

Why Australia should face civil lawsuits over soldier misdeeds in Afghanistan

Written by Tim Matthews, Sessional Academic, Law School, University of Sydney

For the past two years, Paul Brereton, a New South Wales Supreme Court judge and Army Reserve major general, [has been conducting](#) an investigation into the conduct of members of the SAS in Afghanistan. While the findings are not yet known, leaks from within the Australian Defence Force (ADF) have [suggested](#) that as many as five cases involving unlawful killings have been uncovered.

Much of the media commentary surrounding the allegations has centred on the [potential criminal prosecution](#) of these alleged offences. But a further legal issue can arise from investigations of this kind – the alleged victims (or their families) might bring civil claims against Australia’s armed forces, seeking compensation for their suffering.

Read more: [Explainer: how Australia's military justice system works](#)

Cases of this kind have occurred in other countries. In the United States, a number of high-profile [habeas corpus petitions](#) have been filed against the government by people who claim they were unlawfully detained by US armed forces on suspicion of being insurgents in Iraq and Afghanistan.

Claims for damages have also been successfully [brought](#) by former Iraqi detainees against private military contractors over their alleged torture at Abu Ghraib prison in Iraq.

British courts are also currently considering a [number of civil suits](#) arising out of British involvement in the conflicts in Iraq and Afghanistan.

One of those claimants, Yunus Rahmatullah, was arrested by British forces in Iraq in 2004 on suspicion of being a member of Lashkar-e-Taiba, a terrorist organisation with links to al-Qaeda. He was “rendered” by British forces to the custody of the US army in Afghanistan, where he was

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detained for over ten years without charge or trial and, [he alleges](#) , tortured.

Rahmatullah denies ever being a member of a terrorist organisation. He has made a [well-publicised](#) claim for compensation from the UK government, under the country's Human Rights Act.

Why are civil claims against soldiers controversial?

We are all exposed to potential civil liability in our day-to-day lives. If we drive negligently and cause an accident, for instance, we may find ourselves liable to pay compensation to those we have harmed. The same is true of public institutions and authorities, such as hospitals and the police. Few would suggest this is unfair or unreasonable.

Read more: [***Inconsistency bedevils Australia's prosecution of war criminals***](#)

However, the extension of civil liability to the armed forces is controversial. Former Army officer Bill O'Chee, for instance, recently [argued](#) forcefully against such liability:

Service personnel who commit crimes are already subject to military criminal proceedings, and this is rightly so. However, exposing them to claims for personal injury claims would be perverse and entirely unjust.

The very idea that highly paid lawyers in comfortable courts in Australia can understand, let alone litigate these cases, is fanciful at best.

How absurd it would be for our servicemen and women to be subjected to damages claims in these circumstances, let alone be asked to find the money for legal costs and a possible

damages order against them.

Should these civil claims be permitted?

Such civil liability claims have never been brought against individual ADF personnel in Australia before. This would be new legal territory. And nobody is seriously suggesting these soldiers should personally bear the burden of defending civil claims arising from the Afghanistan and Iraq wars. Rather, any potential claims are likely to be defended by the Commonwealth.

This is the way civil claims against police officers in Australia are typically resolved. In such cases, individual officers will often be required to give evidence as to their version of events. Yet the costs of defending the case, and the compensation (if any) paid to the plaintiff, are borne not by the individual officers, but by the relevant public authority.

Despite the controversy surrounding them, there are still good reasons to allow civil claims of this kind to proceed.

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First, criminal and civil claims serve different purposes. A successful criminal prosecution may leave a victim with a feeling of vindication, but it typically does not result in monetary compensation. As a result, it may matter little to victims or their families if the soldiers responsible are professionally disciplined, since they may receive no compensation for their loss.

Secondly, the notion that civilian courts are not competent to adjudicate on military matters is seriously problematic.

Nobody could deny that military personnel are forced to carry out their duties in extremely difficult conditions. It is also true that many lawyers and judges have difficulty appreciating the fraught circumstances in which military decision-making occurs.

But the answer to these difficulties is not the abandonment of such claims altogether. Judges are often faced with the task of making difficult decisions about matters on which they are not experts. Civil justice would simply not work if courts threw up their hands whenever they were faced with such challenges.

Greater accountability for the military

Finally, if the Commonwealth were somehow able to avoid liability for potential civil damages in these types of cases, the ADF may have less incentive to conduct military operations in ways that safeguard the rights of civilians caught in conflict zones.

Given the limited accountability for military decision-making in the public sphere, the possibility of accountability in a civil court would promote stricter adherence to international conventions on war.

Many of the victims who may bring claims of this kind are unlikely to excite public sympathy. For example, one of the claimants in the UK cases, [Serdar Mohammed](#), was arrested while leaving a ten-hour firefight with British troops, discarding a rocket-propelled grenade launcher and ammunition on his way.

But we shouldn't allow our moral judgement of claimants like Mohammed to erode our commitment to the rule of law. Public authorities, and especially our armed forces, should be held accountable for their actions to the limits imposed by law.

John Eldridge is a former tipstaff (judicial assistant) to the Hon Paul Brereton. His views are his own, and should not be taken to represent the views of any other person or organisation.

Tim Matthews does not work for, consult, own shares in or receive funding from any company or

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