made".<sup>27</sup> Therefore, it is unlikely that a NZ court would strike out a *Smith*-like claim in negligence.

**NZBORA.** In the area of human rights the question of extra-territorial application of the NZBORA would likely be a threshold issue. However, if such jurisdiction is considered possible, then, for similar reasons as for negligence claims in a novel area, it is likely that a NZ court would allow a *Smith*-like claim to go to trial.

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developing, a decision should be made on the basis of facts found at trial, not on hypothetical facts assumed to be true for the purpose of strike-out application (see *Couch*, above n 13, at [33]).

<sup>25</sup> *Couch*, above n 13, at [24] and [32]. This point was made in *Barrett v Enfield London Borough Council* [2001] 2 AC 550 when Hutton LJ commented that at the strike-out application hearing it will not be known whether there are "matters of policy involving the balancing of competing public interests or the allocation of limited financial resources" at play, whether the claimed breach was a result of "administrative direction, expert or professional opinion", or whether it resulted from a failure to adhere to technical standards (at 586-587).

<sup>26</sup> *Couch*, above n 13, at [36].

<sup>27</sup> *Couch*, above n 13, at [126] per Tipping J.

## CHAPTER 2 – NEGLIGENCE

### INTRODUCTION

There are three elements which must be proved in an action in negligence: first, that the defendant owed the plaintiff a duty of care; secondly, that the defendant breached that duty by failing to exercise the standard of reasonable care required; and thirdly, that the defendant's breach caused harm to the plaintiff.<sup>28</sup> Whether a legal duty of care is owed is a threshold condition which limits the scope of negligence, and is the focus of this chapter. The aim of Chapter 2 is to identify how a NZ court would approach the duty issue, which factors would likely be determinative of the issue, and which would depend on specific facts. Examples using the *Smith* facts will be provided along the way and, when required, will be discussed with respect to liability of the UK MOD, rather than the NZDF, purely to illustrate points. Before proceeding, however, it is necessary to examine how accident compensation legislation may affect personal harm negligence proceedings in NZ.

### SMITH-LIKE NEGLIGENCE CLAIMS AND ACC

A major difference between the UK and NZ is that NZ has a no-fault statutory compensation scheme for personal injury, governed by the Accident Compensation Act 2001 (ACC Act).<sup>29</sup> If the deaths and injuries in the *Smith* claims occurred to NZDF service personnel, they would be covered as personal injuries under s 26 of the ACC Act.<sup>30</sup> In addition, injuries which occurred on a military operation outside NZ would

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<sup>28</sup> *Couch*, above n 13, at [9].

<sup>29</sup> Since 6 April 2005 the Armed Forces and Reserve Forces Compensation Scheme (AFCS) has been operating in the UK. It provides for benefits in respect of illness, injury or death which is caused by military service. Awards of lump sum or annuity compensation are based on an Injury Tariff. Payment of compensation under the AFCS does not bar civil claims for the same injury (that fact was pointed out in *Smith*, above n 1, at [181] per Carnwath LJ), but regulations do not allow a claimant to be compensated twice for the same injury. In 2010 The Armed Forces and Reserve Forces (Compensation Scheme) (Amendment) Order 2010 No. 1723 clarified where an award under the AFCS will be adjusted where a claimant has received damages in a civil court or tribunal for the same injury or death for which benefit has been paid (s 6). There is some suggestion that claims in negligence are brought by injured service personnel in the UK partly because compensation under the scheme is considered inadequate (Dijen Basu, "Challenging the Combat Immunity principle" (2008) SJ 21 at 22).

<sup>30</sup> The injuries would also be categorised as work injuries under s 28 which deals with the circumstances of employment under which the injury is sustained. Such circumstances would usually be satisfied on operational service overseas.

meet the requirements for ACC cover under s 22.<sup>31</sup> As a result, civil claims for compensation arising out of such personal injuries would be barred by s 317(1) of the ACC Act. However, even though *Smith* claims for compensatory damages in negligence would be barred in NZ, civil claims for exemplary damages, declaratory judgment, or nominal damages may be available.<sup>32</sup> For that reason it is still worthwhile to examine issues surrounding whether a duty of care may exist.

### NZ APPROACH TO DUTY OF CARE IN A NOVEL SITUATION

The NZ law of negligence is based on two leading House of Lords cases: *Anns v Merton London Borough Council*<sup>33</sup> and *Caparo Industries plc v Dickman*<sup>34</sup>. *Anns* provided a two-step approach for determining whether a duty is owed in a novel situation.<sup>35</sup> In *Caparo* the House of Lords adopted a three stage approach involving an

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<sup>31</sup> Under s 22(1)(a)-(d) compensation is available where injuries occur outside NZ if three elements are satisfied: the personal injury must have occurred on or after 1 April 2002; the personal injury must be of the kind described in ss26(1)(a) or (b) or (c) or (e), which includes death and physical injury; the person so injured must be ordinarily resident in New Zealand, which is governed by s 17 and is usually satisfied for NZDF personnel on operations; and that the personal injury is one for which the person would have cover if it had occurred in New Zealand, which is generally satisfied by virtue of s 22(1)(b).

<sup>32</sup> Discussion of remedies is outside the scope of this dissertation, but a few remarks are warranted here. **Exemplary Damages.** Section 319(1) of the ACC Act expressly allows proceedings for exemplary damages for injury covered by ACC. However, exemplary damages will be available only where the plaintiff's conduct was outrageous and deserving of punishment and deterrence, and where the wrong was advertent, meaning there was intention to harm or subjective recklessness as to harming (*Couch v Attorney-General* [2010] NZSC 27). The Supreme Court in *Couch* did not rule out the possibility that exemplary damages may be available where recklessness was objective if the behaviour was sufficiently outrageous (at 17]). Whether exemplary damages are available against a defendant who is vicariously liable only is unclear. (*Couch* at [40]). **Judicial Declaration.** The High Court may investigate a matter and make a binding declaration of right under s 2 of the Declaratory Judgments Act 1908. Declarations may be made where the court has no power to give relief in the matter (s 11). This means that a plaintiff may apply to a court to make a declaratory judgment even in a case where compensatory damages are barred by the ACC Act. However, declarations are discretionary and exceptional (*Re Chase* 1 NZLR 325 (CA) at 334), and a court may decline to make one if it is not in the public interest, for example where the matter has been sufficiently investigated already. **Nominal Damages.** Like a declaration, nominal damages serve to "vindicate a right that is so important that interference with it is actionable without proof of any loss or damage" (Stephen Todd (ed) *The Law of Torts in New Zealand* (6th ed, Thomson Reuters, Wellington, 2013) at 1261). Unlike a declaration, nominal damages are available as a right as long as the elements of the tort are proved. In *Re Chase* the court of appeal held that nominal damages are also barred by s 317(1) of the ACC Act, but, citing *Ashley v Chief Constable of Sussex Police* [2008] UKHL 25, Todd asserts that *Re Chase* was wrongly decided, because nominal damages do not compensate for the harm but vindicate the breach of a right (Todd at 1262).

<sup>33</sup> *Anns v Merton London Borough Council* [1978] AC 728 (HL).

<sup>34</sup> *Caparo Industries plc v Dickman* [1990] 2 AC 605 (HL).

<sup>35</sup> The two stage enquiry in *Anns*, above n 33, is: first the court must establish whether there is "sufficient relationship of proximity or neighbourhood" between the defendant and the plaintiff, such that "in the reasonable contemplation of the former, carelessness on his part may be likely to cause damage to the latter"; secondly the court must consider whether there are any features which should negative or limit liability despite proximity. *Anns* came to be criticised for creating a presumption of a duty which the defendant then had to rebut by providing policy reasons.

assessment of foreseeability, proximity, and whether it is fair just and reasonable to impose a duty of care in the particular case.

In *South Pacific Manufacturing Co Ltd v New Zealand Security Consultants and Investigations Ltd*<sup>36</sup> the NZ Court of Appeal reformulated *Anns*. Stage one of the inquiry is “internal”. It focuses on the proximity of the relationship between the parties. Stage two is an “external” enquiry that involves assessment of whether policy and principle point towards or away from a duty. Cooke P called the two stages a framework for analysis only; all the relevant factors must be weighed and judicial judgment used to decide grey area cases.<sup>37</sup> In *Rolls-Royce NZ Ltd v Carter Holt Harvey Ltd*<sup>38</sup> the Court of Appeal restated the principles to be applied in a way that rolled together *Anns* and *Caparo*, so that the ultimate question after the two stages of analysis is whether, in the light of all the circumstances, it is just and reasonable that a duty should be imposed.<sup>39</sup>

## **APPLICATION OF THE TWO STAGE APPROACH TO SMITH<sup>40</sup>**

### **Stage 1 – Internal Enquiry: Proximity**

Glazebrook J in *Rolls-Royce*<sup>41</sup> listed a number of factors which should be considered to determine whether there is sufficient proximity to justify the imposition of a duty of care in a novel situation. Using these factors as a guide, comments can be made on the issue of proximity with respect to *Smith*-like claims.

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<sup>36</sup> *South Pacific Manufacturing Co Ltd v New Zealand Security Consultants and Investigations Ltd* [1992] 2 NZLR 282 (CA).

<sup>37</sup> *South Pacific Manufacturing*, above n 36, at 293-294.

<sup>38</sup> *Rolls-Royce NZ Ltd v Carter Holt Harvey Ltd* [2005] 1 NZLR 324.

<sup>39</sup> Todd, above n 32, at 153.

<sup>40</sup> The question of duty of care in Chapter 2 will be assessed mainly in terms of institutional liability. The exact identity of the defendant in a negligence claim is important because it may affect the existence and scope of duties owed (see *Couch*, above n 13, at [30]), but the scope of this dissertation does not allow examination of whether a duty may be owed both vicariously and institutionally. In addition, as will be seen in Chapter 4, because of the s 317(1) ACC bar to proceedings for compensation and the uncertain availability of exemplary damages against a defendant who is only vicariously liable, it is more profitable for this dissertation to consider the question of institutional liability.

<sup>41</sup> *Rolls-Royce*, above n 38, at [58]-[64]. See also *South Pacific Manufacturing*, above n 36, at 306-308 per Richardson J, and *Couch*, above n 13, at [48] per Elias CJ and at [79] per Tipping J.

## 1. Analogous Cases

Although NZ Courts accept that the categories of negligence are not closed<sup>42</sup>, considering the degree of analogy between novel claims and cases in which duties are already established ensures that the law develops “in a principled and cohesive manner”<sup>43</sup>.

The analogous cases considered in *Smith* involved negligence claims made against police in the UK. These will be discussed under policy considerations below, but it is worth noting here that the UK police cases can be distinguished from *Smith* situations in terms of proximity. First, they involved harm to third parties, not to police personnel themselves. Secondly, the cases involved statutory functions and powers exercised within national borders, not on operations overseas. Thirdly, there were various reasons no proximity was found, which would not apply to the relationship between the NZDF and its personnel (discussed below). Carnwath LJ also cited an emergency services case in *Smith*, but the analogies which may be drawn from that case relate more to what would constitute a breach of a duty than to whether a duty should be imposed.<sup>44</sup>

Probably because of the operation of the ACC Act, there are no analogous cases in NZ where a court has found that the police owed a duty of care to police officers. There are some cases on police negligence, but they are of little value for *Smith*-like claims. *Re Chase*<sup>45</sup> is distinguishable because it concerned a man shot by police during a drug raid, rather than injury to a police officer. Furthermore, the Court of Appeal in *Re*

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<sup>42</sup> First stated by Lord Reid in *Dorset Yacht Co Ltd v Home Office* [1970] AC 1004, [1970] 2 All ER 294 and affirmed by the Supreme Court in *North Shore City Council v Body Corporate 188529 (Sunset Terraces)* [2010] NZSC 158.

<sup>43</sup> *Rolls-Royce*, above n 38, at [59].

<sup>44</sup> The case was *King v Sussex Ambulance Service NHS Trust* [2002] EWCA Civ 953, [2002] I.C.R. 1413 where an ambulance worker was injured helping to carry a patient downstairs. The case was approached in terms of employer duties, which are not applicable to the *Smith* context because: first, NZDF has an exemption for operational activities under s 7 of the Health and Safety at Work Act 2015; secondly, in *Mulcahy*, above n 5, at 746 Hope LJ held that there is no duty on the MOD to provide a safe system of work on operations. Nevertheless, the case has some relevance. Hale LJ noted that “ambulance technicians accepted risks inherent in their work, though not those which could be avoided by the exercise of reasonable care” by those who owed them a duty of care (at [21]). Such reasonable care was held to include the provision of suitable training and equipment (at [21]). This can be applied in the *Smith* context to conclude that, although combat is inherently risky, if the NZDF runs or fails to advert reasonably avoidable risk it may be liable in negligence (see also the discussion below on burden of a duty on the defendant).

<sup>45</sup> *Re Chase*, above n 32.



*Chase* declined to consider the question of whether there was a duty.<sup>46</sup> In *Brickell v Attorney-General*<sup>47</sup> the High Court found that the police did owe a duty of care to a police employee, but that case can be distinguished from *Smith* on the following grounds: Mr Brickell's case was decided in terms of a breach of employer duties which is not applicable to the military operations context<sup>48</sup>; he was a non-sworn Police employee, not a police officer; he worked in NZ, not overseas; he attended crime scenes during the investigative phase, not during the operational phase; and he was held to have contributed to his mental injury by not making best use of counselling and other support provided by the NZ Police.

## 2. Nexus and Causation

This part of the Stage 1 analysis requires an examination of causation and of the closeness of the nexus between the defendant's alleged negligence and the plaintiff's loss.<sup>49</sup> Mance LJ in *Smith* was concerned that determining causation was where the question of justiciability would become most apparent because of the "inevitable inter-linking of issues relating to the supply of technology and equipment and to training for active service with decisions taken on the ground during active service".<sup>50</sup> However he did conclude, like Hope LJ for the majority, that the court would have to decide causation looking at the facts as a whole.<sup>51</sup> A NZ court would most likely take the same approach and examine all the circumstances to establish the state's role in nexus

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<sup>46</sup> This was because in *Re Chase*, above n 32, the Court of Appeal held that no remedies were available. The plaintiff's claim for exemplary damages was held to be barred by s 3(2)(a) of the Law reform Act 1936, which provides that damages recoverable for the benefit of an estate shall not include any exemplary damages, since these exist to punish a defendant, not to compensate a victim. The application for a declaration was not considered necessary because a number of investigations had already been conducted into the fatal shooting of Paul Chase.

<sup>47</sup> *Brickell v Attorney-General* [2000] 2 ERNZ 529. Over a period of 17 years Mr Brickell had been employed as a police photographer and had frequently and continually been exposed to graphic and traumatic images, both at incident scenes and on film he was required to edit afterwards. The harm suffered was PTSD, which, being a condition caused by cumulative exposure to traumatic events, was not a qualifying mental injury under ACC.

<sup>48</sup> See above n 44.

<sup>49</sup> *Rolls Royce*, above n 38, at [60]. See also *South Pacific Manufacturing*, above n 36, at 306-308 per Richardson J and Todd, above n 32, at 142-151.

<sup>50</sup> *Smith*, above n 1, at [125].

<sup>51</sup> *Smith*, above n 1, at [125].

and causation.<sup>52</sup> The available *Smith* facts do not allow any conclusions to be drawn on causation, but some comments can be made.

The *Smith* claims involved two specific situations: harm directly caused by one member of the British force to another (Challenger claim); and harm directly caused by enemy action (SLR claims). In the Challenger claim it was contended that the UK MOD had caused the harm by failing to provide better vehicle recognition training, failing to provide electronic target identification (TID) equipment to identify friendly vehicles, and failing to provide situation awareness (SA) equipment to assist personnel to manage the tactical situation. Using a “but for” approach, assessing whether training had been inadequate, or whether provision of more advanced equipment would have avoided the harm, would involve many variables and require complex qualitative analysis, modelling, and a certain amount of hypothesising.

The mere fact that more technologically advanced equipment could reduce the risk of human error would not necessarily show that the UK MOD caused the harm by failing to procure such equipment. So another way to look at the equipment aspect of the Challenger claim may be to ask whether the battle management procedures in use at the time showed that the UK MOD had taken reasonable care. If reasonable care were proved, then failure to procure more technologically advanced systems could not indicate a breach of duty, let alone justify the imposition of one. Another issue in the causation question where harm occurs in a combat situation will be the extent to which the combat context contributed to the harm. In the “fog of war”<sup>53</sup>, that is the uncertainty and lack of information that is the hallmark of combat, people make mistakes despite the best equipment and training.

The Ellis SLR claim contended that the victims were killed by IEDs because their vehicles were not fitted with ECM. On the face of it, where vehicles have been deployed into an IED-rich environment without ECM equipment the UK MOD would seem to be firmly in the chain of causation. However, there are various types of ECM and such equipment does not defeat all IEDs, so even in the Ellis claim all the circumstances of the incident would have to be examined to determine the degree of

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<sup>52</sup> I base this on dicta in *Couch*, above n 13, regarding the importance of the facts of a case in determining whether a duty of care is owed.

<sup>53</sup> See Carl von Clausewitz, *Vom Kriege* (1832).

nexus and causation between the death and the failure to supply the particular ECM equipment.

The Ellis SLR claim also contended that the UK MOD could have avoided the death of Cpl Ellis by providing better armoured vehicles, such as Warrior infantry fighting vehicles. Even if being mounted in Warrior could have saved Cpl Ellis against the particular IED he hit, it could not be the basis for imposition of a duty because even a Warrior can be destroyed by an IED that was large enough.<sup>54</sup> This raises indeterminacy issues which will be discussed below, but suffice to say here that it is unlikely that the type of vehicle in which Cpl Ellis was travelling was causative of his death.

### 3. Foreseeability

The more specific, obvious or foreseeable the loss suffered, the stronger the case for a duty will be, especially if the defendant had the power to eliminate or reduce the risk.<sup>55</sup> Where the actions of a third party are involved, as in the *Smith* claims, the risk of harm would have to be “glaringly obvious”.<sup>56</sup> In *Couch*, Elias CJ acknowledged that, in the case of harm caused by a third person, “[k]nowledge of risk [...] is likely to be key”.<sup>57</sup>

For the death and injury in the Challenger claim to be foreseeable, the UK MOD would have had to have known, actually or constructively, that the training or equipment provided would result in mistakes being made by personnel taking reasonable care in the particular combat situation. What is “reasonable” in combat will be difficult to assess, as will the adequacy of training. Where harm occurs due to human error, then it was not necessarily foreseeable. It is one thing to be aware of risk factors that can lead to a friendly fire incident, but it is another to foresee when those risk factors may

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<sup>54</sup> In 2011 three NZDF personnel were killed by an IED while traveling in a lightly armoured High Mobility Medium Wheeled Vehicle in Bamiyan, Afghanistan. The NZDF court of inquiry and coroner’s inquiry into the deaths of concluded that even being mounted in a better armoured Light Armoured Vehicle, which were deployed to Bamiyan at that time, would not have saved the NZDF personnel due to the size of the charge in the IED they struck. The coroner concluded the deaths could not have been prevented (see *Inquiry into the Deaths of Luke Douglas Tamatea, Jacinda Francis Elyse Baker, Richard Lee Harris*, CSU-2012-HAM-000423, CSU-2012-HAM-000424, CSU-2012-HAM-000425, 2 April 2014).

<sup>55</sup> *Couch*, above n 13, at [85].

<sup>56</sup> *Dorset Yacht*, above n 42, at 1034 per Morris LJ, who also spoke of foreseeability where a third party is involved in terms of a “manifest and obvious risk” (at 1035).

<sup>57</sup> *Couch*, above n 13, at [38] per Elias CJ. See also [85] per Tipping J.

combine to cause an accident. Thus, the degree of foreseeability on the available facts of the Challenger claim may not be high.

Looking at the Ellis claim, although the UK MOD could not foresee when or where an IED attack may occur, it was probably sufficiently foreseeable that operating vehicles in the presence of an IED threat without ECM rendered harm a question of when, not if, despite any available non-electronic IED counter-measures.

#### **4. Nature of the Loss and Degree of Harm**

The courts are more likely to impose a duty in a case of personal harm rather than damage to property.<sup>58</sup> The degree of harm caused by state negligence on operations would vary widely, but the more serious the harm, the more likely a duty will be imposed. Using the *Smith* claims, the degree of personal harm caused to personnel travelling in a SLR struck by an IED attack is likely to be great. The degree of harm to personnel targeted by the main gun on a tank is also likely to be high. This would point to imposition of a duty in both cases.

#### **6. Plaintiff's Vulnerability and Reliance**

Assessing the extent of the plaintiff's vulnerability involves assessment of the reliance of the plaintiff on the defendant and assumption of responsibility by the defendant.<sup>59</sup> British and NZ service personnel are volunteers, but once they enlist they relinquish almost total control over their lives to the state.<sup>60</sup> NZ personnel take an oath of allegiance on enlistment which binds them to serve until they are discharged.<sup>61</sup> They do not choose where they are deployed or whom they fight and they cannot normally be released from service on operations overseas until the end of their deployment.<sup>62</sup>

In return for agreeing to serve wherever the government requires despite danger and risk of death, service personnel expect the NZDF to provide the training, equipment, leadership, and support they need to conduct operations with no more risk to them than

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<sup>58</sup> *Rolls-Royce*, above n 38, at [63].

<sup>59</sup> *Rolls-Royce*, above n 38, at [97] and *Couch*, above n 13, at [62].

<sup>60</sup> *Smith*, above n 1, at [52].

<sup>61</sup> Defence Act 1990 ss 34 and 35.

<sup>62</sup> See Defence Act 1990 ss 38(1), 38(2)(b) and 52. Section 56 confers a discretionary power on the Chief of Defence Force or on a Service Chief to grant release notwithstanding being on active duty.

is necessary.<sup>63</sup> It is a relationship of trust which is manifested in a high degree of reliance of service personnel on the NZDF and an assumption of responsibility by the NZDF for the well-being of its personnel.<sup>64</sup> The imposition of a duty may be considered warranted to give legal weight to what could be described as an “unwritten contract” between the NZDF and its deployed personnel.

## 7. Availability of other Remedies and Deterrence

Under this heading the court will ask whether there were other remedies available to the plaintiff, including the availability of adequate means for the plaintiff to protect himself and look after his own interests.<sup>65</sup> It will also determine whether there is adequate deterrence in the absence of an imposed duty.

NZDF personnel are subject to the Armed Forces Discipline Act 1971 (AFDA) at all times.<sup>66</sup> Military law is designed to support the operational effectiveness of the armed forces.<sup>67</sup> Thus, service personnel commit an offence if they refuse to carry out a lawful command or if they refuse to appear for work in order to avoid or remove themselves from a potentially harmful situation.<sup>68</sup> They have the right to make a formal complaint through their command chain, but this is usually after the fact.<sup>69</sup> NZDF personnel do

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<sup>63</sup> The relationship between the NZDF and its deployed service personnel is a matter of custom, convention and expectations. The UK MOD has issued a policy document: Ministry of Defence *2010 to 2015 government policy: armed forces covenant* (London, UK, 2015). It is a living document and was last updated on 8 May 15. The purpose of the document is stated as: “The armed forces covenant sets out the relationship between the nation, the government and the armed forces. It recognises that the whole nation has a moral obligation to members of the armed forces and their families, and it establishes how they should expect to be treated.” However this document does not deal with the issue of duties owed to British service personnel on operations; rather it deals with benefits and initiatives in such areas as rates relief, educational assistance, medical care for injured veterans, and discounts on various goods and services for military personnel.

<sup>64</sup> The existence and importance of the relationship of trust is similar in the UK. There, a coroner reported: “To send soldiers into a combat zone without basic equipment is unforgivable, inexcusable and a breach of trust between the soldiers and those who govern them” (Report of Coroner Andrew Walker on the death of Capt J. Philippon in February 2008, quoted in Anthony Forster “British Judicial Engagement and the Juridification of the Armed Forces” (2012) 88 *International Affairs* 283 at 293).

<sup>65</sup> See *Rolls-Royce*, above n 38, at [62]. Todd considers that the focus should be on what steps a person could reasonably have taken to look after his or her interests (see Stephen Todd *A Methodology of Duty* (High Court of Australia Centenary Conference, Canberra, 2003 at 12).

<sup>66</sup> Section 6. This also applies to Reserve officers. Reserve other ranks are subject to the ADFA only while on duty (s 4). In practice, Reserve personnel are transferred to the regular arm of their Service for the period of pre-deployment training, deployment on the operation, and return to NZ. So all deployed NZDF military personnel are subject to the AFDA.

<sup>67</sup> See Forster, above n 64 at 285.

<sup>68</sup> AFDA ss 38 and 49. There is no defence of honest belief in the unlawfulness of the command. Only if the command was in fact unlawful does the service person have a defence to the charge.

<sup>69</sup> Defence Act 1990 s 49.

not have recourse to the rights and protections contained in the Employment Relations Act 2000<sup>70</sup> or, while carrying out an operational activity, to protection under the Health and Safety at Work Act 2015<sup>71</sup>. In short, they have very little ability to protect themselves from harm or to seek a remedy for harm.

As to deterrence, as already observed, in many ways the NZDF is self-regulating. The coroner investigates deaths on operations, but often relies heavily on the NZDF investigation of the incident.<sup>72</sup> The NZDF itself conducts courts of inquiry as required, but these sit in private and findings are not released outside the NZDF without superior authorisation.<sup>73</sup> There is no offence under the AFDA that can be used to hold anyone accountable for failing to provide the equipment necessary to complete a task, let alone with the minimum of risk.<sup>74</sup> There is nothing in the Defence Act 1990 which makes the NZDF responsible for the safety of service personnel.

In short, without a duty of care, the only things which would deter the NZDF from failing to properly equip, train and support its forces on operations are arguably the risk of arousing political criticism, losing the confidence of allies, and eroding the relationship of trust between service personnel and the NZDF. That relationship of trust is strong in today's NZDF, but the fact remains that, absent a duty of care, there is no legal deterrence of the NZDF from acting negligently.

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<sup>70</sup> Defence Act 1990 s 45(5).

<sup>71</sup> Health and Safety at Work Act 2015 s 7.

<sup>72</sup> See for example *Inquiry into the Deaths of Luke Douglas Tamatea, Jacinda Francis Elyse Baker, Richard Lee Harris*, above n 54.

<sup>73</sup> AFDA ss 200F and 200T.

<sup>74</sup> Section 65 of the AFDA covers dangerous acts or omissions. Under sub-section (1) it is an offence punishable by up to 10 years imprisonment, while using an item of specified equipment, to wilfully and without authority do or omit any act which to the accused's knowledge is likely to cause loss of life or bodily injury to any other person other than the enemy. Sub-section (2) makes it an offence punishable by up to 5 years imprisonment, while using an item of specified equipment, to negligently do or omit any act known, or which having regard to all the circumstances of the case ought to be known, is likely to cause loss of life or bodily injury to any person other than an enemy. Applied to the Challenger friendly fire incident in *Smith*, above n 1, Lt Pinkstone is unlikely to have been liable under such a provision by virtue of the fact that he had permission to fire, albeit based on erroneous information, and, under either limb, he had no knowledge of likelihood of harm to own forces of his act because he thought his target was enemy.

## 8. Burden on and Consequences for the Defendant

While the cost and training burdens of equipment such as ECM and TID may be relatively light, acquisition of major equipment items, such as vehicle fleets<sup>75</sup> and electronic SA systems, represents a significant burden. First, there is the cost of procurement and the need to prioritise projects given a finite defence budget. NZ cannot afford to train and equip for every collective security contingency, so requiring upgrades during a deployment to meet a duty of care would create unanticipated demands on the defence budget and could impact on other areas of NZDF operations. Secondly, there is the time required to procure, introduce into service and train personnel in the proficient use of new equipment. Major equipment programmes do not usually neatly align with deployment decisions, and if meeting a duty of care required deployment of new equipment during an operation, operational effectiveness could be adversely affected.

However, in the NZDF context these burdens may not be as great as for the UK MOD. First, officials provide advice to government on what role the NZDF could fulfil on an operation given its capabilities. Therefore, the NZDF is unlikely to be deployed on an operation without major items of equipment required to do the job and without having identified additional requirements if the situation changed in-theatre. For example, when the security situation for the NZ Reconstruction Team in Bamiyan, Afghanistan, worsened in 2010 the NZDF was able to respond by deploying Light Armoured Vehicles to supplement the lightly armoured vehicles already in-theatre. Secondly, as a small armed force, the NZDF can often benefit from purchasing equipment developed and proved by larger armies, which can shorten the procurement process. Thirdly, as a smaller armed force the NZDF is more agile in procurement than its larger allies.<sup>76</sup>

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<sup>75</sup> In the Ellis and Smith claims, the plaintiffs contended that the MOD should have provided vehicles with better armour protection than was on the lightly armoured SLRs in use.

<sup>76</sup> By contrast, the imperative for the UK, as a medium power, to contribute across more operations and in high intensity combat situations makes military operations far more of a “come as you are” affair than is the case for NZ (See Tugendhat and Croft, above at n 4, at 25 for a discussion of how this issue affects the British armed forces).

Courts will avoid imposing a liability “in an indeterminate amount for an indeterminate time to an indeterminate class”.<sup>77</sup> Indeterminacy in a duty of care could arise on military operations because of adaptive cycles in combat. When the force changes equipment or tactics to meet a threat, the adversary will seek ways to defeat that change. Similarly, where a force exhibits a weakness, the adversary will seek to exploit it. In the IED context, if better armoured vehicles were deployed, the adversary could increase the size or type of charge in IEDs to defeat the new vehicle. If a duty were imposed, this would require the state to deploy a vehicle with even better armour. If ECM equipment is designed to defeat radio detonated IEDs, the adversary could start using infrared (IR) detonated devices. If a duty were imposed, the state would now have to supply ECM equipment to defeat IR detonators. But how fast would the state reasonably be expected to respond to changed adversary modes of operation, and with what frequency? How much burden of cost would the state be expected to shoulder if major items of military equipment have to be replaced before the end of their economic life? Because of such indeterminacy issues, arguably causation would have to be very strong to make a duty of care warranted where harm is caused directly by an adversary.<sup>78</sup>

Tugendhat and Croft point out another less obvious potential burden of imposing a duty in the *Smith* context, namely that the threat of civil claims would require the military to gather and preserve evidence. Even though the *Smith* claims were framed in terms of procurement and training decisions, the harm occurred on operations, which is where some of the legally admissible evidence required for litigation would need to be collected.<sup>79</sup> Such a burden would be more extensive than is currently required when the military investigates incidents of death and injury on deployments<sup>80</sup> and would divert focus from the core business of military operations.

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<sup>77</sup> *Ultramares Corporation v Touche, Niven & Co* 174 NE 441 (NY, 1931) at 444.

<sup>78</sup> Mance LJ cited from *R (Catherine Smith) v HM Assistant Deputy Coroner for Oxfordshire* [2010] UKSC 29 at [127] to make a similar point. He states that identifying the need for better equipment to meet new threats during an operation is something that should inform future procurement decisions as a political matter rather than comprise an element of a legal duty of care (*Smith*, above n 1, at [129]).

<sup>79</sup> See Tugendhat and Croft, above n 4, at 33.

<sup>80</sup> The purpose of a military court of inquiry is not to apportion blame, but rather to identify the causes of an incident (see s 200S(1) AFDA). Because of that, the rules of evidence are more relaxed than would apply in a civil proceeding (s 200K(1) AFDA).



## 9. Statutory Background

International humanitarian law and the Geneva Conventions limit and regulate the conduct of armed conflict, but mainly with respect to other combatants and civilians rather than to how a government treats its own forces. As discussed under availability of remedies and deterrence above, the NZDF has no statutory duty to avoid harm to its personnel on overseas operations.

### Stage 2 – External Enquiry: Policy Considerations

The second stage of the duty enquiry “is concerned with the effect of the recognition of a duty on other legal duties and, more generally, on society”.<sup>81</sup> Policy considerations discussed in this section are the doctrine of combat immunity, the doctrine of the separation of powers, analogous cases, cohesion in the law, and competing interests.

#### 1. Combat Immunity

When considering the liability in negligence of public authorities, the House of Lords in *X* and *Barrett*<sup>82</sup> observed that “the public policy consideration which has first claim on the loyalty of the law is that wrongs should be remedied and that very potent counter-considerations are required to overrule that policy”.<sup>83</sup> The doctrine of combat immunity is an example of a potent counter consideration. Tugendhat and Croft define the doctrine as follows:<sup>84</sup>

Combat immunity is a defence or exemption from legal liability that applies to members of the armed forces or the Government, within the context of actual or imminent armed conflict [...in that] they are under no ‘actionable’ duty of care as defined by common law to avoid causing loss

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<sup>81</sup> *Rolls Royce*, above n 38, at [58].

<sup>82</sup> *X*, above n 24, and *Barrett*, above n 25.

<sup>83</sup> *X*, above n 24, at 663 and 749, and *Barrett*, above n 25, at 568, cited in *Couch*, above n 13, at [69].

<sup>84</sup> Tugendhat and Croft, above n 4, at 31. The American version of combat immunity statutory and is contained at 28 U.S.C.A. §2680(j) of the Federal Tort Claims Act, which states that the sovereign immunity of the Federal Government is not abrogated in respect of “[a]ny claim arising out of the combatant activities of the military or naval forces, or the Coast Guards, during time of war”. (*Smith*, above n 1, at [183]). A further exception to liability relating to “injuries incident to service” has been developed judicially in the USA, and is known as the *Feres* doctrine from a case of the same name: *Feres v United States*, 340 US 135 (S Ct 1950) (*Smith*, above n 1, at [184]).

or damage to their fellow soldiers, or indeed to anyone who may be affected by what they do.

The doctrine raises issues of scope and application. The starting point is *Shaw Savill & Albion Co Ltd v Commonwealth*<sup>85</sup>, where combat immunity was held to apply in “all active operations against the enemy”, whether or not there is actual engagement with the enemy.<sup>86</sup> In *Multiple Claimants v Ministry of Defence*<sup>87</sup> Owen J held that the doctrine includes situations where service personnel are exposed to attack or the threat of attack, including the planning and preparation for the operations in which the injury was sustained. This has been described as a widening of the doctrine<sup>88</sup>, but Owen J qualified his interpretation by saying that “in the planning of and preparation for such operations the interests of service personnel must be subordinate to the attainment of the military objective”.<sup>89</sup> By this he appears to have been referring to planning in the theatre of operations, rather than in the UK.

The interpretation of combat immunity in *Bici and Another v Ministry of Defence*<sup>90</sup> is generally regarded as a narrow one, because Elias J held that combat immunity is an exclusion to justiciability and is therefore to be “strictly confined on constitutional grounds”.<sup>91</sup> But arguably in *Bici* the doctrine was not so much narrowed as simply held not to apply, because the operation was a peacekeeping one which did not have the

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<sup>85</sup> *Shaw Savill & Albion Co Ltd v Commonwealth* (1940) 66 CLR 344.

<sup>86</sup> *Shaw Savill*, above n 85, at 361.

<sup>87</sup> *Multiple Claimants v Ministry of Defence* [2003] EWHC 1134 (QB).

<sup>88</sup> See *Smith*, above n 1, at [88].

<sup>89</sup> *Multiple Claimants*, above n 87, at [2.C.16].

<sup>90</sup> *Bici and Another v Ministry of Defence* [2004] EWHC 786 QB.

<sup>91</sup> See comments in *Smith*, above n 1, at [116] and discussion in *Bici*, above n 90, at [85]-[90]. The facts in the *Bici* took place on 2 July 1999 shortly after the liberation of the province of Kosovo by NATO troops. Four local men were in a car travelling through Pristina, firing an AK-47 and a pistol into the air in celebration, as was the local custom. However, this was in contravention of a rule that Kosovo Liberation Army personnel were not to carry weapons within two kilometres of the capital. They were seen by three corporals of the 1<sup>st</sup> Battalion, the Parachute Regiment, who ordered them to put down their weapons. The men did not and the corporals fired on them killing two and injuring the remaining two. The British corporals claimed they fired in self-defence when one of the local men aimed the AK-47 at them and, as the defendant in the subsequent negligence claim, the MOD asserted that the corporals' actions were covered by combat immunity. The court rejected this assertion. Elias J observed that combat immunity is “relied upon when a person is injured or their property is damaged or destroyed in circumstances where they are the “innocent” victims of action which is taken out of pressing necessity in the wider public interest arising out of combat” (at [101]). In the absence of such pressing public interest combat immunity is not engaged. This was the case in *Bici* because there was no pressing public need for the soldiers to fire and it was held that the soldiers had not acted in self-defence. Thus, a narrow construction of combat immunity was favoured since the doctrine is an exception to the principle in *Entick v Carrington* (1765) 19 State Tr 1029 that the executive cannot rely on the interests of the state to justify commission of wrongs.

character of a combat situation. Similarly in *Shaw Savill*, the doctrine was held not to apply because the negligence of the Australian Navy vessel in colliding with a civilian vessel had nothing to do with the fact that Australia was at war.<sup>92</sup> The harm caused in *Smith* took place during combat, but the claims themselves were framed to concern procurement and training decisions, not decisions made in combat. Consequently the majority in *Smith* considered such claims to be “outside the ambit of the doctrine”.<sup>93</sup> Morgan discusses the consequences of inappropriate invocation of the doctrine of combat immunity when he asserts that the state “should not be permitted to hide failures to fund vital protective equipment under a cloak designed to protect battlefield decisions against judicial questioning”.<sup>94</sup>

As to application, the majority in *Smith* held that combat immunity is a rule. If a case falls within the rule then there is no need for further consideration of whether a duty of care was owed.<sup>95</sup> However, in his minority judgment Mance LJ cited *Mulcahy* as authority that combat immunity is “the result of a general conclusion that it is not fair, just or reasonable to regard the Crown or its officers, soldiers or agents as under a duty of care to avoid injury or death in their acts or omissions in the conduct of an active military operation or act of war”.<sup>96</sup>

In NZ the courts have consistently applied the *Caparo* test within a reworked *Anns* framework. Therefore, it is likely that a NZ court, like the minority in *Smith*, would apply the combat immunity doctrine within that framework as a policy consideration, rather than as a rule. Thus, a NZ court could be expected to look to the military context of a claim to determine the ultimate question of whether it would be fair, just and reasonable to impose a duty of care. This approach would result in the scope of the doctrine being determined with respect to the specific facts of the case, as in *Bici* and

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<sup>92</sup> Starke J commented that “not every warlike operation [...] excuses a person from the duty of taking care or justifies the suspension of the ordinary law” (*Shaw Savill*, above n 85, at 354).

<sup>93</sup> On the Challenger claim Hope LJ stated: “At the stage when men are being trained, whether pre-deployment or in theatre, or decisions are being made about the fitting of equipment to tanks or other fighting vehicles, there is time to think things through, to plan and to exercise judgment. These activities are sufficiently far removed from the pressures and risks of active operations against the enemy for it not to be unreasonable to expect a duty of care to be exercised, so long as the standard of care that is imposed has regard to the nature of these activities and to their circumstances.” (*Smith*, above n 1, at [95])

<sup>94</sup> Morgan, above n 4, at 15.

<sup>95</sup> *Smith*, above n 1, at [83] and *Bici*, above n 90, at [84].

<sup>96</sup> *Smith*, above n 1, at [114].

as indicated by the majority decision in *Smith*.<sup>97</sup> As Hope LJ noted in *Smith*, the “circumstances in which active operations are undertaken by our armed services today vary greatly [...and they] cannot all be grouped under a single umbrella”.<sup>98</sup> Thus, whether combat immunity applies to a civil proceeding with the NZDF as a defendant can expect to be left to be decided on facts at trial.

## 2. Separation of Powers

The doctrine of the separation of powers requires the courts to tread carefully where government policy is in question.<sup>99</sup> A distinction must be made between policy and operational decisions.<sup>100</sup> The NZ Law Commission has noted that the courts in NZ use the policy-operation distinction to restrict government liability in negligence, whereby it may be inappropriate to impose duties of care with respect to policy decisions, but it might be appropriate to recognise duties of care in “operational” matters.<sup>101</sup> As an example of that in *Smith*, Hope LJ for the majority focussed on what Mance LJ called the “middle ground” of decision-makers. These are personnel in Whitehall, who make operational, rather than policy choices or tactical decisions, and whose decisions are therefore justiciable.<sup>102</sup> However, the Law Commission notes that at the margins the

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<sup>97</sup> Alexia Solomou has pointed out that a *Caparo* approach to combat immunity will require a court to “make a factual determination about what constitutes “combat activity” in the circumstances of each claim” (Alexia Solomou “*Smith v Ministry of Defence*” (2014) 108 American Journal of International Law 79 at 85-86).

<sup>98</sup> *Smith*, above n 1, at [98].

<sup>99</sup> According to the doctrine of the separation of powers “the liberty of the individual is secure only if the three primary functions of the state (legislative, executive and judicial) are exercised by distinct and independent organs” (Jonathan Law (ed) *Oxford Dictionary of Law*, 8<sup>th</sup> ed, OUP, 2015). Each of the three branches of government has specific responsibilities with respect to the rule of law: Parliament enacts law; the courts interpret and apply law; and the Executive governs within the law. In order to maintain the balance inherent in this system, it is essential that each branch remains within its own sphere.

<sup>100</sup> In *Dorset Yacht*, above n 42, at 1056 Pearson LJ was of the view that public policy may affect the standard of a duty but not its existence.

<sup>101</sup> Law Commission, above n 17, at [3.39].

<sup>102</sup> *Smith*, above n 1, at [148]. Although Hope LJ did not himself use the term “middle ground” in his judgment (Mance LJ did), his dicta at [95] and [99] reflect this description. Mance LJ, by contrast asserted that the procurement and training decisions criticised in the *Smith* claims raised policy issues involving “predictions as to uncertain future needs, the assessment and balancing of multiple risks and the setting of difficult priorities for the often enormous expenditure required to be made out of limited resources” (at [128]). He concluded that these were political issues and that a Parliamentary inquiry would be the appropriate forum in which to consider them. That conclusion was based on dicta in *R (Catherine Smith)*, above n 78, at [127] where Rodger LJ discussed the essentially political nature of decisions leading to the deployment of SLRs in Iraq: “But questions, say, as to whether it would have been feasible to fit stronger protection, or as to why the particular vehicles were used in the operation or campaign, or as to why those vehicles, as opposed to vehicles with stronger protection, were

distinction is blurred; “what some might consider to be an operational failure – for instance, to inspect – might be explained as a policy decision not to provide particular resources to enable the inspections”.<sup>103</sup>

Todd assesses that the difficulty of drawing the distinction between policy and operational decisions has seen NZ courts tending to focus on whether the decision is justiciable or is essentially political in character.<sup>104</sup> That requires the chain of events involved in a claim to be unpicked to determine what and who is ultimately responsible for the harm caused. For example, if body armour issued to a deployed force proved to be inadequate, and if it could be shown that errors had been made in specifications for the body armour which went out to tender, then the decision to procure that type of body armour would be justiciable as an operational, not policy, decision. If, on the other hand, the decision to purchase that type of body armour was based on a need to source equipment under terms of a defence cooperation agreement, then the decision would be one of policy. Neither it nor flow-on decisions constrained by this policy decision would be justiciable.<sup>105</sup> Ultimately, a NZ court will probably take the same approach as the majority in *Smith* and leave the question of justiciability to a trial judge to determine on the facts.

### 3. Analogous Cases

Analogous cases are used in Stage 2 of the analysis to shed light on policy considerations which may be relevant in the proposed new area of negligence. As discussed above, there are no analogous cases in NZ. In *Smith* it was the minority who

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originally purchased by the Ministry of Defence, or as to whether it would have been better to have more helicopters available etc, all raise issues which are essentially political rather than legal”.

<sup>103</sup> Law Commission, above n 17, at [3.40]. The case of *Samantha Roberts v Ministry of Defence* [2006] (unreported) also illustrates this dynamic. Sgt Roberts was shot dead in a friendly fire incident in Iraq in 2003. The claimant, his widow, contended that the MOD had breached its duty of care to Sgt Roberts by not purchasing enough body armour before deployment. In-theatre there had been a reallocation of body armour from mounted troops to dismounted personnel on the grounds that the mounted personnel were at less risk. However, Sgt Roberts ended up operating a dismounted checkpoint and not wearing body armour when he was accidentally shot. On the face of it, the failure to supply Sgt Roberts with body armour appears to be of an operational nature, but it was revealed that the MOD had decided not to buy more body armour before announcing the deployment so as not to forewarn the Iraqis. The coroner reporting on the death wrote that “to send soldiers into a combat zone without appropriate basic equipment amounted to a breach of trust between the soldiers and the government” (See Tugendhat and Croft, above n 4, at 24-25). The claim was settled out of court.

<sup>104</sup> Todd, above n 32, at 170.

<sup>105</sup> See *Smith*, above n 1, at [99]. Hope LJ was referring to tactical decisions constrained by policy, but the argument applies also to operational decisions so constrained.

cited police cases to show that UK courts have consistently declined to impose liability on police on policy grounds. Essentially, in police investigations the interests of the community were held to weigh more than the interests of an individual.<sup>106</sup> The reasons for this approach were that imposition of a duty would result in police carrying out their functions “in a detrimentally defensive frame of mind”, would put the spotlight on “a variety of decisions to be made on matters of policy and discretion”, and would result in diversion of Police resources from preventing and investigating crime to defending against claims in negligence.<sup>107</sup> Mance LJ believed imposing a duty on the UK MOD would have similar adverse consequences.<sup>108</sup> The majority in *Smith* did not explore policy factors in analogous cases, noting only that *Mulcahy* was the only case where the reasoning in the police cases had been applied in a military situation.<sup>109</sup> The majority fundamentally believed the *Smith* claims should go to trial where policy considerations could be examined with respect to the facts.

A NZ court would probably consider the UK police cases to be relevant analogies to be considered on the facts of a claim. This is because it is conceivable that the risk of potential litigation if a duty were imposed would divert NZDF resources and effort away from core military business and could lead to the NZDF exhibiting risk aversion in its planning and preparing for military operations. Of course, the latter is not necessarily a bad thing. Clear guidance from the courts around potential liability and the standard of care required to avoid liability in negligence for training and equipment procurement decisions could assist decision-makers to allocate resources and design training appropriately. It could also enhance political decision-making around

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<sup>106</sup> In *Van Colle v Chief Constable of the Hertfordshire Police (Secretary of State for the Home Department intervening)* [2009] AC 225 the House of Lords held that, in the interests of the community as a whole, the police owed no duty when investigating crime even where they were aware of a specific threat to an individual witness. In *Brooks v Comr of Police of the Metropolis* [2005] 1 WLR 1495 the court held that the Police have no duty of care not to cause harm to victims of serious crime, and that the imposition of a duty of care would impede the Police in performing their prime function: “preservation of the Queen’s peace”.

<sup>107</sup> *Hill v Chief Constable of West Yorkshire* [1989] AC 53 cited in *Smith*, above n 1, at [119].

<sup>108</sup> *Smith*, above n 1, at [131]. Tugendhat and Croft, above n 4, assert that imposition of a duty of care will lead to risk-averse behaviour and avoidance of the kind of innovation and calculated risk-taking in the field which smaller armies with limited resources rely on to win battles (at 16). As Tugendhat and Croft put it, “fighting means risk” (at 18), so risk aversion would almost certainly undermine the operational effectiveness of the military. Arguably Tugendhat’s and Croft’s assertions overstate the case because the kind of risk-taking on the battlefield they refer to will probably be protected by combat immunity.

<sup>109</sup> *Smith*, above n 1, at [98]. This was in relation to there being no duty on the UK MOD to maintain a safe system of work on operations.

deployments to ensure the best match between NZDF capability and threats in the proposed theatre of operations.

#### 4. Cohesion in the Law

In developing the law of negligence it is necessary to consider “whether the proposed duty fits coherently into an overall scheme of rights and responsibilities”.<sup>110</sup> Imposing a duty of care in a novel situation must not undermine other areas of the law. For example, in *South Pacific Manufacturing* a duty of care was not imposed because that would have eroded the defences available in the tort of defamation.<sup>111</sup> However, there is no other tort which could apply to the deaths and injuries of *Smith*-like claims. As for statutory obligations, as has been discussed, the Defence Act and AFDA do not impose responsibility on the NZDF to provide adequate training or equipment to service personnel undertaking operational activities. However, under s 7 of the Health and Safety at Work Act 2015, the NZDF is granted an exemption for operational activities. It could be argued that recognising a duty would undermine that exemption. However, the blanket nature of the s 7 exemption is possibly open to objection as being an unjustified limitation of rights contained in the NZ Bill of Rights Act 1990.<sup>112</sup> Thus, there is a counter-argument that recognising a duty of care in negligence, where the doctrine of combat immunity can operate to limit liability, would ameliorate the blanket nature of the s 7 exemption in appropriate cases.

#### 5. Competing Interests

In *South Pacific Manufacturing* Richardson J wrote that “proximity reflects a balancing of the plaintiff’s moral claim to compensation for avoidable harm and the defendant’s moral claim to be protected from an undue burden of legal responsibility”.<sup>113</sup> Underlying this is the issue of competing interests. In *Smith*-like claims, the relevant interest of the plaintiff is avoiding risk of death and injury over

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<sup>110</sup> Todd, above n 32, at 165.

<sup>111</sup> *South Pacific Manufacturing*, above n 36.

<sup>112</sup> The Attorney-General did not consider this issue in his NZBORA s 7 report on the Health and Safety at Work Bill when it was introduced into Parliament. This may be because s 7 of the Act was not viewed as a direct limitation on the NZBORA s 8 right not to be deprived to life. In any case, the exemption arguably simply reflects the common law position that the state does not owe a duty to its personnel to provide safe systems of work on operations.

<sup>113</sup> *South Pacific Manufacturing*, above n 36, at 306.

and above what is inherent on a military operation. The state's interests are the power to deploy armed forces in accordance with policy, and the power to employ those forces effectively to achieve strategic objectives.

Where the competition is between private and public interests, as they will be in *Smith*-like claims, the court's balancing task is more difficult than when the interests on both sides are private. In *Smith*-like claims, if the balance is struck incorrectly in favour of the plaintiff, then the exposure of the NZDF to negligence claims could compromise the value of the NZDF as an instrument of foreign policy and the operational effectiveness of the NZDF.<sup>114</sup> However, this risk is less than in the UK because of the ACC bar to compensatory damages in personal injury claims. On the other hand, if the balance is struck incorrectly in favour of the NZDF, the character of NZ as a free and democratic society is threatened by the failure to recognise the importance of ensuring that service personnel, who accept the risks of serving on military operations on behalf of society, are not unnecessarily harmed or killed.

Obviously the facts of each case will inform the analysis of where the balance between competing interests lies in this context, but being free from negligently caused personal harm is a vital interest to any plaintiff. Therefore, a strong policy justification would probably be required to tip the balance in favour of the state's interests.

### **Balancing Proximity and Policy**

The proximity factors most likely to point to the existence of a duty of care are: the degree of harm involved in *Smith*-like claims; the vulnerability of deployed NZDF

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<sup>114</sup> Over the past 15 years the UK MOD has faced a growing number of negligence claims brought by its own personnel or their representatives. In *Smith* Mance warned that a narrow interpretation of combat immunity could lead to situations where service personnel or their families could sue for harm caused by alleged failings in preparing or equipping a force, with the absurd result that soldiers could sue during an operation and even receive interim relief in the form of a court order to cease using particular equipment or carrying out particular types of mission (*Smith*, above n 1, at [131]). Tugendhat and Croft conclude that increased litigation faced by the UK MOD is a result of many factors: the extension of coronial jurisdiction in the early 1980s to include military deaths overseas; the introduction of narrative verdicts in 2004 in which a coroner can record the circumstances as well as the cause of death; and the removal of Crown Immunity in 1987 (Section 10 of the CPA(UK): see above n 14). As well as service personnel and their families, a number of foreign nationals, funded ironically by British legal aid, have also successfully sued the UK MOD for harm caused by British military forces in Iraq and Afghanistan (Tugendhat and Croft, above n 4, at 22-24).



personnel and their reliance on the NZDF to provide the training, equipment and support necessary to allow them to achieve their mission with the best chance of survival; the lack of deterrence of the NZDF in the absence of relevant statutory obligations; and the fact that NZDF service personnel have very limited ability to protect themselves – any remedies they do have, such as ACC or a Court of Inquiry come after the fact and neither can prevent the harm or hold the NZDF to account for causing harm. These factors are unlikely to vary much between claims. There are no proximity factors which intrinsically point away from a duty in this context. However, there are a number of factors that will be decisive on the facts: nexus and causation, foreseeability, the ability of the NZDF to prevent the harm, and the burden created by imposing a duty. Therefore, these factors can be expected to be determinative of whether a duty should be imposed on proximity grounds.

The policy considerations most likely to point towards imposition of a duty are whether combat immunity applies and the need to ensure a new duty maintains cohesion in the law. Regarding combat immunity, *Smith*-like claims will concern equipment and training decisions made away from combat situations, so a fair just and reasonable analysis would likely conclude that combat immunity does not apply. Thus, even though a decision of a tactical commander to deploy a vehicle patrol without ECM will probably be protected by combat immunity, the higher decision to deploy the force without ECM in the first place will be unlikely to escape a court's scrutiny. Regarding the cohesion question, imposing a duty is unlikely to undermine existing legal responsibilities or defences.

The policy consideration most likely to point away from imposition of a duty is the policy approach taken in UK police cases and the possibility that similar adverse effects on military operations would attend the imposition of a duty on the NZDF. Such adverse consequences are a distinct possibility, but the weight given to this consideration should be tempered by the fact that increased awareness of risk among planners and trainers may not be a bad thing.

The policy considerations which are likely to be determined on their facts are the application of the doctrine of the separation of powers and the issue of competing interests. On the question of justiciability, a NZ court would likely examine not only

what happened, but why it happened, because the nature of the decisions taken and acts performed will do most to illuminate the character of the issue. The mere influence of policy or resource allocation issues will not be enough to protect it from the court's scrutiny. On the other hand, if the decision truly is one of policy, then the court can be expected to allow the government a margin of appreciation. As regards competing interests, each may be compelling, but while the plaintiff's interest is unlikely to vary, the NZDF's interest will depend on the facts; the more localised the relevant interest of the NZDF, the less likely it would be that it would trump a plaintiff's interest. For example, if the decision to deploy without ECM was made on administrative rather than policy grounds, then the plaintiff's interest would be likely to tip the balance in favour of a duty. Consideration of justiciability and the balance between competing interests is therefore likely to be determinative of whether a duty should be imposed on policy grounds.

## CHAPTER 3 – HUMAN RIGHTS

### INTRODUCTION

In *Smith* the issues raised by the claims under the ECHR concerned extra-territorial application of the ECHR and the scope of the art 2(1) right to life. Similar issues will be explored here in the context of the New Zealand Bill of Rights Act 1990 (NZBORA). This chapter will begin by examining differences in human rights law in the UK and NZ as they affected the *Smith* decision. It will then consider whether the NZBORA could be applied extra-territorially. Next, the scope and nature of the s 8 right not to be deprived of life will be addressed, followed by consideration of issues surrounding breach of s 8 in the *Smith* context. Finally there will be discussion of justified limitations of the s 8 under s 5 NZBORA and application of s 5 to the *Smith* facts.<sup>115</sup>

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<sup>115</sup> Discussion of remedies for NZBORA breaches is beyond the scope of this dissertation, but some comments are warranted here. The NZBORA contains no remedy provisions. Nevertheless, the NZ courts have recognised that remedies should be available on grounds of common law principles, the purpose of the NZBORA and its ICCPR context. Remedies available are generally a declaration of inconsistency or breach, and public law damages. In *Taylor v Attorney-General* [2015] NZHC 1706 Heath J accepted that s 5 has not only an interpretative function but also gives the courts power to declare when a provision is inconsistent with the NZBORA. In *Taylor* he considered that the importance of the breached right and the nature of the inconsistency in the legislation were “sufficiently fundamental to demand a remedy by way of formal declaration” (at [76]). In *Wilding v Attorney-General* CA260/02, 7 July 2003 the Court of Appeal noted that “relief can be afforded [...] by a declaration that there has been a breach of the Bill of Rights” (at [13]). Public law damages are not a tortious remedy but a stand-alone remedy available when the state is directly liable for a breach of the NZBORA (see *Baigent’s Case*, above n 20). There is no scale of public law damages, but the award must “be enough to provide an incentive to the defendant and other state agencies not to repeat the infringing conduct and also to ensure that the plaintiff does not reasonably feel that the award is trivialising of the breach” (*Taunoa v Attorney-General* [2007] NZSC 70 at [258]). In *Taunoa* the Supreme Court reiterated that public law damages will only be awarded if non-monetary relief, such as a declaration, or any non-Bill of Rights Act damages is not enough to redress the breach and the consequent injury to the rights of the plaintiff in the particular circumstances (at [258]). In *Wilding* the Court of Appeal suggested that exemplary damages may be available in a NZBORA breach claim (at [17]), but that seems unlikely as in both *Baigent’s Case* and *Taunoa* the court held that public law damages exist to compensate the plaintiff and vindicate the value of the breach of a right, not to punish the state (see *Baigent’s Case*, above n 20, at 702-703 and *Taunoa* at [300]).

## COMPARISON OF UK AND NZ CONTEXT

The relevant legislation in the UK is the Human Rights Act 1998 (HRA (UK)). While there are similarities in the respective legislation in the UK and NZ<sup>116</sup>, there are also marked differences which affected the outcome in *Smith*. First, ECHR articles are imported directly into the legislation in Schedule 1 of the HRA (UK).<sup>117</sup> Thus, the right to life provision in the HRA (UK) is identical to art 2 of the ECHR. By contrast, the NZBORA, while it is described in its long title as an Act “to affirm New Zealand's commitment to the International Covenant on Civil and Political Rights” (ICCPR)<sup>118</sup>, does not incorporate ICCPR articles word for word.<sup>119</sup> Thus, the relationship between the NZBORA and ICCPR is not a direct as between the HRA (UK) and the ECHR.

Secondly, s 2 of the HRA (UK) mandates that interpretation of ECHR rights in the UK must take account of relevant jurisprudence of the European Court of Human Rights (ECtHR)<sup>120</sup>. In addition, UK courts are bound by ECtHR decisions to which the UK is a party. NZ courts are bound by the Supreme Court of NZ alone. They are only

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<sup>116</sup> Like the NZBORA, the HRA (UK) is not superior legislation. As in NZ, UK courts must interpret primary and subordinate legislation in a way which is compatible with the HRA (UK) rights so far as possible (s 6 NZBORA and s 3(1) HRA (UK)), and they cannot refuse to apply legislation that is incompatible with the rights and freedoms contained in the respective legislation (s 4 NZBORA and s 3(2) HRA (UK)).

<sup>117</sup> Section 1 HRA (UK).

<sup>118</sup> At (b). NZ ratified the ICCPR in 1978.

<sup>119</sup> In addition, the NZBORA represents only partial incorporation of articles of the ICCPR. Other articles are incorporated into the Human Rights Act 1993, described in its preamble as an “Act to consolidate and amend the Race Relations Act 1971 and the Human Rights Commission Act 1977 and to provide better protection of human rights in New Zealand in general accordance with United Nations Covenants or Conventions on Human Rights”.

<sup>120</sup> Certain opinions and decisions of the European Commission of Human Rights and Committee of Ministers must also be considered.

persuaded by decisions of the UN Human Rights Committee (HRC)<sup>121</sup>, the ECtHR<sup>122</sup>, or higher courts in other jurisdictions.<sup>123</sup>

## JURISDICTION

### Is the NZDF Subject to the NZBORA?

Section 3 of the BORA states:

- “3. This Bill of Rights applies only to acts done—
- (a) by the legislative, executive, or judicial branches of the Government of New Zealand; or
  - (b) by any person or body in the performance of any public function, power, or duty conferred or imposed on that person or body by or pursuant to law.”

The Schedule to the State Sector Act 1988 lists the departments that make up the public service of NZ. The Ministry of Defence<sup>124</sup> is listed, but the NZDF is not. Nevertheless, case law suggests s 3(a) would apply to the NZDF. First, the NZ Police is not listed as a government department that is a part of the public service of NZ either, but in *R v N*<sup>125</sup> the Court of Appeal held that “the exercise or purported exercise by the police of

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<sup>121</sup> Art 28(1) of the ICCPR establishes an elected 18 member United Nations Human Rights Committee (HRC), made up of experts rather than judges, whose function is to monitor the adherence of member states to the ICCPR. HRC reports are not binding on NZ: “The Human Rights Committee does not exercise the adjudicative functions of New Zealand, but its own independent jurisdiction derived from an international instrument and the submission of state parties.” (*Tangiora v Wellington District Legal Services Committee* [2000] 1 NZLR 17 (PC) at 22). Andrew Butler and Petra Butler *The New Zealand Bill of Rights Act: A Commentary* (2<sup>nd</sup> ed, LexisNexis NZ Ltd, Wellington, 2015) note that of 200 NZBORA cases they reviewed, only five referred to the HRC or its decisions. They put this down to, among other things, the fact that HRC decisions do not usually contain detailed reasoning and are usually very much confined to the specific facts of each case (at 104). Nevertheless, the Court of Appeal has observed of HRC decisions that they “at least [...] must be of considerable persuasive authority” (*R v Goodwin (No 2)* [1993] 2 NZLR 390 (CA) at 393).

<sup>122</sup> See for example, *Zaoui v Attorney-General* [2005] 1 NZLR 577 (CA) at [94]-[96] where McGrath J preferred the ECtHR decision in *Chahal v United Kingdom* (1996) 23 EHRR 413 (ECtHR) over the majority of the HRC in *Ahani v Canada* (Comm No 1051/2002, 15 June 2004) HRC.

<sup>123</sup> NZ courts often refer to human rights decisions of the Supreme Court of Canada (SCC). Although, unlike the NZBORA, the Canadian Charter is a constitutional act (see s 52 of Canada’s Constitution Act 1982), Canadian cases are often considered in NZBORA judgments for three reasons: first, to a large degree the NZBORA is modelled on the Canadian Charter of Rights and Freedoms 1982. Secondly, the Canadian Charter also represents fulfilment of the state’s ICCPR obligations. Thirdly, the SCC has decided many more human rights cases over a longer period than NZ courts.

<sup>124</sup> As explained in Chapter 1, the Ministry of Defence may be responsible for some of the decisions involved in the *Smith* claims had they occurred in NZ. Nevertheless, this dissertation will focus on the liability of the NZDF.

<sup>125</sup> *R v N* [1999] 1 NZLR 713 (CA).

their powers comes within s 3(a) of the Bill of Rights”.<sup>126</sup> Secondly, in *Innes v Wong (No 2)*<sup>127</sup> Cartwright J held that the NZBORA applied to Crown Health Enterprises under s 3(a) because the Crown has direct responsibility for their actions.<sup>128</sup> Using this approach the NZDF would fall under s 3(a) because the Crown is responsible for the NZDF through the exercise of prerogative power and the Defence Act 1990. If not caught under s 3(a), s 3(b) is worded widely enough to encompass NZDF.<sup>129</sup> Either way, the NZDF is subject to the NZBORA.

### **Does the NZBORA Apply Extra-Territorially?**

The jurisdiction question in *Smith* revolved around whether the ECHR applies extra-territorially.<sup>130</sup> The majority followed *Al Skeini*<sup>131</sup>, where the ECtHR decided that “acts of the contracting states performed, or producing effects, outside their territories can constitute an exercise of jurisdiction within the meaning of article 1 only in exceptional circumstances”<sup>132</sup>. The ECtHR identified one such exceptional circumstance as individuals operating outside a state’s territory under control of the state’s authorities.

The state control concept in *Al Skeini* is worth examining because, even though NZ courts are not bound by the ECtHR, the reasoning behind how it was applied in *Smith* applies also to the relationship between the NZDF and service personnel. Although *Al-Skeini* was a case about the rights of detainees under the control of British forces in Iraq, the majority held that the state control principle was relevant to the *Smith* claims because “[w]hat is decisive in such cases is the exercise of physical power and control over the person in question”.<sup>133</sup> It applied the state control approach in *Al Skeini* and concluded that, as agents of the state who “relinquish almost total control of their lives to the state”, service personnel serving on operations outside UK territory “are all

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<sup>126</sup> *R v N*, above n 125, at 718.

<sup>127</sup> *Innes v Wong (No 2)* (1996) 4 HRNZ 247 (HC).

<sup>128</sup> See discussion in Butler, above n 121, at 123.

<sup>129</sup> For example, in *Federated Farmers v New Zealand Post* [1990-92] 3 NZBORR 339 (HC) NZ Post, a government agency which was not part of the s 3(a) government structure of departments and ministries, was held to fall within s 3(b) (see Butler, above n 121, at 122-123).

<sup>130</sup> Art 1 ECHR states: “The High Contracting Parties shall secure to everyone *within their jurisdiction* the rights and freedoms defined in Section I of this Convention (italics added).

<sup>131</sup> *Al-Skeini*, above n 8.

<sup>132</sup> *Al-Skeini*, above n 8, at [131]. This reaffirmed the ECtHR’s dicta in *Bankovic v Belgium* (2001) 11 BHRC 435.

<sup>133</sup> *Al-Skeini*, above n 8, at [136] quoted in *Smith*, above n 1, at [36].

brought within the state's article 1 jurisdiction".<sup>134</sup> NZDF personnel are likewise under the control of NZ when serving on overseas operations.

The NZBORA does not have a specific jurisdiction provision. The only relevant provision is the description in its short title of the NZBORA as an act to "affirm, protect, and promote human rights and fundamental freedoms *in New Zealand*" (italics added). Rishworth et al acknowledge that there is "nothing in the Bill of Rights to indicate an intention that it apply extraterritorially"<sup>135</sup>, but assert that the NZBORA may nevertheless have extraterritorial effect.<sup>136</sup> In discussing the issue they note that s 15 of the Constitution Act 1986 empowers Parliament to legislate with extra-territorial effect, and they point out that there are numerous government employees who operate as agents of NZ outside out borders.<sup>137</sup>

The only case to have examined extra-territorial application of NZBORA is *R v Matthews*<sup>138</sup>. Matthews had been arrested by Australian police in Australia, who allowed a NZ detective to interview him there. His claim of breach of his s 23 NZBORA right was not upheld, but not directly on grounds of lack of extra-territorial jurisdiction.<sup>139</sup> Clearly *Matthews* can be distinguished because NZDF personal serving on overseas operations are agents of the state acting under international law. Moreover, here we are not concerned with the NZBORA implications of acts of NZDF personnel on operations; rather we are concerned with the NZBORA implications for deployed NZDF personnel of NZDF decisions.

Confining the jurisdiction of the NZBORA to NZ territory may be an abrogation of NZ's international obligations under the ICCPR. Art 2(1) ICCPR states that the treaty

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<sup>134</sup> *Smith*, above n 1, at [55]. In *Al-Skeini*, above n 8, the Grand Chamber noted that the UK has authority and control over its armed forces when operating overseas, as evidenced by s 367(1) of the Armed Forces Act 2006, under which serve persons are subject to UK military law without territorial limit (*Al-Skeini*, above n 8, at [130] quoted in *Smith*, above n 1, at [28]).

<sup>135</sup> Paul Rishworth, Grant Huscroft, Scott Optican and Richard Mahoney *The New Zealand Bill of Rights* (Oxford University Press, New York, 2003) at 114.

<sup>136</sup> Rishworth, above n 135, at 70. Butler and Butler agree (above n 121, at 155). As a parallel, the lack of express remedy provisions in the NZBORA has not prevented NZ courts from providing remedies for NZBORA breaches.

<sup>137</sup> For example, immigration officials, diplomatic staff, NZDF personnel (see Butler, above n 121, at 155 and Rishworth, above n 135, at 70).

<sup>138</sup> *R v Matthews* (1994) 11 CRNZ 564.

<sup>139</sup> Tipping J found that Matthews did not enjoy s 23 rights because the word "enactment" in s 23(1) referred only to NZ enactments and no NZ enactment was engaged since Matthews as arrested by Australian police under Australian law.

applies to each state party “within its territory *and* subject to its jurisdiction” (italics added). On art 2(1) Nowak notes that “when states parties [...] take actions on foreign territory that violate the rights of persons subj 3

ect to their sovereign authority, it would be contrary to the purpose of the Covenant if they were not held responsible”.<sup>140</sup> Moreover, the HRC has stated that obligations assumed by states parties under the ICCPR apply not only within their boundaries but also to “acts for which those states are legally responsible in international law outside their borders”.<sup>141</sup>

There is some similarity between the ICCPR position and the state control approach in *Smith*. To deny NZDF personnel protection of the NZBORA simply because they are deployed on operations outside NZ could arguably be contrary not only to the intent of the ICCPR but also to the purpose of the NZBORA to make the Government accountable for acts which affects fundamental rights of New Zealanders. Taking the ICCPR and ECHR approach, from a jurisdictional point of view, determining whether and which rights should be protected on operations requires an assessment of the degree of control exercised by the NZDF over the operation. Thus, even though the words “in New Zealand” appear to describe territorial jurisdiction for the NZBORA, a wider jurisdictional concept can be argued.

## SECTION 8: RIGHT NOT TO BE DEPRIVED OF LIFE

### 8 Right not to be deprived of life

No one shall be deprived of life except on such grounds as are established by law and are consistent with the principles of fundamental justice.

#### Nature and Scope of s 8

Article 2(1) ECHR and art 6(1) ICCPR both contain a positive duty to protect life.<sup>142</sup> By contrast, s 8 of the NZBORA imposes only an express negative duty not to deprive

<sup>140</sup> Manfred Nowak *UN Covenant on Civil and Political Rights: CCPR Commentary* (2<sup>nd</sup> ed, N.P. Engel, 2005) at 44.

<sup>141</sup> Quoted in Butler and Butler, above n 121, at 155, citing from *Lopez Burgos v Uruguay* Comm No 52/1979, 29 July 1981 (HRC).

<sup>142</sup> Article 2(1) ECHR states: “Everyone’s right to life shall be protected by law. No one shall be deprived of his life intentionally save in the execution of a sentence of a court following his conviction for a crime for which this penalty is provided by law.” Article 6(1) ICCPR states: “Every human being



of life. It is a “pure restraint on government action and not an entitlement to a freedom”.<sup>143</sup> Article 2(1) ECHR and art 6(1) ICCPR also both contain an implied duty to take preventive operational measures to protect those at risk of a real, direct and immediate threat to life.<sup>144</sup> The implied duty in s 8 is narrower: Rishworth et al identify it as a positive duty to perform acts necessary to avoid a particular person’s life being deprived in circumstances where omission to perform these acts would be legally or morally culpable.<sup>145</sup>

The scope of s 8 is narrower than the scope of art 6 ICCPR. Nowak reports that the HRC has extended the scope of protection under art 6 to include other threats to human life such as malnutrition, life-threatening illness, and armed conflict.<sup>146</sup> For a number of years s 8 was regarded as being restricted to the physical integrity of the person only and as not imposing wider “security of the person” duties on the state.<sup>147</sup> However, Butler and Butler point to international jurisprudence over the last 10 years to argue that a “purposive and human rights-friendly” interpretation of s 8 “would include deprivations of certain elements of living that are crucial to a person’s ability to live a dignified, meaningful life”.<sup>148</sup> Such an interpretation may bring severe and life-changing physical injuries sustained on military operations within the ambit of s 8, but for the purpose of the *Smith* claims the breach of s 8 involves death, not degradation in the quality of life.

### **Limitations Inherent in s 8**

Section 8 incorporates inherent limitations: persons have the right not to be deprived of life “except on such grounds as are established by law and consistent with the principles of fundamental justice”. Deprivation of a service person’s life on operations can be said to be established by law via the crown prerogative and the Defence Act authority to deploy armed forces on operations where they may be killed.

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has the inherent right to life. This right shall be protected by law. No one shall be arbitrarily deprived of his life.”

<sup>143</sup> Rishworth, above n 135, at 222.

<sup>144</sup> *Smith*, above n 1, at [78] and [103]. See also *Öneryildiz v Turkey* (2004) 41 ERHRR 325.

<sup>145</sup> Rishworth, above n 135, at 221.

<sup>146</sup> Nowak, above n 140, at 123 and 125.

<sup>147</sup> See Rishworth, above n 135.

<sup>148</sup> See Bulter, above n 121, at 319.

Butler and Butler suggest that the principles of fundamental justice would require a proportionality analysis.<sup>149</sup> By “proportionality analysis” they appear to mean a weighing of opposing interests.<sup>150</sup> That is how the concept was applied by the Attorney-General in his s 7 report to Parliament on the Death with Dignity Bill 2003.<sup>151</sup> He wrote that the proposed law “must be substantively just and applied in a procedurally fair manner”. He added that substantive fairness results when “the right balance has been struck between the competing values that need to be reconciled”.<sup>152</sup> Case law on the principles of fundamental justice will be discussed in the next section.

### ***Smith*-like Claims and s 8 Deprivation of Life**

For the NZDF to be liable for a breach of s 8, it would first have to be shown that the NZDF decision caused the loss of life in question. This would require not only a similar analysis of causation as for negligence, but also an assessment of whether the state action causing the breach reached Rishworth’s “morally culpable” standard. In *Smith* the UKSC held that art 2 ECHR is not breached simply by deploying an armed force as long as it is adequately organised, trained and equipped for its tasks.<sup>153</sup> The corollary is that knowingly deploying service personnel without adequate equipment could be a breach of their art 2 right. But in NZ more would be needed. For example, a failure to supply ECM equipment in full knowledge of the risk of death to which that would expose service personnel would not be enough. An element showing disregard for the s 8 right of affected personnel would be also required, perhaps demonstrated by a lack of policy or operational reason to fail to supply ECM, and by the fact that it was in the state’s power to provide the equipment.

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<sup>149</sup> Butler, above n 121, at 333.

<sup>150</sup> They give as an example that authorising the killing of a petty offender who escapes from custody would require analysis of the factors such as: the importance of keeping all persons placed in secure custody in that custody; the danger to the community if the petty offender escapes; the immediate threat to the public caused by the manner of escape; and the importance of the escapee’s right to life (Butler, above n 125, at 333 using an example given in the Bill of Rights White Paper at [10.89]).

<sup>151</sup> Attorney-General *Report of the Attorney-General under the New Zealand Bill of Rights Act 1990 on the Death with Dignity Bill 2003* (E.63, House of Representatives, Wellington, 5 September 2002).

<sup>152</sup> *Report of the Attorney-General*, above n 151, at 3. In the case of the Death with Dignity Bill, the Attorney-General concluded it was not a justified limit on s 8 because there were insufficient safeguards to ensure that consent was reliable and genuine.

<sup>153</sup> *Smith*, above n 1, at [62].

The morally culpable standard is particularly appropriate where death is a direct result of third party action, as in the *Smith* claims, because having the bar set high avoids imposing a disproportionate burden on the NZDF when the actions of a third party are involved. The *Osman*<sup>154</sup> case is relevant here. That case concerned the criminal actions of a third party over whom the defendant had no control. The ECtHR held that, for an obligation to arise, risk to life must arise with respect to a specific person, specific threats and knowledge by officials that they should have acted.<sup>155</sup> Butler and Butler describe this as a “very high threshold that turns on whether or not it could be said that the state deliberately stood back in the face of, and in contemplation of, a known and real risk to the life of an individual”.<sup>156</sup>

Also relevant to whether the threshold of moral culpability was crossed would be the assessment of whether the deprivation of life occurred in accordance with the principles of fundamental justice. The concept of fundamental justice has been discussed in two NZBORA s 8 cases: *Shortland v Northland Health Ltd*<sup>157</sup> and *Seales v Attorney-General*<sup>158</sup>. The result in neither case depended on s 8 limitations, so the discussion was obiter and limited. *Shortland* involved a use of delegated statutory power and resonates more with *Smith* facts than *Seales*, which was concerned with the interpretation of a statutory provision. Accordingly, analysis of how the principles of fundamental justice apply to the *Smith* facts will largely follow the analytical framework established in *Shortland*, although it will also address the gross disproportionality consideration raised in *Seales*.<sup>159</sup>

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<sup>154</sup> *Osman v United Kingdom* (1998) 29 EHRR 245 (ECtHR) at [116]. *Osman* was a case where law enforcement authorities failed to take preventative measures to protect an individual whose life was at risk from a criminal act of a third party. On the facts, the UK Police had actual or constructive knowledge of a threat made against Mr Osman, it was within the scope of their powers to act, and that preventative action might reasonably have been expected to avoid the risk. However, in *Osman* there was held to be no breach of art 2(1) of the ECHR because the threat was undefined beyond the fact that a certain person could be the source of a possible threat.

<sup>155</sup> Rishworth, above n 135, at 225.

<sup>156</sup> Butler, above n 121, at 327. In many ways, a breach of s 8 on those terms would require knowing behaviour so outrageous that it would justify the award of exemplary damages in a negligence claim.

<sup>157</sup> *Shortland v Northland Health Ltd* [1998] 1 NZLR 433 (CA).

<sup>158</sup> *Seales v Attorney-General* [2015] NZHC 1239.

<sup>159</sup> *Seales*, above n 158, concerned whether a statutory provision infringed the s 8 right. The phrase “fundamental justice” was adopted from s 7 of the Canadian Charter, so Colins J looked to Canadian cases for assistance, mainly *Carter v Attorney-General* 2015 SCC 5. He concluded that the principles of fundamental justice incorporate three components: first, there must be no arbitrariness or lack of rational connection between the objective and the law; secondly, the reach of a law which deprives of

*Shortland* concerned the death of a dialysis patient who was denied treatment. To shed light on what the principles of fundamental justice are, the court turned to the concept of arbitrariness from art 6(1) of the ICCPR.<sup>160</sup> The court looked to other factors in how the decision was made and held that there was no breach of s 8 because the decision to deny treatment was based on clinical judgment and standard medical guidelines.<sup>161</sup> Overall, the principles of fundamental justice were considered in *Shortland* to include concepts of arbitrariness, good faith and the application of professional best practice. Assessment of all these factors together is required to assess whether the required level of culpability is reached.

**Arbitrariness.** A decision will be arbitrary if it fails to consider relevant factors or is not rationally connected to its objective. For example, if the decision to deploy lightly armoured vehicles, rather than vehicles with better protection, was made without considering the force protection implications for affected personnel, then that decision could be said to be arbitrary in terms of the s 8 right. Or, if a decision to provide a certain level of vehicle identification training was based on analysis of the threat environment, and then the standard was lowered just to save training time, then the decision to lower the standard of training would be arbitrary when weighed against the interests of the service personnel affected.

**Good Faith.** This imports ideas of acting in someone's best interests or making the best decision on available information and given relevant freedoms and constraints. For example, if the IED threat in Iraq was well known and there was opportunity to provide ECM equipment to the SLRs, but the authorities failed to do so, then they could have been acting in bad faith.

**Professional Best Practice.** In *Shortland* the Court of Appeal was satisfied that Northland Health had consulted widely with experts who all agreed that, in their

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life must not be overly broad; thirdly, the impact of the restriction on the individual's life must not be grossly disproportionate to the purpose of the law in question (at [171]-[173]).

<sup>160</sup> "No one shall be *arbitrarily* deprived of his life" (*italics added*).

<sup>161</sup> *Auckland Area Health Board v Attorney-General* [1993] 1 NZLR 235, 244 (HC) was a similar case. It involved a decision to turn off a life support ventilator to a patient. It was held that there was no breach of s 8 because turning off the ventilator would not cause death and in the circumstances there was no legal duty to provide the necessities of life to the patient because the on-going use of a ventilator had no therapeutic or medical benefit. Withdrawal of the life support was also in accordance with good medical practice and was approved by the hospital's ethics committee.

professional judgment, the patient concerned would not benefit from dialysis treatment.<sup>162</sup> In the *Smith* context, professional best practice may be relevant, but it will be less likely to apply the further away from combat the decision is made and it will not always be a prerequisite of the particular decision. For example, if a decision to procure unsuitable equipment was made primarily on the basis of cost, then it would be less protected by professional military best practice and more likely to be assessed using a reasonableness standard.<sup>163</sup>

**Gross Disproportionality.** “Gross disproportionality describes state actions or legislative responses to a problem that are so extreme as to be disproportionate to any legitimate government purpose.”<sup>164</sup> “Grossly” disproportionate involves the same high standard as morally culpable behaviour. The standard required is high because the rule against gross disproportionality “only applies in extreme cases where the seriousness of the deprivation is totally out of synch with the objective of the measure”.<sup>165</sup> To take the example of procuring equipment based on cost, if it was known that more expensive equipment was actually better suited to the user requirement and likely threats to be faced on a deployment, and if the budget allowed the more expensive equipment to be procured, then a decision to nevertheless procure the less suitable equipment could be held to be a totally unacceptable imposition of risk on service personnel killed as a consequence.

If it is concluded that a deprivation of life caused by an NZDF decision did occur in accordance with the principles of fundamental justice, then there will be no breach of s 8. If, on the other hand, the conclusion is that the breach did not fall within the limitations inherent in s 8, then the next stage of the enquiry in NZ would be to consider whether the breach nevertheless represents a justified limitation of the right under s 5 NZBORA.<sup>166</sup> However, there is some opinion in the literature that a NZ court would

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<sup>162</sup> *Shortland*, above n 157, at 445. In light of that finding, the court emphasised that it was concerned with the lawfulness of Northland Health Ltd’s actions and not with matters that are the subject matter of the medical profession.

<sup>163</sup> The “professional best practice” consideration in the s 8 analysis can be compared with the doctrine of combat immunity in negligence in that it reflects the lack of competence in the court to pass judgement in some areas.

<sup>164</sup> *Seales*, above n 158, at [188] quoting from Robert J Sharpe and Kent Roach *The Charter of Rights and Freedoms* 5<sup>th</sup> ed Irwin Law Inc, Toronto, 2015 at 247.

<sup>165</sup> *Seales*, above n 158, at [189] quoting from *Canada (Attorney-General) v Bedford* [2013] SCC 72, [2013] 3 SCR 1101 at [120].

<sup>166</sup> See *Shortland*, above n 157, at 444.

not apply s 5 to a breach of s 8. Butler and Butler believe that a prima facie breach of s 8 will make a s 5 analysis unnecessary, because if the deprivation of life is not consistent with the principles of fundamental justice, then it is unlikely to be justified as a reasonable limit.<sup>167</sup> Similarly, McLean has analysed the courts' approach to s 5 and concluded that, where rights contain their own qualifier, as s 8 does, the courts have tended to focus on defining the qualifier and have not applied s 5.<sup>168</sup> However, this approach would blur the distinction between the narrow plaintiff-oriented focus of the s 8 limitation enquiry, and the wider policy focus of the s 5 analysis.<sup>169</sup> Because the application of the NZBORA in a *Smith*-like claim would be a new area of judicial enquiry in NZ, it is likely that the court would proceed to a s 5 analysis to ensure that the question whether limitation of a right as fundamental as in s 8 is demonstrably justified is fully explored.

## SECTION 5: JUSTIFIED LIMITATION OF RIGHTS

While the onus is on the plaintiff to prove a breach of a right on the balance of probabilities, once a breach has been proved, the onus shifts to the defendant to show that, again on the balance of probabilities, that the limit was reasonable and justified under s 5.<sup>170</sup>

### 5. Justified limitations

Subject to section 4, the rights and freedoms contained in this Bill of Rights may be subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.

The first thing s 5 requires is that any limitation of a right must be reasonable. This is an over-arching requirement. Indeed, it is not usually a separate issue analysed by the

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<sup>167</sup> Butler, above n 121, at 346.

<sup>168</sup> McLean's example of this was *Cropp v Judicial Committee* [2008] NZSC 46, [2008] 2 NZLR 774, which involved breach of s 21, not the breach of a right as fundamental as in s 8 (McLean, Janet "The Impact of the Bill of Rights on Administrative Law Revisited: Rights, Utility, and Administration", (2008) 1 NZL Rev 377).

<sup>169</sup> In *Seales*, above n 158, Colins J made the point that the focus of the limitation analysis under s 8 is whether the plaintiff can show that his or her individual rights have been breached, whereas under s 5 the focus is "the wider societal perspective" (at [175]). There is also an argument that failure to conduct a s 5 analysis where it is warranted results in a failure to realise the full potential of the NZBORA. In the case of *Smith*-like breaches, if s 5 is not applied the court is unable to make a clear statement of inconsistency to the executive (See Andrew Butler "Judicial Indications of Inconsistency – A New Weapon in the Bill of Rights Armoury?" (2000) 1 NZL Rev 43 at 50).

<sup>170</sup> *Hansen v R* [2007] NZSC 7 [2007] 3 NZLR 1 at [108].

courts under s 5.<sup>171</sup> The second requirement is that the limitation is “prescribed by law”. The wide interpretation of this phrase by the Canadian Supreme Court<sup>172</sup>, accepted by the Court of Appeal in *Noort*<sup>173</sup>, is as follows:<sup>174</sup>

The limit will be prescribed by law [...] if it is expressly provided for by statute or regulation, or results by necessary implication from the terms of a statute or regulation or from its operating requirements. The limit may also result from the application of a common law rule.

As is the case for the grounds of law required to inherently limit s 8, the legal source of a s 5 justified limitation of s 8 lies in the Crown’s power to maintain and deploy armed forces as an exercise of prerogative power and under the Defence Act 1990.

The third requirement is that a limitation of a right must be “as can be demonstrably justified in a free and democratic society”. There are two points to note here. First, the limitation not only has to be justified, it has to be *demonstrably* justified. This reflects the rights-centred purpose of the NZBORA. On this qualification Tipping J said: “If anything, the benefit of the doubt should go against justification of the limit”.<sup>175</sup> Secondly, NZ is characterised as a free and democratic society. This is the point of reference for the wider societal perspective which is to be explored under s 5.

### **Application of s 5 to *Smith*-like Claims**

In *Hansen* the Supreme Court laid out a proportionality test for the s 5 analysis.<sup>176</sup> However, *Hansen* was about the right-limiting effect of a statutory provision and is awkward to apply to a government decision as in the *Smith* context.<sup>177</sup> There is no guidance from decided cases in how to approach this test where government decisions are involved, but a version of the *Hansen* proportionality test appropriate for judicial

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<sup>171</sup> In *Hansen*, above n 170, Tipping J indicated that the reasonable requirement involved the need to allow Parliament discretion, a margin of appreciation, with respect to its determination of whether a limit on a right is reasonable. Presumably the same margin of appreciation is also due to the Executive branch.

<sup>172</sup> This is with reference to s 1 of the Canadian Charter which is almost identical to s 5 NZBORA.

<sup>173</sup> *Ministry of Transport v Noort* [1992] 3 NZLR 260 (CA) at 272.

<sup>174</sup> *R v Thomsen* (2988) 63 CR (3d) 1; 40 CCC (3d) 257 (SCC).

<sup>175</sup> *Hansen*, above n 170, at [110].

<sup>176</sup> See *Hansen*, above n 170.

<sup>177</sup> This is similar to the problem of trying to apply the analytical framework in *Seales*, above n 158, to analysis of inherent limitation of s 8 in light of a government decision rather than legislation.

review of government decisions has been suggested by McLean and can be applied here.<sup>178</sup>

The government must demonstrate that:

1. It has a pressing and substantive objective; and
2. The measure it has taken has a rational connection with that objective; and
3. The right has been minimally impaired; and
4. There is proportionality between the objective and the right.

Compared with the s 8 proportionality analysis, s 5 analysis takes the wider societal perspective, but still the infringed right will be centre stage. In *Goodwin Cooke P* said:<sup>179</sup>

In my judgment the Bill of Rights Act itself mandates a right-centred approach to the assessment of the public interest. That does not mean that other aspects of the public interest are to be ignored. It requires that the weighing processes respect the concern of the legislation for the vindication of human rights and that it should consciously seek to assess all the circumstances of the case against that standard.

## 1. Pressing and Substantial Objective

In existing NZBORA cases the objective of the impugned statutory provision or executive measure at issue is usually clear: for example, gathering evidence of crime (*Baigent's Case*); controlling supply of illicit drugs in the community (*Hansen*); controlling difficult prisoners (*Taunoa*); limiting prisoners' qualification to vote (*Taylor*); or preventing the unlawful taking of a life (*Seales*). By contrast, in the *Smith* context the object of the impugned decision may not be independently ascertainable. Furthermore, as the defendant, the NZDF is more likely to be in a position to identify the objective of the decision impugned by the plaintiff.

The impugned decision or its associated objective may be of a policy nature. Usually the courts will grant the government a margin of appreciation where matters of policy are concerned. However, this is less the case in NZBORA cases because s 5 allows judges to determine whether legislation and state action are inconsistent with the

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<sup>178</sup> Mclean, above n 168, at 384.

<sup>179</sup> *R v Goodwin*, above n 121, at 194.



NZBORA, as they would if the NZBORA were a constitutional statute.<sup>180</sup> The NZ courts accept that they may have to delve into non-legal issues as a matter of a duty imposed by parliament in enacting s 5.<sup>181</sup> In *Noort* Richardson J described the s 5 analysis as “an abridging inquiry” properly involving “consideration of all economic, administrative and social implications”.<sup>182</sup> In *Moonen* the court noted that the s 5 analysis involves the court in “considering all the issues which may have a bearing on the individual case, whether they be social legal, moral, economic, administrative, ethical or otherwise”.<sup>183</sup> Heath J in the High Court in *Taylor* noted that by enacting s 5 Parliament has empowered the courts to take into account “quasi-political considerations”.<sup>184</sup> Thus, in NZ a court will probably not take a deferential approach, but instead is likely to consider policy decisions in *Smith*-like claims to be open to judicial scrutiny. Overall, this approach reflects the fact that NZBORA cases are rights-centred and that the state itself is directly responsible for NZBORA breaches. Moreover, applying the possible principle underlying judicial scrutiny in *Taunoa*, human rights is not an area of expertise or even primary concern for the NZDF. Therefore, close supervision by the courts of the state’s observance of human rights on operations may be considered warranted.<sup>185</sup>

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<sup>180</sup> Paul Rishworth (“Human Rights”, (2012) 2 NZL Rev 321 at 324) points out that the only difference between a statutory bill of rights and a constitutional one is “the *consequence* of finding inconsistency.”

<sup>181</sup> See *Moonen v Film and Literature Board of Review* [2000] 2 NZLR 9 (CA) at [20]. Tipping J said that the purpose of s 5 “necessarily involved the Court having the power, and on occasions the duty, to indicate that although a statutory provision must be enforced according to its proper meaning, it is inconsistent with the Bill of Rights, in that it constitutes an unreasonable limitation on the relevant right or freedom which cannot be demonstrably justified in a free and democratic society”. See also *Hansen*, above n 171, at [253] where McGrath J wrote of the courts not “shirking” their responsibility to indicate where there is inconsistency. Butler puts forwards a number of arguments against there being jurisdiction for the courts to make a declaration on inconsistency or breach. He sees the question as finely balanced but does emphasise the point that “if judicial indications [he sees “indication” and “declaration” as interchangeable] of inconsistency are to become part of the legal landscape, they must be made available in an ordered and rational manner; they should not be dispensed at the pleasure of the judges, in a haphazard and structure way” (above n 169, at 55). This remark echoes McLean’s conclusion that there is inconsistency in the way judges in NZ apply s 5 (McLean, above n 168). See also Andrew Butler, “Strengthening the Bill of Rights” [2000] 31 Victoria U Wellington L Rev 129.

<sup>182</sup> *Noort*, above n 173, at 283.

<sup>183</sup> *Moonen*, above n 181, at 234.

<sup>184</sup> *Taylor*, above n 115, at [43].

<sup>185</sup> *Taunoa*, above n 115, in the Supreme Court provides an example of when less deference may be justified. In that case the Supreme Court applied s 5 to a substitutionary rather than a review standard, in that it substituted its own assessment of whether the Behaviour Management Regime (BMR) breached s 9 NZBORA, rather than merely enquire whether the Corrections Department had considered s 9 in the light of s 5 when it instituted the BMR in prisons. Hanna Wilberg believes this is because prison officers are not well placed to make judgments in the area of human rights, so the Courts need to supervise their treatment of prisoners closely (Hanna Wilberg “The Bill of Rights in Administrative

Whatever objective is identified or argued, it must be pressing and substantial. Objectives at play in legislation are usually obviously in the public interest, since legislation is often aimed at remedying a mischief or controlling undesirable behaviour. Government measures alleged to have breached the NZBORA in the decided cases are also often clearly of a public interest nature, such as sanctioning those who break laws (*Taylor*) or enabling the police to investigate crime (*Baigent's Case*). The NZDF is deployed as a foreign policy tool. The overall objectives of the NZDF deployment to Iraq probably did not relate directly to defence of NZ, but rather to securing wider foreign policy benefits associated with engaging in collective security operations. Such objectives may be legitimate government objectives but it may be difficult to argue that they are pressing or substantial to NZ as a free and democratic society. Furthermore, if the overall objective of such a deployment is not considered pressing or substantial, then it is unlikely that the objectives of any decision made within the government decision to deploy armed forces will be pressing or substantial either. For example, objectives of decisions made about equipment are not only far removed from government objectives, but they will also relate to the interests of small numbers of individuals only. It would probably be difficult for the NZDF to prove that the objective of any decision concerning a *Smith*-like deployment was pressing and substantial in NZ as a free democratic society.

## 2. Rational Connection

Once a relevant objective has been identified, the NZDF would need to show that the impugned decision was rationally connected to its objective and did not have an inconsistent or arbitrary effect.<sup>186</sup> In the *Smith* context this analysis will depend entirely on the facts and will be closely related to the reason for a decision. The question to be asked is: did the decision achieve its objective? Taking the example of procurement of ECM equipment, a decision to deploy the force without it could be rationally connected to the objective of avoiding the political embarrassment that

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Law Cases: Taking Stock and Suggesting Some Reassessment" (2013) 25 NZ Universities L Rev 866 at 885).

<sup>186</sup> For example, in *Taylor*, above n 115, Heath J held that the blanket ban on prisoner voting under s 80(1)(d) of the Electoral (Disqualification of Sentenced Prisoners) Act 2010 was not rationally connected to the objective because it bore no relation either to the objective of the Bill or to the conduct of prisoners and would have inconsistent and arbitrary effect (at [13], [29], [33]-[35]).

would attend a delay in deployment, if it could be shown that procuring and supplying such equipment would have delayed deployment.

### 3. Minimal Impairment

In some respects it is meaningless to speak of impairment of the s 8 right not to be deprived of life because, as has been discussed, the breach of s 8 in the *Smith* context involves death, not degradation in the quality of life.<sup>187</sup> However, what can be asked is whether there was an alternative decision open to the government which would have met the objective with less risk of death for the service person concerned.<sup>188</sup> To that end, the minimal impairment analysis could be guided by the considerations contained in s 22 of the Health and Safety at Work Act 2015.<sup>189</sup> Returning to the hypothetical example above concerning the SLR claims, if it could be shown that the objective of avoiding delay in the deployment could have been met by limiting the use of SLRs in-theatre until ECM could be fitted, or that deployment schedules could have been altered to allow ECM to be fitted, then arguably the decision to deploy the SLRs without ECM did not minimise impairment of the s 8 right.

To determine the question of minimal harm in the *Smith* context would require expert military evidence on the possible impact of alternative decisions in the combat environment where the deprivation of life occurred. In addition, the effectiveness of the military operation or mission would also be a consideration in determining whether an alternative decision was available on the facts. The guiding principle could be that the risks imposed on service persons by the state should be no more than is necessary in all the circumstances of military operations.

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<sup>187</sup> See the discussion above on the scope of s 8.

<sup>188</sup> In *R v Chaulk* [1990] 3 SCR 1303 the Supreme Court of Canada pointed out that the phrase “as little as possible” was “not intended to be given an absolute or literal meaning and that a choice could be made from a range of means which impaired the right as little as was reasonably necessary” (*Hansen*, above n 170, at [79]; see also [126] and [217]).

<sup>189</sup> Section 22 of the Health and Safety at Work Act 2015 allows the following factors to be taken into account to determine whether a responsible party has done what was reasonably practicable to eliminate or minimise a risk: likelihood of risk occurring; degree of harm that may result from the risk; what the person reasonably knows or ought to know about the risk and ways to eliminate or minimise it; the availability of suitable ways to eliminate or minimise the risk; and whether the cost of doing so is disproportionate to the risk.

#### 4. Proportionality between Objective and Right

This is the crux of the matter. The Canadian Supreme Court in *Oakes* observed that “the more severe the deleterious effects of a measure, the more important the objective must be”.<sup>190</sup> In respect of *Smith* claims, the question will be: was the objective proportionate to the deprivation of life?<sup>191</sup>

The ECtHR has repeatedly emphasised that, when assessing a state’s obligations under the ECHR, “a fair balance must be struck between the competing interests of the individual and of the community as a whole”.<sup>192</sup> On the public side in *Smith*-like claims, as has been discussed, are benefits that flow from the government’s choice to participate in collective security operations. But benefits such as favourable treatment in trade negotiations are very indirect and highly political and have little effect on the character of NZ as a free and democratic society. Another relevant public interest is the importance of the s 8 right not to be deprived of life. In *Taunoa McGrath J* noted that when a right is breached, there are two victims: the individual whose rights were infringed; and society as a whole, which is affected by the loss of the rule of law that a rights infringement signifies.<sup>193</sup> It is also worth noting at this point that art 4(2) ICCPR specifically prohibits derogation of the obligation to protect the art 6 right even “in time of public emergency which threatens the life of the nation”. So, any limitation on the s 8 right should not be taken lightly in a free and democratic society.

On the side of the individual NZDF service member, the s 8 right must be considered in the proper context. In *Smith Hope LJ* said that “it would not be compatible with the characteristics of military life to expect the same standard of protection as would be afforded by art 2(1) to civilians who had not undertaken the obligations and risks associated with life in the military”.<sup>194</sup> On the other hand, the court “must give effect to those obligations where it would be reasonable to expect the individual to be afforded the protection of the article”.<sup>195</sup> The weight to be given to the individual’s

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<sup>190</sup> *R v Oakes* [1986] 1 SCR 103 at headnote, quoted in *Hansen*, above n 170, at [103].

<sup>191</sup> See *Hansen*, above n 170, at [123]: “Whether a limit on a right or freedom is justified under s 5 is essentially an enquiry into whether a justified end is achieved by proportionate means.”

<sup>192</sup> *Smith*, above n 1, at [61].

<sup>193</sup> *Taunoa*, above n 115, at [317].

<sup>194</sup> *Smith*, above n 1, at [71].

<sup>195</sup> *Smith*, above n 1, at [76].

right will depend on specific facts, particularly on how close the reason for the death was to a combat situation.<sup>196</sup> Overall, the relevant principle in *Smith*-like claims will be that, although service personnel expect to face risks on operations, equipment and training decisions which expose them to *unnecessary* and *avoidable* risks are unlikely to be proportionate to the objective involved.

### **Outcome of the s 5 Proportionality Assessment in the *Smith* Context**

Of the four factors involved in the s 5 proportional test, the one likely to point away from demonstrable justification of a limitation of s 8 will be that the objective of the decision causing the breach is unlikely to be pressing and substantial in NZ as a free and democratic society. The two factors most likely to depend on specific facts are assessment of rational connection between the decision and its objective and determining whether the decision involved minimal impairment of the s 8 right, that is, whether the risk imposed was the minimum reasonably achievable in all the circumstances. If rational connection and minimal impairment are proved, then the last factor, namely proportionality between the objective and the right, is likely to be determinative of the s 5 analysis. However, if the objective of the impugned decision was not pressing or substantial in the first place, then it is unlikely to outweigh the importance of the right not to be deprived of life.

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<sup>196</sup> For example, Hope LJ pointed out that in *Finogenov v Russia* Application Nos 18299/03 and 27311/03 “the ECtHR was prepared to give a margin of appreciation to the domestic authorities” when considering an art 2 claim arising from an operation to rescue hostages from the Dubrovka Theatre, Moscow, in 2002. However the deaths were attributable to decisions made on the conduct of the operation, not to higher level equipment or training decisions (*Smith*, above n 1, at [75]).

## CHAPTER 4 – CONCLUSION

The aim of this dissertation was to explore issues surrounding whether the NZDF could owe a duty of care to service personnel killed or injured on operations and whether the NZDF could be held to have breached s 8 NZBORA where a service person loses his or her life on an overseas operation.

### NEGLIGENCE

Liability in negligence looked at the threshold question of whether, in the context of *Smith*, it may be fair just and reasonable to impose a duty of care on the NZDF. After weighing proximity and policy factors, it was concluded that the determinative factors for imposition of a duty would depend on the facts of a particular case and would consist of causation, nexus, foreseeability of harm, ability of the NZDF to prevent the harm, burden a duty would impose on the NZDF, whether the impugned decision was political or operational, and whether there was a strong public interest to outweigh the interest of the plaintiff in avoiding personal harm. In principle, then, a duty would most likely be imposed where the NZDF had been proved to have caused clearly foreseeable physical harm without any policy or national interest imperative, and in a situation where it was within the ability and resources of the NZDF to avoid the harm.

This dissertation focussed on the duty question, but some further comments on liability in negligence are warranted. Even if a duty of care were imposed, the plaintiff would have to show that a breach of the standard of duty required had occurred. This would involve potentially complex questions of what is reasonable in the military operational context of a claim. Secondly, the operation of s 317 of the ACC Act in NZ would mean that the only remedies available would be judicial declaration, or exemplary or nominal damages. Given that the NZDF investigates death and injury on operations, a judicial declaration is unlikely to be considered necessary.<sup>197</sup> As for exemplary damages, where the NZDF were vicariously liable only, these may not be available.<sup>198</sup>

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<sup>197</sup> See above n 32 on the Court of Appeal's ruling on declaratory judgment in *Re Chase*. In the case of a death, there would also be a coronial investigation.

<sup>198</sup> Exemplary damages serve to punish the wrong-doer, but it has been argued that they also exist to protect the public interest, for example deterrence and incentivisation of those vicariously liable to "change his systems of work, or to change his staff, in such a way to minimise acts of negligence" (*Couch*, above n 32, at [40]).

In the case of institutional negligence it may be difficult to prove that a number of decisions, none of which was negligent on its own, amounted to NZDF as an institution behaving in an intentionally or recklessly outrageous manner. Such behaviour could be characterised as callous disregard for the interests of service personnel under circumstances where the NZDF could have avoided the harm. In *Couch* it was characterised in the following terms:<sup>199</sup>

In the case of systemic failure [...] it may be sufficiently outrageous if there is consciousness of the inadequacy of the systems in place or deliberate indifference to responsibility, even if the harm that eventuates is not foreseen.

Thus, even if a duty of care were imposed on the NZDF, it would be an extreme breach only which could successfully support a claim of negligence against the NZDF in a *Smith*-like case.

## HUMAN RIGHTS

If the NZBORA were held to apply to deployed NZDF personnel, then a duty would be owed under the s 8 right not to be deprived of life, but the plaintiff would still have to clear the hurdle of proving that the NZDF had breached that right in the circumstances of the military operation. Because s 8 embodies a negative duty with respect to the fact of life only, breach of the right would require an element of moral culpability, something akin to knowingly causing or allowing the imposition of unnecessary and avoidable risk on deployed service personnel. For a decision causing the deprivation of life to amount to a breach of s 8, it would also have to be shown to be contrary to the principles of fundamental justice. That is, it would have to be arbitrary, not made in good faith or in accordance with military best practice, and grossly disproportionate to the infringed right. It is a very high standard which means s 8 will be breached in extreme cases only. However, if that high threshold were reached, only a pressing and substantial public interest of the magnitude of national

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<sup>199</sup> *Couch*, above n 32, at [24].

security would be capable of demonstrably justifying the breach in NZ as a free and democratic society.

### OTHER AREAS OF POTENTIAL LIABILITY

Conclusions on liability in this dissertation have been shaped by the fact that the *Smith* claims involved alleged failings in provision of equipment and training where the direct cause of harm was the actions of a third party over whom the UK MOD had little (in the Challenger claim) or no (in the SLR claims) control. Where no third party were involved in causing physical harm, the conclusions on whether a duty of care should be imposed may be different. For example, if a force were deployed with equipment known to be defective, and which caused injury or death to users, it may be more likely that a duty of care would be imposed.<sup>200</sup> As the subject of a NZBORA claim, death caused by defective equipment, which was not fixed or withdrawn for reasons which had nothing to do with the operation, may lead to a conclusion that the breach of the s 8 right was not based on principles of fundamental justice.

Another possible area of liability in negligence is claims involving injuries not covered by ACC, for example post-traumatic stress disorder (PTSD) caused by cumulative exposure to traumatic events.<sup>201</sup> Such a claim would be likely to focus on the lack of treatment for the condition rather than exposure to situations that caused the condition, so combat immunity would not be engaged, and high level policy decisions are unlikely to be relevant. Moreover, such a claim could proceed on the basis of compensatory damages so there would be no requirement to prove behaviour meriting exemplary damages. That also means that the claim could involve vicarious or institutional liability.

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<sup>200</sup> Compare *Smith*, above n 1, at [135]. If the equipment were known to be defective, then issues of foreseeability, reliance and ability to avoid the harm would also add to the balance in favour of liability. Justiciability issues would be less likely to arise because the fault would be more likely to lie with the state: the combat circumstances would merely be the mechanism of how the harm was caused and, absent pressing resource allocation issues at a high level of decision-making, the decision not to fix the defect would be unlikely to be political. Furthermore, if the failure to withdraw or remedy defective equipment was accompanied by disregard for the interests of affected personnel, then not only may a duty of care be imposed but the breach might also warrant the award of exemplary damages, making a civil claim in negligence tenable. In a NZBORA case, disregard for the interests of affected personnel in such a case may push the decision over the morally culpable standard required for a breach of s 8.

<sup>201</sup> To be covered by ACC, a work-related mental injury must be the result of a single event (s 21(b)(1)(b) ACC Act; see also *KB v ACC* [2013] NZACC 41).



On the NZBORA front, another possible area of liability is the secondment of service personnel as UN Military Experts on Mission (UNMEOM).<sup>202</sup> UNMEOMs usually deploy from NZ as individuals so they often have to rely on UN support in the operational area. In some missions, this support does not meet the standard of what would be provided by the NZDF, particularly regarding protected mobility and casualty evacuation.<sup>203</sup> If a NZ service person died as a result, then conduct which might meet the threshold of morally culpable behaviour for a breach of s 8 could be a NZ government decision to deploy the individual in disregard of the known and high level of risk to which he or she were exposed. Government objectives involved in deployment of a NZDF service person as a UNMEOM would be unlikely to justify the breach.

### RELATIONSHIP BETWEEN NEGLIGENCE AND HUMAN RIGHTS

The UKSC in *Smith* seemed to suggest that the law of negligence should inform the development of human rights law in a *Smith* context.<sup>204</sup> This may not be the case in NZ. It is true that there are overlaps in factors relevant to the two areas of law: causation is a central element; issues of reliance and good faith will weigh heavily towards imposition of a duty under both heads; risk mitigation, guided by principles in s 22 of the Health and Safety at Work Act 2015 and as in reasonable in the operational context, is relevant to both types of claim; both have an in-built measure to control liability, in the form of combat immunity in negligence and margin of appreciation given to professional best practice in the case of a s 8 breach; both also

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<sup>202</sup> UNMEOMs comprise UN Military Observers, UN Military Advisors and UN Military Liaison Officers (United Nations *Roles and Training Standards for UN Military Experts on Mission* (UN DPKO New York, 2011) at footnote 1 and [24]).

<sup>203</sup> Often these missions are not combat missions, but they usually involve armed groups, some of whom do not wish the UN well. As unarmed foreign military personnel, UNMEOMs can be particularly vulnerable if things go wrong.

<sup>204</sup> In their dissenting judgments in *Smith* both Mance and Carnwath LJ opined that in the factual context of the claims the right approach was to look at the common law position before considering liability under human rights legislation. (*Smith*, above n 1, at [106] per Mance LJ and [155] per Carnwath LJ). One reason for this approach was that, whereas the UKSC can control the development of the law of negligence in England, it is subject to the ECtHR in human rights law, so domestic courts should await clear guidance from the ECtHR before extending the scope of art 2 to military operations (*Smith*, above n 1, at [142] and [143] per Mance LJ and [156] per Carnwath LJ. Mance LJ also held that if no duty of care in negligence was found, then “we should not lightly conclude, in so important and sensitive an area of national life, that the Strasbourg court [ie the ECtHR] would take a different view” (at [143]). Hope LJ believed that the principles of non-justiciability of policy decisions and of combat immunity in negligence could be applied to human rights claims to avoid imposing an impossible or disproportionate burden on the state (*Smith*, above n 1, at [99] referring to [64]-[66] and [75]-[81]).

entail an internal and an external enquiry in which competing interests must be balanced.<sup>205</sup>

However, there the similarities end, because negligence and NZBORA claims serve entirely different purposes. Negligence is a tort and is part of private law, whereas NZBORA claims are a public law cause of action. The harm caused by negligence can take many forms, but the harm caused in a NZBORA case will always be the breach of a fundamental human right. The aim of the court in a negligence case is to balance the plaintiff's moral claim to compensation for avoidable harm and the defendant's moral claim to be protected from an undue burden of legal responsibility.<sup>206</sup> By contrast, the court's aim in a NZBORA case is nothing less than to affirm, protect and promote fundamental rights which the state of NZ has agreed to uphold while avoiding the imposition of impossible and disproportionate burdens on the state. In negligence the threshold issue is whether a duty of care should be imposed, whereas in NZBORA claims, as long as the Act applies, the duty is taken as owed and the question is whether it has been breached.<sup>207</sup>

Perhaps most importantly, as a private law action negligence may be harder to prove in a novel area such as a *Smith*-like claim because justiciability and the reasonableness of a burden imposed on the NZDF are more likely to be in issue. In a public law NZBORA case, by contrast, the rights of the plaintiff will be given more weight and an objective that is pressing and substantial enough to justify the deprivation of life in the *Smith* context will be uncommon. In that respect, an NZBORA claim may be more likely to succeed against the NZDF than one based in negligence on the same *Smith*-like facts.

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<sup>205</sup> In negligence this is framed as considerations of proximity versus policy, and the ultimate question of whether it is fair, just and reasonable to impose a duty of care. In NZBORA cases the balancing occurs first on an internal level under s 8, and then on an external level under s 5.

<sup>206</sup> *South Pacific Manufacturing*, above n 36, at 306.

<sup>207</sup> In *Smith*, above n 1, Mance LJ expressed a similar view in *Catherine Smith* at [196] when he stated that "the exigencies of military life go to the standard and performance, rather than the existence of, any [ECHR] duty" (cited in *Smith*, above n 1, at [140]).

## **ANNEX A – DETAILS OF THE *SMITH* CLAIMS<sup>208</sup>**

### **ALLBUTT (AND OTHERS) CHALLENGER CLAIM**

The events that comprise the Challenger claim took place in the first phase of the Second Gulf War (19-31 March 2003) when coalition forces invaded Iraq. On 25 March 2003 Corporal Stephen Allbutt, Lance Corporal Daniel Twiddy and Trooper Andrew Julien were serving with the Queen's Royal Lancers as part of the Royal Regiment of Fusiliers battle group during the fourth day of the offensive by British troops to take Basra. They were in one of a number of Challenger II tanks which had been placed at a dam in hull down positions to minimise their visibility to the enemy. Just after midnight a Challenger II tank of the Second Royal Tank Regiment, which had been assigned to the 1st Battalion Black Watch battle group and was commanded by Lt Pinkstone, crossed over onto the enemy side of a canal to take up a guarding position some distance to the south east of the dam. At about 0050 hrs Lt Pinkstone identified two hot spots through his thermal imaging sights which he thought might be personnel moving in and out of a bunker. He described the location to Sgt Donlon who was unable to identify the hot spots for himself because the description he was given was incorrect. After Lt Pinkstone had identified a further four hot spots in the same area he was given permission to fire by Sgt Donlon.

Lt Pinkstone's tank fired a first round of high explosive shell at about 0120 hrs and a second round shortly afterwards. The hot spots that he had observed were in fact men on top of Cpl Allbutt's Challenger II tank at the dam. The first shell landed short of the tank, but the explosion blew off the men who were on top of it, including Lance Corporal Twiddy. The second shell entered the tank and killed Cpl Allbutt, injured Trooper Julien and another soldier, and caused further injury to Lance Corporal Twiddy. Lt Pinkstone did not know of the presence at the dam of the Royal Regiment of Fusiliers battle group. He did not realise that he was firing back across the canal, as he was disorientated and believed that he was firing in a different direction. It is also alleged that one of the factors contributing to the incident was the failure of Lt

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<sup>208</sup> Sources: *Smith and others v The Ministry of Defence* [2011] EWHC 1676 (QB) and *Smith*, above n 1, at [2]-[12].

Pinkstone's officer commanding to inform him of the presence of British tanks on the other side of the dam.

The claimants alleged that the Ministry of Defence (MOD) negligently failed to ensure that the claimants' tank and the tanks of the battle group that fired on it were properly equipped with the technology and equipment that would have prevented the incident. That equipment falls into two categories: target identification devices that provide automatic confirmation as to whether a vehicle is a friend or foe; and situational awareness equipment that permits tank crews to locate their position and direction of sight accurately. Secondly, they allege that the MOD was negligent in failing to provide soldiers with adequate recognition training pre-deployment and also in theatre. The claimants were careful not to allege that the tactical decisions that led to the friendly fire incident were negligent.

### **SMITH (AND OTHERS) SNATCH LAND ROVER CLAIM**

The events of the Snatch Land Rover claims took place during the second phase of the Second Gulf War. This began on 1 May 2003 when major combat operations ceased and coalition forces began a period of occupation of Iraq and counter-insurgency operations.

In 2005 Private Phillip Hewett, who was the son of the claimant Susan Smith, was serving with 1st Battalion the Staffordshire Regiment. On 10 May 2005 he was deployed to Camp Abu Naji, near the town of Al Amarah in the Maysan Province of Iraq. He was assigned to a battle group working alongside soldiers from other battalions. In mid-July 2005 there was a substantial threat against Camp Abu Naji from rocket attacks and an operation was launched to counter this threat by restricting the movement of insurgent anti-government forces in Iraq.

On 15 July 2005 Pte Hewett was assigned to a mobile unit which was sent that evening to patrol around Al Amarah. The unit consisted of three Snatch Land Rovers. Snatch Land Rovers are lightly armoured. Their armour is designed to provide limited protection against ballistic threats, such as those from small arms fire. It provided no significant protection, against improvised explosive devices (IEDs). It was escorted into, but not around, the town by a Warrior fighting vehicle. Warriors are heavily

armoured and tracked, and are capable of carrying seven or eight personnel as well as the crew. Pte Hewett was in the lead Snatch Land Rover as its driver with 2Lt Richard Shearer. It had no electronic counter measures (ECMs) to protect it against the threat of radio detonated IEDs.

At about 0115 hrs on 16 July 2005 an explosion was heard in the vicinity of the stadium in Al Amarah. 2Lt Shearer decided to investigate the explosion. As the Snatch Land Rovers were driving down the single road to the stadium an IED detonated level with the lead vehicle. Pte Hewett, 2Lt Shearer, and another soldier who was acting as top cover, died in the explosion, and two other occupants of the vehicle were seriously injured.

The Smith claimants alleged that the MOD breached Article 2 of the European Convention on Human Rights; in particular that the MOD (i) failed to provide better/medium armoured vehicles for use by Pte Hewett's commander which, if provided, would have been used for Pte Hewett's patrol, (ii) failed to ensure that any patrol inside Al Amarah was led by a Warrior, (iii) caused or permitted a patrol of three Snatch Land Rovers to proceed inside Al Amarah, especially when there was no ECM on the lead Snatch Land Rover and it knew or ought to have known that ECMs were ineffective against the triggers that were in use by the insurgents and no suitable counter measures had been provided, (iv) permitted the patrol of Snatch Land Rovers to investigate the bomb blast, especially when there was only one road to the decoy bomb site, (v) failed to provide other vehicles for route clearing and route planning ahead of the Snatch Land Rovers, (vi) failed to provide suitable counter measures to IEDs in the light of the death of Lance Corporal Brackenbury, who was killed by an IED while in a Snatch Land Rover on 29 May 2005 and (vii) failed to use means other than patrols to combat the threat posed by the insurgents. The elements of the Smith claim include tactical and operations decisions made. Arguably only the decision to deploy occupying forces into Iraq with Snatch Land Rovers as opposed to Warrior concerns a strategic and resource allocation issue.

### **ELLIS SNATCH LAND ROVER CLAIM**

In 2006 Private Lee Ellis was serving with the 2nd Battalion the Parachute Regiment. His unit was attached to the Royal Scots Dragoon Guards and was based at Camp Abu Naji. On 28 February 2006 Pte Ellis was the driver of a Snatch Land Rover in a patrol of three Warriors and two Snatch Land Rovers which made a journey from the Camp to the Iraqi police headquarters in Al Amarah. Captain Richard Holmes and another soldier were in the same vehicle.

On the return journey from the police headquarters an IED was remotely detonated level with the lead Snatch Land Rover driven by Pte Ellis. He and Capt Holmes were killed by the explosion and another soldier in the vehicle was injured. The vehicle had been fitted with an ECM, but a new part of that equipment, known as Element A, was not fitted to it at that time. Element A was fitted to the other Snatch Land Rovers used in the Camp within a few days of the incident.

The Ellis claimants alleged that the MOD breached Article 2 of the European Convention on Human Rights and that it was negligent. The particulars of the Ellis claim under both heads are that the MOD failed (i) to limit Pte Ellis's patrol to better, medium or heavily armoured vehicles, (ii) to provide any or any sufficient better or armoured vehicle for use by Pte Ellis's commander which, had they been provided, would or should have been used for his patrol and (iii) to ensure that Element A had been fitted to the ECM on Pte Ellis's Snatch Land Rover, without which it should not have been permitted to leave the Camp. Like the Smith claim, only the decision to deploy occupying forces into Iraq with Snatch Land Rovers as opposed to Warrior concerns a strategic and resource allocation issue. The other elements of the claim relate to tactical decisions.

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