Commonwealth Liability to Soldiers Injured on Duty

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Introduction

This article will enquire into the question whether, as a matter of law, a soldier personally injured in the course of his "employment" can recover in common law damages from the Commonwealth for its failure or default or that of any of its servants. It is not proposed to explore the nuances of the terms *duty*, *employment* and *service* as they apply to the activities of a soldier. Nothing that follows is impugned by treating these terms as interchangeable.

There is a further and final restriction. The comments herein will be directed to the position in peacetime. The High Court's decision in *Shaw Savill & Albion Co. Ltd.* v. *Commonwealth*[1] makes it clear that no action based upon something done or omitted in the course of actual operations of war can be brought. As Windeyer J. put it in *Parker* v. *Commonwealth*[2] "such acts are not justiciable in the civil courts".

Other Jurisdictions

It may be useful and of interest to give the discussion about the Australian position a comparative perspective by reference to the state of the law in the other major common law jurisdictions.

In the other jurisdictions, for the most part, this question of a soldier's recovery from the government of common law damages for injury sustained in the course of duty is a non-problem. In the United Kingdom, New Zealand, Canada and the United States, the soldier will fail. In all but the U.S. he is defeated by legislation[3] in that action is barred where the serviceman (or dependant) is entitled to receive a military pension or compensation. It is impossible to imagine a situation in which a soldier could make out the elements of a common law damages claim but would not be entitled to the statutory compensation. In the United States the soldier is defeated by a combination of the legislation and what has become known as the *Feres Doctrine*. The American Federal Tort Claims Act[4] which removes governmental immunity in tort claims does not *expressly* restrict the common law rights of a person who might also be entitled to compensation under other legislation. However, a line of cases, starting with *Feres* v. *U.S.*[5] has interpreted the legislation to this effect.

Feres was really a consolidation of three separate cases by soldiers against the U.S. Government for damages for negligence. The dependants of Feres sued in respect of his death in a barracks fire said to have been caused by

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1. (1940) 66 C.L.R. 344.
2. (1965) 112 C.L.R. 295, 301.
3. Crown Proceedings Act 1947 (U.K.) s. 10; Crown Proceedings Act 1950 (NZ) s. 9; Crown Liability Act 1952–53 C.30 S. 1 Sec. 4 (Can.).
4. 28 U.S.C.A. 2671 et seq.
5. (1950) 340 U.S. 135.

the negligence of other soldiers. The second and third claims both related to alleged negligence by army surgeons. Because of the common issue arising in each of the three cases, they were considered by the U.S. Supreme Court together. Jackson J, delivering the opinion of the Court said:

> This Court in deciding claims for wrongs incident to service under the Tort Claims Act, cannot escape attributing some bearing upon it to enactments by Congress which provide systems of simple certain and uniform compensation for injuries or death of those in armed services.[6]

The Court indeed did so, and found that a serviceman cannot recover damages from the government for injury sustained "incident to service" in which case, of course, he would receive aid under the statutory compensation scheme. This is not to say, of course, that the decision was based solely upon the existence of a statutory compensation scheme. On the contrary, reference was made to other matters such as service morale and discipline.

The *Feres* doctrine has been applied dutifully by American Courts since 1950[7] in cases which include *Callaway* v. *Garber and United States* (1961),[8] *United States* v. *Lee* (1968),[9] *Harten* v. *Coons et al* (1974),[10] and *Thomasen* v. *Sanchez et al* (1975).[11] All of these involved claims by or on behalf of servicemen against the government for damages for negligence.

The Australian Position

As a general proposition, it is correct to say that Crown immunity from tort liability in peacetime has been removed by legislation[12] in each of the Australian States and, at a Federal level, by the Judiciary Act 1903 as amended (Cth.), Part IX of which contemplates suits against the Commonwealth. However, as shall be indicated, at least one eminent authority supports the view that Crown immunity survives in respect of actions by members of Her Majesty's forces.

This authority—and it will be central to the discussion—is the judgment of Windeyer J in *Parker* v. *Commonwealth*.[13] Sir Victor Windeyer, quite apart from his outstanding legal career which included membership of the High Court bench during what is often referred to as that court's "golden age", had also a most distinguished military career. This latter fact may not have been irrelevant in the formulation of his views on the liability of the Commonwealth to its servicemen for injuries they suffer in the course of duty.

Parker's case arose out of the tragic collision between *HMAS Melbourne* and *HMAS Voyager*. The plaintiff, Parker, had served in the Navy as a rating but had been discharged upon expiration of his initial twelve-year engagement. He then underwent training as an electrician under the Commonwealth

6. *Ibid.*, at 144.
7. *Feres* was distinguished in *United States* v. *Brown* (1954) 348 U.S. 110, but it is submitted that the distinction was a valid one and the case does not at all weaken the *Feres* doctrine. For a discussion of the doctrine, see Jacoby S., *The Feres Doctrine*, (1972/73) 24 Hastings L.J. 1281.
8. 289 F. 2d 171 (1961).
9. 400 F. 2d 558 (1968).
10. 502 F. 2d 1363 (1974).
11. 398 F. Supp. 500 (1975).
12. Claims Against Government Act 1866 (Qld); Claims Against the Government and Crown Suits Act 1912 (NSW); Supreme Court Act 1935 (S.A.); Supreme Court Civil Procedure Act 1932 (Tas.); Crown Proceedings Act 1958 (Vic.); Crown Suits Act 1947 (W.A.).
13. *Supra*, n. 2.

Rehabilitation Scheme after which he re-engaged for 6 years. He was again discharged at the expiration of this term. He was then employed in a civil capacity as a Technical Officer at the Naval Dockyard, Williamstown. The *Voyager* had been refitted at Williamstown and, at the time of collision, Parker was on board to carry out final adjustments to the vessel's electrical weapon control system. Parker lost his life in the collision. His widow acting on behalf of herself and a child brought suit against the Commonwealth, claiming damages on the basis that her husband's death was caused by the negligence of the officers and crew of the two ships and of other servants of the Commonwealth. The action was commenced in the Admiralty jurisdiction of the High Court. But Windeyer J, taking the view that "the plaintiff's rights are . . . no greater, perhaps rather less, in an action in the Admiralty jurisdiction than they would be in an ordinary action in the original jurisdiction of the Court"[14] determined to consider the case as if it were an ordinary action at law.

In the course of his judgment, His Honour had much to say about the rights of servicemen to recover from the Commonwealth. The following passage from the judgment is instructive:

> The case of a member of the forces injured by the negligence of a fellow member is, however, in a different category. And as I understand that there are cases of that kind now pending in this Court, I shall not express any final option on the question they raise. Nevertheless, I feel bound to say that, as I see the matter at present, the law does not enable a serving member of any of Her Majesty's forces to recover damages from a fellow member because acts done by him in the course of his duty were negligently done: And, if the negligent person is not himself liable, the Commonwealth in my opinion cannot be liable.[15]

Plainly, His Honour's comments were *obiter dicta*, for he had in fact found that Parker was a civilian. But, if one might respectfully say so, it is a very weighty dictum, and, as a commentator has noted:

> The considered statement of opinion by His Honour, though he admitted it to be *dictum*, was couched in terms which showed that he would not regret this view influencing subsequent litigation.[16]

Windeyer J's view has been roundly criticized in some quarters. Professor Hogg, in his seminal work *Liability of the Crown in Australia, New Zealand and the United Kingdom*[17] argues that His Honour's dictum is wrong on principle and authority. He points out, rightly it is submitted, that, of the cases upon which Windeyer J. relied, none concerned an action for negligence. In each case, as he says, disciplinary action was in issue and the defendant escaped liability on the ground that his act was justified by the authority to administer military discipline.[18]

Glass & McHugh, in their book, *The Liability of Employers*[19] draw a distinction between the vicarious liability of the Commonwealth for the negligence of one soldier towards another and the *direct* liability of the

14. *Ibid.*, at 298.
15. *Ibid.*, at 301–302.
16. Crawford J.A., Case Note: *Parker* v. *The Commonwealth of Australia* (1966) 2 Fed. L.Rev. 122, 123.
17. Hogg P., *Liability of the Crown in Australia, New Zealand and the United Kingdom*, Law Book Company Limited, Sydney, 1971.
18. *Ibid.*, at 97.
19. Glass H., and McHugh M., *Liability of Employers*, Law Book Company Limited, Sydney, 1966.

Commonwealth, as, for example, in the case where the Commonwealth provides an unsafe system of work. Their view seems to be that the *Parker* doctrine should not apply in the latter case. No authority is cited for that distinction and, with respect, it is difficult to see the merit in it. Either the Judiciary Act 1903 as amended (Cth.) removed the Crown immunity which existed at common law in respect of actions by soldiers or it did not. There is no basis for saying that it did so in part only.

Another writer, also critical of Windeyer J's thesis,[20] has argued that the common law provides no solution and that, a standing army being unknown to the common law but a creation of the legislature, the special privileges and liabilities of servicemen can only be determined by reference to legislation. It always has been assumed, so the argument runs, that members of the armed forces, although subject to military law, are not thereby divested of the civil rights and duties of citizens. Thus, the right of a member to sue another for negligence could only be removed by legislation. There is no legislative enactment to this effect in Australia.

Be that as it may, Windeyer J's dictum stands without specific countermand from any authority that this writer has been able to find. Regretably the other cases arising out of the *Voyager* collision did not reach the High Court and were apparently settled. However, it seems that the High Court has expressly declined on two occasions to sanction settlements by the Commonwealth in favour of infant dependants of deceased servicemen where the death was caused by the negligence of other servicemen. The Court has reasoned that to do this would be tantamount to accepting, contrary to Windeyer J's view, that a right of action would exist. This the Court was not prepared to do without at least having the matter fully argued.[21]

Although the position is not by any means clear in Australia, one might at least be excused for believing the law to be that a soldier cannot recover from the Commonwealth for injuries received in the course of duty. However, as we shall see, the de facto position is most curious.

In 1970 in *Fazio* v. *The Commonwealth*[22] a school cadet sued the Commonwealth for damages for negligence in respect of injuries he sustained when a shell exploded on a field firing range at Singleton Army Camp. The unexploded shell had in fact been found by the plaintiff and another cadet Farrell. The latter removed the shell, transported it some distance and struck it on a fence causing it to explode. The plaintiff succeeded at first instance but appealed on the inadequacy of damages. The Commonwealth cross-appealed against the liability finding, but, in doing so, based its case upon the argument that Farrell's activity had constituted a *novus actus interveniens*. The cross-appeal was upheld by the New South Wales Court of Appeal, with Holmes and Mason JJ.A. forming the majority and Jacobs J.A. dissenting. Remarkably, one might think, the Commonwealth did not rely at the trial nor on appeal upon *Parker's* case. As Holmes J.A. said:

> The Commonwealth did not rely at the trial nor before us upon any defence that a soldier, albeit a cadet, could not sue the Commonwealth for damages in respect of an injury incurred in the circumstances of this case (cf *Parker* v. *The Commonwealth of Australia*[23]

20. *Supra*, n. 16, at 125–126.
21. This information was given by an officer of the Crown Solicitor's Office. It was thought that disclosure of the names of the parties or other information could be a breach of privilege.
22. (1970) 91 W.N. (NSW) 806.
23. *Ibid.*, at 812.

In 1974 in the Queensland Supreme Court case of *Thomsen* v. *Davison*[24], W. B. Campbell J. sitting with a jury had to consider a claim for damages for negligence against an army doctor and his employer, the Commonwealth. It was claimed by the plaintiff, a soldier, that the doctor had negligently failed to ascertain the results of certain pathology tests made in respect of the plaintiff and to make an appropriate recommendation about investigation of the plaintiff's state of health. His Honour said:

> During the trial Mr. Macrossan stated that the second defendant (the Commonwealth) would not take the point that the first defendant (the doctor) was not liable in tort for damage caused to a fellow member of the Armed Forces by his negligence in course of his duties, and that the second defendant could not, for that reason be sued. (*Parker* v. *The Commonwealth of Australia* (1965) 112 CLR 295)[25]

In 1975 in *Greenwood* v. *Commonwealth of Australia*[26], the Victorian Full Court was faced with a claim against the Commonwealth by a naval rating injured by the negligent driving of a fellow rating. It was expressly found at first instance and on the appeal that the driver was a servant or agent of the Commonwealth acting in the course of his employment. The Commonwealth was held liable in damages. *Parker* was not even mentioned.

Readers will be relieved to know that the lack of argument about the principle of the Commonwealth's liability to a member of the armed services for injury sustained in the course of duty is due neither to oversight by the judiciary and the Commonwealth's legal representatives nor to dereliction by the plaintiff's representatives in their duty to inform the Court of relevant authorities. The true explanation is that the Federal Attorney-General has instructed the Crown Solicitor that the Commonwealth is not to take the point. In a directive issued shortly after the *Parker* decision, the Attorney-General stated that, in respect of claims by servicemen injured by the tortious acts of other servicemen in the course of duty, the Commonwealth:

(a) should continue handling such claims as though there was a cause of action if negligence could be established; and
(b) if the Court raised the question the Commonwealth should state that it did not wish to argue that there was not a cause of action; unless
(c) the court insisted that the question be argued in which case the Commonwealth would give every possible assistance.[27]

Therein lies the reason for the conspicuous absence from the three cases here examined (and, no doubt, from numerous out-of-court settlements) of the *Parker* argument.

Observations on the Australian Position

If one may respectfully say so, there are two major difficulties in the Commonwealth's position on this matter. The first was adverted to by Windeyer J. in *Parker's Case*:

> It was suggested that the Commonwealth had thus (i.e. by admitting Par. 12 of the plaintiff's statement of claim which alleged a vicarious liability in the

24. [1975] Qd. R. 97.
25. *Ibid.*, at 97–98.
26. [1975] V.R. 859.
27. The paraphrasing of the Attorney-General's directive was supplied by the office of the Commonwealth Crown Solicitor.

> Commonwealth) admitted its liability and that all that this Court had to do was to assess the plaintiff's damages. This is a mistaken view. To speak of an admission of liability can be misleading. A defendant may admit any allegation of fact. But a defendant cannot by admitting that facts alleged entitle the plaintiff to have damages require the Court to assess and award damages unless those facts would in law have that consequence. The Court can only assess damages when it appears, from facts admitted or proved, that there was a legal wrong entitling the plaintiff to damages according to some measure recognized by law.[28]

The point, of course, is that the Commonwealth cannot, with the best of intentions, create a liability where none exists simply by seeking to admit it. There is perhaps an analogy in the criminal law. An accused may plead guilty until he is blue in the face, but if the elements of the offence are not made out, the court must reject his plea.

The second difficulty is that a kind of hiatus in the law has been created. It has to be conceded that the question whether there is a liability is still open in this country[29]. The Commonwealth apparently by a conventional application of the *respondeat superior* doctrine, has always considered that the soldier's right of action exists. Street[30] argues in support of this and points out that, if the parliaments of the United Kingdom and New Zealand took the trouble to preclude a right of action, then it could only have been because it was thought that one would otherwise have been created or recognized by the enabling legislation. One can make only two comments in relation to that argument. The first is that it is pre-*Parker* in its vintage, and the second is that similar legislation in the United States has been interpreted *not* to have created or recognized such an action, notwithstanding the absence in the U.S. legislation of any preclusionary section relating to servicemen.

In any event, the *Parker* thesis must, at least, represent a substantial obstacle for any potential claimant. Exploration of the traditional avenues of research would leave the researcher with the impression that the question is as yet unresolved. The hiatus exists between the theoretical and practical positions, for, in practice, the Commonwealth treats the question as resolved in favour of the soldier. The researcher will not discover this, as has been noted, in traditional source materials though presumably, he will discover, as this writer did, cases such as *Fazio* and *Greenwood*, and will wonder why the Commonwealth did not argue *Parker* and will be told the true position upon enquiry directed to the Attorney-General or the relevant Crown Law Office. It should be mentioned that Dr. Hogg, one of the most respected authorities in the area of Crown Liability, appears to have assumed that *Parker* was the prevailing dogma (though, of course, he was critical of it) and does not appear to have been aware of the situation in practice.

All in all, it is fair to say that this is an unhappy state of affairs. It may be that the same lawyers would tend to be involved in actions for soldiers and, being in practice in the area, presumably would be aware of the Commonwealth's policy. It is therefore difficult to estimate the extent of practical hardship. That aside, it is a rather unsatisfactory basis for operation of an important area of the law, indeed, of any area of the law.

28. *Parker* v. *Commonwealth, supra*, n. 2 at 299.
29. The Australian Commonwealth compensation legislation, Compensation (Commonwealth Employees) Act 1971–1976, does not preclude common law recovery. Indeed s. 99 contains an adjustment formula (Cf. *Feres v U.S., supra*, n. 5, at 144).
30. Street H., *Government Liability: A Comparative Study*, University Press, Cambridge, 1953.

The Commonwealth, it seems, is not going to take the point raised in *Parker*; no plaintiff, obviously, is going to seek to have it argued and, so far, the State Courts have not pressed the matter. It is unlikely, therefore, that the opportunity for definitive decision by the High Court will ever arise. The only other means by which the position can be rationalized is legislation. It is strange that Australia should be the only one of the major common law jurisdictions in which these claims do succeed, though, bearing in mind the notorious inadequacy of institutionalized compensation schemes by comparison with common law damages, this writer would prefer the benevolent approach, and would be pleased to see legislative amendment removing any doubts raised by *Parker* and making plain the serviceman's right to recover from the Commonwealth for injury sustained in the course of employment. But if this "benevloent approach", as it has been called here, is to prevail, then it must be through legislation and not "through the back door".

Conclusion

To summarize, it can be said that, although a soldier will not succeed in the other major common law jurisdictions, the position at law in Australia is still open. Many authorities of eminent standing would urge that, at law, a soldier can succeed in damages against the Commonwealth for injury sustained in the course of peacetime duty. However, there is high opinion to the contrary which cannot simply be ignored. The Commonwealth's attempt to do so and the abetment of this by the State Supreme Courts is, at best, unbecoming and, perhaps, for the reason enunciated by Windeyer J, conducive to bad law: a kind of collaborative abuse of process. In the writer's opinion the ultimate end, preservation of the soldier's common law rights, is noble enough. But if a problem has been raised by *Parker's Case*, then it ought to be resolved by the Parliament.[31]

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31. A special position obtains in respect of servicemen whose claims arise out of air accidents. The Air Accidents (Australian Government Liability) Act 1963 as amended (Cth.), applies to the government those provisions of the Civil Aviation (Carriers' Liability) Act 1959 as amended (Cth.), which impose absolute liability on the carrier for death or injury of a passenger. However, the definition section specifically excludes from the term "passenger" a member of the crew, including the pilot and any member of the Defence Force who is in receipt of flight pay. Notwithstanding this fairly clear legislative exclusion, the Crown Solicitor has now been advised of an executive decision to approve ex gratia payments to people in this category. This is perhaps a more disturbing example of the type of problem referred to in this article in relation to *Parker's Case*. It is arguable that *Parker's Case* does nothing more than raise a doubt and that it is perfectly legitimate to ignore it until the doubt has been confirmed. Any merit in that view must surely be diminished when applied to the above statutory example.