

# ACTS OF TORTURE AS AN INSTRUMENT OF GOVERNMENT POLICY IN THE COLONY OF CYPRUS IN THE 1950S AND CHOICE OF LAW

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**Abstract** This article notes the judgment in *Sophocleous v Secretary of State for the Foreign and Commonwealth Office*, in which the High Court dealt with the law applicable to civil claims arising out of alleged acts of torture committed by British military and security services in the colony of Cyprus in the 1950s. The judgment is important because it sheds light on some underexplored corners of choice of law (law governing the external aspects of vicarious liability and of accessory liability in tort) and reaches the conclusion, which runs against the grain of other recent judgments given in civil claims brought against the Crown for the external exercise of governmental authority, that English law governs.

**Keywords:** private international law, accessory liability, choice of law, conflict of laws, Crown, Cyprus, tort, vicarious liability.

## I. INTRODUCTION

Many civil claims have recently been brought against different government departments, officials and agents for torts allegedly committed by British military and security services in the course of overseas counterterrorism, military and peacekeeping operations. The vast majority of these claims concern operations in Kosovo, Iraq and Afghanistan and the assistance that British security services have provided to their United States counterparts in the context of the ‘war on terror’. There is one set of claims, however, which does not concern these relatively recent external projections of British sovereign power. In January 2018, Mr Justice Kerr handed down a judgment in *Sophocleous v Secretary of State for the Foreign and Commonwealth Office*,<sup>1</sup> which dealt with the choice-of-law aspects of civil claims brought by 34 Greek Cypriots for wrongs allegedly committed by British soldiers and the British and colonial governments during the suppression of the Cypriot independence movement in the mid-to-late 1950s.

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The judgment deals with the law applicable to the issues of limitation and basis of liability in claims founded on 1) vicarious liability 2) accessory liability in tort and 3) the negligence of the defendants, the successors to the Secretaries of State for the Colonial Office and the War Office. The defendants conceded that the claims were justiciable, so the Crown act of State doctrine was not examined. The choice-of-law issues raised by the first two kinds of claim have received little attention in the past, both in case law and academic literature. With respect to all three kinds of claim, the court applied a flexible exception to the relevant choice-of-law rule and decided that English law governed. This outcome is somewhat surprising because it runs against the grain of other recent judgments given in civil claims against the Crown, where the issue of attribution of conduct of British soldiers was routinely subject to the rules of public international law and the issues of limitation and basis of liability were routinely said to be governed by the foreign law of the place of the tort. *Sophocleous* is of importance for shedding light on some underexplored corners of choice of law and for prompting us to question the routine application of the rules of public international law and of the foreign law of the place of the tort in other recent judgments given in civil claims against the Crown.

## II. A GHOST FROM THE PAST: THE FACTS AND LEGAL ISSUES

*Sophocleous* is not the first conflict of laws case concerned with the external exercise of governmental authority in Cyprus. In *A-G v Nissan*,<sup>2</sup> the English courts dealt with a claim for trespass to chattels said to have been committed by British soldiers in this country in the early 1960s. The cause of action in this case arose after Cyprus had obtained independence and British soldiers were present and operating in this country initially at the invitation of the government of Cyprus and later as part of a United Nations (UN) peacekeeping force. *Sophocleous*, in contrast, dealt with the period before independence. Here, some soldiers in the British Army and British police officers and agents seconded to the then Colonial Administration of Cyprus were accused of having tortured 34 Greek Cypriots in the following gruesome ways:

assaults, shooting in the ear, striking with rifles, tying the hands between the legs impairing breathing, wrapping a blanket round the head, whipping with an iron edged whip tearing the skin from the back, rubbing salt into wounds, punching and kicking, placing a tin bucket on the head and striking the bucket with a hammer, deprivation of water, forcing a person to swallow salt, shining bright light into the eyes, sleep deprivation, placing blocks of ice on the body, subjection to electric shocks, threats of death including placing one claimant in a coffin, simulated executions including simulation of hanging by putting the head through a noose, rape of one claimant, a young female student and a virgin at the time, tightening with screws an 'iron wreath' placed around the head causing discharge of blood from the ears and eye sockets, simulation of drowning, a threat to cut off a person's penis and testicles, being left naked in a small dark space alone for days, stubbing out cigarettes on the exposed rectum, slamming the head into a wall and being made to stand for long periods in a stress position.<sup>3</sup>

None of these facts have been proved by the claimants, but were assumed for the purpose of dealing with the choice-of-law aspects of the case.

<sup>2</sup> [1970] AC 179 (HL).

<sup>3</sup> [2018] EWHC 19 (QB) [20].

Since the alleged acts of torture fall outside the temporal scope of the Human Rights Act 1998, claims against the Crown could only be brought under private law. More specifically, three kinds of claim were advanced: 1) on the basis of the defendants' vicarious liability for the torts of battery and assault committed by primary tortfeasors; 2) for the defendants' involvement in the commission of these batteries and assaults by the colonial government, and 3) for the negligence of the defendants by allowing these batteries and assaults to take place or failing to prevent them. Since the alleged acts of torture were committed in Cyprus, the choice-of-law problem arose with respect to each category of claim.

Not only do these acts fall outside the temporal scope of the human rights legislation but also outside the temporal scope of the Private International Law (Miscellaneous Provisions) Act 1995 (1995 Act)<sup>4</sup> and outside both the temporal scope and subject-matter scope of the Rome II Regulation.<sup>5</sup> For the purpose of applying the common law choice-of-law rules for torts, the court had to decide first where in substance the causes of action arose.<sup>6</sup> If in substance the causes of action arose in England, English law would apply.<sup>7</sup> If in substance the causes of action arose in Cyprus, the applicable law would fall to be determined under the double actionability rule.<sup>8</sup> According to this rule, an act done in a foreign country can be sued for as a tort in England only if it would have been a tort if it had been done in England and also if it is actionable according to the law of the foreign country where it was done. There is, however, a flexible exception which allows the court to depart from either limb of the double actionability rule in favour of the sole application of English law<sup>9</sup> or the sole application of the law of the place of the tort.<sup>10</sup>

Although the question where in substance the causes of action arose was asked for the purpose of applying the common law choice-of-law rules for torts, now applicable only in cases falling outside the temporal scope of the 1995 Act and the Rome II Regulation and to defamation claims,<sup>11</sup> the discussion of this issue in *Sophocleous* is of wider importance. This is because the courts ask the same question to decide whether a claim falls within the jurisdictional gateway for torts in Civil Procedure Rules Practice Direction 6B by reason of damage which has been or will be sustained resulting from an act committed, or likely to be committed, within the jurisdiction<sup>12</sup> and to apply the rule that the place where in substance a tort arises is a weighty factor pointing to that jurisdiction being the appropriate one.<sup>13</sup> The common law authorities are admittedly of very limited use for identifying, for the purpose of the 1995 Act, where the most

<sup>4</sup> 1995 Act, section 14(1).

<sup>5</sup> Reg (EC) No 864/2007 of the European Parliament and of the Council of 11 July 2007 on the law applicable to non-contractual obligations (Rome II) [2007] OJ L 199/40, arts 1(1), 31, 32 and Recital 9; Case C-292/05 *Lechouritou v Germany* [2007] ECR I-1519 (claims arising out of *acta iure imperii* involve matters that are excluded from the subject-matter scope of the Regulation).

<sup>6</sup> *Metall und Rohstoff AG v Donaldson Lufkin & Jenrette Inc* [1990] 1 QB 391 (CA) 443. See also *Distillers Co (Biochemicals) Ltd v Thompson* [1971] AC 458 (PC) 468.

<sup>7</sup> *Szalatnay-Stacho v Fink* [1947] KB 1 (CA).

<sup>8</sup> *Phillips v Eyre* (1870) LR 6 QB 1; *Boys v Chaplin* [1971] AC 356 (HL).

<sup>9</sup> *Boys v Chaplin* [1971] AC 356 (HL).

<sup>10</sup> *Red Sea Insurance Co Ltd v Bouygues SA* [1995] 1 AC 190 (PC).

<sup>11</sup> 1995 Act, section 13; Rome II, art 1(2)(g).

<sup>12</sup> CPR Practice Direction 6B, rule 3.1(9)(b); *Four Seasons Holdings Inc v Brownlie* [2017] UKSC 80, [2018] 1 WLR 192 [30], [40].

<sup>13</sup> *Berezovsky v Forbes Inc (No 1)* [2000] 1 WLR 1004 (HL) 1014.

significant element or elements of the events constituting the tort in question occurred.<sup>14</sup> Nevertheless, *Sophocleous* is of some relevance in this context because it addresses the nature of vicarious liability and accessory liability in tort and can thus facilitate the location of the elements of the cause of action in a claim based on vicarious liability or accessory liability. This aspect of *Sophocleous* is also of some relevance in the context of the Rome II Regulation. Additionally, the value of *Sophocleous* lies in the fact that it provides a useful contrast to other recent judgments given in civil claims against the Crown which dealt with choice of law.

### III. VICARIOUS LIABILITY IN CHOICE OF LAW

The claimants' first claim was that the defendants were vicariously liable for the torts committed by British soldiers, the torts committed by British police officers and agents seconded to the Colonial Administration of Cyprus and the torts of the colonial government itself.<sup>15</sup>

The argument that the Crown is vicariously liable for the torts committed by the British soldiers in question seems strong. According to the assumed facts, the soldiers were deployed by the British government from the United Kingdom.<sup>16</sup> They answered to their military commander in the British Army.<sup>17</sup> The British Army had the power to discipline and dismiss the soldiers through the court-martial system.<sup>18</sup>

The vicarious liability of the Crown for the torts committed by British police officers and agents seconded to the Colonial Administration and the torts committed by the Colonial Administration itself raises more complicated issues. Since the police officers and agents in question were seconded to the colonial government, a sufficiently close connection between the Crown and the police officers and agents and their acts has to be established. Similarly, the Crown can be vicariously liable for the torts of the Colonial Administration only if there is a sufficiently close connection between the Crown and the colonial government and its acts. In order to establish the existence of a sufficiently close connection, some legal tests will have to be applied and these tests are to be found in the system of law which governs the issue of vicarious liability. The claimants' argument was that this issue was governed by English law and that vicarious liability should be imposed on the Crown because the British government 'exercised *de iure* and/or *de facto* control over the Security Forces operating in Cyprus'.<sup>19</sup>

Two points emerge from the court's discussion. One concerns the nature of vicarious liability and the relevance thereof for deciding where in substance the causes of action arose. It should be mentioned in this respect that vicarious liability involves at least three parties and three kinds of relationship. The three parties are the primary tortfeasor, the vicariously liable person and the victim. The three kinds of relationship are the internal

<sup>14</sup> 1995 Act, section 11(2).

<sup>15</sup> It should be mentioned here that section 2(1) of the Crown Proceedings Act 1947 ('Liability of the Crown in tort') provides that 'Subject to the provisions of this Act, the Crown shall be subject to all those liabilities in tort to which, if it were a private person of full age and capacity, it would be subject:— (a) in respect of torts committed by its servants or agents.'

<sup>16</sup> [2018] EWHC 19 (QB) [13].

<sup>17</sup> *ibid.*

<sup>18</sup> *ibid* [14].

<sup>19</sup> *ibid* [55]. A number of facts were pleaded to support this argument: *ibid* [13]–[17] and [56]–[57].

relationship between the primary tortfeasor and the vicariously liable person and the external relationships between the victim and the primary tortfeasor and the victim and the vicariously liable person. The court in *Sophocleous* was only concerned with the external relationship between the victim and the vicariously liable person. Is vicarious liability a tort in its own right or, as the defendants argued, a mechanism for the attribution of liability to a person for a tort committed by someone else? The liability of the vicariously liable person is derivative in the sense that there can be no liability before the primary tortfeasor has committed a tort. But is the liability of the vicariously liable person also autonomous in the sense that this person is not held liable for the tort of the primary tortfeasor but for his or her own fault which consists in somehow enabling or facilitating the primary tort? If the liability of the vicariously liable person is autonomous, then it could be argued that the crucial factor for locating the causes of action is the exercise of control by the Crown over the operations in Cyprus and the making of policy decisions, which occurred in England.<sup>20</sup> If the vicarious liability of the Crown is considered to be dependent on the primary torts, then the crucial factor for locating the causes of action is the place where these torts were committed.<sup>21</sup>

The court dealt briefly with this point. It accepted that in English law<sup>22</sup> vicarious liability is not, conceptually, a tort. 'It is the description of a legal rule which imposes liability for someone else's tort.'<sup>23</sup> This is clearly correct.<sup>24</sup> Vicarious liability is based on the relationship between the primary tortfeasor and the vicariously liable person and on the fact that the primary tort occurred in the course of a specific task or in the course of employment. It is not based on the fact that the vicariously liable person somehow enabled, facilitated or participated in the primary tort. Vicarious liability is not personal. It is imposed despite the (usual) innocence of the vicariously liable person. The vicariously liable person can therefore be said to incur liability in the place where the primary tort is committed. In the present case, the causes of action based on vicarious liability arose in Cyprus, which meant that the double actionability rule applied.

This insight concerning the nature of vicarious liability is of some relevance for claims to which the Private International Law (Miscellaneous Provisions) Act 1995 and the Rome II Regulation apply. Under the 1995 Act, the applicable law is, subject to the operation of a displacement rule, the law of the country in which the events constituting the tort in question occur.<sup>25</sup> In its 1990 report preceding the adoption of the 1995 Act,<sup>26</sup> the Law Commission wrote that there was little support among consultants for the proposition that the law applicable in an action by the claimant against a vicariously liable defendant should always be the same as that which would have applied in an action by the claimant against the actual wrongdoer on the ground that an action against the wrongdoer is a logically separate issue from that against a potentially vicariously liable defendant.<sup>27</sup> The recommendation was that no mention

<sup>20</sup> See the arguments of the claimants: *ibid* [61].

<sup>21</sup> See the arguments of the defendants: *ibid* [58].

<sup>22</sup> *Cox v Ministry of Justice* [2016] UKSC 10, [2016] AC 600; *Mohamud v Wm Morrison Supermarkets plc* [2016] UKSC 11, [2016] AC 677. <sup>23</sup> [2018] EWHC 19 (QB) [66].

<sup>24</sup> PS Atiyah, *Vicarious Liability in the Law of Torts* (Butterworths 1967); P Giliker, *Vicarious Liability in Torts: A Comparative Perspective* (Cambridge University Press 2010).

<sup>25</sup> 1995 Act, section 11. The displacement rule is set out in section 12.

<sup>26</sup> Law Commission, *Private International Law: Choice of Law in Tort and Delict* (Law Com No 193, 1990). <sup>27</sup> *ibid* para 3.36.

be made of this in implementing legislation.<sup>28</sup> It can be said, following the reasoning in *Sophocleous* that, in a case of vicarious liability, the events constituting the tort in question occur in the place where the primary tort is committed.<sup>29</sup> This conclusion is supported by the wording of the 1995 Act. The general choice-of-law rule of the Act speaks of the events constituting 'the tort in question'. *Sophocleous* confirms that, in a case of vicarious liability, there is only one tort, namely that committed by the primary tortfeasor, which therefore has to be 'the tort in question' for the purposes of the general rule. Under Rome II, the general choice-of-law rule for torts is that the law applicable to a tort, subject to the common habitual residence rule and the operation of an escape clause, is the law of the country in which the damage occurs irrespective of the country in which the event giving rise to the damage occurred and irrespective of the country or countries in which the indirect consequences of that event occur.<sup>30</sup> The reasoning in *Sophocleous* suggests that, in a case of vicarious liability,<sup>31</sup> the focus should be on the primary tort when determining the applicable law under the general rule. The law of the country to which the general rules of the 1995 Act and Rome II point can, however, be displaced by the operation of the displacement rule in section 12 of the 1995 Act and the exceptions in Article 4(2) and (3) of Rome II.

The second point that emerges from the court's discussion of vicarious liability and choice of law in *Sophocleous* is that the doctrine of vicarious liability, as developed in English law, is perfectly capable of dealing with the question whether the Crown should be liable for the acts and omissions of British military and security services placed at the disposal of another body, in this case the Colonial Administration in Cyprus. This insight is important because it allows us to question some of the other recent judgments given in civil claims against the Crown. In *R (Al-Jedda) v Secretary of State for Defence*,<sup>32</sup> *Mohammed v Ministry of Defence*<sup>33</sup> and *Kontić v Ministry of Defence*,<sup>34</sup> the English courts were faced with the question whether the acts and omissions of British soldiers present and operating in, respectively, Iraq, Afghanistan and Kosovo should be attributed to the Crown, the UN, International Security Assistance Force (ISAF), Kosovo Force (KFOR) or the North Atlantic Treaty Organisation (NATO). In these three cases, the English courts applied directly the rules of public international law on attribution of conduct, now contained primarily in the International Law Commission's Draft Articles on the Responsibility of States for Internationally Wrongful Acts<sup>35</sup> and Draft Articles on the Responsibility of International Organizations<sup>36</sup> and in the judgments of the European Court of Human Rights in *Behrami v France*<sup>37</sup> and *Al-Jedda v United Kingdom*.<sup>38</sup> In none of these three cases

<sup>28</sup> *ibid.*

<sup>29</sup> See *Smith v Skanska Construction Services Ltd* [2008] EWHC 1776 (QB) [148].

<sup>30</sup> Rome II, art 4(1). The escape clause is set out in art 4(3).

<sup>31</sup> The term 'vicarious liability' derives from the common law; civilian systems generally refer to 'liability for the acts of others': Giliker (n 24) 5. The Rome II Regulation adopts the terminology of civilian systems. Art 15(a) of Rome II states that the applicable law governs, among other things, 'the determination of persons who may be held liable for acts performed by them'.

<sup>32</sup> [2007] UKHL 58, [2008] 1 AC 332.

<sup>33</sup> [2015] EWCA Civ 843, [2016] 2 WLR 247, reversing in part [2014] EWHC 1369 (QB).

<sup>34</sup> [2016] EWHC 2034 (QB).

<sup>35</sup> International Law Commission, Draft Articles on the Responsibility of States for Internationally Wrongful Acts, with Commentaries Yearbook of the ILC (2001) vol 2, Pt 2, 26.

<sup>36</sup> International Law Commission, Draft Articles on the Responsibility of International Organizations, Yearbook of the ILC (2011) vol 2, Pt 2, 37.

<sup>37</sup> (2007) 45 EHRR SE10.

<sup>38</sup> (2011) 53 EHRR 23.

did the English courts explain why, and on what basis, the rules of public international law were being directly applied and municipal laws were being disregarded.

*Sophocleous*, as a case that concerned the relationship between the Crown and the then Colonial Administration of Cyprus, is outside the purview of public international law.<sup>39</sup> But the way in which the case was argued and approached by the court shows that the English law of vicarious liability is capable of taking into account the nature and extent of authority and control exercised by the Crown over its soldiers, officers and agents present and operating abroad and placed at the disposal of another body, and of deriving from this the relevant legal consequences. The facts that were advanced by the claimants in *Sophocleous*<sup>40</sup> are of the same kind as the facts that the courts considered in *Al-Jedda, Mohammed* and *Kontić* to determine the nature and extent of authority and control exercised by the Crown over its soldiers, officers and agents present and operating in Iraq, Afghanistan and Kosovo for the purpose of applying the rules of public international law. *Sophocleous* thus indicates that the reasoning in *Al-Jedda, Mohammed* and *Kontić* was far from satisfactory. Faced with a situation where the issue of attribution of conduct could have been resolved by the application of either the rules of public international law on attribution or the rules of municipal law on vicarious liability and agency, the English courts should have offered some explanation for their decisions directly to apply the rules of public international law and disregard municipal laws. This leaves the impression that the choice of law in this area is being developed in a haphazard and unprincipled way.

#### IV. ACCESSORY LIABILITY IN TORT IN CHOICE OF LAW

Vicarious liability gives rise to joint liability on the part of the primary tortfeasor and his or her employer or principal. Joint liability in tort may arise in a number of other ways. In *Sophocleous*, the liability of the Crown was alleged to have arisen out of a common design between the British government and the Colonial Administration to restore law and order in Cyprus and to obtain intelligence, using torture if necessary, and out of the assistance, encouragement and advice that the British government provided to the colonial government in furtherance of the common design.<sup>41</sup> In the English law of torts, liability for participation in a common design is a species of what is known as accessory or accessorial liability.<sup>42</sup> Accessory liability also exists where a party authorizes or induces another to commit a tort.<sup>43</sup>

<sup>39</sup> See JA Kämmerer, 'Colonialism' in R Wolfrum (gen ed), *Max Planck Encyclopedia of Public International Law* (Oxford University Press 2008) para 9 ('Colonialism is a matter of concern to public international law, since the latter not only served as an instrument for establishing colonial regimes but also for justifying the mode of their acquisition and colonial policy. '); para 15 ('Each "conqueror" elaborated its specific colonial law. '); para 23 ('historical incidents must not be judged on the basis of currently applicable rules of public international law, but only on the law in force at the respective time '); and para 24 ('In sum, present public international law has not been able to remedy the shortcomings of the rules that, more than a century ago, applied to colonies and colonial peoples. ').<sup>40</sup> See (n 19).

<sup>41</sup> A number of facts were pleaded to support these claims: [2018] EWHC 19 (QB) [71]–[72], [74]–[75].

<sup>42</sup> J Dietrich, 'Accessorial Liability in the Law of Torts' (2011) 31 LS 231; PS Davies, *Accessory Liability* (Hart 2015); J Dietrich and P Ridge, *Accessories in Private Law* (Cambridge University Press 2015); PS Davies, 'Accessory Liability in Tort' (2016) 132 LQR 15; G McMeel, 'Joint and Accessory Liability for Wrongs in Private Law' [2016] LMCLQ 29.

<sup>43</sup> Dietrich (n 42) 232 and 239; Dietrich and Ridge (n 42) 94–5.

Issues raised by accessory liability in tort, as well as by joint liability more generally, may be divided into two categories.<sup>44</sup> One set of issues, which includes the existence and division of liability among tortfeasors, concerns the external relationship of a group of tortfeasors in relation to their victim(s). The other set of issues, which includes subrogation, contribution and indemnification,<sup>45</sup> concerns the internal relationship among tortfeasors. Different laws have different rules on issues concerning both kinds of relationship in accessory liability cases. In the English law of torts, for example, accessory liability has been recently addressed in a high-profile judgment of the Supreme Court in *Fish & Fish Ltd v Sea Shepherd UK*.<sup>46</sup> The judgment confirms that accessory liability will come about if the claimant proves two elements: ‘D [the defendant] must have acted in a way which furthered the commission of the tort by P [the primary tortfeasor]; and D must have done so in pursuance of a common design to do or secure the doing of the acts which constituted the tort.’<sup>47</sup> Other laws may require proof of different elements. The requirement of common design in the English law of torts is relatively strict. In some other laws knowing assistance may be sufficient in and of itself to give rise to joint liability on the part of the accessory.<sup>48</sup> That is one of the reasons why choice of law is of considerable importance for claims based on accessory liability in tort.<sup>49</sup>

Locating a cause of action based on accessory liability in tort is no mean feat. There may be a number of alleged tortfeasors and victims who may be located in a number of countries. The formation of a common design and acts done in furtherance of it, as well as any acts of inducement and assistance, may occur in different places. As may acts which constitute the primary tort. A claim for accessory liability may give rise to a number of issues, which may be connected to different countries in different ways. It is beyond the scope of this paper to deal with all the possible scenarios. It suffices to note for present purposes that the claims in *Sophocleous* were relatively straightforward. Here, the Crown, located in England, was said to have combined with the Colonial Administration in Cyprus to do or secure the doing of torts in Cyprus against Cypriot residents. The issues raised by the claims were limitation and the existence of accessory liability.

To answer the question concerning where in substance the causes of action arose, the court had to address the nature of accessory liability in tort. Is it similar to vicarious liability in the sense of being derivative and dependent, which would undoubtedly point to the (law of the) place of the primary tort? In *Fish & Fish*, Lord Sumption said the following about the nature of accessory liability in the English law of torts: ‘the accessory’s liability is not for the assistance. He is liable for the tortious act of the

<sup>44</sup> C Heinze, ‘Multiple Defendants and Joint Liability’ in J Basedow (gen ed), *Encyclopedia of Private International Law* (Edward Elgar 2017) vol II, 1277.

<sup>45</sup> See TW Dornis, ‘Contribution and Indemnification among Joint Tortfeasors in Multi-State Conflict Cases: A Study of Doctrine and the Current Law in the US and Under the Rome II Regulation’ (2008) JPIL 237; K Takahashi, *Claims for Contribution and Reimbursement in an International Context* (Oxford University Press 2000).

<sup>46</sup> [2015] UKSC 10, [2015] AC 1229.

<sup>47</sup> *ibid* [21] (per Lord Toulson). Similarly, *ibid* [37] (per Lord Sumption).

<sup>48</sup> That this should be the law in Scotland, see obiter dicta in *Frank Houlgate Investment Co Ltd v Biggart Baillie* [2014] CSIH 79, 2015 SC 187 [44] (per Lord Malcolm), [89] (per Lord McEwan). This is the law in the United States: *Restatement (Second) of the Law of Torts*, para 876; *Halberstam v Welch* 705 F 2d 472, 478 (1983, Col). This approach has been advocated in England by the leading commentators: see the works cited in (n 42) above.

<sup>49</sup> See JW Wade, ‘Joint Tortfeasors and the Conflict of Laws’ (1953) 6 VandLRev 464.



primary actor, because by reason of the assistance the law treats him as a party to it.<sup>50</sup> This led the judge in *Sophocleous* to conclude that accessory liability was different from vicarious liability and that no analogy was possible. In a vicarious liability case, the person vicariously liable is usually not personally a wrongdoer<sup>51</sup> and liability is based on the relationship between the person vicariously liable and the individual perpetrator of the tort.<sup>52</sup> In an accessory liability case, in contrast, the accessory and the primary tortfeasor are both wrongdoers and liability is not derived from the relationship between the accessory and the primary tortfeasor, but from the accessory's participation in the primary tort.<sup>53</sup> That much is uncontroversial.<sup>54</sup>

The judge also made some further comments about the nature of accessory liability in tort. The judge said that:

the accessory and the principal are joint tortfeasors and no less so than in a case of direct joint participation in the tort.

This is because, as Lord Sumption explained, the law treats the accessory as a party to the primary tortfeasor's act. The accessory is liable not for the assistance given but as a party to the primary tortious act. That is as much the case in an accessory liability case ... as where an assault is committed by two persons each wielding a hammer and attacking the victim together.<sup>55</sup>

According to the judge, in a claim based on accessory liability 'the allegation is one of joint liability for the same tort',<sup>56</sup> where 'the essence of the tort is the common design or combination, such that the law makes the accessory a party to the primary tortious act'.<sup>57</sup> Elsewhere, the judge described the liability of the accessory as 'secondary'.<sup>58</sup>

These comments disclose a degree of confusion about the nature of accessory liability in tort. On one hand, the judge considered that the accessory and the primary tortfeasor commit only one tort either because they are joint principals or because accessory liability is a doctrine which attributes the liability of the primary tortfeasor to the accessory. On the other hand, describing the liability of the accessory as 'secondary' could be read as implying that accessory liability is a doctrine which makes the accessory liable for an independent wrong which is parasitic upon the primary tort. In other words, if P commits a tort against V with A's assistance, the judge's comments seem to support two different ways of conceptualizing A's wrong. One way (alternative (1)) is to say that P and A have committed one tort<sup>59</sup> for which they are both jointly liable. Another way (alternative (2)) is to say that P committed the primary tort and that A committed an independent wrong, which is parasitic upon the primary tort.

This part of the judgment can be criticized on the basis that a clear determination of the nature of accessory liability in tort is crucial for the purpose of choice of law for at least two reasons. Firstly, the location of a cause of action based on accessory liability may depend on this. If the accessory and the primary tortfeasor are treated as having committed only one tort (alternative (1)), then a cause of action based on accessory

<sup>50</sup> [2015] UKSC 10, [2015] AC 1229 [38].

<sup>52</sup> *ibid* [94].

<sup>54</sup> Davies, *Accessory Liability* (n 42) 58–60 and 180–1; Dietrich and Ridge (n 42) 27 and 105–6.

<sup>55</sup> [2018] EWHC 19 (QB) [91]–[92]. See also *ibid* [105].

<sup>58</sup> *ibid* [93].

<sup>59</sup> The judge referred to this 'tort' as 'the common design tort' and 'common design joint liability tort' at *ibid* [94] and [119] respectively.

<sup>51</sup> [2018] EWHC 19 (QB) [93].

<sup>53</sup> *ibid* [91].

<sup>56</sup> *ibid* [103].

<sup>57</sup> *ibid* [104].

liability can only arise where that tort took place. If accessory liability is regarded as a doctrine which makes the accessory liable for an independent wrong, which is parasitic upon the primary tort (alternative (2)), it becomes possible for a cause of action based on accessory liability to arise outside the place of the primary tort. Secondly, the outcome of the choice-of-law process may depend on the view taken with respect to the nature of accessory liability. Under alternative (1), one law inevitably governs the liability of the accessory and the primary tortfeasor. But under alternative (2), the liability of the accessory and that of the primary tortfeasor may be subject to separate laws because their liabilities arise out of separate wrongs.

Having commented on the nature of accessory liability in tort, the judge in *Sophocleous* proceeded to consider the location of the causes of action in question. This was a difficult task. The decision of the court seems to have been based on the view that the accessory and the primary tortfeasor commit only one tort (alternative (1) above),<sup>60</sup> with the consequence that ‘the substance of the joint tort must be committed in one country, not two or more’.<sup>61</sup> On one hand, it could be said that ‘the “engine” of the wrong was in England; that the formation of the common design proceeded from there’.<sup>62</sup> On the other hand, the entire purpose of the alleged common design was to do or secure the doing of torts in Cyprus. On balance, the judge concluded that in substance the causes of action arose in Cyprus:

the location of the common design liability should be the same as the location of the ultimate individual perpetrator’s liability, which is also that of the other partner in the common design. I think it is artificial to treat the common design liability of the defendants, jointly with the then Colonial Administration, as located in a different country from that in which the ultimate perpetrators of the assaults, who executed the design, are located.<sup>63</sup>

As a result, the double actionability rule applied.

It is well documented how the use of the concept of ‘joint tortfeasance’ has obscured the nature and elements of accessory liability in the substantive law of torts.<sup>64</sup> *Sophocleous* is an example of this phenomenon in the area of choice of law. The judge’s discussion of the location of the causes of action based on accessory liability in tort was founded on the following assumption: ‘I do not think that [the application of different laws] is likely or even possible where the allegation is one of joint liability for the same tort’.<sup>65</sup> But while it may be true that it is unlikely for a cause of action based on accessory liability to arise outside the place of the primary tort, it is not impossible that this may occur and that the liability of the accessory may be governed by a law different from that governing the liability of the primary tortfeasor. Indeed, *Sophocleous* itself is an example of this. Here, the court eventually applied the flexible exception to the double actionability rule and held English law to be applicable to the alleged accessory liability of the defendant, although the primary torts remained subject to Cypriot law. The wrong of the accessory is therefore best regarded as independent from, although deriving from and parasitic upon, the primary tort (alternative (2) above).

The insights concerning the nature of accessory liability in tort are of some relevance for determining the law governing the external relationship in accessory liability cases to which the Private International Law (Miscellaneous Provisions) Act 1995 and the Rome

<sup>60</sup> *ibid* [103]–[107].      <sup>61</sup> *ibid* [104]. Also [105].      <sup>62</sup> *ibid* [108].      <sup>63</sup> *ibid* [109].

<sup>64</sup> Davies, *Accessory Liability* (n 42) 7–8, 54–5, 59–60 and 178–82; Dietrich and Ridge (n 42) 11, 96–8.      <sup>65</sup> [2018] EWHC 19 (QB) [103].

II Regulation apply. While Rome II expressly deals with subrogation<sup>66</sup> and contribution and indemnification among several debtors who are liable for the same claim,<sup>67</sup> there are no express provisions or any case law dealing with the external relationship in accessory liability cases under either the 1995 Act or Rome II.<sup>68</sup> The reports and memoranda preceding the adoption of the 1995 Act and Rome II are silent on this issue, as are case law and academic commentaries. If accessory liability is understood as independent, but derivative from and parasitic to, the primary tort, it follows that, in a claim based on accessory liability, the country in which the events constituting the tort or delict in question occur (for the purpose of the general choice-of-law rule in section 11 of the 1995 Act) and the country in which the damage occurs (for the purpose of the general choice of law rule in Article 4(1) of Rome II) will usually be the country of the primary tort. The law of this country can, however, be displaced by the operation of the displacement rule in section 12 of the 1995 Act and the exceptions in Article 4 (2) and (3) of Rome II. Another consequence of this understanding of the nature of accessory liability in tort is that this kind of liability is better analysed by comparing and contrasting it with the instances of accessory liability in other areas of the conflict of laws<sup>69</sup> than by using the concept of joint tortfeasance.

V. FLEXIBLE EXCEPTIONS AND POLITICAL AND MILITARY CONTEXTS

Having decided that in substance all the causes of action arose in Cyprus,<sup>70</sup> the court turned to the question whether to assess the actionability of the Crown's acts under both English and Cypriot laws or to apply the flexible exception to the double actionability rule.

The court found itself in uncharted territory here. Notwithstanding the existence of cases applying the flexible exception to the double actionability rule,<sup>71</sup> the court thought that it was faced with a novel situation. *Sophocleous* was said to be a case 'like no other in the lexicon of reported cases'.<sup>72</sup> This is because it concerned 'the political element ..., namely the deliberate use of force as an instrument of government policy in the exercise of state power'.<sup>73</sup> The factors that the court took into account in order to decide whether to apply the flexible exception were inevitably shaped by this 'political and military context'.<sup>74</sup>

One factor was the colonial background of the case, in particular the fact that the law of the colony of Cyprus before independence was made by the United Kingdom. In other words, the defendants represented the State that had made the very law under which it

<sup>66</sup> Rome II, art 19.

<sup>67</sup> *ibid* art 20.

<sup>68</sup> Art 15 of Rome II only states that the law applicable to non-contractual obligations under this Regulation governs, among other things, the basis and extent of liability and division of liability.

<sup>69</sup> For cases which show that different laws may govern the liability of the accessory and the liability of the primary wrongdoer, see *Fiona Trust & Holding Corp v Privalov* [2010] EWHC 3199 (Comm) [153] (breach of fiduciary duty); *Protea Leasing Ltd v Royal Air Cambodge Co Ltd* [2002] EWHC 2731 (Comm) [75]–[80] (inducing breach of contract); *Metall und Rohstoff AG v Donaldson Lufkin & Jenrette Inc* [1990] 1 QB 391 (CA) (conspiracy; inducing breach of contract; procuring a breach of trust).

<sup>70</sup> For the causes of action in negligence, see [2018] EWHC 19 (QB) [111]–[120].

<sup>71</sup> *Boys v Chaplin* [1971] AC 356 (HL); *Church of Scientology of California v Commissioner of Metropolitan Police* (1976) 120 Sol J 690; *Johnson v Coventry Churchill International Ltd* [1992] 3 All ER 14; *Red Sea Insurance Co Ltd v Bouygues SA* [1995] 1 AC 190 (PC); *Kuwait Airways Corp v Iraqi Airways Co (Nos 4 and 5)* [2002] 2 AC 883 (HL).

<sup>73</sup> *ibid* [97]. See also [165], [185] and [196].

<sup>72</sup> [2018] EWHC 19 (QB) [96].  
<sup>74</sup> *ibid* [98].

might have immunized or protected itself against suit.<sup>75</sup> Another factor was the strength of the connection with the United Kingdom: 'it was [the Crown] which bore responsibility for justice in Cyprus; and many of the key decisions and instructions emanated from London'.<sup>76</sup> A third factor was the constitutional context of the case: 'all three pleaded torts engage the special responsibility of the State where violence is deliberately inflicted on its citizens. In ... the vicarious liability and joint liability claims, the claimants seek to hold the defendants directly responsible for the injuries.'<sup>77</sup> This factor was held to be particularly relevant in light of the seriousness of the alleged acts of violence in Cyprus.<sup>78</sup> A fourth factor was said to be the disinterestedness of the independent State of Cyprus in the application of its law, which meant that there was no reason of comity to apply the contemporary Cypriot law of torts.<sup>79</sup> Finally, a relevant factor was also the fact that the English law of torts is well equipped to deal with claims advanced against the Crown.<sup>80</sup> The outcome was that the flexible exception to the double actionability rule was applied and English law was held to be solely applicable. Consequently, the issues of limitation and basis of liability were subject to English law.

It is striking that the judgment in *Sophocleous* does not mention any of the many recent judgments handed down in civil claims against the Crown which concerned the external projection of British sovereign power in Kosovo, Iraq and Afghanistan and in the course of rendering assistance to the American security services in the context of the 'war on terror'. These claims fell within the temporal scope of the Private International Law (Miscellaneous Provisions) Act 1995, but outside the temporal and subject-matter scope of the Rome II Regulation.<sup>81</sup> The courts hearing these claims were therefore confronted with the question whether English law should be applied on the basis that its application was 'substantially more appropriate' than the application of the foreign law of the place of the tort.<sup>82</sup> The courts in all of these cases were unanimous that, despite their political and military context, it was the law of the foreign place of the tort that applied.<sup>83</sup> Admittedly, the flexible exception to the double actionability rule and the displacement rule in section 12 of the 1995 Act are not the same. Nevertheless, if some of the factors taken into account in *Sophocleous* are also relevant for cases falling within the scope of the 1995 Act, that would provide the basis for questioning either the outcome of *Sophocleous* or the choice-of-law decisions in the other recent judgments handed down in civil claims against the Crown.

*Sophocleous* arose out of a colonial context. The other recent judgments given in civil claims against the Crown dealt with the presence and operations of British military and security services in independent States. This appears to be a crucial distinction, but only at first sight. Cases like *Al-Jedda*,<sup>84</sup> *Rahmatullah*, *Mohammed*<sup>85</sup> and *Kontić*<sup>86</sup>

<sup>75</sup> *ibid* [187]–[188] and [197].      <sup>76</sup> *ibid* [189].      <sup>77</sup> *ibid* [190].      <sup>78</sup> *ibid* [191]–[192].

<sup>79</sup> *ibid* [193]–[194].      <sup>80</sup> *ibid* [195].      <sup>81</sup> See nn 4 and 5 above.

<sup>82</sup> 1995 Act, section 12(1).

<sup>83</sup> *R (Al-Jedda) v Secretary of State for Defence (No 1)* [2006] EWCA Civ 327, [2007] QB 621 [100]–[107]; *affd* [2007] UKHL 58, [2008] 1 AC 332 [40]–[43] and [153]–[154]; *Belhaj v Straw* [2013] EWHC 4111 (QB) [119]–[144]; *affd* [2014] EWCA Civ 1394, [2015] 2 WLR 1105 [134]–[160].

<sup>84</sup> *R (Al-Jedda) v Secretary of State for Defence (No 1)* [2007] UKHL 58, [2008] 1 AC 332; *R (Al-Jedda) v Secretary of State for Defence (No 2)* [2010] EWCA Civ 758, [2011] QB 773.

<sup>85</sup> *Rahmatullah (No 2) v Ministry of Defence* [2017] UKSC 1, sub nom *Mohammed v Ministry of Defence* [2017] 2 WLR 287; see also [2017] UKSC 1, [2017] AC 964.

<sup>86</sup> [2016] EWHC 2034 (QB).

demonstrate that the presence and operations of British forces overseas may be a consequence of a military intervention, such as an invasion and subsequent occupation, to which the country in which the intervention has taken place has not consented and whose legality under public international law may be controversial. The presence and operations of British forces overseas may be based on treaties and United Nations Security Council (UNSC) resolutions which are adopted *post hoc* and reflect the facts on the ground and give extensive privileges and immunities to British troops. Such treaties and UNSC resolutions create regimes which are not dissimilar to those created by capitulations through which Western powers were granted the privilege of extraterritoriality in oriental countries, dubbed ‘colonialism without colonies’.<sup>87</sup>

In any event, it was not the fact that Cyprus was a British colony that in and of itself justified the application of English law in *Sophocleous*. It was rather the fact that the law of the colony of Cyprus was made by the United Kingdom under which it might have immunized or protected itself against suit. But this is similar to what happened in the *Kontić* case.<sup>88</sup> This case concerned the presence and operations of British forces in Kosovo in 1999. An issue raised by this case was whether the immunity granted to KFOR barred the commencement of proceedings in the English courts for the alleged wrongful acts and omissions of British soldiers in Kosovo forming part of KFOR. The immunity of KFOR was based on two legal instruments: the Joint Declaration of the Special Representative of the UN Secretary General and the Commander of KFOR adopted on 17 August 2000 and Regulation 2000/47 on the status, privileges and immunities of KFOR and UNMIK (the UN Mission in Kosovo) and their personnel in Kosovo adopted on 18 August 2000 by the Special Representative of the UN Secretary General to implement the Joint Declaration. The Joint Declaration provided that ‘UNMIK and KFOR ... are immune from any form of legal process’.<sup>89</sup> The court held that, pursuant to UNSC Resolution 1244, UNMIK, through the Special Representative, was empowered to change, repeal or suspend existing laws in Kosovo to the extent necessary for the carrying out of his functions, or where existing laws were incompatible with the mandate, aims and purposes of the interim civil administration.<sup>90</sup> The court then stated obiter that, ‘It follows that the immunity conferred under UNMIK Regulation 2000/47 became part of the *substantive law* of Kosovo.’<sup>91</sup> The consequence of this *non sequitur* was that the immunity of KFOR in Kosovo had the effect of barring any civil claim brought against the defendant in both Kosovo and the UK.<sup>92</sup> If the fact that the foreign law of the place of the tort should

<sup>87</sup> See T Ruskola, ‘Colonialism without Colonies: On the Extraterritorial Jurisprudence of the US Court for China’ (2008) 71 LCP 237: ‘China as a whole was never colonized by the United States or any other western power, and the West’s extraterritorial legal presence in China was ultimately authorized in a series of bilateral “Treaties of Trade, Peace and Amity” to which China had given its formal consent – even if only at gunpoint.’ See also *ibid* 236 (‘In the West’s legal encounter with the states of Asia, for example, the practice of extraterritorial jurisdiction emerged as a key technology of a kind of nonterritorial imperialism – in effect, a colonialism without colonies as such.’); and *ibid* 238–9 (‘given its similarities to and differences from classic territorial imperialism, Western extraterritoriality in China constituted a kind of colonialism without colonies that was in some ways remarkably modern – more akin to neocolonialism than to traditional colonialism’).<sup>88</sup> [2016] EWHC 2034 (QB).

<sup>89</sup> Joint Declaration, art 1. Art 2.1 of Reg 2000/47 is essentially identical.

<sup>90</sup> [2016] EWHC 2034 (QB) [229].

<sup>91</sup> *ibid* [230] (emphasis added).

<sup>92</sup> *ibid* [257].

not be applied to determine the liability of the Crown because the United Kingdom made that law and could have immunized or protected itself against suit is a factor that points away from the application of that law, then the fact that the commanders of a military force of which British troops formed part could participate in the making of, or even independently make,<sup>93</sup> laws which grant extensive privileges and immunities to British forces ought similarly to point away from the application of the foreign place of the tort.

Another important factor in *Sophocleous* was its constitutional context. Similarly, all the other recent judgments handed down in civil claims against the Crown involved the responsibility and accountability of the Crown and the rule of law, which are matters of great constitutional concern. It is true that the court in *Sophocleous* attached particular weight to the fact that this case concerned the special responsibility of the State where violence was deliberately inflicted on its own citizens. But the *Al-Jedda* case also concerned a claim brought by a British citizen against the Crown. One could point out that in *Al-Jedda* the claimant also held the nationality of Iraq, the country in which the alleged torts were committed. But in *Sophocleous* all the claimants were resident in Cyprus, and presumably held Cypriot citizenships, at the moment of commencement of proceedings.

This brings us to the stated disinterestedness of the independent State of Cyprus in the application of its law in *Sophocleous*. The court held<sup>94</sup> that the Republic of Cyprus had no more interest in the application of its law than Malta did in *Boys v Chaplin*<sup>95</sup> or West Germany did in *Johnson v Churchill Coventry International Ltd*.<sup>96</sup> But these two cases are of a very different kind. *Boys v Chaplin* concerned a tort arising out of a traffic accident between two British military personnel temporarily stationed in Malta. Malta was held not to have any interest in the method for determining recovery of damages in the situation where the majority of the harm, and in particular the problematic loss of amenities and future financial losses, were to be suffered in Britain. *Johnson v Churchill Coventry International Ltd* concerned a tort arising out of an employment contract governed by English law between an English employee posted to Germany by his English employer. Germany was held not to have any interest in the application of its rule which was shaped by the German social security system of which the claimant was not a beneficiary and to which the claimant had not contributed. In contrast, all the claimants in *Sophocleous* were Cypriot residents and presumably Cypriot citizens at the moment of commencement of proceedings. The argument that the Republic of Cyprus had no interest in applying its law to a case that concerned the alleged acts of torture committed during the suppression of the Cypriot independence movement against persons who are now its residents and citizens and former independence fighters is not persuasive.

The remaining two factors, namely the strength of the connection with the United Kingdom and the fact that the English law of torts is well-equipped to deal with claims advanced against the Crown, apply with equal force in both *Sophocleous* and the other recent civil claims brought against the Crown. Even if British soldiers are present and operate abroad as part of a multinational force (eg UN, ISAF, KFOR,

<sup>93</sup> See *R (Al-Jedda) v Secretary of State for Defence (No 2)* [2010] EWCA Civ 758, [2011] QB 773, where the immunity of the British forces present and operating in Iraq was afforded by the Coalition Provisional Authority (CPA) Order No 17.

<sup>95</sup> [1971] AC 356 (HL).

<sup>94</sup> [2016] EWHC 2034 (QB) [193].

<sup>96</sup> [1992] 3 All ER 14.

NATO), the British Army retains a substantial amount of control over its troops and many of the key decisions and instructions will emanate from the United Kingdom. The English law of torts as it applies to claims against British military and security services is the same regardless of whether the torts are allegedly committed in a former colony or a foreign independent country.

In conclusion, the judgment in *Sophocleous* can be criticized for not taking into account the other recent judgments handed down in civil claims against the Crown. But *Sophocleous* should be used as an opportunity to reflect on the choice-of-law aspects of other recent civil claims brought against the Crown for the external exercise of sovereign power. The choice-of-law issues in these civil claims were resolved following the strict interpretation of section 12 of the Private International Law (Miscellaneous Provisions) Act 1995 adopted in preceding cases,<sup>97</sup> which almost exclusively concerned traffic accidents, accidents suffered in the course of employment and torts arising out of commercial dealings. But *Sophocleous* demonstrates that civil claims brought against the Crown in the aftermath of overseas counterterrorism, military and peacekeeping operations are ‘like no other in the lexicon of reported cases’<sup>98</sup> and that the political, military and constitutional context of these claims must seriously be taken into account. If this is done, there are good arguments for displacing the foreign law of the place of the tort in favour of the application of English law.

#### VI. CONCLUSION

*Sophocleous* is a rich case that deals with the law applicable to vicarious liability and accessory liability in tort. The choice-of-law issues raised by claims based on these kinds of liability have received little attention in the past. *Sophocleous* fills this gap by dealing with the nature of these kinds of liability and the relevance thereof for the location of the elements of the cause of action in a claim based on vicarious liability or accessory liability in tort. The insights that it offers are relevant not only for the purpose of the common law choice-of-law rules which the court was applying in *Sophocleous*, but also for the interpretation and application of the general choice-of-law rules for torts of the Private International Law (Miscellaneous) Provisions Act 1995 and the Rome II Regulation. *Sophocleous* is also important because it demonstrates that civil claims brought against the Crown in the aftermath of overseas counterterrorism, military and peacekeeping operations are ‘like no other in the lexicon of reported cases’ and that the political, military and constitutional context of these claims must seriously be taken into account.

*Sophocleous* also allows us to reflect on and question the choice-of-law decisions made in other recent judgments handed down in civil claims against the Crown which concerned the external exercise of governmental authority. In these judgments, the issue

<sup>97</sup> See *R (Al-Jedda) v Secretary of State for Defence* [2006] EWCA Civ 327, [2007] QB 621 [106], referring to *Roerig v Valiant Trawlers Ltd* [2002] EWCA Civ 21, [2002] 1 WLR 2304 [12]: ‘the general rule is not to be dislodged easily’ and *Harding v Wealands* [2004] EWCA Civ 1735, [2005] 1 WLR 1539 (in both cases sections 11 and 12 of the 1995 Act were strictly applied). The Court of Appeal decision on choice of law in *Al-Jedda* was affirmed by the House of Lords in [2007] UKHL 58, [2008] 1 AC 332. See also *Belhaj v Straw* [2013] EWHC 4111 (QB) [128], referring to [12] of *Roerig v Valiant Trawlers Ltd*. The High Court decision on choice of law in *Belhaj* was affirmed by the Court of Appeal in [2014] EWCA Civ 1394, [2015] 2 WLR 1105.

<sup>98</sup> [2018] EWHC 19 (QB) [96].

of attribution of conduct of British soldiers was routinely subject to the rules of public international law and the issues of limitation and basis of liability were routinely said to be governed by the foreign law of the place of the tort. *Sophocleous* shows that the English law of vicarious liability is capable of taking into account the nature and extent of authority and control exercised by the Crown over its soldiers, officers and agents present and operating abroad and placed at the disposal of another body, and of deriving from this the relevant legal consequences. This, in turn, demonstrates that the reasoning in other recent judgments handed down in civil claims against the Crown which dealt with the issue of attribution is unsatisfactory and that the courts giving these judgments should have explained why, and on what basis, the rules of public international law were being directly applied and municipal laws were being disregarded. The factors that persuaded the court in *Sophocleous* to apply English law are also relevant for other civil claims brought against the Crown which concern the external exercise of sovereign authority, which indicates that it might be 'substantially more appropriate' to also subject these claims to English law. It is to be hoped that the next time the English courts have the opportunity to deal with choice-of-law issues raised by civil claims brought against the Crown in the aftermath of overseas counterterrorism, military and peacekeeping operations, they will seriously take into account the political, military and constitutional context of these claims and engage more meaningfully with the determination of the law governing the issues of attribution of conduct, limitation and basis of liability.