Where does this leave the rule in *Rylands v Fletcher*? In light of the House of Lords' opinion in, among others, *Transco*, there is little hope that it would develop into a general "strict" liability rule for damage caused by abnormally dangerous activities. The current judicial preference is for retaining but restricting the rule. This is hardly satisfactory. One can no longer agree with Laws L.J. in *Arscott v Coal Authority* [2004] EWCA Civ 892, that the rule is "alive and well." Years of erosion have taken the life out of it, so much so that one wonders whether it would not be better to put it out of its misery by abolishing it altogether.

STELIOS TOFARIS

NEGLIGENCE: INTO BATTLE

CAN soldiers killed or injured during combat sue the Ministry of Defence for failing to protect them? At first blush this sounds like the latest in that series of questions to which the terse answer is "no". Such claims, in negligence, have previously been given short shrift: *Mulcahy v Ministry of Defence* [1996] Q.B. 732 (which P.S. Atiyah said was "surely entitled to the prize for the most undeserving claim of the decade (which is saying something)": *The Damages Lottery* (Hart, 1997), p. 90). On the other hand, the Ministry clearly owes duties to its employees both at common law and under the Health and Safety at Work Act 1974, as confirmed in cases concerning injuries during military training exercises (*e.g.*, *Chalk v MoD* [2002] EWHC 422 (QB) and *Fawdry v MoD* [2003] EWHC 322 (QB)). Furthermore, since the claim in *Mulcahy* was dismissed, the Human Rights Act 1998 has imposed new duties upon the Government. Might the line in the sand now be crossed?

Smith v MoD [2012] EWCA Civ 1365 concerned soldiers wounded or killed during the Iraq war. There were two groups of incidents and claims. In the first, numerous "Snatch" Land Rover vehicles (which were notoriously lightly armoured) had been attacked using "improvised explosive devices". In the second incident, a tank from a different regiment of the British army had shelled the claimant soldiers (mistaking their identity). The claimants sought to rely upon the MoD's obligation to safeguard their right to life under Article 2 of the European Convention on Human Rights, or upon common law negligence, or both. The gist of the alleged breaches was a failure to provide suitable equipment (properly armoured Land Rovers; automatic recognition systems to guard against "friendly fire") or adequate training in vehicle recognition.

Our focus here will be upon the common law claims. The European Convention was held inapplicable in accordance with the decision in *Regina (Smith) v Oxfordshire Assistant Deputy Coroner* [2010] UKSC 29, [2011] 1 A.C. 1. (It was noted that a Strasbourg challenge was pending against *Smith v Oxfordshire* in *Pritchard v U.K.*, but that any reconsideration would have to await the European Court's judgment.) The starting point for Moses L.J. (with whom Rimer L.J. and Lord Neuberger M.R. agreed) was the Ministry's duty *qua* employer to provide a safe system of work for the claimant soldiers. This was too well established to be disputed. The question was whether that duty yielded to the "combat immunity" relied upon in *Mulcahy*. In the end, the Court of Appeal held that that was a question of fact which would have to be determined at the trial of the action. Accordingly, the judge below (Owen J.) had been wrong to strike the claims out on the basis of "combat immunity" (*cf.* [2011] EWHC 1676 (QB)).

This sounds like an un-illuminating classification of the central issue as one of "fact". But Moses L.J. gave some guidance on the proper scope of "combat immunity". It was *not* sufficient that the injuries in question were sustained during battle (otherwise all of these claims would, necessarily, have failed). The question was whether the supposedly negligent *decisions* were taken during "active operations". Decisions about training and equipment taken some time before the conflict in question could not enjoy "combat immunity". Otherwise, it would be "difficult to see how anything done by the Ministry of Defence" would fall beyond it (at [62]). So decisions "away from the theatre of war" would not enjoy the immunity, which was to be narrowly construed. Only if the court would be required to sit in judgment on decisions made in the course of active operations would "combat immunity" bar claims.

There are good constitutional grounds for this narrow approach. As Elias J. pointed out in *Bici v MoD* [2004] EWHC 786 (QB) the successful invocation of "combat immunity" hinders the court's "historic and jealously guarded role of determining [when] rights have been unlawfully infringed by an act of the executive". His Lordship cited the great case of *Entick v Carrington* (1765) 19 Howell's State Trials 1029 to show that the Government may not "simply assert interests of state or the public interest and rely upon that as a justification for the commission of wrongs". This is stirring stuff, and important. There has been public disquiet about the alleged underfunding of Mr Blair's wars by his Chancellor of the Exchequer. The Ministry of Defence should not be permitted to hide failures to fund vital protective equipment under a cloak designed to protect battlefield decisions against judicial questioning.

But even assuming that the decisions did not fall within "combat immunity", is it proper for them to be scrutinised by the courts in an action for damages? In *Smith* the Ministry argued not, although unsuccessfully. Military procurement (involving decisions about the allocation of scarce resources) was said to be a political matter for which ministers were answerable exclusively to Parliament. The courts should not trespass into such matters: they were non-justiciable. Lord Rodger had said as much in *Smith v Oxfordshire* (at [127]). Moreover, arguments that resource allocation is non-justiciable had prevailed in the past, in judicial review cases (*e.g.*, *Regina v Cambridge Health Authority, Ex parte B* [1995] 1 W.L.R. 898). Also the courts had consistently protected the autonomy of, for example, the police to decide how best to fight crime by denying a duty of care, ever since *Hill v Chief Constable of West Yorkshire* [1989] A.C. 53). So why did the argument fail?

Moses L.J. held that while justiciability would be relevant if considering a "novel" duty of care (as in *Hill*), it simply did not arise in the case before him when the duty *qua* employer was so well established. But, with respect, this seems a slender ground for distinguishing *Hill*. Earlier cases on the MoD's employer liability may well have been decided without even considering justiciability. The historical accidents of legal development provide no sure reason to ignore the justiciability argument when it *does* arise and *is* clearly relevant, especially given its support in the authorities.

Secondly, however, Moses L.J. relied on quite a different line of authority. He cited *Barrett v Enfield L.B.C.* [2001] 2 A.C. 550 and *Phelps v Hillingdon L.B.C.* [2001] 2 A.C. 616 to show that "the mere fact that questions might arise as to policy, and as to the allocation of scarce resources, did not preclude the existence of a duty to take care" (at [48]). Rather, these matters should be taken into account in tailoring the standard of care to be applied (*cf. Bolam v Friern Hospital Management Trust* [1957] 1 W.L.R. 582).

This is rather surprising. *Barrett* and *Phelps* were both decided in the febrile months following *Osman v UK* (2000) 29 E.H.R.R. 245, when the courts became most reluctant to strike out *any* claim on duty of care grounds lest they be held to have breached Article 6 of the ECHR. But once the *Osman* heresy had been corrected in *Z v UK* (2001) 34 E.H.R.R. 97, the House of Lords reverted to its previous approach, routinely denying duties of care. The non-justiciability argument in *Smith v MoD* (which involved funding national defence procurement) was anyway much stronger than that in *Barrett* or *Phelps* (which involved decisions by social workers and educational psychologists). Moreover, Moses L.J.'s favoured strategy of controlling liability by means of a variable standard of care (*i.e.*,

breach rather than duty) was more recently championed entirely *unsuccessfully* by the late Lord Bingham, dissenting in *JD v East Berkshire Community Health NHS Trust* [2005] UKHL 23, [2005] 2 A.C. 373 and *Smith v Chief Constable of Sussex; Van Colle v Chief Constable of Hertfordshire* [2008] UKHL 50, [2009] 1 A.C. 225. What Lord Bingham tried in vain the Court of Appeal in *Smith v MoD* has now been accomplished, by declining to engage with those authorities at all.

Public authority tort liability is notorious for complexity. For it is a tricky business to weigh up the competing constitutional concerns: the state should not claim sweeping immunities for its (otherwise tortious) actions (*e.g., Entick v Carrington*); but the courts should not second-guess matters of high policy for which politicians should properly be accountable to Parliament. Yet if ministerial responsibility is seen to be "falling short", this should be addressed directly; it would be unwise for the judiciary to fill the "vacuum" (*cf. Regina v Home Secretary, Ex parte Fire Brigades Union* [1995] 2 A.C. 513, 567 *per* Lord Mustill). By contrast with such inherent problems, *needless* complication arises from incompatible lines of case-law. One might have believed that *Barrett* and *Phelps* had joined *Junior Books v Veichi* [1983] 1 A.C. 520 in "the slumber of the uniquely distinguished" (*cf. The Orjula* [1995] 2 Lloyd's Rep. 395 per Mance J.). But *Smith v MoD* has awoken them once more. The Supreme Court may yet restore order (an appeal is to be heard in February 2013).

JONATHAN MORGAN

THE BASIS OF VICARIOUS LIABILITY

VICARIOUS liability is founded on the responsibility of an enterprise for those it uses as helpers to carry out its activities. That is the conclusion to be drawn from *The Catholic Child Welfare Society v Various Claimants and the Institute of the Brothers of Christian Schools* [2012] UKSC 56. In a single judgment of the Supreme Court, Lord Phillips restated some of the basic principles of vicarious liability so as to give more clarity to a branch of law unsettled by a flurry of recent decisions, notably *Lister v Hesley Hall Ltd.* [2002] 1 A.C. 215 and *Dubai Aluminium Co. Ltd. v Salaam* [2003] 2 A.C. 366. This case has made significant progress in achieving what O'Sullivan ([2012] C.L.J. 485, 488) identified as "specifically *tortious* principles and policies" for this branch of law.

The *Various Claimants* case dealt with a preliminary issue whether the Institute of the Brothers of Christian Schools (the "De La Salle