Ah Boys to Men: Training Deaths and Accountability

"Go, tell the Spartans, stranger passing by
That here, obedient to their laws, we lie."
– Simonides of Ceos

I. Introduction

1. Croesus might have been mistaken when he commented that "in peace, sons bury fathers, but in war fathers bury sons".[1] Training accidents do occur, and soldiers pay the ultimate price. On 18th April 2018, Corporal ("**CPL**") Dave Lee, a full-time National Serviceman ("**NSF**"), succumbed to heat injury following his fast march.[2] Since then, allegations of the "reckless" behaviour of the training commanders involved have surfaced.[3]

2. CPL Lee's death is yet another incident that has unfortunately occurred in recent years.[4] One might also recall the case of Dominique Sarron, an NSF who died after a training exercise in 2012.[5] Unsurprisingly, there has been increased scrutiny of such incidents by the media, no less because the bulk of the Singapore Armed Forces ("**SAF**") is conscripted.[6]

3. Inevitably, an element of danger is inherent in any military manoeuvre. It is for this reason that safety protocols are put in place to ensure that military training is rigorous yet safe.[7] However, where protocols are breached, resulting in death, should commanders be held liable? If so, how exactly should these commanders be held liable?

4. In cases where death is allegedly caused negligently, looking to tort law seems reasonable; for example, the family could sue the person responsible for said death.[8] However, in *Estate of Lee Rui Feng Dominique Sarron, deceased v Najib Hanuk bin Muhammad Jalal and others* ("***Dominique Sarron***"),[9] s 14(1) of the Government

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[1] Herodotus, *The Histories* (Penguin Classics, 4th Ed, 2003) at p 41.

[2] Ministry of Defence Website <https://www.mindef.gov.sg/web/portal/mindef/news-and-events/latest-releases/article-detail/2018/april/30apr18_news> (accessed 16 May 2018).

[3] Asyraf Kamil, "'Please tell the full truth,' aunts of late NSF Dave Lee say in latest appeal to his army mates", <https://www.todayonline.com/singapore/please-tell-full-truth-aunts-late-nsf-dave-lee-say-latest-appeal-his-army-mates> (accessed 16 May 2018).

[4] Just a year before, Third Sergeant ("3SG") Gavin Chan was killed in a training accident in Australia. See Louisa Tang, "Solemn military send off for 3SG Gavin Chan, NSF killed during Ex Wallaby", <https://www.todayonline.com/singapore/family-friends-bid-farewell-3sg-gavin-chan-nsf-killed-during-ex-wallaby> (accessed 16 May 2018).

[5] "Mindef explains stance on NSF Dominique Sarron Lee's death", <https://www.straitstimes.com/singapore/mindef-explains-stance-on-nsf-dominique-sarron-lees-death> (accessed 14 August 2018).

[6] All males must serve unless medically exempted. See the Enlistment Act (Cap 93, 2001 Rev Ed) s 7(2).

[7] Ng Jun Sen, "Safety is paramount even as SAF pursue realistic training: Ong Ye Kung" (9 October 2017) <https://www.straitstimes.com/asia/australianz/safety-is-paramount-even-as-saf-pursue-realistic-training-ong-ye-kung> (accessed 14 May 2018).

[8] See *Man Mohan Singh s/o Jothirambal Singh v Zurich Insurance (Singapore) Pte Ltd (now known as QBE Insurance (Singapore) Pte Ltd)* [2008] 3 SLR 735.

[9] *Estate of Lee Rui Feng Dominique Sarron, deceased v Najib Hanuk bin Muhammad Jalal and others* ("*Dominique Sarron*") [2016] 4 SLR 438.

[10] Government Proceedings Act (Cap 121, 1985 Rev Ed) ("**GPA**").

Proceedings Act ("**GPA**")[10] was interpreted as exempting the Government and any member of the SAF from tortious liability even where death was caused negligently.

5. In this paper, it is suggested that the broad scope of s 14, which prevents tortious claims even when there has been a breach of training safety regulations ("**TSR**") should be narrowed. In making this suggestion, it is argued that the court in *Dominique Sarron* erred in its interpretation of the scope of s 14, and that an alternative reading of Parliament's intention should be preferred instead. Such an approach would promote accountability within the SAF, in addition to giving the affected families closure. The author further suggests that this approach should be applied to CPL Lee's case, and other similar cases.

II. Discussion

A. Current state of law

6. Section 14 of the GPA provides that:

> (1) Nothing done or omitted to be done by a member of the forces while on duty as such shall subject either him or the Government to liability in tort for causing the death of another person, or for causing personal injury to another person, in so far as the death or personal injury is due to anything suffered by that other person while he is a member of the forces if —
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> (a) at the time when the thing is suffered by that other person, he is —
>
> (i) on duty as a member of the forces.
>
> (ii) though not on duty as a member of the forces –
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> (A) on any land, premises, ship, aircraft or vehicle for the time being used for the purposes of the forces; or
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> (B) on any journey necessary to enable him to report for duty as such or to return home after such duty; and
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> (b) the Minister responsible for finance certifies that his suffering that thing has been or will be treated as attributable to service for the purposes of entitlement to an award under any written law relating to the disablement or death of members of the force of which he is a member:
>
> Provided that this subsection shall not exempt a member of the forces from liability in tort in any case in which the court is satisfied that the act or omission was not connected with the execution of his duties as a member of the forces.

This section was applied in the case of *Dominique Sarron*.[11]

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[11] *Dominique Sarron* was the first instance where s 14 was applied to bar tortious claims arising from negligence. Notably, Parliament amended s 14 to its present form after the Court allowed the appeal in *Abdul Rahman v Attorney-General* [1985-1986] SLR(R) 705. In that case, the Plaintiff was hit by a Ministry of Environment vehicle just as he left camp. The Ministry of Defence issued a certificate stating that the Plaintiff had suffered his injuries while on duty; this certificate indemnified the Government under s 14. However, the Court allowed the appeal on grounds that the certificate was erroneously issued given that the Plaintiff was not on duty when the

7. Private ("**PTE**") Sarron suffered an allergic reaction from the smoke grenades used during a training exercise.[12] The training safety regulations ("**TSR**") stipulated that "not more than two smoke grenades" were to be used given the layout of the training exercise.[13] However, the commander used *six* smoke grenades, breaching the TSR.[14] The Committee of Inquiry ("**COI**") opined that "if the TSR had been complied with", the risks of any "adverse reactions to the smoke" could have been reduced.[15] The COI concluded that one Najib Hanuk bin Muhammad Jalal, who commanded the platoon which PTE Sarron was attached to, was "negligent" as he knew of the specific TSR but did not comply with it.[16]

8. However, when the parents of PTE Sarron brought a tortious claim in the High Court against Platoon Commander Najib, Chief Safety Officer of the Exercise Captain Chia Thye Siong, and the Attorney-General ("**the Defendants**"), the Court held that no such claim could be brought against the Defendants because of s 14(1) of the GPA.[17] Kannan JC stated that s 14 of the GPA was "derived from s 10 of the English Crown Proceedings Acts 1947" ("**ECPA 1947**").[18] Its effect, the British Parliament stated, was to exempt the Government and members of its military forces from liability for any acts of negligence committed during service.[19] The justification was one of "public policy",[20] since removing this immunity would prejudice the "efficiency and discipline" of the army.[21]

9. Kannan JC further derived the legislative intent behind s 14 of the GPA, referring to the remarks made by then-Minister for Defence, BG Lee Hsien Loong ("**BG Lee**") in a parliamentary sitting. Responding to a query by Member of Parliament J B Jeyaretnam on the discriminatory nature of s 14, BG Lee said that:

> An alternative could be to sue an individual instead of the Crown under such circumstances, namely, the officer involved who gave the order. However, this is also not allowed, for a specific reason, namely, that *if we propose to do so, any officer or soldier who is making an operational decision, is placed in a difficult position. And in training you make decisions which are just the same as operational ones. You have to have the absolute confidence that you can make the judgment correctly.* You cannot afford always to have at the back of your mind the thought that, "If I do it wrong, will I be sued? Will the

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accident occurred. Other instances where s 14 was applied include: *Tan Heng Liang Kelvin v Govindsamy Balamurugan (Chong Kwok Leong and Another, Third Parties)* [2003] SGDC 324 and *Phang Fook Seng v Attorney-General of Singapore* [2000] SGHC 98.

[12] *Dominique Sarron*, *supra* n 9, at [10]. See also Brigadier General Chan Wing Kai, "Key Findings from the Death of PTE Dominique Sarron Lee", *MINDEF* (7 March 2016) <https://www.mindef.gov.sg/web/portal/mindef/news-and-events/latest-releases/article-detail/2016/march/7Mar16-coi-001> (accessed 16 May 2018).

[13] *Ibid*.

[14] *Ibid.*

[15] *Ibid*.

[16] *Ibid*.

[17] *Id*, at [3] – [4].

[18] *Id*, at [29].

[19] *Ibid*.

[20] *Ibid*.

[21] *Id*, at [33].

> Government not back me? Should I have to appear in court?"
> That is the reason why the law stands as it is.[22] [Emphasis added]

10. Thus, Kannan JC held that the legislative intent behind s 14 of the GPA revolved around "safeguarding the efficiency of the armed forces' training" by giving commanders the flexibility to make decisions during training without fear of facing tortious liability.[23] In his view, it did not matter whether "the said act or omission was connected with the member of the SAF executing his duties in accordance with prescribed rules and regulations",[24] and that to read such a meaning into the provision would amount to "judicial legislation".[25]

B. Incorrect interpretation of legislative intent

11. It is submitted that the court in *Dominique Sarron* erred in its interpretation of s 14. When BG Lee highlighted that s 14 was needed to "[protect] the morale, discipline and efficiency of the service",[26] he is not likely to have intended s 14 to cover clear breaches of the TSR where the commander had the time to think before exercising judgement. In *Dominique Sarron*, the smoke grenades were discharged "for the purpose of providing cover for a simulated attack by [PTE Sarron's] platoon" during a training exercise. The Platoon Commander and Chief Safety Officer would have been aware of the need to follow the TSR which "describe[s] safety procedures in detail" for the purposes of training exercises.[27] This meant that they should have had the opportunity to consider the number of smoke grenades they needed to discharge to provide sufficient cover for their platoon. Consequently, protecting such breaches would undermine soldiers' morale as commanders would not be seen to be held accountable for their actions, thereby affecting the discipline and efficiency of the armed forces.[28] This would go against the said legislative intent.[29]

12. Instead, an alternative, and narrower reading of s 14(1) should be adopted. Section 14(1) should not apply to bar claims where the commander has not followed the TSR or taken appropriate precautions to ensure safety before issuing the order.[30] This narrower approach should be adopted as it could (a) strengthen accountability in the SAF given the signalling function of tort law, and (b) provide closure for the serviceman's family.

(1) Operational decisions versus training decisions

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[22] *Ibid*.
[23] *Id*, at [51].
[24] *Id*, at [58].
[25] *Ibid*.
[26] *Id*, at [37].
[27] *Singapore Parliamentary Debates, Official Report* (9 Jan 2017) vol 94 (Mr Dennis Tan, Non-Constituency Member of Parliament).
[28] See *Singapore Parliamentary Debates, Official Report* (09 Jan 2017) vol 94 (Mr Dennis Tan Lip Fong, Non-Constituency Member). In his speech, Mr Dennis Tan noted that "In effect, at least from a civil law perspective, errant officers or instructors are not directly accountable to the people they are in charge of. At best, officers are only accountable to MINDEF or to the state."
[29] *Dominique Sarron*, *supra* n 9, at [37].
[30] See *Singapore Parliamentary Debates, Official Report* (09 Jan 2017) vol 94 (Mr Dennis Tan Lip Fong, Non-Constituency Member). He said that "Even if an accident happens, and they unfortunately do, once commanders have shown that they have taken all necessary precautions and have complied with TSR requirements, they should not be held responsible. They should not have to worry about any civil liability." Based on Mr Tan's reasoning, if an accident occurs due to commanders' failure to adhere to the TSR and take necessary precautions to ensure safety, these commanders do not deserve similar protection under s 14 of the GPA.

13. As stated earlier, s 14 of the GPA was debated in Parliament in 1986.[31] BG Lee stated that any soldier making an "operational" decision was placed in a "difficult position".[32] Training decisions made were "just the same as operational ones".[33] The rationale for immunity under s 14 was that the soldier could not afford to pause; he must have the "absolute confidence" that he was making the correct judgement.[34]

14. It is perhaps correct to say that decisions reached in training could be as difficult as decisions reached in actual operations. Yet, to hold that all decisions made during training puts a soldier in the same "difficult position" as decisions made in actual combat operations would be an oversimplification. Clearly, not all decisions reached in training are of the same degree and difficulty as those reached in, for example, a counter-terrorist situation.[35]

15. On closer scrutiny of the Parliamentary Debates, Parliament seemed to have intended s 14 to apply only to situations where ad-hoc decisions have to be made in training.[36] Responding to a motion filed by Mr Dennis Tan to amend s 14 of the GPA to allow tortious claims against SAF personnel and the government, Minister Ng Eng Hen cited the police shooting at the Shangri-La Dialogue as an example of a situation where snap decisions had to be made.[37] In that incident, police officers guarding the hotel where the Dialogue was being held made the decision to open fire on a car that had breached the security barriers.[38] This situation involved a sudden event where a decision had to be made, even though there was clearly no "time to think things through, to plan and to exercise judgment".[39] In cases of regular, *planned* training, however, commanders would have had sufficient time to think through the training plan, and ensure compliance with the TSR. It is argued that this was exactly the case in *Dominique Sarron* where the commanders clearly had the time to think through their decision and ensure compliance with the TSR.

16. Essentially, a distinction must be drawn between decisions made in the course of training which were arrived at in the heat of the moment, and situations where soldiers had the luxury of time to think and comply with the TSR. Therefore, the wide scope of s 14 and how it was interpreted and applied in *Dominique Sarron* is questionable.

(2) Applying the narrower approach to CPL Dave Lee

17. CPL Lee suffered a heat stroke following his fast march and was subsequently evacuated to Changi General Hospital.[40] He died 12 days later.[41] It was found that there

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[31] See the exchange between BG Lee Hsien Loong and J.B. Jeyaretnam in *Singapore Parliamentary Debates*, *Official Report* (19 Mar 1986) vol 47.
[32] *Singapore Parliamentary Debates, Official Report* (19 Mar 1986) vol 47 at col 742 (BG Lee Hsien Loong, Minister of State for Defence).
[33] *Ibid*.
[34] *Ibid*.
[35] See Lee Min Kok, "S'porean man shot dead by police, 2 others detained in incident near Shangri-La Hotel" (31 May 2015) <https://www.straitstimes.com/singapore/courts-crime/sporean-man-shot-dead-by-police-2-others-detained-in-incident-near-shangri-la> (accessed 17 May 2015).
[36] *Singapore Parliamentary Debates*, *Official Report* (24 Mar 2015) vol 94 at col 7 (Dr Ng Eng Hen, Minister for Defence).
[37] *Singapore Parliamentary Debates*, *Official Report* (24 Mar 2016) vol 94 (Dr Ng Eng Hen, Minister for Defence).
[38] *Ibid*.
[39] *Smith v Ministry of Defence* [2013] UKSC 41 at [95].
[40] See "Death of NSF Dave Lee: Full text of Dr Ng Eng Hen's ministerial statement in Parliament" (6 August 2018) <https://www.channelnewsasia.com/news/singapore/nsf-dave-lee-death-dr-ng-eng-hen-ministerial-statement-10594188> (accessed 14 August 2018).
[41] *Ibid*.

were two breaches of the TSR the day before the fast march.[42] First, during a physical exercise session, CPL Lee was made to run together with his company, at a faster pace than he would have been running at had the training plan been followed.[43] Second, a collective punishment meted out to CPL Lee's platoon the night before the fast march was unauthorised, resulting in the trainees not being able to get sufficient rest.[44] In this situation, s 14 should not apply to bar any tortious claims. The decision to depart from the training plan for the physical exercise session and the unauthorised punishment could not have been made in the heat of the moment. Thus, it could not be said that the commanders' departure from the TSR was justified and therefore protected by the shield of s 14.

C. Appropriate approach

18. The author suggests that the specific *circumstances* in which allegedly poor decisions were taken by the commanding officers should be carefully considered before the court decides whether s 14 should apply.[45] The practical implication of the narrower approach would be that the TSR would have to be followed in all training situations, unless a solder can justifiably show that he responded differently in the heat of the moment.

19. Such a case-by-case assessment (as opposed to a blanket protection under s 14) is preferable, as it may promote greater accountability among commanders.[46] This will also further promote Parliament's intention of "ensur[ing] that the efficiency and discipline of the armed forces in both training and operations are safeguarded" to be better upheld.[47]

20. This approach is also supported by public policy reasons: (a) promoting greater accountability given the "signalling function" of tort law;[48] and (b) allowing the families to obtain closure.

(1) Signalling function of tort law

21. Allowing tortious claims against negligent commanding officers will promote greater accountability given the "signalling function" of tort law.[49] This signalling function alerts potential tortfeasors as to what exactly is the standard of care owed.[50] For instance,

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[42] Aqil Haziq Mahmud, "https://www.channelnewsasia.com/news/singapore/death-nsf-dave-lee-casualty-management-delayed-evacuation-10592976" (6 August 2018) < https://www.channelnewsasia.com/news/singapore/death-nsf-dave-lee-casualty-management-delayed-evacuation-10592976> (accessed 7 August 2018).

[43] *Ibid*.

[44] *Ibid*.

[45] Ascertaining the standard of care owed in the tort of negligence is a fact-centric exercise. See Gary Chan Kok Yew, *The Law of Torts in Singapore* (Academy Publishing, 2nd Ed, 2016) at para 06.008. See also *Roe v Minister of Health* [1954] 2 QB 66 where Lord Denning famously remarked that one should not "look at a 1947 incident with 1954 spectacles".

[46] Indeed, Dr Ng Eng Hen, the Minster for Defence, stated that the SAF fully accepts the judicial processes, and deems them necessary so that SAF servicemen can be held accountable for their actions. See *Singapore Parliamentary Debates, Official Report* (24 Mar 2015) vol 94 at col 7.

[47] *Dominique Sarron*, *supra* n 9, at [37].

[48] David M. Engel, *The Myth of the Litigious Society: Why We Don't Sue* (University of Chicago Press, 2016) at p 179.

[49] *Ibid*.

[50] This is because in every negligence suit, a breach of a standard of care must be shown which necessitates a determination of exactly what the standard of care owed is. See *Hii Chii Kok v Ooi Peng Jin London Lucien* [2017] 2 SLR 492, *Bolam v Frien Hospital Management Committee* [1957] 1 WLR 582, *Bolitho v City and Hackney Health Authority* [1998] AC 232, *The "Sunrise Crane"* [2004] 4 SLR 715, *Blyth v Birmingham Waterworks Co* (1856) 11 Ex 781, *Mullins v Richards* [1998] 1 WLR 1304 and *Nettleship v Weston* [1971] 2 QB 691 for examples of the different standards of care recognised in tort. See also Gary Chan Kok Yew, *The Law of Torts in Singapore* (Academy Publishing, 2nd Ed, 2016) at paras 06.002 and 01.044.

if liability is found in a certain factual matrix involving medical negligence, doctors upon encountering future cases of the same sort would behave more defensively in the form of ordering more tests to confirm their diagnosis and protect themselves from potential litigation.[51]

22. Similarly, allowing tortious claims for negligent misconduct by military commanders would have the effect of encouraging commanders to be "less cavalier about the non-observance of [the] TSR or safety considerations in lesson plans".[52] Knowing that they can be held accountable to the families of servicemen in court could be a powerful motivating factor.[53] Moreover, it would allow for a transparent assessment of the TSR itself, perhaps with reference to best established practices in other militaries.[54] Indeed, should the court find that the TSR itself is inadequate, the SAF can then build on this and improve its training regulations.

(2) Closure for the family

23. Allowing such tortious claims to be pursued and heard in court would also allow families to gain some form of closure. PTE Sarron's mother commented in a Facebook post that she was "*worn-down, beaten and defeated by the very government (she) taught (her son) to trust; […] to have faith in"* [emphasis added].[55]

24. Her aggrievement stemming from her perception that justice was not served in this instance is clearly felt. Here, Lord Hewart CJ's words come to mind: "Justice must not only be done but it must be ***seen*** to be done" [emphasis added].[56] Allowing this specific type of tortious claim to be heard under s 14 of the GPA, where death or injury to a national serviceman has resulted from an breach of a TSR, will allow a full, thorough and transparent airing of the underlying issues.[57] In doing so, family members of the deceased may find answers concerning the death of their son and from that, some semblance of closure.[58]

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[51] Kelly Ng, "Concerns in Parliament over 'defensive medicine' after doctor's suspension" (2 August 2017) <https://www.todayonline.com/singapore/concerns-parliament-over-defensive-medicine-after-doctors-suspension> (Accessed 7 August 2018).

[52] See *Singapore Parliamentary Debates, Official Report* (09 Jan 2017) vol 94 (Mr Dennis Tan Lip Fong, Non-Constituency Member).

[53] *Ibid*.

[54] See *Hotel Royal @ Queens Pte Ltd v J M Pang & Seah (Pte) Ltd* [2014] 3 SLR 967. The court takes into consideration regulations or industry guidelines in determining if there has been a breach of a duty of care, even though this is not determinative.

[55] Jermyn Chow, "No compensation from SAF accepted, says family of Pte Dominique Sarron Lee" (8 March 2018) <http://www.asiaone.com/singapore/no-compensation-saf-accepted-says-family-pte-dominique-sarron-lee> (accessed 15 May 2018).

[56] *R v Sussex Justices, ex parte McCarthy* [1924] KB 256.

[57] See "*On The Economics Of Trials: Adversarial Process, Evidence And Equilibrium Bias*", Andrew F. Daughety and Jennifer F. Reinganum. In an economic analysis of the litigation process, they posit that Plaintiffs and Defendants alike "separately develop and present evidence pertaining to liability". It is this process of evidential discovery and disclosure in court that allows for a full and transparent airing of issues.

[58] See remarks made by the family of PTE Sarron. They commented that "We would like to clarify that this law suit has never been about money. It has always been about getting answers to our questions," <https://www.straitstimes.com/singapore/courts-crime/family-of-nsf-who-died-will-get-legal-bill-slashed> (accessed 16 May 2018).

III. Conclusion

25. In the words of Mdm Yeo, CPL Dave's mother, "*If I have to sacrifice my only son to bring this message across, make sure it is one that brings forth solid changes to seemingly perfect training systems*" [emphasis added].[59] The SAF is undoubtedly a core national institution and a cornerstone of national defence, but it too needs to stay relevant today.[60] To do so, the author believes that it needs to earn and retain the trust of the public and of the families who have entrusted their sons to them. In this regard, there is much the law could do, and allowing tortious claims of this nature to be litigated would be a significant first step.

[59] Rachel Au-Yong, "Tearful final farewell for late NSF Dave Lee at military funeral" (5 May 2018) <https://www.straitstimes.com/singapore/tearful-final-farewell-for-late-nsf-dave-lee-at-military-funeral> (accessed 16 May 2018).

[60] Ong Weichong, "Relevance of the Singapore Armed Forces: A Journey into Singaporeaness" *RSIS commentaries* (14 December 2009).