

Neutral Citation Number 2004 EWHC 786(QB)

Case No: LS 290157

IN THE HIGH COURT OF JUSTICE

QUEEN'S BENCH DIVISION

LEEDS DISTRICT REGISTRY

Royal Courts of Justice

Strand, London, WC2A 2LL

Date: 7th April 2004

B e f o r e:

THE HONOURABLE MR JUSTICE ELIAS

MOHAMET BICI (1)

and

SKENDER BICI (2)

Claimants

and

MINISTRY OF DEFENCE Defendants

Mr. Stephen Miller Q.C. and Mr David Evans (instructed by Treasury Solicitors for the Defendants)

Mr. Paul Rose Q.C. (instructed by Irwin Mitchell for the Claimants)

Mr Justice Elias:

Introduction.

1. At about midnight on July 2nd 1999, three British soldiers involved in a United Nations peacekeeping operation in Kosovo shot and killed two men, Fahri Bici and Avni Dundi, and injured another two. The men, all Kosovar Albanians, were travelling together in a car in the city of Pristina. The shooting took place near a building known as Building 42. The first claimant in this action, Mohamet Bici, was injured by a bullet which struck him in the face. It entered his mouth and exited the lower left side of his jaw. Apart from the not inconsiderable pain, it has also caused longer term problems with eating and speaking. The second claimant, his cousin Skender Bici, did not suffer any direct physical injury but alleges that he has suffered psychiatric illness as a consequence of being in the car, both as a result of being put in personal fear, and from witnessing the incident. Both claimants sue for damages both in negligence and trespass. The soldiers say that they were acting in self-defence being in fear of their own lives.

2. It was ordered by the District Judge, in accordance with agreement between the parties, that the defendant's liability should be determined according to English law pursuant to section 12 of the Private International Law (Miscellaneous Provisions) Act 1995, and that there should be a separate trial on the issue of liability. The defendant has conceded that it is vicariously liable for any wrongs committed by any of the soldiers. The Crown retained command of the British forces notwithstanding that they were acting under the auspices of the U.N.

The background.

3. In June 1999 Kosovo was liberated from Serb occupation by international forces acting under the authority of the United Nations. The 1st Battalion Parachute Regiment was part of that UN mandated multinational force. The battalion had entered Kosovo from Macedonia on 12th June 1999 and it reached the provincial capital of Pristina on the following day. Its objective was to ensure that Pristina was a secure environment. This involved controlling the withdrawal of the Yugoslav National Army, the Interior Military Police and other forces from Pristina. That withdrawal was to take effect in accordance with the military technical agreement that had been entered into between NATO and the Serbian Government in Belgrade. Prior to that agreement being reached, there was a real risk that the forces would have had to take the province by force.

4. I heard evidence about the general situation in Kosovo when the troops entered both from General Sir Mike Jackson, who in 1999 was the Commander of the Allied Command Europe Rapid Reaction Corps and was in command of the NATO troops that made up KFOR, and from the commander of the Parachute Battalion, Colonel (now Brigadier) Paul Gibson. They were in the best position to assess the problems facing the troops. They both confirmed that when the Serb authorities left, there was practically a complete breakdown of law and order in Pristina. The city was in a state of anarchy with no police force, criminal justice system or effective public administration. There is no doubt that the situation improved rapidly, but I accept their evidence that even by the date of the incident on the 2 July there remained a fear of attack by Serb forces from Serbia and occasional ethnic killings, sometimes barbaric, continued in Kosovo itself. There were also occasions when KFOR troops came under fire, particularly when they were caught in the cross fire when seeking to prevent atrocities being committed against Serbs. However, whilst the troops had to be on their guard, and incidents could arise at any time, for the most part, the British troops who made up the UN deployment force were welcomed by the inhabitants of Kosovo and treated as liberators. Colonel Gibson accepted that there had in fact been no casualties among the troops arising from contact with either the Serbs or the Kosovo Liberation Army ("UCK").

5. The purpose of the UN presence was to try to facilitate the transfer of power from the Serbs to the Kosovar Albanians. The leaders of the Kosovo Liberation Army ("UCK") had entered into an undertaking entitled the "Undertaking of Demilitarisation and Transformation". Two central features of this undertakings were first, that no weapons of a particular kind would be carried by UCK members within 2 kilometres of certain towns, including Pristina; and second, that there would be an orderly handing over of all weapons by the UCK. In addition there were to be no hostile or provocative acts, which included firing guns. If necessary, it was recognised that those that were not authorised to carry weapons would have to be disarmed.

The rules of engagement.

6. Each of the British soldiers stationed in Kosovo was issued with a document setting out individual guidance on the use of force. It permits the minimum force necessary to be used in self-defence. It provides that if the situation permits a challenge should be issued, such as "NATO! STOP OR I WILL FIRE", and that if there is a failure to stop a warning shot may be fired. Paragraph 11 provides, so far as is material:

"You may use necessary minimum force, including opening fire, against any individual whom you believe is about to commit or is committing an act which endangers life, and there is no other way to prevent such an act. For example, you may open fire against an individual who:

Fires or aims a weapon at you or any person in your presence.

Paragraph 13 states that "if you have to open fire, you must fire only aimed shots, and fire no more rounds than are necessary, and stop firing as soon as the situation permits."

The facts.

7. I now turn to consider the evidence. Much of the background is uncontroversial. I have heard evidence from a number of witnesses about the incident itself. As is inevitably the case in a fast moving and dramatic incident, there are a number of discrepancies in the evidence, and it is not possible to

reconstruct in detail the exact sequence of events.

8. There are three areas where the proper inference to be drawn from the evidence is strongly contested. The first and crucial issue is whether the soldiers reasonably believed that Fahri Bici, who was on the roof of the car, was aiming a Kalashnikov at them, it being common ground that he did have such a weapon. This goes to the heart of their contention that they were acting in self-defence. The second issue is to what extent there was a hostile and potentially dangerous crowd gathering outside building 42, a building close to where the incident occurred, and which housed the remnants of the Serbian administration. For reasons I give below, I consider that in fact this is of limited relevance in this case. The third area of dispute is whether the shooting by the soldiers was deliberately and recklessly directed to disabling the vehicle rather than, as the soldiers claim, aimed solely to kill Fahri Bici. This turns very largely on the assessment of the two experts concerned with ballistics and such matters, and I shall deal with that separately after considering the first two issues.

The witnesses.

9. Surprisingly only one of the three soldiers has appeared to give evidence, namely Corporal Madden. The other two, for no very good reason as it appears to the court, have failed to do so, although Corporal Dolman did produce a witness statement. In the case of each of these soldiers, however, there was an earlier investigation by the Special Investigation Branch of the Royal Military Police. Corporal Dolman and Corporal Madden were twice interviewed in the course of that investigation, and the third soldier, Corporal Eacott was also interviewed. Mr. Rose Q.C., counsel for the claimants, accepted that I could have regard to that material, and indeed in part he relied upon it, whilst of course emphasising that it should be viewed with considerable caution in the case of Dolman and Eacott since he had not been able to cross-examine them upon it. Moreover, Corporal Madden said more than once when giving evidence that to the extent that there were conflicts between his evidence in the witness box and what he had said in those earlier interviews, the latter should be preferred because they were nearer the time of the incident. I did not find him a convincing witness.

10. Mr Rose also adduced in evidence certain statements from various witnesses, which was principally directed towards the prevailing atmosphere in Pristina on the night in question. Civil Evidence Act notices were issued on the grounds that the witnesses could say no more than was in their statements and that the cost of securing their presence was disproportionate to the benefit of their attendance. I do, however, bear in mind the concerns of Mr Miller QC, counsel for the Ministry of Defence, who observed not only that their evidence had not been tested by cross examination, but also that these were but a small group of people giving their own impressions of the atmosphere, that they were far from being universally shared.

11. Each of the claimants gave evidence. I found them to be essentially honest witnesses save that I do not think they were frank about the extent to which they were aware of Fahri Bici's use of guns, nor do I accept that they could have been in doubt, as they appear to have suggested, about whether Fahri was entitled to have a weapon. It was widely appreciated that weapons were not to be kept.

12. As to the other witnesses who gave evidence before me, General Jackson was not a witness to any events relating to the shooting itself. Colonel Gibson's evidence, in so far as it related to the incident itself, was directed principally at the prevailing atmosphere of the crowd on the evening of July 2, and in particular the mood of the people congregated outside building 42. I was impressed by the evidence of three other witnesses who gave oral evidence and had observed at least some aspects of the shooting. These witnesses, Isa Blumi, Christopher Wenner, and Arian Mungjiu, had no direct connection with either the claimants or the army. Isa Blumi is a US citizen who now lives in New York and lectures in History and Middle Eastern Studies in New York University. He is of Albanian descent. At the time of the incident he was in Kosovo as an editor working for a News Agency in Tirana. His job was to obtain accounts of the experiences of those who had lived through the conflict. He had a KFOR press pass. Christopher Wenner is a filmmaker and freelance journalist who was visiting Kosovo because he was producing a series of video films about the problems facing Macedonian Serbs and Kosovans during the Kosovo crisis. It was he who took the video that was shown to the court. Arian Mungjiu is a native of Pristina who was taking part in the celebrations and witnessed part of the incident. I have no doubt that each of these witnesses was

attempting to describe events as they remembered them as accurately as they could.

13. In addition to these witnesses I heard certain expert evidence on two matters. First there was forensic evidence about the cause of death. This was highly relevant to the soldiers' claim that they acted in self-defence. Second, there was evidence dealing with the pattern of the gunshots and the inferences which could be drawn from them. This was relevant to the contention of the claimants that the soldiers had acted recklessly.

The background to the incident.

14. The background to the events in question is uncontroversial. On 2nd July 1999, crowds gathered in the centre of Pristina to celebrate the city's liberation. The date was significant because it was Kosovo National Day. Independence had originally been declared on that day in 1991 but because the region had then fallen under Serb Control, it was the first time since then that the Kosovar Albanians had been able to celebrate Independence Day. Surprisingly, perhaps, the forces were not aware that this was a special day or that people would be taking to the streets. Initially it caused alarm when they did, not least because of the intermittent gunfire that punctuated the celebrations, but there was less concern when the reason for the gathering became clear.

15. All the witnesses have testified that the crowds were for the most part in a celebratory mood. I have seen a video of some of the events that took place during that evening in the vicinity where the incident occurred. There was much chanting and dancing, flags and banners were waved, car horns were sounded and from time to time the sound of gunfire could be heard. It is not uncommon in the Balkan region for public celebrations to include the firing of guns into the air. Indeed, according to one witness, Mr Wenner, who has much experience of the region, there was less gunfire than usual, which no doubt he rightly put down to the fact that strictly no one was permitted to carry guns. In short, there was in much of the city a boisterous party in celebration of the occasion.

16. But, as one might expect given the history of the area, the situation was not without its difficulties, and hostile incidents occasionally punctuated the carnival atmosphere even on the evening of the 2 July. For example, I had written evidence from Corporal McConville who reported how earlier in the evening he had been on patrol with others and they had to break up a fight between groups of Serbs and Albanians; on another occasion they had to rescue a Serb who was being beaten up by some Albanians. He also accepted however that overall the atmosphere was celebratory; that it was a wonderful experience, and that he was made to feel "like a king." His experience captures the ambiguous role in which the troops found themselves.

17. One particular area of responsibility for the Second Battalion of Paratroopers was a building known as Building 42. This was situated on Ramiz Sadiku Street in the city centre, at the junction with Vidovdanska Street. The front of the building was set back from the road and there was grass and a little shrubbery in front of it, with a path leading from the road to the building itself. On the 2nd July there was still a number of Serbian officials, the residue of the former government of Pristina, who remained in the building. (The evidence was that when the celebrations were taking place the building was in the dark. However, there were still persons within it, keeping a low profile.) Colonel Gibson understandably was concerned that this would be a potential focus for Albanian anger directed at the Serbs. Accordingly, the building was permanently guarded by a small group of soldiers (not from the parachute regiment) lining the path between the road and the building.

18. At 2240 on 2nd July, Colonel Gibson went on patrol with his Tactical Headquarters ("TACHQ"). Three of the members of Colonel Gibson's patrol were Corporals Madden, Dolman and Eacott. They were each armed on the night of July 2nd with 5.56 calibre SA 80 rifles with sight units small arms trilux ("SUSAT") sights. The patrol went to building 42 to prevent any action by the Kosovar Albanians. There was concern expressed by the Serbian Administrator, Mr Anđelković, that he and his staff were not safe. Apparently he reported that a Serbian flag had been burnt and the crowd had been chanting pro KLA and other threatening slogans. Colonel Gibson said that he was upbraided by Mr Anđelković for failing to provide adequate security for the Serbs inside the building. About three quarters of an hour later, Mr Anđelković asked to see Colonel Gibson again. He was concerned that the crowd outside building 42 was growing and becoming more aggressive, perhaps in contrast to the carnival atmosphere that prevailed in much of the

rest of the city. Colonel Gibson naturally took these concerns seriously.

19. The forces were understandably concerned that the building may be a focal point for Albanian anger and a possible target for an attack. That is demonstrated by the fact that a guard force was placed there on a permanent basis to defend the building. There was a Serbian flag (and perhaps more than one) hoist from the building, and it was potentially a flashpoint. Brigadier Gibson accepted that in most parts of Pristina there was a celebratory atmosphere but his opinion was that the situation outside Building 42 was very different. He said there was aggressive chanting and an overt display of UCK flags and banners. He described the crowd as ugly and intimidating. The situation had in his view deteriorated even in the interval between his two visits. Corporal Madden described the crowd as "a bit hostile" in his original interview for the SIB, but said in his evidence in court that there was hostile jeering and shouting. I have no doubt that his true impression is better reflected by his earlier comments.

20. Other witnesses also testified to the hostility at least of some of the crowd in the vicinity of that building. I was taken by Mr. Miller to a number of statements where soldiers had indicated that they felt nervous because they believed that the situation had the potential to develop into a serious incident, and understandably their concerns were compounded by the gunfire which was relatively widespread that evening.

21. Other witnesses, however, were far more sanguine and plainly had a different impression. Both Mr. Wenner and Mr. Blumi, both of whom one might have thought had a professional interest in any potential heightening of friction, were not aware of anything untoward in the behaviour of the crowd that evening, and they were close to building 42. Indeed, Mr. Wenner's impression was that building 42 did not attract any interest from the crowd at all, but I do not accept that there was such indifference to it as he suggests. Other witnesses, whose evidence was adduced but not tested by cross-examination, were likewise not particularly perturbed by events. A witness with a particularly good vantage point was a soldier, Leigh Weatherell, who was on guard duty outside building 42 from early evening until the incident. He said that the crowd was jubilant and grateful to the army for the role it had played in liberating Kosovo. He reported that some of the crowd were seeking to fly an Albanian flag from the building but that with the help of three Albanian men the soldiers managed to keep them back and the crowd remained jovial.

22. Taken as a whole, the evidence does not in my judgment bear out the description that there was a hostile and ugly crowd, although the potential for events to turn sour, particularly outside the building which symbolised Serbian authority, was ever present. This concern, and the obvious worries of the staff in building 42, understandably coloured Colonel Gibson's perception of events. There was in fact no attempt to storm the building or anything of that nature, and indeed no violence of any kind was reported outside the building. In my opinion the evidence was consistent with there having been some aggressive individuals, perhaps fuelled by drink, and perhaps moments of particular tension. But matters never in fact did get out of hand. There never was anything remotely amounting to a riot or anything approaching it.

23. In any event, for reasons which I develop more fully below, I do not consider that the attitude of the crowd outside building 42 was of any material significance in this case. The soldiers did not allege that they shot Fahri Bici because of concerns about the crowd or the safety of building 42 or the Serbians within it or anything of that nature. The sole basis on which they sought to justify their conduct was that they had been acting in self-defence.

The incident.

24. The claimants were two of a group of men who were travelling in a white Opel estate. They say they were simply participating in the celebrations. The car drove slowly a number of times, at least two and possibly three, up and down Ramiz Sadiku Street. There were traffic lights at a junction between Ramiz Sadiku Street and Vidovdanska Street, and it seems likely that the car did a U turn at those lights, as part of its circuit. (It may have been at a gap in the road a little further up the street but nothing of significance turns on that.). The area was relatively well lit. As the vehicle carried out the U turn it would have passed close to the front of building 42. The car was driven by Nasser Bici. In the front passenger seat was Driton Bici; Avni Dudi, was a rear seat passenger as initially at least was second claimant Skender Bici. There were two persons who were on the roof of the car; one was Mohamet Bici who was at

the front and behind him was Fahri Bici. As virtually all the evidence indicates, Fahri Bici had an AK47, (a Kalashnikov) which is an automatic rifle. In addition, there is evidence that he had also originally had a pistol with him. Mr Wenner was very clear that he had earlier been firing the pistol in the air, and I accept his evidence. He recalled this in particular because he had wanted to capture this on video but was not quick enough to do so. However, no one suggests that he still had the pistol in his possession at the time of the incident itself. Each of the claimants denies that he saw the pistol on that evening, but the first claimant Mohamet Bici says that he was aware that Fahri Bici had the pistol because he had told him that he was going to give the pistol to his brother in the car. There was a pistol subsequently found in the car but with no bullets in it. It is reasonable to infer that they had been discharged.

25. At some time, which must have been a matter of minutes prior to the incident taking place, the car was doing a U-turn by the traffic lights in the vicinity of building 42. It stopped, according to the two claimants, to pick up another person, Isak Berisha. He got into the back seat of the car. Almost immediately thereafter the second claimant Skender Bici says that he climbed from the back of the car to the front and sat on the edge of the window with legs on the front seat in the car and his head and trunk out of the car. None of the other witnesses recalls seeing him in that position, but he gave a graphic account of seeing Mohamet immediately after he was shot, and I accept his evidence on this point. However, it does not follow that the soldiers would have been aware of his presence there.

26. At some time, either just before or just after Isak Berisha joined the vehicle, Fahri Bici fired his AK47 into the air. All the evidence shows that the shooting occurred very shortly after that. Both Mr Wenner and Mr Blumi thought that it was almost immediate, but Mr Mungju considered that there was a gap of some twenty seconds or so.

27. The bare bones of the matter can be described as follows. As the car was being driven away from building 42, three soldiers emerged from the undergrowth outside building 42 and fired shots towards the vehicle. The effect was devastating. Fahri Bici was killed by a single bullet. It entered his back 8 centimetres to the right of the mid line and exited from his chest. Avni Dundi, was also killed. Isak Berisha, who had so recently joined the car, and Mohamet Bici, the first claimant, were wounded. The uncontroverted evidence was that the car began to accelerate away from the soldiers as the firing was taking place, before it came to a halt at a distance of some metres from its position when the first gun was fired.

28. There is a conflict of evidence about the circumstances in which this shooting occurred. The evidence of the soldiers, as it emerges from the interviews, is broadly consistent one with the other as to the circumstances in which they had fired on this car. Both Corporal Madden and Corporal Dolman in their statements said that they became aware of a large vehicle that had stopped on the road in front of the path leading to building 42. From their experience in Northern Ireland they were concerned that this might possibly have been strategically placed in anticipation of an attack on the building. They heard around the same time what sounded like gunshots and they hid in some bushes which were outside building 42 in order to observe what was going on. They then saw an Opel Kadett hatchback carrying the group of men to which I have already made reference. They noted that there was a man on the roof and Corporal Dolman could see that he had a gun. He told Corporal Madden that. Corporal Dolman is then alleged to have said "on me", that is "cover me", to Corporal Madden, and he emerged from the bushes. Each says at that point the gunman fired the automatic rifle into the air and the soldiers moved forward intending to disarm him. Corporal Dolman alleges in his statement that the man smiled at him and still fired into the air. He asserts (and this was supported by the evidence of Corporal Madden) that he shouted at the man to put down the weapon. He was not sure precisely what the words were that he used but something to the effect "NATO put down your weapon." He said he gesticulated to try and demonstrate what he wanted the man to do. He said the man ignored him but instead initially fired a burst of gunfire into the air and then brought the weapon down over his shoulder in an arc, with his body twisted, apparently about to target Corporal Dolman and Corporal Madden. Corporal Madden said in evidence to the SIB that Fahri Bici had turned round or twisted around, twisting in his seat, and aimed the gun in the general direction of the soldiers. However, in court he said that Bici had at all times kept his trunk facing the front but had pointed the gun backwards by moving his arm and head, whilst slightly swivelling his shoulders, and holding the gun behind him in one hand. The theoretical possibility that this could have occurred was first referred to by Dr Clark, when he carried out a post mortem for the purposes of the SIB hearing, in which he expressed

the view that the Fahri Bici must have had his back to the soldiers when he was shot. This report was made in November 1999, shortly after the SIB interviews but obviously well before the hearing before the court.

29. Each of the soldiers says that he thought the gunman was intending to fire at him or his colleague, and each says that he independently decided to fire in self-defence. Corporal Dolman fired first, and then fired eight shots. He says in his statement that he started firing when the car was about 15 or 20 metres away although it was then accelerating away as he was shooting. Corporal Madden fired 5 rounds. Unbeknown to either Dolman or Madden, Corporal Eacott was behind them, and he also fired two rounds. So fifteen rounds were fired in all. A number of the rounds missed their target. There were a number of bullet holes in the car itself. Each of the Corporals claims to have fired his gun from the kneeling and unsupported position, each says that he was aiming at Fahri Bici because of a fear of being shot, and each says that he stopped firing once that objective had been achieved.

30. Neither of the claimants actually witnessed the incident as it was happening. Mohamet Bici says he was sitting on the front of the car facing forwards. Fahri was sitting behind him although occasionally Fahri would stand and fire his Kalashnikov. When the gun was idle it was left on the roof of the car facing forwards. As to the incident itself, he said that he was not aware of the soldiers and he did not hear any warning. Indeed, he was not aware of anything unusual happening until he felt a sharp pain in his face. He realised that he was bleeding heavily. He lay down on the roof of the car, and as he did so he saw that Fahri was lying down. He realised that Fahri had been shot.

31. Skender Bici likewise was not aware of the presence of the three soldiers, nor of any warning to disarm. He said that after Fahri had fired the Kalashnikov on that final occasion, he saw Fahri squatting on the car roof with his hands resting on Mohamet's shoulders. He said that the gun was between Fahri's legs pointing in the direction in which the car was travelling. Skender Bici says that he was then looking at the crowds and suddenly became aware of the fact that Mohamet had his face covered in blood. He had not heard a shot. After seeing Mohamet, he also noticed Fahri lying back on the roof of the vehicle but he did not at that point see any blood, nor did he know that Fahri had been shot.

32. Mr Blumi gave a description about the general celebratory atmosphere in the city. He was sitting on the roof of his van which was parked at a junction between Vidovdanska Street and Ramiz Sadiku Street. He had parked because it was impossible to drive through the crowds.

33. He observed that people were destroying some of the evidence of Serbian rule such as signs written in Serbian and pulling down statues of Serbian leaders and so forth. But he said that this was not aggressive. His impression of the attitude of the soldiers was that whilst some of them very much entered into the party atmosphere, others were rather aggressive and were being unnecessarily confrontational. He said that he heard handguns and automatic fire on occasions. He saw the a white vehicle with two people on the roof, initially travelling north to south on Ramiz Sadiku Street and then after they had been out of his sight for a very short period they reappeared travelling in the opposite direction. He then saw an automatic weapon being fired. He could see that it was an AK47. His impression from the flare of the barrel was that it was being held by someone reaching up from the rear passenger seat of the car. He did not think it was being held by either of the two people sitting on the roof, because the flare coming from the top of the gun seemed to be too low for that. He was concerned not because he felt that anyone was being threatened by the gunfire itself, but because of the risk of accident from bullets coming down on top of someone. About ten minutes later he said he saw the car again which had come round for the second time. Again there was a burst of gunfire. He said the crowd was cheering in encouragement in response to the gunfire. He had a good view of the men on top of the car and at that point one appeared to have his hand draped over the shoulder of the man in front who in turn appeared to be seated between the legs of the man at the back. He was suddenly aware of the white car increasing speed and as it did so the man nearest the rear of the car on the roof threw his hands in the air and fell backwards. The impression he had was of someone losing his balance as a consequence of the car's acceleration. Initially he thought that the man was smiling and laughing but then he realised that the man had been shot. He was quite adamant that as he fell backwards there was definitely no gun in his hands. He said that at no stage during the incident did the man on the roof of the car turn around to face backwards.

34. Mr Wenner described the celebratory evening on 2nd July as "a party." He said there were guns fired

into the air from time to time. He saw a man standing on a white car who initially was firing a pistol into the air. He paid particular attention to the man because he knew that guns on the streets of Kosovo were not permitted at the time. People were cheering when he was firing the pistol. Later that evening he saw the same man but this time firing a Kalashnikov rather than a pistol; it was being fired straight into the air. He said that a matter of seconds later he saw the car pass him and soldiers were running after it and firing at the vehicle. By then he said the man on the white car, who had been firing the gun, was lying on top of the car with his head over the side, and the gun was no longer in his hands. He became aware of the soldiers and saw them firing at the car. He said that at that stage they appeared to be shooting with their guns at chest height whilst running rather than specifically taking aim at anyone. He saw three tracer bullets of which at least one struck the car even after the man on the roof was lying on the roof as he had described.

35. Mr Mungjiu said that he had seen both men on the roof of the car fire the Kalashnikov. After the last occasion they were sitting cross-legged and facing forwards on the roof of the car when the soldiers fired at them. It was about twenty seconds or so after the last bout of firing by the man on the car. At no time did either of the men on the roof turn to face the soldiers or point a rifle in their direction. Indeed, his impression was that amongst all the noise the men on the roof had not even realised that the soldiers were there. The soldiers fired at them on one knee. He thought that there were seven or eight shots.

The expert evidence.

36. I received expert evidence from John Clark, Senior Lecturer in Forensic Pathology at the University of Glasgow and Professor Milroy, Professor of Forensic Pathology at the University of Sheffield. Dr Clark carried out a post mortem on the body of Fahri Bici, and Professor Milroy based his report largely on the facts as they emerged from that examination. There was no disagreement between them on any material conclusion at all. They set out a joint statement identifying the points of agreement and in the circumstances they were not called to give oral evidence.

37. They concluded that Fahri Bici died from a single gunshot wound that entered the right side of his back, went through the thoracic aorta, lacerated the surface of the lower lobe of the right lung, passed through the left lobe of the liver and finally exited the body through the front immediately below the breast bone. The bullet entered the back of the chest at an angle from the right side, the angle being in the order of 20-30 degrees. This could have been either because the firer was somewhat to the right of the line of the vehicle or because the deceased had slightly turned his back or because of a combination of both of these factors.

38. Both pathologists agree that Fahri Bici would be likely to have been almost immediately incapacitated by the injury. He would not necessarily have died immediately but he would have been unable to make any purposeful movements after having been struck by the bullet. The fact that he collapsed backwards was entirely consistent with his sitting on the roof at the car at the time.

39. Two of their conclusions in particular are of some importance in this case. First, the pathologists were asked whether it was physically possible for the deceased to have turned his head and or his arm towards the soldiers behind him in the moments before he was shot. They agreed that this would be physically possible without changing the position of his trunk or turning it only slightly but added that "it would be neither a natural nor a comfortable action and he would not have been able to point at anything with any accuracy". They said that it would be more natural if he were firing the gun in this way that he would turn his trunk around at the same time. However, had he done that then the track of the bullet through the body would have been a very different one. Accordingly they concluded that it was most unlikely that he had turned the rifle on to the soldiers in the way described by Corporal Madden.

40. The second matter of significance was this. The pathologists were asked the following question: "if Fahri Bici was sat on the roof of the car and acting as alleged by Corporals Madden Dolman and Eacott i.e. pointing the gun at the soldiers, on the balance of probability where would you have expected his rifle to come to rest after the fatal shot?" Their answer was that in those circumstances:

"We feel that it is much more likely that the gun would have fallen from his hands on the roadway than that he would have been able to continue gripping it as such that it ended up where it was subsequently

found i.e. between his legs.....We feel that he would have collapsed virtually immediately and he would have no strength or power to do anything else".

41. The claimants put considerable weight on this evidence which was not challenged by the defendant. They suggest that it is another strong pointer which is inconsistent with the evidence of Corporal Madden that Fahri Bici was aiming a weapon at him.

Were the soldiers acting in self-defence?

42. One of the defences advanced by the soldiers in this case is that they were acting in self-defence. As far as the criminal law is concerned, it is a defence if they had an honest belief that they were going to be attacked and reacted with proportionate force: see *R v Palmer* (1971) 55 Cr App R 223 (P.C.). In civil law, however, the belief must be both honest and reasonable. The defence is available both to meet a claim in negligence and in trespass (whether assault or battery), but the manner in which it does so is slightly different in each case. In negligence, the claim asserts that the defendant owed a duty of care and breached that duty by unreasonable conduct causing foreseeable loss to the claimant. Accordingly, if the defendant's conduct is reasonable, there is no breach. In trespass, any unlawful interference with the bodily integrity of the claimant will not be unlawful if it is justified, and it will be justified if the defendant can establish that the claimant's conduct was such that the defendant reasonably apprehended that he would be imminently attacked and used reasonable force to protect himself. In this case the claimants properly concede that if the soldiers did reasonably believe that Fahri Bici was about to shoot at them, then they were entitled to shoot first; such a response would be reasonable and proportionate.

43. There is a complication arising in this case from the fact that neither of the claimants themselves threatened the soldiers, and nor is there any evidence that they were specifically targeted by the soldiers. I consider the implications of that when analysing the specific torts relied on by the claimants.

44. In determining this question of whether the soldiers had a reasonable apprehension that they might be shot, I bear in mind two matters. First, as Mr Rose accepts, in circumstances where the failure to establish self-defence suggests that the soldiers may well have committed serious criminal offences, the evidence of wrongdoing must be strong. The well-known observations of Lord Nicholls in *re H (Minors)* [1996] A.C. 563 at 586 are pertinent:

"When assessing the probabilities the court will have in mind as a factor, to whatever extent is appropriate in the particular case, that the more serious the allegation the less likely it is that the event occurred and, hence, the stronger should be the evidence before the court concludes that the allegation is established on the balance of probability. Fraud is less likely than negligence. Deliberate physical injury is less likely than accidental physical injury.....Built into the preponderance of the probability standard is a generous degree of flexibility in respect of the seriousness of the allegation."

45. That principle is applicable here, albeit that it has to be applied where the burden is on the defence. It is not readily to be assumed that these soldiers would without reasonable cause have fired their guns at Fahri Bici.

46. Second, I also bear in mind certain observations of Lord Diplock in *Attorney General for Northern Ireland's Reference no 1 of 1975* [1997] A.C.105 at 138, when he observed that often a soldier has to act intuitively, and that in assessing his conduct and judging the action of the reasonable soldier, it is important to recognise that his action "is not undertaken in the calm analytical atmosphere of the court room after counsel with the benefit of hindsight have expounded at length the reasons for and against the kind and degree of force that was used by the accused, but in the brief second or two which the accused had to decide whether to shoot or not and under all the stresses to which he was exposed.". These observations were made in the context of a criminal case, but in my view they apply no less forcefully when considering liability in civil law.

47. Even bearing these matters very fully in mind, I have reached the clear conclusion on the evidence before me that the soldiers were not being threatened with being shot by Fahri Bici when they fired their guns, and there were no reasonable grounds for them to believe that they were. I reach this conclusion for the following reasons:

No witness supports the soldiers' case, and Isa Blumi and Arian Mumxjiu, whose evidence I accept, were both adamant that Fahri Bici did not turn and face the soldiers or aim his rifle at them. Certain of the Civil Evidence Act statements are to the same effect e.g. the statement of Daut Latifi although I do not put too much weight upon those.

Mohamet Bici said that as he fell back after being shot he saw the gun facing forwards by the inside of Fahri Bici's right leg.

The agreed forensic evidence is extremely powerful. It is inconsistent with the soldiers' evidence in two important respects, and is entirely consistent with the claimants' contentions. First, it shows that it would be highly unlikely for the gun to have ended up on the car roof facing forwards and in front of Fahri Bici if he had been shot when he was pointing the gun backwards at the soldiers. In those circumstances the gun would in all probability have dropped onto the floor. As his life was ebbing away he would not have had the strength to pull it back onto the car roof. Second, the track made by the bullet is inconsistent with Fahri Bici being shot whilst aiming his weapon at the soldiers in any realistic way.

Whilst it is theoretically possible that Fahri Bici could have swivelled his neck and arms and pointed the gun one handed at the soldiers, as Corporal Madden asserted in evidence, this would be extremely unlikely. It is not a natural movement. In any event, whilst Corporal Madden gave evidence before the court that this is what happened, this is not consistent with the evidence that he gave before the SIB. There he said on a number of occasions, as did the other soldiers, that Fahri Bici had turned around and directed his weapon at them. Mr Rose suggested that the evidence had been tailored to fit in with the forensic evidence, and in particular the fact that in his first report Dr Clarke had raised this as a theoretical possibility. I think that is a realistic inference. But in any event the account given to the court by Corporal Madden as to the circumstances in which the soldiers were threatened by Fahri Bici is quite unrealistic and I have no hesitation in rejecting that evidence.

48. It is not necessary for me to assess whether in the heat of the moment the soldiers could conceivably for some reason have been acting under the honest but mistaken impression that Fahri Bici was threatening to shoot them. It is enough for the purposes of civil liability that I reach the clear conclusion that any such belief was not reasonable. Indeed, the alternative view is unsupported by any reliable evidence.

Were the soldiers reckless?

49. Mr Rose asked the court to go further. He submitted that not only were the soldiers not acting in self-defence, but that the evidence supported the inference that they were deliberately firing to disable the car, and were thereby acting in a wholly reckless manner. They must have been aware that there were persons in the car, and they were acting with no thought for their safety. He suggests that they may have been irritated by the fact that Fahri Bici refused, as they saw it, to hand over his weapon, and that they lost control in the face of this provocative act. In support of this argument he relied heavily upon Mr Warlow, the ballistics expert called by the claimants, who drew certain inferences from the distribution of the bullets.

50. There was no material dispute about where the bullets had struck the car. As I have indicated, there were a total of 15 bullets fired. Seven of the shots struck the rear car bodywork, one of which must have passed through the car and killed Avni Dundi; one struck the petrol tank, and another smashed the rear window. A further bullet struck the near side rear tyre. Two bullets struck Fahri Bici and the claimant Mohamet Bici respectively; and it seems that in all probability three of the bullets missed their intended target altogether and did not strike the car. The claimants say that the pattern of distribution of these bullets is such that it is simply not feasible to believe that these three soldiers could have been aiming at Fahri Bici at all times, as they alleged. This would show a defect of marksmanship which is inexplicable. Each of the soldiers was skilled in using guns; Corporal Dolman was a qualified sniper and Corporal Madden was a skilled weapons instructor. He had consistently achieved high scores in the annual personal

weapons test which each soldier must pass if he is to be allowed to retain his weapon.

51. The claimant's expert, Mr Warlow, has over 40 years experience in the use of handling firearms of all types. He has produced technical papers and articles concerning firearms and is also an author of a book in the field. He was employed for 26 years in the Home Office Forensic Science Service as a firearms reporting officer and has been an expert witness in the courts over the years. He was for a time an advisor to the Home Office on firearm related matters. There is no doubt that he is man of pre-eminence in the field and I was impressed by the clarity of his explanation.

52. The defendant's expert was Captain Sandison who has served in the Army for 26 years. He is currently involved in the training and safety of weapons. He is an expert of the Army operational shooting policy but he is not, as he readily accepted, a ballistics expert.

53. Mr Warlow concluded that the distribution of the bullets was such that it was simply not feasible to believe that the soldiers had only been aiming at Fahri Bici. He did not suggest that it was wild fire but considered that there were certain target areas of choice. His view was that the pattern demonstrated a deliberate attempt to disable the vehicle and bring it to a halt by deflating its tyres. He also thought there had been a deliberate plan to aim at the central rear section of the car.

54. He specifically dealt with two issues in particular which the defendants had suggested might explain this distribution, even from skilled marksmen. First, it was said that the rifle had been set so that the zero setting was for a distance of 100 metres. Captain Sandison had initially suggested that if the range over which the shots had occurred was between 10 and 50 metres, which appears to be the kind of distance involved, then this would explain why the shots fell below Fahri Bici and struck the car. Mr Warlow explained why this was not so. The variation would be minimal over short distances the bullet can be treated as going in a straight line, perhaps dropping somewhere in the region of 4 centimetres over a 25 metre distance. Captain Sanderson accepted this and agreed that it would not to begin to explain the distribution.

55. The second explanation given by Captain Sandison was the circumstances in which the guns were fired. These were not shots fired on the shooting range with a static target. Rather they were fired in far from ideal conditions and at night, albeit that the area was relatively well lit. Moreover, the soldiers were faced with a moving target and under conditions of considerable stress and potential danger.

56. Mr Warlow agreed that these factors would affect the accuracy of any marksman, but nothing like to the extent indicated by the distribution of these bullets. Even although the vehicle was moving, it was effectively in a straight line with virtually no lateral movement, as Captain Sandison accepted. Accordingly, Mr Warlow did not accept there would have to be any significant adjustment of the weapons as the target was moving away. His evidence was supported by the soldiers themselves. Corporal Madden also accepted that it was not feasible for the soldiers to have hit the car if they were aiming to shoot Fahri Bici, and Corporal Dolman gave evidence in interview before the SIB to similar effect.

57. By contrast, Captain Sandison expressed the view that the largely vertical grouping of the shots was consistent with aiming at Fahri Bici, although from his perspective as a shooting coach, he accepted that it was certainly disappointing marksmanship. He provided some information to demonstrate how the marksmanship differed from the standards which soldiers of this skill would be expected to show on a firing range, and he sought to explain that it was not as significant as it might seem. Mr Rose was critical of some of the methodology adopted, in my view with good reason. Nonetheless, the essential thrust of Captain Sandison's evidence was that one has to make considerable allowances for the stress of firing under pressure and it was his opinion that given that fact, the distribution was consistent with the soldiers' claim that they were at all times targeting Fahri Bici.

58. Bearing in mind the gravity of these allegations, and the matters I have referred to above, I have concluded, not without hesitation, that the claimants have not shown that the soldiers were reckless in the manner alleged. I have regard to the fact that it would be surprising if they lost their discipline in such a fundamental way, and there is no obvious reason why they should have done so.

The legal issues.

59. The claimants allege both negligence and trespass. The arguments based on trespass are raised in unusual circumstances since the claimants accept that the soldiers did not intend to interfere with their personal security. In response to these claims, the defendants raise two broad defences, in addition to the issue of self-defence, which I have already analysed. The first is what is termed "combat immunity". The defendants submit not only that this defence is applicable, but also that it is a complete answer to any tortious claim which is advanced, however formulated. The second defence relates solely to the claim in negligence. It is that in the circumstances the soldiers did not owe the claimants a duty of care at all, and accordingly cannot be liable in negligence. I shall deal with these defences after analysing the torts relied upon by the claimants.

The nature of the claims.

Negligence.

60. The principal ground relied upon by each of these claimants is negligence. It is alleged that the soldiers owed the claimants a duty of care to prevent personal injury, that they were in breach of that duty in that they failed to exercise reasonable care, and that the injuries to the claimants were suffered as a consequence.

61. In order for Skender Bici to be able to sue in negligence then since he has suffered psychiatric harm he must show that he is a "primary victim" within the language used in *Page v Smith* [1996] A.C.195. This requires that it was foreseeable that he would be physically injured. I have no doubt that he was a primary victim so defined, and I do not understand Mr Miller to be contending to the contrary. Once that is established, it matters not that the injury he suffers is in fact psychiatric and not physical injury. (It was conceded that the family connections were not close enough in this case for him to qualify as a secondary victim on that count.) I should add that my understanding is that once the claimant establishes that he is a primary victim, he can recover damages for the psychiatric injury even if it was caused principally as a result of witnessing the event rather than through fear of personal injury. However, I have heard no argument about that, and if the point is in issue it is a matter which will have to be determined at any quantum hearing.

62. Mr Miller contended that even if self-defence were unavailable, nevertheless there was no breach of duty. The soldiers issued a warning and genuinely perceived a threat of attack. Even if that threat was not present, they should not be held liable for the almost instinctive response in the heat of the moment.

63. I reject that submission. Assuming the duty of care, there was in my view clearly a breach of that duty for which the defendant is vicariously liable. The breach of the duty did not result from any negligent conduct in the manner in which the soldiers fired their weapons; I do not find that they were careless in the way in which they fired at Fahri Bici. Rather they were in breach of duty in firing at him at all. They failed to take reasonable care in that they deliberately fired when there was no justification in law for so doing. Had they been acting in lawful self-defence I would not have treated their firing, as inaccurate as it was, as negligent in the circumstances.

64. Mr Rose also submitted that in any event the soldiers recklessly fired at the car. This however adds nothing to this part of the claim, and in any event I have rejected that on the facts.

Alternative causes of action.

65. Mr Rose also put his case on a number of other grounds. It is necessary briefly to consider these for two reasons. First, the existence or otherwise of such claims is material if the soldiers did not owe the claimants a duty of care. Second, the defendant contends that even if there is liability, the claimants are contributorily liable. If that is right, that doctrine may apply differently to negligence claims than it does to the intentional torts. I consider the question of contributory fault below, after I have analysed the other potential causes of action and the defences. I will deal with the two claimants separately.

Mohamet Bici.

66. Mohamet Bici submits that in addition to liability in negligence, there is also liability for trespass to the

person in the form of battery. As Lord Goff observed in *F v West Berkshire Health Authority* [1990] 2 A.C.1 at p.73 "any touching of another's body is, in the absence of lawful excuse, capable of amounting to a battery and a trespass."

67. The case on battery was put in two ways. First it was accepted that there was no specific intention to harm Mohamet Bici, but it was submitted that the soldiers were reckless as to whether he would be harmed or not, and this was sufficient to establish liability. I accept that recklessness will in principle suffice, but it must be a subjective recklessness that they appreciated the potential harm to the claimants and were indifferent to it. The short answer to this point is that I have found that the soldiers were not reckless in that sense.

68. Second, he says that even although he was not the target of the soldiers' fire, in circumstances where he has been injured as a consequence of the deliberate act, the doctrine of transferred malice applies and permits him to sue the defendant. In support of this principle he relies upon the certain observations of Lord Hutton in *Livingstone v Ministry of Defence* [1984] N.I.L.R.356. The facts were that the plaintiff was injured in Northern Ireland when a soldier fired a baton round after some soldiers were attacked by rioters. It was accepted that the round had been deliberately fired, although denied that it had been intended to strike the plaintiff. The claim was in negligence and assault and battery. The trial judge dismissed the claim in negligence but did not give a ruling on the question of battery. On appeal the Northern Ireland Court of Appeal allowed the appeal and ordered a new trial. Hutton J, giving the judgment of the court, rejected the argument that there could be no battery because the plaintiff was not the chosen target in the following terms (p.361)

"In my judgment when a soldier deliberately fires at one rioter intending to strike him and he misses him and hits another rioter nearby, the soldier has "intentionally" applied force to the rioter who has been struck. Similarly if a soldier fires a rifle bullet at a rioter intending to strike him and the bullet strikes that rioter and passes through his body and wounds another rioter directly behind the first rioter, whom the soldier had not seen, both rioters have been "intentionally" struck by the soldier and, assuming that the force used was not justified, the soldier has committed a battery against both."

69. In reaching this conclusion the judge followed the decision in *James v Campbell* (1832) 5 Car & P 372; 172 E.R.1015 in which the defendant became involved in a fight at what must have been a memorable parish dinner and it was suggested that he had hit the claimant by mistake, giving him two black eyes. Mr Justice Bosanquet told the jury that even on that premise he would be liable. (A decision which goes even further than these, and which was not cited in *Livingstone*, is *Ball v Axten* (1866) 4 F.& F.1019; 176 E.R. 890, where Lord Cockburn C.J. held that a defendant who was aiming to hit a farmer's dog and by mistake hit the farmer's wife who was trying to protect it was liable in assault. It is, however, surprising to apply the principle of transferred malice from animal to human, however reprehensible violence to the former may be. Given the extension since those times of the principle of negligence, it may be that a different conclusion would now be reached.)

70. Mr Miller contends that this principle is inconsistent with the well known case of *Letang v Cooper* [1965] 1Q.B.232 where the Court of Appeal held that a negligent trespass to the person could only be pursued in negligence and not in trespass. The identical argument was run and rejected in *Livingstone*. As Hutton J pointed out, the observations of the Court in *Letang* do not preclude a court finding liability in trespass where there is an intention to apply force to someone; the claimant as the injured party sues because of the intentionally wrongful act.

71. In my judgment the principle enunciated in the *Livingstone* case and these earlier authorities is sound law and even although I am not strictly bound by the decision of the Northern Ireland Court of Appeal, I respectfully follow it, particularly when the observations come from such a distinguished judge.

72. Of course, if the defendants were to have a defence of self-defence available to them with respect to the targeted individual, then it would run equally to the transferred claimant. The defendant can be no worse off in respect of the latter. However, since I have rejected that defence, it follows that the defendant is liable in this case to Mohamet Bici in trespass to the person as well as negligence.

Skender Bici.

73. Mr Rose contends that in addition to his claim for negligence, Skender Bici can sue in assault, or alternatively under the principle established in *Wilkinson v Downton*. I shall deal with them in turn.

74. The term "assault" is used in two different ways. Sometimes it is used to describe the infliction of force, which is strictly the tort of battery, and sometimes to describe the threat of the application of force. Skender Bici can only rely upon assault in the latter sense.

75. In *R v Ireland* [1997]4 All E R225 Lord Hope defined assault as "any act by which the defendant, intentionally or recklessly, causes the claimant to apprehend immediate and unlawful personal violence", approving, inter alia, the definition earlier given by Lord Ackner in *R v Savage* [1992] 1A.C.699, 740 .

76. Skender Bici alleges that he was put in personal fear for his own safety when the shots were fired. He contends that this is sufficient in the circumstances to constitute the tort of assault. He accepts that there will be an issue to be determined at the stage when damages are assessed as to whether any psychiatric harm flowed from the fear of an imminent attack as opposed to his witnessing the incident, but submits that this does not affect liability.

77. In my judgment the claim for assault cannot succeed. There is no basis for any finding that the soldiers intended personally to put him in fear of imminent violence. Indeed, there was no evidence that they intended to put anyone at all in fear. The fact that it may have been the consequence of their actions, even a foreseeable consequence, is not enough to fix them with liability in trespass.

78. However, Mr Rose contends that nonetheless there are two ways in which he can rely upon this tort. First he contends that the soldiers were reckless within the definition of the tort. However, to establish liability under this tort it would not be enough to show that their conduct had been reckless (which in any event I have concluded has not been established.) Rather it would have to be shown that the soldiers must subjectively have appreciated that by their conduct the claimants would be put in fear of the immediate application of a battery, and they must have been indifferent as to this possibility. There is no evidence that it crossed their minds at all.

79. Second, he submits that just as there may be transferred malice to establish liability for battery, as in *Livingstone*, so there can likewise be transferred malice creating liability in assault. The argument is that the soldiers intended to put Fahri Bici in fear of imminent violence, and that same intention can be attributed to Skender Bici. In my judgment this argument fails at the first hurdle. There is no evidence that Fahri Bici himself was put in fear of anything. No doubt he would have heard gunfire, but on the night in question that would not necessarily have caused him any anxiety. He was shot from behind and therefore in all probability did not see the soldiers and would not have known that he was their target. So the claimant fails to establish the premise on which this argument depends. It is also highly artificial to say that someone who intends to shoot A intends to put him in fear, even although that may be a strong possibility.

80. In any event, I am far from satisfied that the doctrine of transferred malice would apply to an assault in the same way as it applies to a battery. The fear that Skender Bici experienced as a consequence of the shooting would have been felt quite independently of the chosen target. Indeed, it would be quite fortuitous whether there was a chosen target or not. This extension of the principle would considerably widen the scope of what is essentially a tort of intention and nudge it ever closer to the tort of negligence, without any obvious purpose or justification.

81. For these reasons, the action grounded in assault fails.

82. The scope of the tort derived from *Wilkinson v Downton* has recently been considered by the House of Lords in *Wainwright v Home Office* [2003] UKHL 53; [2003] 4 All E R 969. Lord Hoffmann, with whose judgment on this point Lords Bingham, Hope, Hutton and Scott concurred, analysed the cases in which the doctrine has been applied. He observed that *Wilkinson v Downton* itself was decided at a time when damages for psychiatric harm were not recoverable in negligence and was an attempt to circumvent that limitation. His Lordship also observed that given the subsequent developments in the law of negligence,

Wilkinson v Downton has no role to play in the modern law. No doubt in most cases it is right to say that it matters not whether the psychiatric harm results from a negligent or intentional act, although this case demonstrates that the distinction may exceptionally be relevant where there is no duty of care. Lord Hoffmann left open the question whether the tort was available for compensating mere distress falling short of psychiatric injury, but concluded that even if it was, it was a necessary requirement for the application of this tort that there should at least be an intention to cause the requisite harm or recklessness, the defendant not caring whether he would cause harm or not. For reasons I have already given, neither condition is satisfied in this case with regard to Skender Bici and accordingly this claim fails also.

The defences.

83. As I have indicated, apart from self-defence these are combat immunity and the lack of any duty of care.

Combat immunity.

84. The defence of combat immunity is not strictly a defence at all, in the sense of rendering lawful what is alleged to be unlawful. Rather, where the doctrine applies its effect is to remove the jurisdiction of the court to decide certain kinds of dispute; they are non-justiciable. Where the doctrine applies the court is being deprived of its historic and jealously guarded role of determining a dispute where a citizen claims that his rights have been unlawfully infringed by an act of the executive.

85. Before considering the scope of this doctrine, it helpful to bear in mind certain fundamental principles of constitutional law. The starting point is the famous case of *Entick v Carrington*(1765) 19 ST.TR.1030. The King's messengers were sued in trespass for breaking into the plaintiff's house and seizing his papers. They pleaded that they were acting under a warrant of the Secretary of State, but the defence failed. Lord Camden C. J. observed:

"...with respect to the argument of State necessity, or a distinction that has been aimed at between state offences and others, the common law does not understand that kind of reasoning, nor do our books take notice of any such distinctions."

86. This is a ringing endorsement of the rule of law and of the system of democratic government. The executive cannot simply assert interests of state or the public interest and rely upon that as a justification for the commission of wrongs.

87. However, whilst that is the general position, there are certain circumstances where the courts will decline to determine the claims brought before them.

88. One such situation may arise where the interests of foreign nationals are concerned. In a claim for compensation against the state, the state can in an appropriate case rely on the doctrine of Act of State. The concept is a highly ambiguous one and the term is used in a number of quite discrete ways. However, in the context where claims are brought by foreign nationals alleging infringement of their legal rights, the effect of a successful claim of Act of State is to remove the jurisdiction of the court to hear the dispute. The way in which the government exercises its prerogatives in relation to foreign affairs and in its relations with foreign states does not give rise to rights which are cognisable by the domestic courts. As Lord Wilberforce commented in *Nissan v The Attorney General* [1970] AC 179 at 231(f):

"As regard such acts it is certainly the law that the injured person if an alien cannot sue in an British Court and can only have resort to diplomatic protest. How far this rule goes and how far it prevents resort to the courts by British subjects is not a matter on which clear authority exists."

89. In this case the defendants have expressly disavowed any reliance upon this doctrine. It has not been contended that the acts of the soldiers were either authorised or ratified by the Crown.

90. The concept of combat immunity, which is relied upon, serves a quite different purpose. Unlike Act of State, it can be relied upon even against citizens of the United Kingdom and even where torts are committed in the United Kingdom. It is closely and imprecisely related to (and in some cases perhaps

identical with) a separate concept of necessity. This is exceptionally a defence to the Government and indeed individuals, who take action in the course of actual or imminent armed conflict and cause damage to property or injury (including possibly death) to fellow soldiers or civilians. Unlike Act of State, the doctrine has nothing to do with a concern about undermining the acts of the executive in relation to foreign affairs. It is essentially an exception to the *Entick v Carrington* principle and as such should be narrowly construed. The courts recognise that very exceptionally the basic liberties of the citizen may have to give way to vital interests of state. When arms clash or attack is imminent, the citizen may be an unfortunate victim of the conflict, whether as a result of enemy action or sometimes friendly fire or precautionary actions. In relying upon the doctrine in this case, the defendants have to demonstrate that the defence would be available in similar circumstances if the events had taken place on British soil in relation to a British citizen. Save where Act of State is applicable, no special principles apply because the injured claimant is a citizen of a foreign state.

91. There are a few cases which testify to this principle of combat immunity. It seems that the concept was first described in those terms in *Shaw Savill and Albion Company Ltd v The Commonwealth* [1940] HCA40; (1940) 66 CLR 344, a decision of the High Court of Australia. The plaintiffs brought a claim in damages for negligence. They owned a ship "The Coptic" which was in a collision with His Majesties Australian Ship "Adelaide". The plaintiff alleged that the collision resulted from the negligence of the defendant's officers. It was said that the Adelaide was sailing too fast, that it failed to keep a proper lookout for the Coptic and that it was not navigated in a proper and seaman like manner. The defence was that, at the relevant time; the Adelaide was part of the naval forces of Australia and was engaged in active naval operations against the enemy

92. The High Court of Australia accepted that in principle such a defence was open to the state. Dixon J, in the course of his judgment, said this:

"It could hardly be maintained that during an actual engagement with the enemy or a pursuit of any of his ships the navigating officer of a King's ship of war was under a common-law duty of care to avoid harm to such non-combatant ships as might appear in the theatre of operations. It cannot be enough to say that the conflict or pursuit is a circumstance affecting the reasonableness of the officer's conduct as a discharge of the duty of care, though the duty itself persists. To adopt such a view would mean that whether the combat be by sea, land or air our men go into action accompanied by the law of civil negligence, warning them to be mindful of the person and property of civilians. It would mean that the Courts could be called upon to day whether the soldier on the field of battle or the sailor fighting on his ship might reasonably have been more careful to avoid causing civil loss or damage. No one can imagine a court undertaking the trial of such an issue, either during or after a war. To concede that any civil liability can rest upon a member of the armed forces for supposedly negligent acts or omissions in the course of an actual engagement with the enemy is opposed alike to reason and to policy. But the principle cannot be limited to the presence of the enemy or to occasions when contact with the enemy has been established. Warfare perhaps never did admit of such a distinction, but now it would be quite absurd. The development of the speed of ships and the range of guns were enough to show it to be an impracticable refinement, but it has been put out of question by the bomber, the submarine and the floating mine. The principle must extend to all active operations against the enemy. It must cover attack and resistance, advance and retreat, pursuit and avoidance, reconnaissance and engagement. But the real distinction does exist between active operations against the enemy and other activities of the combatant services in time of war."

93. But he made it plain that the basis of the immunity is wider than simply relieving soldiers from any duty of care that might otherwise exist. The judge said this:

"There is no authority dealing with civil liability for negligence on the part of the King's forces when in action, but the law has always recognised the rights of property and of person must give way to the necessities of the defence of the realm...."

The uniform tendency of the law has been to concede to the armed forces complete legal freedom of action in the field, that is to say in the course of active operations against the enemy, so that the application of private law by the ordinary courts may end where the active use of arms begins. Consistently with this tendency the civil law of negligence cannot attach to active naval operations

against the enemy."

94. A similar principle but relating to damage to property and not in terms described as combat immunity was adopted by the House of Lords in *Burma Oil Company Ltd v Lord Advocate* [1965] AC 75. In that case the General Officer Commanding in Burma during the war of 1939 to 1945 ordered certain oil installations of the appellant companies near Rangoon to be destroyed. The reason was that the Japanese Army was advancing and the Government wished to deny resources to the enemy. The destruction was carried out on the day before the Japanese occupied Rangoon. The question was, whether compensation was payable for this destruction. Their Lordships, by majority of three to two (Lords Reid, Pearce and Upjohn, Viscount Radcliffe and Lord Hodson dissenting), held that the Government were exercising a prerogative power which required them to pay compensation. However, their Lordships distinguished this situation from one where property was damaged or destroyed during the course of battle. Lord Reid after quoting many cases and the views of learned jurists, concluded as follows (p.110):

"In my judgment, those authorities and others quoted in their opinions afford ample justification for the decision of the First Division with regard to the general rule, and no contrary Scots authority has been cited. This case therefore turns, in my view, on the extent of the exception of what has been called battle damage.

Such damage must include both accidental and deliberate damage done in the course of fighting operations. It cannot matter whether the damage was unintentional or done by our artillery or aircraft to dislodge the enemy or by the enemy to dislodge our troops. And the same must apply to destruction of a building or a bridge before the enemy actually capture it. Moreover, it would be absurd if the right to compensation for such a building or bridge depended on how near the enemy were when it was destroyed. But I would think that Vattel is right in contrasting acts done deliberately (*librement et par precaution*) with damage caused by inevitable necessity (*par une necessite inevitable*). His examples show that he means something dictated by the disposition of the opposing forces. It may become necessary during the war to have new airfields or training grounds and the necessity may be inevitable, but that kind of thing would not come within the exception as stated by any of the commentators, inevitably necessary because there is really no choice: for example, there may be only one factory in the country or one site available for a particular purpose."

95. These authorities were followed by the Court of Appeal in *Mulcahy v Ministry of Defence* [1996] QB 732. In that case a serving soldier in the Artillery Regiment was serving in Saudi Arabia in the course of the Gulf war. He was injured when he was part of a team managing a Howitzer, which was firing live rounds into Iraq, and he was standing in front of the gun when it was negligently fired by the gun commander. The Ministry of Defence sought to have the application struck out as disclosing no cause of action. The judge held at first instance that there should be a trial but on appeal the Court of Appeal held that even on the facts pleaded, the plaintiff did not have a cause of action in negligence against the defendant. Lord Justice Neill in his judgment copiously quoted both from the *Shaw Savill* and the *Burma Oil* cases. He concluded that even if the facts alleged by the plaintiff were proved, the damage would have been incurred during battle conditions. Accordingly no civil action was available.

96. It is pertinent to note that His Lordship also concluded that even independently of this doctrine he would have concluded that on grounds of public policy it would not have been right for the common law to have imposed a duty of care in the circumstances of the case. In reaching that conclusion he had regard to a decision of May J. in *Hughes v National Union of Mine Worker* [1991] ICR 669. That was a case where the plaintiff was a police officer who had been injured during disturbances at a colliery in North Yorkshire in 1984 during the national miners' strike. The officer alleged that the Chief Constable had failed to provide adequate protection and had unreasonably exposed him to risk of injury. On a strike out application the judge dismissed the action. He concluded that it would be detrimental to the public interest if officers charged with deploying other officers in times of serious public disorder were to have to concern themselves with the possible negligence claims from their subordinates. The fear of such claims could inhibit the effective deployment of resources.

97. Lord Justice Neill's judgment in *Mulcahy* was concurred in by both Lord Justice McCowen and Sir Iain Glidewell. After referring to the passage in the judgment of Mr Justice Dixon which I have made mention,

Sir Iain Glidewell added:

"If during the course of hostilities no duty of care is owed by a member of the armed forces to civilians or their property, it must be even more apparent that no such duty is owed to another member of the armed forces."

98. More recently the whole question of combat immunity has been considered by Mr Justice Owen in *Bell & Others v Ministry of Defence* [2003] EWHC 1134. His Lordship in that case was concerned with claims by a very large number of former members of the armed forces who claimed to have sustained psychiatric injury as a consequence of exposure to the stress and trauma of combat. In the course of a very detailed judgment, Owen J. considered specifically the issue of combat immunity insofar as it had a bearing on the negligence claims before him. One of the issues that he had to consider was whether the doctrine applied to anti terrorist policing and peacekeeping operations such, as for example had occurred in Northern Ireland and in Bosnia and Kosovo. He concluded that it did. Relying upon the judgment of May J. in the *Hughes* case, he held that:

"It will apply to operations in which service personnel come under attack or threat of attack."

99. He also expressly approved the analysis of Dixon J. in the *Shaw Savill* case who said:

"It covers attack and resistance, advance and retreat pursuit and avoidance reconnaissance and engagement."

100. In my judgment, these authorities suggest that the exclusion of liability for the intentional infliction of damage to property or person will, as one might expect, be narrower than the exclusion of liability for negligence. As *Burma Oil* makes plain, there can be no deliberate interference with property rights without payment of damages or compensation save where it is the result of inevitable necessity or what Lord Reid termed "something dictated by the disposition of the opposing forces." That of course was in the context of interfering with property rights but the right to interfere with personal integrity can hardly be any less rigorous. Indeed, one might expect that the courts would require a high degree of necessity even in war time for the Government to be able to claim combat immunity in relation to the deliberate infliction of harm on one of its citizens.

101. I confess that I have considerable difficulty in seeing how the doctrine has any application at all in this case. It is relied upon when a person is injured or their property is damaged or destroyed in circumstances where they are the "innocent" victims of action which is taken out of pressing necessity in the wider public interest arising out of combat. It is not the conduct of the victim which justifies immunity from suit but rather a very pressing public interest. It is curious to pray the concept in aid where the claimants themselves have been acting unlawfully. The justification for the defendant in those circumstances, if there be any justification, is that steps are required to restrain or prevent the wrongful conduct. That is precisely the situation here. The justification advanced for firing at Fahri Bici was the soldiers' self-protection, namely that they were about to be shot by him, or at least that this was their reasonable belief. It has never been suggested by the soldiers or anyone else that they fired at him because of wider concerns which necessitated such draconian measures in the public interest, nor even that any such interest arose out in the course of combat, however widely that concept is construed. For example, it has not been suggested that there was a real fear that the men in the car were part of a wider group intent on attacking building 42 or anything of that nature. Whatever initial concerns there may have been on that score, they no longer figured in the minds of the soldiers when the car was being driven away at increasing speed from that building. If self-defence fails, as I have held that it does, then I do not see how combat immunity is engaged.

102. Moreover, we are in my judgment very far from the kind of situation where the courts would permit the executive by reason of state necessity to act free from any legal fetters for negligent or intentional acts. Even focusing on the soldier's activities on the night in question, it is plain that they were carrying out essentially a policing and peacekeeping function. I accept that this labelling of their role does not of itself determine matters since even when carrying out those activities they could still be engaged in an attack or threat of attack, as Mr Justice Owen recognised in *Bell*. But any such threat must in my view be imminent and serious. Indeed, even where they are under some sort of attack, such as where there is a

civilian riot that, would not mean that the doctrine of combat immunity would necessarily apply. There are numerous cases of riot where the authorities have been held liable in tort, the *Livingstone* case itself being but one example. In my view it requires a significant degree of necessity before the doctrine can trump the fundamental protection afforded by *Entick v Carrington*, and I do not consider that the situation comes near to being such a case. It was at most an incident of disorder in the streets. The soldiers did not claim that they were in a combat situation, and in my judgment they plainly were not.

Was there a duty of care?

103. I turn to consider whether the circumstances were such as to negate the duty of care. I have referred above to the *Mulcahy* and *Hill* cases where the courts held that no such duty arose on traditional *Caparo* principles. In the circumstances of those cases it was not considered to be fair, just and reasonable to subject the defendants to a duty of care. However, in *Hill* the reason was that it was not considered appropriate for the superior officer to be at risk of negligence claims because of the deployment of his forces in a riot, and in *Mulcahy* it was thought inappropriate in what were described as "battle conditions" to impose on the defendant the duty to maintain a safe system of work.

104. In my view those authorities are not applicable here. Troops frequently have to carry out difficult and sensitive peace keeping functions, such as in Northern Ireland, whilst still being subject to common law duties of care. The difficulties of their task are reflected in the standard of the duty rather than by denying its applicability. In *Attorney General for Northern Ireland's Reference no 1* [1977] A.C.105, 137 a British soldier had shot and killed an unarmed man who had run away when challenged, in the honest and reasonable, although mistaken, belief that he was a terrorist. The soldier was searching for terrorists at the time. The judge held that he had no intention to kill or seriously injure and that the killing was justifiable homicide. The reference from the Attorney General raised two questions, first whether the Crown had established in the circumstances that the act of the constituted unreasonable force; and second, if so, whether this constituted the crime of murder. The House of Lords held that these were matters of fact rather than law. In the course of giving his judgment, Lord Diplock said this (p.137):

"There is little authority in English law concerning the rights and duties of a member of the armed forces of the Crown when acting in aid of the civil power, and what little authority there is relates almost entirely to the duties of soldiers when troops are called upon to assist in controlling a riotous assembly. Where used for such temporary purposes, it may not be inaccurate to describe the legal rights and duties of a soldier as being no more than those of an ordinary citizen in uniform."

The basic position therefore is that soldiers owe the same duties as ordinary citizens, and the latter clearly owe a duty of care in the circumstances.

105. I am confirmed in my view that the duty of care is in principle applicable to peace keeping and policing functions of this kind by the fact that soldiers peace keeping in Northern Ireland have from time to time faced negligence claims arising from incidents when they have been required to take aggressive action to preserve the peace in the face of a disorderly and hostile crowd. Again *Livingstone* is but one example, although the action in negligence failed in that case. *A fortiori* in my view these soldiers were subject to a duty when, as I have found, there was no relevant aggressive action directed against the authorities at all.

106. It follows that in my view the defences on which the defendant seeks to rely are not available to them.

Contributory Fault.

107. Finally I turn to consider the issue of contributory fault. Mr Miller contends that the claimants are contributorily negligent. He submits that by agreeing to travel in a vehicle with someone who, to their knowledge, was firing a gun in a potentially provocative manner, they were acting recklessly and contributing to their own injury. Moreover, he submits, and I accept, that they must have known that there was an embargo on the use of guns.

108. It is well established that in assessing whether or not to apportion liability under the Law Reform

(Contributory Negligence) Act 1945 it is necessary to have regard both to causation and to blameworthiness.

109. In my judgment it cannot sensibly be said that the claimants by their conduct shared in the responsibility for their injuries. Any imprudence on their part was dwarfed by the acts of the soldiers. The latter deliberately and without justification caused these injuries, and in my view it would not be just or equitable to reduce the damages on grounds of contributory fault.

110. In the circumstances it is not necessary for me to enter into the knotty question whether damages can be reduced for contributory fault in the case of intentional torts. I was referred to a number of authorities on the point going either way, including another decision of Hutton J (as he was) in *Wasson v Chief Constable of Northern Ireland* [1987] N.I.420 in the High Court of Northern Ireland in which, after an extensive review of the law up to that date, he held that contributory negligence could apply even where the defendant was liable for intentional torts. Indeed he found that it applied on the facts in that case and reduced the plaintiff's damages for assault by half where he had been hit by a plastic baton round whilst voluntarily participating in a riot.

111. I found his reasoning persuasive, but it matters not since even allowing that contributory negligence can be raised as a defence, it would in my view be a very rare case where damages should be reduced in circumstances where the defendant's conduct is intentional and unjustified and the claimant's is merely negligent. Moreover, in my view this feature should in most cases at least defeat a claim to contributory negligence, whether the cause of action is framed in trespass or negligence. In my opinion, even assuming that the claimants' imprudence could fairly justify the epithet "negligent", this would not be one of the exceptional cases where contributory fault should be found.

Conclusion.

112. In my judgment the claimants succeed in establishing that the defendant is liable to them in negligence and also, in the case of Mohamet Bici, in trespass to the person. The amount of damages will have to be assessed at a separate hearing.

113. It would, however, be wrong to leave this judgment without putting this incident in context. The British Army can justifiably be proud of the operation it carried out in Kosovo. It helped to bring peace to a scarred and deeply divided community, and will have saved countless lives. It displayed professionalism and discipline of the highest quality. The soldiers on the ground had to carry out difficult and highly responsible tasks which required a combination of courage and sensitivity. In general, they discharged their duties with considerable credit. But soldiers are human; from time to time mistakes are inevitable, and even the most rigorous discipline will crack. In this case the fall from the Army's usual high standards led to tragic consequences for the victims and their families. The Queen's uniform is not a licence to commit wrongdoing, and it has never been suggested that it should be. The Army should be held accountable for such shortcomings, even where the victims are from the very community which has benefited so much from the Army's assistance. A proper system of justice requires no less.