

**BUREAUCRACY, NATIONAL SECURITY AND
ACCESS TO JUSTICE: NEW LIGHT ON
*DUNCAN v CAMMELL LAIRD***

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The conventional view of *Duncan v Cammell Laird*¹ was succinctly expressed by Wade and Forsyth. “The case”, they wrote, “is a good example of the most genuine type where it seems plain that the interests of litigants must be sacrificed in order to preserve secrets of state.” To Zuckerman *Duncan* was “the most outstanding” example of a rare number of cases genuinely involving national security.² These, along with almost all other commentators, argue that national security considerations meant that the 1942 decision was on its facts pretty well inevitable and probably correct. This article suggests that the view that the plaintiffs had to take second place to the greater good of keeping Germany in ignorance of British naval secrets perpetuates a myth. This myth was fostered by civil service lawyers in the interests of litigation management by the Crown. The case papers tell a different story.

The trial itself arose from the loss of the submarine *HMS Thetis* in Liverpool Bay in June 1939. On her maiden dive she sank with loss of 99 lives. These included naval personnel and also workers from the Birkenhead company commissioned by the Admiralty to build the vessel. Dependants of the civilian victims requested disclosure of official documents to assist their suits for damages against the shipbuilders. The government refused. In a landmark judgement the House of Lords held that the courts could not look behind a properly constituted ministerial claim for Crown privilege. Over twenty years later, in *Conway v Rimmer*,³ the House of Lords overruled that aspect of the judgement and thereafter claimed the right to inspect contested documents while still holding that *Duncan* itself was correctly decided.⁴ But the continuing academic contention that neither the courts nor the Admiralty had any choice in refusing disclosure of the contested documents is not borne

* I am grateful for assistance given by Professor Brenda Barrett, George Malcomson, Archivist at the Royal Naval Submarine Museum, Gosport and by Dr. Robin Agnew.

¹ [1942] A.C. 624.

² W.R. Wade and C.F. Forsyth *Administrative Law* (8th Edn., 2000) OUP p.827. A. Zuckerman in “Privilege and Public Interest”, in C. Tapper (ed) *Crime, Proof and Punishment: Essays in Memory of Sir Rupert Cross*, (1981 Butterworths) p.270 notes. “Very few cases have strictly involved national security or foreign relations, *Duncan v Cammell Laird* being the most outstanding among them.” A. Gull in “Public Interest Immunity and the Right to a Fair Trial” (1996-7) 1 *Journal of Civil Liberties* 2 p.9 wrote, “on the facts the result was justified”.

³ [1968] A.C. 910.

⁴ Lord Reid stated (at p.938), “I have no doubt that the case of *Duncan v Cammell Laird* [1942] A.C. 624 was rightly decided. The plaintiff sought discovery of documents relating to the submarine *Thetis* including a contract for the hull and machinery and plans and specifications.”

out by the evidence. War-time files of the Admiralty⁵ and the Treasury Solicitor's department⁶ suggest that the government insistence on secrecy was due less to the need to protect the nation's defences than to an entrenched bureaucratic hostility to court challenges on the part of ordinary citizens. Government officials saw the litigants as an intrusive inconvenience, particularly since they were financed by their trade unions. The claims of Crown privilege were just one aspect of an attempt to undermine these plaintiffs and also to hamper future ones. The government and civil service were anxious to establish clearly the legal principle that the courts would not look behind a claim for non-disclosure if made by a minister in the proper form. This principle was established by the House of Lords in the preliminary hearing on evidence in 1942 and civil servants duly welcomed its future wide sweeping implications for smooth administration. The substantive litigation against Cammell Laird proceeded nonetheless. The archives reveal that a year later, in an almost complete *volte-face*, the government, having gained the long term security of the Lords' ruling, and to the outrage and astonishment of counsel for the plaintiffs, was now disposed to make some of the very documents which were the subject of the 1942 case available to those same litigants. The contemporary record suggests that the administration manipulated the national security claim as part of a longer term strategy to undermine litigation which placed unacceptable demands on the wartime administration. In this the interests of the civil service bureaucracy, proclaimed as the public interest, prevailed over those of plaintiffs and arguably also of justice. The episode highlights a blurring of the distinctions between national security, the public interest and administrative convenience which has long pervaded the operation of the doctrine of Crown privilege (later to be renamed public interest immunity).⁷

Today the mantra of national security perpetuates a continuing judicial deference to executive edict which remains open to abuse. The decision in *Duncan* continues to influence this stance. Indeed Zuckerman suggests that the blanket immunity on national security pronounced in *Duncan* remains even after *Conway v Rimmer*.⁸ It is therefore pertinent to examine the nature of the national security claim made in 1942. The continuing rather sepulchral acceptance by public lawyers of the correctness of the decision in this case suggests a reluctance to consider alternative narratives. It perpetuates a sort

⁵ PRO ADM Series.

⁶ PRO TS Series. There is a separate series for the Departmental Law Officers, LOD, but this contains nothing of interest to the subject matter of this article. It seems the department then was small and that the Treasury Solicitor's department acted as legal advisors to the Attorney-General. For accounts of the government legal services see J.H. Edwards *Law Officers of the Crown* (1964, Sweet and Maxwell), and *Attorney-General: Politics and Public Interest* (1984, Sweet and Maxwell).

⁷ See *Rogers v Home Secretary* [1973] A.C. 388.

⁸ See A. Zuckerman. "Public Interest Immunity, a Matter of Prime Judicial Responsibility" (1994) 57 *Modern Law Review*, 703, p.714. "In relation to National Security blanket immunity subsisted both before and after *Conway v Rimmer*. In *Conway v Rimmer* itself there were dicta that could be interpreted as saying that decisions to withhold on grounds of national security must be left to ministerial discretion [1968] 1 All E.R. 874, 880, 888, 890."

of “official version” which should be avoided in the history of administrative law as much as in political, diplomatic or military history.

More generally *Duncan* is an illuminating example of how lawyers, including academic scholars, tend to take the judge’s findings of fact in a case as representing the true state of affairs. This is of course quite reasonable when it comes to considering the legal principles of court decisions, since these are based on the application of the law to the facts as found by the judge. But decisions which are “right” in the sense that they apply the law correctly to the judge’s factual findings may still be questionable if those findings are in some way flawed. Commentators have hitherto accepted the narrative of *Duncan v Cammell Laird* as it appears in the Law Reports. This article shows that there is another story behind this account and also attempts to place the case within broader intellectual and cultural currents of the time. The significance of this case is not only that it demonstrates judicial cowardice towards the executive particularly on the question of national security. On the wider front the hitherto secret departmental papers reveal much about the reservations held by ministers and civil servants over the citizen’s right to litigate. These reservations are of interest in the light of events leading up to the Crown Proceedings Act 1947 and the Legal Aid and Advice Act 1949. These two statutes were acknowledged as watersheds in extending rights of access to the courts but the form they took indicates that the postwar administration was determined to confine these rights within tight limits.⁹ The argument here is that the roots of this restrictive approach were deep within the bureaucracy. Thus new evidence from the departmental papers indicates that, to a greater extent than has hitherto been appreciated, bureaucratic norms, practices and assessment of the law influenced the development of the legal doctrine of crown immunity. Moreover resistance to disclosure of documents in the name of the blanket claim of national security was in fact part of a more deep seated obstruction of citizens who exercised their right to pursue litigation involving the Crown.

The Disaster

What actually happened in *HMS Thetis* in Liverpool Bay on 1 June 1939 still remains somewhat of a mystery.¹⁰ The first submarine built by Cammell Laird, she sank on her test dive which was due to last for only an hour or so. She was carrying 41 civilians in excess of her naval crew, most of them Cammell Laird employees. The Captain, Lieutenant Commander Bolus, had not, as had been expected, disembarked the visitors, to a waiting tug before she dived. As a result the amount of air available in *Thetis* for those trapped on the seabed was much less than the three days worth originally allocated for her crew. The effect was thereby drastically to limit the time available

⁹ See M. Spencer, “The Attlee Government and Civil Legal Aid, 1945-1950”. Unpublished PhD thesis Middlesex University, 1999.

¹⁰ For a full account of the sinking of *HMS Thetis* see C. Warren and J. Benson *The Admiralty Regrets. The Disaster in Liverpool Bay* (1997) Avid Publications. See also D. Roberts *HMS Thetis, Secrets and Scandal* (1999) Avid Publications. This draws on detailed archival research and interviews with relatives of the survivors.

for a successful rescue attempt¹¹. The disaster itself was precipitated by the opening of the inside doors of number five torpedo tube, one of six inner torpedo tubes, when its outer door was open to the sea. The submarine was not carrying any torpedoes at the time. The consequential rapid flooding of key compartments by the onrush of sea water destabilised the submarine, she dived rapidly and out of control. The crew's efforts to raise her failed. The inner torpedo door had been opened by Able Seaman Hambrook on the orders of First Lieutenant Woods who had not informed Bolus what he was going to do. Woods had read the indicator to the lever of the outer door or bow cap as being closed to the sea. He had not carried out other standard procedures to confirm this but one check he had made was to examine the inside of number five torpedo tube by opening a small hole in the inner door called a test cock. The fact that water had not trickled through had led him to believe the tube was empty of sea water. Four men including Lieutenant Woods escaped from the stricken submarine but Hambrook and Bolus perished in the disaster.¹² When the submarine was raised in September 1939 it was revealed that the indicator to the bow cap of number five tube was set at open, the bow cap itself was open to the sea and the levers operating the outer doors were all in the neutral not the closed position. Moving a lever to the neutral position had the effect of fixing each outer door in whatever position, *i.e.* open or shut, it had formerly been. It was also discovered that the test cock was blocked by a small plug of bitumastic enamel which had been used to paint the door while *Thetis* was in dock. The painting had been carried out by J.H. Stinson, employed by Wailes-Dove Bitmastic, a subcontractor of Cammell Laird. This blockage had not been noticed by either W.G. Taylor, the Cammell Laird foreman, nor Edward Grundy the Admiralty overseer when checking Stinson's work. It was thus apparent that some tragic mistakes had been made by Admiralty or Cammell Laird personnel. Immediately after the sinking the Admiralty had set up an internal inquiry. In this inquiry 51 witnesses were interviewed including Woods, Cammell Laird workers and naval experts. The report was presented promptly at the end of June and made the following critical assessment of Wood's responsibility for the accident.

“Lieutenant Woods carried out the inspection of the bow tubes by opening the rear doors on his own responsibility. Although there is no danger normally attached to opening the rear doors if the correct procedure is carried out, and this has frequently to be done during work on torpedoes, on this occasion there were no torpedoes on board and the rear doors became part of the normal safety fittings of the submarine such as the lower conning tower hatch, which the Commanding Officer would expect to be closed before diving especially under “trial conditions”. We consider that in these circumstances there

¹¹ The rescue attempts themselves were much delayed and there were accusations of bungling by the Admiralty. The situation was made all the more poignant since she sank in relatively shallow waters and part of the stern of the vessel was visible.

¹² There seems no doubt that Woods demonstrated considerable heroism during abortive efforts to refloat the submarine and in volunteering to embark on the hazardous escape in order to help with rescue attempts. He was to return to active service and was awarded the Distinguished Service Cross in 1940.

was no adequate reason for Lieutenant Woods opening the rear doors and he was not justified in doing so without instructions.”¹³

The naval inspectors however were impressed with the undoubted bravery of Woods in the aftermath of the flooding of the submarine and concluded:

“We are of the opinion that the behaviour of all in the submarine – naval personnel and civilians – was exemplary and in accordance with the best traditions of the Naval service and the British Race.”¹⁴

Woods was later to admit at the High Court trial in 1943 that the question he had asked Hambrook about the bow cap levers was not whether they were shut but, more ambiguously, whether they were “correct”. This change from his earlier testimony did not shake the official view that he was a reliable and convincing witness and that his version of what happened was accurate. Nor did the plaintiffs’ lawyers, persuaded by publicly expressed official confidence, challenge this view of Woods’ account of what happened. It was not until the summer of 1943 that the Treasury Solicitor’s department had picked up the inconsistency in Woods’ evidence. Assisting Woods prepare for the hearing G.B. Burke wrote, “In your evidence I noticed that you asked the rating whether the levers were shut and he answered ‘yes’. It is now known that after the disaster the levers were found in the neutral position. It is most unlikely that anyone – assuming that a third party had deliberately or accidentally moved the Number 5 lever – moved all the levers. It therefore seems to me that it must be assumed that at the time when the rating answered ‘yes’ all the levers were in the neutral position. If one makes that assumption then the rating’s answer was clearly inaccurate and this point will no doubt be seized upon by the Plaintiffs.” Woods acknowledged that he had in fact asked the rating the different and more ambiguous question.¹⁵

The Unions Sponsor Litigation

In August 1939, supported by the victims’ trade unions and represented by solicitors Evill and Coleman, relatives of a number of civilians on board initiated legal action against Woods, the widows of Hambrook and Bolus, Cammell Laird and the subcontractors Wailes-Dove Bitumastic.¹⁶ In all, 26

¹³ I am grateful to maritime historian David Roberts for drawing my attention to the papers of the internal naval inquiry which are housed in the archives of the Submarine Museum at Fort Gosport, Hants, files A1939/023 and A/1939/5.

¹⁴ *Ibid.*

¹⁵ See TS 32/113 Hearing before Mr Justice Wrottesley, September 1943. TS 32/110 Burke to Woods 5/7/1943.

¹⁶ It is not clear from the papers why Grundy was not initially joined in the action but the Treasury Solicitor’s department noted at the end of 1939 that “it is particularly to be noticed that neither Grundy nor Stinson nor Stinson’s employers have been joined as defendants in these proceedings. So far as Grundy is concerned it is now too late for him to be joined as a defendant, as any claim against him is now barred under the Public Authorities Protection Act.” TS 32/111. “HMS Thetis” undated. Stinson’s employers Wailes Dove Bitumastic were joined to the action at a later stage.

separate actions were initiated and two cases were selected as test cases.¹⁷ As the law stood then no legal liability existed for deaths to serving naval personnel. In addition the Crown could not be sued in tort for the civilian deaths. By custom it supported employees, both civil servants and military personnel, who were sued by civilians for performing allegedly negligent acts in the course of their duties other than military exercises.¹⁸ Initially the Admiralty considered not standing behind Woods, however Treasury Solicitor's department official E.A.K. Ridley pointed out problems in this.¹⁹

Ridley suggested as an alternative that the litigants might be threatened with the ancient offence of unlawful "maintenance" of litigation by a non-party. Such action was arguably also legal professional misconduct. Ridley conveniently overlooked the point that under common law the trade unions had been exempted from this offence for half a century. Moreover the government was in effect "maintaining" its defendant employees.²⁰ Ridley stressed that:

". . . if the Department are going to refuse to stand behind Woods they must make up their minds to put a bold face on the matter from the first. They have in the present emergency an unusually favourable opportunity for doing so and it is impossible not to feel that any sort of stand against the accident claims racket be salutary. It ought not to be very difficult to make it clear to reasonably minded persons that what really lies behind these claims is not so much the desire of the claimants to obtain redress for their wrongs but the desire of the AEU to embarrass the government and of the solicitors to make money out of a national calamity. That would have, I think, to be the main justification for refusing to stand behind Woods and it could be shown that the claimants have exhibited no great willingness to prefer claims but have been pressed to do so by Evill and Coleman."

¹⁷ Nineteen cases were sponsored by trade unions. The two test cases originally selected were those of Mrs Ankers and Mrs Craven. Mrs Duncan was substituted for Mrs Ankers in August 1940. Solicitors Evill and Coleman wrote to Lawton that Mrs Ankers "is not very well mentally and is worried by the action". Lawton noted on this. "I am beginning to suspect that it may be due to the reluctance of the Plaintiffs to proceed with the action" TS 32/110. Evill and Coleman to Lawton, 8/8/1940, Lawton, 24/8/1940.

¹⁸ The Crown Proceedings Act 1947 changed the law on Crown Immunity. Before that Act Crown Immunity meant that the Crown could not be either personally or vicariously liable for torts.

¹⁹ TS 32/110. Ridley to Lawton, 31/9/39. He wrote, "The fact that a Service defendant is being defended at the public expense has, I think, generally been taken in the past to imply that the Crown were standing behind him in regard to damages. . . I think one can feel pretty sure that a refusal by the Department to stand behind Woods would kill these actions, but if they are pursued there is nothing to prevent the Department telling Woods that if the action goes against him they pay him anything which he loses in bankruptcy and that bankruptcy will involve no stigma against him in the Service."

²⁰ For an account of the law on maintenance as it then existed see E.H. Bodkin *The Law of Maintenance and Champerty* (1935 Stevens and Sons).

Ridley suggested that the plaintiffs were undeserving cases who were in receipt of adequate compensation for their loss. He went on, "This contention would be reinforced if it could be shown that the proceedings were illegally maintained and that the solicitors' action in touting the claims has been the subject of disciplinary action by the Law Society". A further suggestion was to undermine the litigation by drawing attention to the support the plaintiffs were getting from the Fund established by the Lord Mayor of London. Ridley continued:

"It would probably be possible to carry the matter further by showing that no real hardship would be suffered by the claimants if they were unable to recover these claims, since they have not only workmen's compensation but in addition a large fund has been raised by public subscription and it is not to be supposed that this fund would have been subscribed if it had been known that the persons to benefit from it were looking to the Admiralty for full compensation, nothing having been said about this while the fund was being collected."²¹

Ridley's argument demonstrates the extent to which the department's lawyers took a partisan position in relation to litigation which challenged the government. There was no acknowledgement that the plaintiffs might be justified in taking action; on the contrary, they were pictured as passive participants in the hands of the troublesome unions and solicitors. The Attorney General Donald Somervell,²² however, was rather more familiar with current law and not inclined to adopt such an extremist stance. His response was that it would be a mistake not to support Woods since that "would lead to a demand, which would be very difficult to resist, that the old immunity of the Crown should be done away with." With regard to "(1) the impropriety of the Solicitors' actions and (2) the question of maintenance with regard to the union" he noted, "I doubt whether much can be made of either of these . . . I do not profess to speak with authority on the etiquette of the Solicitor's profession, but I understand that it is not unusual when a Solicitor finds himself interested in one or members of a class for him to communicate to see whether others who on the basis of the legal advice he has received have similar rights would care to join in any proceedings." He did not think that actions in maintenance would succeed, pointing out that "there are one or two cases which seem to leave the position of Unions in some doubt". He observed that "as the potential plaintiffs are probably all poor the maintenance could be refuted on the ground that it was an act of charity".²³

The Admiralty Version

Before the internal inquiry had completed its work the government appointed a full public inquiry under the Tribunals and Inquiries Act 1921, to be chaired by Mr Justice Bucknill. This took evidence from June to December

²¹ TS 32/110 Ridley to Lawton 21/9/1939.

²² Sir Donald Somervell was Conservative MP for Crewe 1931-1945. He became Lord Justice of Appeal 1946-54 and Lord of Appeal in Ordinary and life peer 1954-60.

²³ TS 32/110. Somervell to Lawton, 4/10/1939.

1939.²⁴ With the possibility of having to face negligence suits it was important that the public inquiry findings should not be adverse to Admiralty personnel. As is usual in such circumstances the Treasury Solicitor's department supplied legal services to the inquiry with particular responsibility allocated to F.W. Lawton, Senior Legal Assistant, supported by his colleague E.A.K. Ridley. Privately Lawton's view was that "the claimants may well have chance of making out a prima facie case of negligence on the part of Lieut. Woods but that they would have difficulty in doing so against the others".²⁵ At the outset of the inquiry, concerned about pressure from the Admiralty, Lawton had written to Ridley "I imagine it will be made clear we are acting for the Tribunal not the Admiralty which is what they seem to be imagining".²⁶ However the government officials were clearly anxious that the Admiralty version of events should prevail. As the inquiry reached its concluding stages they presented a memorandum to the government's counsel. This noted that Woods "was able with calmness and deliberation so faithfully and accurately to recall what happened, and it will not be forgotten that at no time did he seek to cast any blame on any other person or to suggest that anyone was responsible for any act or omission connected with the accident." In contradiction to the view secretly expressed in the report of the naval internal inquiry, officials accepted the public Admiralty position that Woods was not blameworthy. The memorandum noted:

"The fact that he opened the tubes is no sufficient reason for condemning Lieutenant Woods. The tubes are designed to be opened and but for the accident no one would have thought of complaining or of suggesting that that was not the time or the occasion for examining the insides of the tubes. . . Strenuous efforts will no doubt be made to establish a case of negligence sufficient to sustain a claim for damages. . ."²⁷

Evidence from Admiralty witnesses to the inquiry had argued that the Number 5 bow cap was not opened until the last minute before the rear torpedo door was opened probably accidentally by persons unknown and so Woods' reading of the lever at shut was correct at that point. So convinced were the Admiralty and the Treasury Solicitor's department that Woods' account should be believed that they did not suggest an alternative version to the inquiry. A plausible alternative explanation was however that Number 5 bow cap had been opened in dock at Cammell Laird before *Thetis* sailed, that all the levers were then put at neutral not shut (thus locking the outer doors in their previous open position with disastrous results when Woods opened the inner door) and that Woods had misread the indicator. In July 1944 in the Court of Appeal, Lord Greene MR sitting with Goddard and du Parcq LJJ, heard the appeal in the negligence suit. Before Wrottesley J the plaintiffs had lost against Mrs. Hambrook, Lieutenant Woods and Wailes-Dove

²⁴ See TS 32/101-115.

²⁵ TS 32/110. FW Lawton, 10/10/1939.

²⁶ TS 32/102. Lawton to Ridley, 12/6/1939.

²⁷ TS 32/111 "HMS *Thetis*" undated. Unfortunately this file has one page missing which, it appears from the context, dealt more fully with Woods' account to the Tribunal.

Bitumastic but won against Cammell Laird. The plaintiffs appealed. Lord Greene stated:

“there are only four possible explanations of the accident . . . at least only four have been suggested. The first is that when the vessel left Birkenhead Number 5 bow cap was open, the pressure was locked by closing the isolating valves at bulkhead Number 40, the valves on the panel were closed and Number 5 lever as well as the other levers were left in the neutral position. If this theory was correct, an intelligible explanation of the accident could be given as follows: Hambrook finding the levers at neutral, assumed wrongly that they had all been moved to the neutral position from the closed position, whereas in the case of number five the penultimate position was in fact the open position with the result that when the pressure was locked and the bow cap remained open. . . . This explanation of course would involve a finding that Lieut. Woods misread the indicator . . . I have a strong suspicion that this is the true explanation of the catastrophe. But I cannot adopt it for this reason. At the trial it was admitted by counsel for the plaintiffs that the bow cap was closed when the vessel left Birkenhead and remained closed throughout the voyage. As a result of this admission the matter was not investigated at the trial.”

Thus the account of events given by the Admiralty at the Bucknill Inquiry had convinced the plaintiffs.²⁸

The Attorney General is, as Bradley put it, the “independent guardian of the public interest”²⁹ but his legal advisers had conveyed to counsel how necessary it was for the Admiralty explanation of what had happened to be accepted by Bucknill:

“Counsel will appreciate that it is a matter of no small importance that this position should be established and, if possible, be reflected in the findings of the Tribunal”.³⁰

In the event, the Bucknill Inquiry concluded that the disaster was due to a combination of factors but there should be no individual responsibility.³¹ The government next considered whether to publish the Bucknill Report. First Sea Lord Winston Churchill wrote, (with a rather insensitive choice of words), “All interest in this tragedy has been submerged by the war. I should deprecate any disciplinary action unless some definite act can be traced to an individual. Indeed I should be glad if Lieutenant Woods’ mind could be set

²⁸ TS 32/113. Court of Appeal 7/7/1944. The Court of Appeal went on however to find Woods liable in negligence. The bow door indicator dials were acknowledged to be badly positioned and difficult to read. The shut position was different on each dial. Modifications were made to all submarines after the tragedy.

²⁹ A.W. Bradley “Justice, Good Government and Public Interest Immunity” (1992) *Public Law* 514, 517.

³⁰ TS 32/111 “H.M.S. Thetis” undated.

³¹ Cmd 6190 1940.

at rest.”³² The Second Sea Lord, Sir Charles Little, noted “I am in favour of publication as owing to the incidence of the war it will receive the least notice at the present time. . .” Little referred to the parts played by Woods and Grundy in the disaster, echoing the criticism of them made in the internal inquiry:

“. . . the door of the torpedo tube is fitted to admit offloading or withdrawing the torpedo; it is not intended as a means for observing whether the tube is full or empty of water. For this purpose a drain cock is specially fitted at the forward and after ends of the tube underneath and the special fitting referred to with the time attachment is placed on the rear door for the same purpose. In my opinion no discreet or experienced submarine officer would have tested the tube for this purpose and especially under the circumstances of the trial dive, by the rear door. Mr Grundy, the Admiralty overseer who inspected the internal painting of the tube is also not free from blame as he failed to make a thorough and secure inspection.”

However, despite this private acceptance of failures on the part of Admiralty personnel, Little welcomed the conclusion reached by Bucknill:

“It is clear that the action of these two (Lieutenant Woods and Mr Grundy) only forms part of a series of what the judge calls “perverse mishaps” in the report of the Tribunal. It is suggested that an official letter should be sent to their superior authorities to the effect that, after considering the reports of the Naval Board of Inquiry and of the Public Tribunal, their Lordships have come to the conclusion that the loss of HMS Thetis is to be attributed to a combination of mischances, and that it has not been possible to discover the whole facts; in the circumstances, it is to be put on record that Their Lordships will not hold Lieutenant Woods or Mr Grundy to blame for the disaster, and that in this respect the matter is to be regarded as closed”.³³

The Bucknill Inquiry findings however did not halt the litigation and for the next six years the negligence suits received a considerable amount of attention from government law officers. They provided legal assistance for Woods, Bolus and Hambrook and instructed the Attorney-General who appeared for these defendants in the substantive hearings. The decision to refuse disclosure of the official documents which were in the hands of Cammell Laird was just one of a number of moves to halt the litigation and depict the plaintiffs as unpatriotic and self seeking. The papers suggest that administrative convenience, not concern for the relatives of the victims, was of paramount concern and that officials considered employing questionable

³² ADM 116/4115. Personal Minute, 12/2/1940.

³³ ADM 116/4115. Memorandum by Second Sea Lord, 16/2/1940. Prime Minister Neville Chamberlain approved of this outcome. His private Secretary wrote to the Admiralty that the Prime Minister “was glad to hear that the Board of Admiralty have been able to take the view that Lieut. Woods and Mr. Grundy need not be held to blame for the disaster.” ADM 116/4115 A.N. Rucker to E.A. Seal 7/3/1940.

tactics such as manoeuvring the case into a friendlier court in order to remain in control of events.³⁴ Behind the official front of even handedness there was collusion between the administration and court service.

Seeking a Friendly Court

Government lawyers appeared to have greater confidence in some courts than others and discussed with defendants the possibility of Cammell Laird transferring the case to a sympathetic court. In early 1940 Cammell Laird's Liverpool solicitors, Laces, wrote to Lawton suggesting the transfer of the case to the Commercial or Admiralty Court.

“We feel somewhat strongly about this, as we think there is considerable danger if the actions are left in the KBD [Kings Bench Division] of their coming before a Judge who is really unsuitable to try an action of this nature and who may be one of the plaintively-minded judges.”³⁵

Lawton replied:

“With regard to the suggested transfer to the Commercial or Admiralty Court, I am not so much concerned about the first of the two grounds you mention as I think the KB Division could easily cope with such matters of construction or technicalities as are likely to arise, but on the second ground I am in complete agreement, hence my desire to defer the matter for the time being.”³⁶

Cammell Laird's London solicitors, Carpenters, took up the same theme a few months later and wrote to Lawton stating that. “We are instructed to strongly oppose an order for a special jury or a jury of any description; apart from the fact that there are difficult questions of law arising; the preliminary findings of fact will involve long investigation, in which questions of scientific evidence will arise – matters quite unsuitable to be decided by a jury.”³⁷

The issue was still contentious in September of the same year. Laces solicitor J. Holland wrote to Lawton expressing confidence that a sympathetic hearing would be arranged:

³⁴ It appears some influence was exerted to prevail on the coroner at the inquest on the victims in June 1940 not to call Grundy as a witness. He had given inconsistent and damaging evidence to the public inquiry and although he was officially exonerated and any suit against him was time barred Treasury Solicitor lawyers were still concerned about the embarrassing nature of his evidence. The firm of solicitors acting for the government wrote to Lawton, “. . . maybe we could get him [the coroner] to agree not to call evidence of so controversial a character.” Lawton replied, “Unless the coroner insists upon calling Mr. Grundy I quite agree with you that it will be very much better if Mr. Grundy does not give evidence at the inquest.” Grundy was not called. Thus fact finding was subservient to the need to keep inconvenient witnesses away from court. TS 32/102. Batesons to Lawton, 22/6/1940. Lawton to Batesons, 24/6/1940.

³⁵ TS32/110. Laces to Lawton, 3/9/1940.

³⁶ TS32/110. Lawton to Laces, 12/2/1940.

³⁷ TS32/110. Carpenters to Ass. Treas. Sol., 30/5/1940.

“I am wondering whether you have still in mind the question of the transfer of these actions to the Commercial or the Admiralty Court. I have a feeling that when the actions are ready for hearing you will probably be able to arrange for them to be heard by a suitable judge, even if they stay in the KBD, in which case I would have no objection to their being tried there, but I do want particularly to avoid the possibility of an unsuitable judge.”³⁸

In fact the case was to be heard in the Kings Bench Division. Both series of litigation, the interlocutory hearings on disclosure as well as the substantive negligence suit were appealed to the House of Lords.

The government need not have worried about “plaintively-minded judges”. Woods was found liable in negligence in the Court of Appeal but this was reversed in the House of Lords in 1946. The single speech in the House of Lords 1942 judgement on disclosure was made by Lord Simon, the Lord Chancellor, and thus a Cabinet member, sitting in judgement on a claim made by another government minister namely the First Lord of the Admiralty. Simon sat in the House of Lords in both the interlocutory and substantive hearings.³⁹

Settlement Offer Rejected as Charity

One way out of the unwelcome litigation was suggested by Attorney-General Somervell. He was clearly worried that the litigants had a winnable case. In November 1940 Somervell suggested that the Admiralty should consider offering a settlement. He wrote to the Treasury Solicitor:

“I have considered whether the plaintiffs could get their case on its legs; I am inclined to think that they could. They could interrogate Lieutenant Woods or ask for admissions of fact,

³⁸ TS32/110 Holland to Lawton 3/9/1940.

³⁹ The litigation on the negligence suit was not completed until February 1946. After the final judgment of the House of Lords Treasury Solicitor’s assistant F. Lawton drafted a table for the Admiralty showing the outcomes of the various hearings (PRO TS 32/110 “HMS Thetis. Actions for Damages”. 27/2/1946). It reads as follows:

| | Wrottesley J | Court of Appeal (3judges) | House of Lords (5 judges) |
|---------------|--------------|------------------------------|------------------------------|
| Woods | Not liable | Liable | Not liable |
| Hambrook | Not liable | Not Liable | Not liable |
| Bolus | Not liable | No appeal | ----- |
| Cammell Laird | Liable | Not liable | Not liable |
| Wailes Dove | Not liable | Not liable | Not liable |

An indication of the financial risk the government had faced is given in Lawton’s additional note. “The final result is that the Plaintiffs are held to be disentitled to recover against any one of the Defendants, Lt. Cmdr. Woods; Mrs Bolus (as representing the late Cmdr. Colus(sic); Mrs Hambrook (as representing the late leading Seaman Hambrook); Cammell Laird & Co Ltd; Wailes Dove Bitumastic Ltd, a result that I think you will agree is most satisfactory. I have not sufficient information to make any reliable estimate of the sum that might have been recovered if damages were awarded but a total in the neighbourhood of £100,000 would not surprise me”.

and I am of the opinion that they could probably in this way, with possibly some other evidence, make out a prima facie case.”⁴⁰

He pointed out the difficulty of calling defence witnesses in wartime and considered various ways to deal with the situation. He emphasised what he saw as the unnecessary and inappropriate nature of the plaintiffs’ case:

“The actions were felt to be objectionable partly because of the circumstances of the case and the unpleasantness of pursuing with a claim for negligence the executors of dead men who were not there to give evidence and deal with allegations made against them. Lieutenant Woods is alive, so this objection did not apply to his case, but it would I think seem distasteful to many to pursue him in this way. In his case and the other cases one’s mind is affected by the very large sum of money (I believe about £150,000) raised by the public in order that the Workmens’ Compensation and other payments should be supplemented. On the other hand of course one must be careful of adopting the position of suggesting that people are not entitled to enforce their legal rights.”

He assessed the likely outcome of the case:

“It is one of those cases in which I do not think anyone could or would express a confident opinion one way or the other as to the result. There is the possibility envisaged by the Bucknill Report that the real cause of the disaster may have been an unwitting interference with the lever by someone unknown. I think myself that a finding that Lieutenant Woods and Able Seaman Hambrouk (sic) were negligent is a possible result and perhaps a not unlikely one. They were jointly engaged in opening the rear doors and in fact one bow cap was open and the levers were in the neutral and not in the shut position. When an accident happens in circumstances such as this, however fortuitous the group of circumstances which lead to the disaster, the Court rarely, if ever, find it was accidental.”

He suggested that the Admiralty make an offer since the “circumstances of the war may have affected the attitude of the plaintiffs and those advising them”. The offer should be to pay the costs incurred and make a payment to the Lord Mayor’s Fund for the accident. The latter proposal would have the effect of ensuring that any donation from government was available to relatives of all the victims not just those who had the temerity to sue. He pointed out that “As the trustees of the fund will, I imagine, take into account any sums that might be received as a result of these proceedings by the plaintiffs, the plaintiffs have not the same financial interest as they would have in an ordinary case”.⁴¹

Lawton however took a punitive stance and advised the Treasury Solicitor, Sir Thomas Barnes, against the proposal noting that “the actions reflect no

⁴⁰ TS32/110 Somervell 6/11/1940.

⁴¹ *Ibid.*

credit on those who are responsible for their institution and to pay damages without an order of the court would be to put a premium on such conduct".⁴² However Barnes suggested to Admiralty Permanent Secretary Sir Archibald Carter that a possible way forward was that "an informal approach should be made to the leaders of the two Trades Unions concerned". He added that the Solicitor-General, William Jowitt, "was prepared to see Sir Walter Citrine who he knows very well".⁴³

In suggesting a settlement the officials were clearly determined that the victims' relatives should not benefit inordinately from the disaster and officials used their influence to obtain precise figures of the charitable payouts. Somervell wrote to Barnes asking "whether it might be a good idea to discover from the Trustees of the Fund what payments are being made to these people. I feel that this should and might affect the mind of the court, and I also feel that from the point of view of any injustice by delay it would be satisfactory to know".⁴⁴ Barnes replied with the figures sending a detailed list of the weekly sums to the widows. Mrs Duncan was receiving £1 a week and Mrs Craven £1 7s 8d.⁴⁵ Reluctantly the Admiralty and Treasury agreed to the proposal of paying costs and a donation to the Lord Mayor's Fund of a sum not exceeding £10,000 although pointing out to the Treasury Solicitor "it being understood that you will try and settle for a lower figure".⁴⁶

Jowitt arranged to meet Citrine and other union representatives. The Treasury Solicitor's lawyers prepared a Note for the meeting which emphasised a rather different view of the likely outcome of the litigation than that secretly conceded by the Attorney-General.⁴⁷ It was suggested that Jowitt should stress that "it is thought that the Plaintiffs would have very great difficulty in establishing any case of negligence". The unions were also to be asked to bear in mind that the "changed circumstances since *HMS Thetis* was lost may well have rendered it extremely distasteful to any of the Plaintiffs to continue with their proceedings". On 5 June 1941 Jowitt reported on his meeting with the unions⁴⁸ who expressed their objection to the proposal of a government donation to the Fund. They pointed out to Jowitt that "the charitable funds were being doled out to the various recipients on a means tested basis and as a matter of charity". Jowitt reported that as a result of discussions with the unions he was "pretty sure they won't be content merely with a payment by the Admiralty to the fund as they would regard this with all the hatred which they regard (sic) the means test and charity generally." He thought they "might be disposed to look to their workmen's compensation remedy if this was sweetened by some lump

⁴² TS32/110. Lawton to Barnes, 12/11/1940.

⁴³ TS32/110. T. Barnes to A. Carter, 20/11/1940. Sir Walter Citrine was Secretary-General of the TUC.

⁴⁴ TS32/110. Somervell to T. Barnes, 20/12/1940.

⁴⁵ TS32/110. Barnes to Somervell, 17/1/1941.

⁴⁶ TS32/110. J.S. Barnes to T. Barnes, 3/45/1941. See n.39 for the amount Lawton feared might have been awarded if the claim had succeeded.

⁴⁷ TS32/110. "HMS Thetis. Claims for damages. Observations for Purposes of Discussions with Trade Union Representatives", undated.

⁴⁸ TS 32/110. Jowitt to Barnes, 5/6/1941. The note indicates that the litigants were disadvantaged by the delay in settling the case since the claims for damages meant they could not receive statutory industrial compensation.

sum payment by the Admiralty directly or indirectly”. Another meeting took place between Jowitt and the union leaders in October 1941 and the unions again expressed their hostility to the proposal of a contribution to the Fund.⁴⁹ They asked if the Admiralty would consider contributing £10,000 outside the Fund. In the event the talks appear to have foundered in part because Cammell Laird refused to countenance making any contribution to costs, they had already made a donation of £5,000 to the Fund and in any case thought the actions should be “contested as a matter of principle”⁵⁰

The episode illustrates the extent to which the Second World War was a watershed in developing notions of citizenship and rights, specifically a right of access to the courts. It seemed almost incomprehensible to the government lawyers that the plaintiffs might not be satisfied with charitable handouts and wanted to assert a legal right to redress. The government officials stressed the sense of collective wartime suffering which in their view made the litigation “distasteful” while on the other hand the litigants through their unions exhibited a confidence in their entitlement to redress. There are hints here of themes in the later debates on the Beveridge proposals and the notion of rights to benefits without means testing. Jose Harris has doubted whether the spirit of Dunkirk and the Blitz during the Second World War imbued the general populace to the extent that is generally portrayed. She writes:

“Support for the war and acceptance of the need for overall controls was almost certainly more general than in the First World War; but an unpretentious popular patriotism in no way precluded widespread resentment against “red tape”, “bull”, “snoopers” and other manifestations of official interference. . . . Days lost in strikes throughout the war were fewer than in 1914-18, but were still sufficiently numerous to indicate considerable industrial discontent. . . . Popular humour of the period portrayed the prevalent attitude to authority as one of ‘much binding in the marsh’.”⁵¹

A sense of this somewhat subversive approach to the state is evident in the reactions of the unions to the attempt by the government to persuade them to drop their legal action in what was claimed was the national interest.

The National Security Claim

The above account suggests that the government’s strategy of resisting disclosure of official documents to the plaintiffs was just one of several in their overall objective of stemming the litigation. In the course of making the case for an out of court settlement the Treasury Solicitor made the point that it was:

“. . . obviously undesirable in the public interest that questions relating to construction of submarines should be discussed in

⁴⁹ TS32/110. Jowitt to Barnes, 31/10/1941.

⁵⁰ TS32/110. Holland to Lawton, 20/5/1941.

⁵¹ J.Harris, “Society and the State in Twentieth Century Britain” in FML Thompson (edn.) *Cambridge Social History of Britain 1750-1950 Vol.3: Social Agencies and Institutions* (1993, Cambridge University Press) p.91.

open court and while the Admiralty could claim privilege in respect of many matters involved there might well be some feeling of injustice to the particular claimants if, by reason of a claim to privilege, they were barred from pursuing what would otherwise be a good claim.”⁵²

The issue of disclosure had arisen early in 1940 and here again the Treasury Solicitor’s staff took the initiative in determining government policy on the issue. Cammell Laird had possession of the contract with the Admiralty, the plans of the submarine and the records of the painting of the doors and the plaintiffs requested discovery. The Admiralty had not formally taken possession of the vessel on 1 June 1939 and so legal ownership under the contract was one issue in the case. Since these were Crown documents Cammell Laird asked the Admiralty for advice. Sixteen documents were requested. They included the 1936 contract between the Admiralty and Cammell Laird and also the contract between Cammell Laird and Bitumastic Ltd. Item 15 was the notebook of Cammell Laird’s foreman painter, Taylor.⁵³ Some of these documents had been presented to the Bucknill Inquiry and referred to in the Report. Lawton outlined his assessment of the law:

“The Crown’s claim for privilege which has at all times been jealously guarded, is based solely upon considerations of general public interest. I regard it as of very great importance that in no case should there be any relaxation of the direct application of the principle where it properly applies.”

He explained that the claim was based upon one or other of two grounds, namely, that it would be contrary to the public interest to disclose a particular document because of its contents or that it would be contrary to the public interest to disclose a document because it belongs to a class which as a class it would be against public interest to disclose, *e.g.* inter-Departmental communications. Although he did not think that the listed documents fell wholly within one category or the other he did allocate them to the two categories. He added:

“It is undesirable to select extracts from documents if that course can possibly be avoided. Nor do I think that the war should be expressly relied on as a ground for refusal to admit disclosure since the actions may not come on for trial until after the war.”

Lawton concluded:

“In my view, whatever importance is attached to the documents either by the solicitors or by the court, the claim for privilege if made by the First Lord in the proper manner cannot be challenged successfully in or by the court and it is unlikely that anything further will be required from the First Lord than an affidavit in which the claim is made formally.”⁵⁴

⁵² TS32/110. Barnes to Markham, 27/3/1941.

⁵³ TS32/110. “HMS Thetis. List of Documents”, 26/6/1940.

⁵⁴ TS32/110. Lawton to Secretary, Admiralty July 1940.

The Admiralty acted on Lawton's advice and the Treasury Solicitor wrote to Cammell Laird solicitors refusing disclosure.⁵⁵ During this time the Treasury Solicitor was pressing for delaying the trial until after the war. Evill and Coleman complained about "the indefinite adjournment of this case".

"You must appreciate that we are representing poor widows, and the Crown has no right to elect to postpone the hearing of a suit at its own convenience. It would, we think, be a monstrous abuse of etiquette that an action should stand over to await the convenience of the Attorney General. There is in fact no reason why the action should not be tried except some vague fears in the minds of the advisers to the Treasury. Every fact which will come out at the trial is well known to the Germans by reason of the fact that it was all thrashed out at the public inquiry. We shall, of course, become too happy to collaborate with you to prevent anything which is not already known from leaking out if it is of the slightest value to anybody. Here this action is merely concerned with legal contentions to be drawn from facts which, it is true, will have to be proved over again, but which are already well known. . . ."⁵⁶

Finally in January 29 1941 Alexander, First Lord of the Admiralty, signed the affidavit forbidding disclosure "in the public interest". The High Court and the Court of Appeal both gave judgments in favour of the Crown and in early 1942 the plaintiffs appealed to the House of Lords. The impending case appears to have created keen interest in other departments of the Civil Service. For example Sir Alfred Brown, Solicitor at Customs and Excise, presciently noted in March 1941, "I hope the case goes to the House of Lords as I imagine the present Lord Chancellor can be trusted to make a good decision from our point of view".⁵⁷ In *Duncan v Cammell Laird and Co* Lord Simon, Lord Chancellor, gave the single judgement which almost exactly mirrored Lawton's 1940 advice.⁵⁸

The Documents Revealed

Despite this 1942 ruling litigation on the substantive issue continued through the courts although subject to constant delays. It was finally listed in the King's Bench Division in September 1943. One continuing cause of contention was that despite the ruling on disclosure the government wanted to have the case heard "in camera". Evill and Coleman resisted,

". . . there is no justification whatsoever for the order which you propose to ask to be made for a hearing in camera under the Emergency Powers Act 1939 and this will be opposed by the Plaintiffs. . . . In our view it is idle to say that there is much that could affect security in this action. It is simply an action to ascertain which of the many Defendants is liable for sending a perfectly good submarine to the bottom and killing

⁵⁵ TS32/110. Lawton to Carpenters, 7/6/1940.

⁵⁶ TS32/110. Evill and Coleman to Lawton, 28/10/1940.

⁵⁷ TS58/317. Brown to Lawton, 27/3/1941.

⁵⁸ [1942] A.C. 624.

100 men . . . We do not think that our Counsel would oppose the hearing of the evidence in camera of the details of the construction of the submarine but this can only be a comparatively small part of the case.

We understand that one of the grounds of asking for this order will be that Messrs Cammell Laird and Co intend to read some of the clauses of the Admiralty Contract and rely thereon. This, we suggest, is entirely an illusory ground for hearing the case in camera because we think that the effect of the decision of the House of Lords is that nobody in this action is able to refer to this contract at all and the contract clearly cannot be kept up the sleeves of the parties to the action and suddenly produced therefrom at will of any party to the action – it and all its detail, by the wish of the Admiralty, are now for ever unproducible.”⁵⁹

Faced with this inconvenient approach and with Cammell Laird pressing to refer to the contract whose disclosure had been forbidden by the House of Lord’s ruling, Lawton told the Admiralty that a review of strategy for the trial was necessary. It had been decided that the transcripts of the Bucknill Inquiry would provide the basis of the trial although Woods himself would be called in person as a witness. The problem was that the transcript of the Bucknill proceedings would not be intelligible if the official documents which were available there could not now be referred to in the court. The Admiralty response was that:

“. . . the First Lord directed that the matter should proceed on the following lines:

The Admiralty should not press for the trial to be held in camera

The extracts for which privilege was claimed by the First Lord in 1940 should be shown to the Judge and Counsel only;

An Admiralty representative should be present in Court with authority to advise the Judge and Attorney General when he considers that for reasons of security the public should be cleared from the Court”.⁶⁰

Thus a year and a half after the landmark victory in the House of Lords the government effected an extraordinary about turn. As counsel for Wailes-Dove expressed it “. . . notwithstanding the journey to the House of Lords (!) [exclamation mark in the original] the First Lord is now prepared to allow copies of the documents for which privilege was successfully claimed to be made available for use of the Judge and Counsel”. . .⁶¹ The Honourable H. Parker, Counsel for Woods, reported to the Treasury Solicitor’s department the reaction of Counsel for the plaintiff, Mr Wallington KC, who:

⁵⁹ TS32/110 Evill and Coleman to Treasury Solicitor 31/8/1943.

⁶⁰ TS32/110 Lawton to Head of N.L. Admiralty 7/9/1943; Head of N.L. to Treasury Solicitor 13/9/1943.

⁶¹ TS32/110 Streatfeild to Parker 17/9/1943.

“expressed great indignation that the First Lord was now prepared that those documents should be shown to Judge and Counsel and he could not understand how the First Lord came to allow this”.

Parker had replied that:

“. . . today conditions are very different to what they were when the First Lord swore his affidavit. Mr Wallington appreciated this, but said that it was unfortunate, since, if he had known that the First Lord was prepared to make this limited disclosure, he would never have appealed to the House of Lords”.

Parker’s note concluded:

“Finally Mr Wallington said that he saw no objection to the proposal because:

(1) he very much doubted whether he would desire to refer to any of the documents; indeed, he thought that he might be in a better position as against Cammell Laird if the documents were not referred to, and

(2) The House of Lords having decided that these documents were not to be disclosed, he did not think that the Judge could admit them”.⁶²

When the trial opened the Attorney-General explained the position:

“The First Lord of the Admiralty, having looked at [the documents] filed an affidavit in the terms referred to saying that it was not in the public interest that they should be disclosed. That was taken to the House of Lords really on the point as to whether that was a matter for the First Lord or for the Courts. When arrangements were made some time later . . . that this case should be tried on the transcript [of the Bucknill Inquiry] we communicated with the First Lord and we also communicated with my learned friend, who said that these documents should be available for Counsel and the Judge and if required by anyone for the purpose of seeing that all proper issues were brought before your Lordship”.

Wallington’s response was indignant:

“The position was this, that this matter of production and indeed the question whether it would be injurious to the public interest that any of the said documents should be disclosed to any person, as the First Lord swore it would be, went to the House of Lords, despite the fact that in each Court on our way up to the House of Lords and in the House of Lords what we were saying was: ‘Let the Judge look at the documents; let him be the judge of whether this is unjust or not and at all events let some direction be given that the Judge himself and Counsel may see the documents’. But that was rejected and right up to

⁶² TS 32/110. Note by H.L. Parker 14/9/1943.

the House of Lords the position was maintained against us that nobody must see them and the affidavit of the First Lord was final and conclusive about it. Various arguments that I need not reiterate to your Lordship now were addressed on other parts of the matter in order to show how unreasonable that would be, but they availed nothing because the First Lord had made this affidavit in these terms . . . What I feel and what I want to present to your Lordship on the case now is that the House of Lords having ruled, as they did, that none of these are to be seen by anybody because the First Lord so said, it is not now open to the Attorney-General to be magnanimous and say, 'Well, now, in 1943, although there has been no change in circumstances, what the First Lord swore in 1941 no longer holds and you may see them, although we refused to allow you to see them in 1941'."

Mr Justice Wrottesley rather tartly observed that the logic of this argument was that he "should decide upon what is apparently on issue, namely as to who owned this submarine on the 1st June, without looking at the contract". He suggested that Wallington should look at the document and told him, "I shall not hold it against you if after that you say it is in an unclean thing which you refuse to look at any further".⁶³

The clear inference from the apparent about turn was that the overriding objective of the administration had been to assert its unquestioned authority over the courts on the decision on disclosure. Once this was achieved and thus settled the law for all future claims it suited the government to make this limited disclosure, particularly since Cammell Laird wanted to refer to the terms of the contract. The Attorney General was forthcoming about the government's motives. He told the court "everybody has been told" what is in the contract.

"The real point in the Cammell Laird issue which was decided was whether, as my learned friend was saying, the question of non-disclosure in the public interest was a matter for the Judge or a matter for the Crown. That was the issue and the House of Lords did not make any order that the First Lord of the Admiralty could never at any time allow anybody to see it".⁶⁴

There is also a hint in the papers that the administration had hoped that their earlier tactics would halt the litigation and that the national security claim was part of a manoeuvre to do that. In December 1940 Wallington had asked to inspect a submarine similar to the *Thetis* and been refused. The approach had changed by the summer of 1943, as Admiralty official H.N. Morrison revealed:

"When application was made in December, 1940 for Mr Wallington KC to be permitted to inspect a submarine similar to the "Thetis" we were hoping to arrange for the threatened legal actions to be withdrawn. The Attorney General was not in favour of granting the facilities, we took the hint from him

⁶³ TS32/113 Transcript of Proceedings in KBD, September 1943.

⁶⁴ *Ibid.*

and refused to grant them “under present conditions” without giving any reason. The papers show that the actual reason was expediency and not considerations of public interest and security, since representatives of the Press were constantly being given facilities to visit submarines. . . The circumstances have changed the plaintiffs have now got their case together and obtained a date for the trial, the Attorney-General considers it would be desirable, if at all possible, that facilities should be granted to the plaintiffs’ counsel and also the counsel for Cammell Lairds, to inspect a “comparable submarine”.⁶⁵

The visit was to be arranged this time.

Postscript: What Was the Secret?

Of course it almost goes without saying that there will be sensitive security issues in a case involving a Royal Navy submarine taking place during a World War. However, even here claims should not just be accepted on faith. The actual content of the claim in *Duncan* remains somewhat of a mystery. Wade and Forsyth, approving the government’s claim for non-disclosure, write: “After the war it was divulged that the *Thetis* class of submarines had a new type of torpedo tube which in 1942 was still secret.”⁶⁶ They do not source this revelation. Lord Simon in the House of Lords debate on the Crown Proceedings Bill in 1947 did refer to torpedo tubes of a new type. Justifying his 1942 ruling he stated: “I do not think I am disclosing any secret nowadays when I say that if those blueprints had been produced it would have appeared that submarines of the type of the “*Thetis*” were not only armed so that they could fire forwards under water but that there were also further tubes which could fire from behind. That was a secret and we were at war with the Germans”.⁶⁷ In June 1939 the Admiralty had sent a note to the Treasury Solicitor’s department in preparation for the Bucknill Tribunal. This stated that the external torpedo tubes were among a list of ten items which were “very secret” and should not be referred to in public but added that, “If it is desired during the course of the investigations to refer to them, arrangements should be made for the Court to sit in camera while these items are dealt with”. The papers examined for this article contain no reference to backward firing torpedos. The historian of the T class of submarine to which *Thetis* belonged, records that backward firing torpedoes were not fitted to these vessels until after the outbreak of the Second World War.⁶⁸

⁶⁵ TS32/110 H.N. Morrison 5/7/1943.

⁶⁶ *Sup cit* n.2 p.817. See also, C. Forsyth “Public Interest Immunity: Recent and Future Developments”. (1997) *Cambridge Law Journal* 56(1) p51, n 1.

⁶⁷ H.L. DebVol 146 cols 927-8 (March 31 1947).

⁶⁸ TS 32/102 Synott to Lawton 29/6/1939; Paul J Kemp *The T-Class Submarine. The Classic British Design* (1990) Arms and Armour Press, p.47. *Thetis* was raised from the sea-bed, refitted and returned to active service as *HMS Thunderbolt*. Kemp records that she was fitted with the new backward firing torpedo in 1942.

CONCLUSION

The longer term implication of the House of Lords ruling to the smooth running of administrative decision making was noted by a number of departments immediately. The Treasury Solicitor's department appears to have lost little time in informing the rest of the civil service of the victory. They received some grateful responses. W.B. Blatch, lawyer at the Inland Revenue commented, ". . . we shall have to consider the position in relation to the numerous small actions in which one side or the other wants to see his opponent's income tax returns. I am glad to have it; a statement I could not always make about judgment in the House of Lords".⁶⁹ Sir Oscar Dowson, Legal Adviser to the Home Office, congratulated the Treasury Solicitor: "The LC's exposition, (plus the chorus of concurrences at the end) makes this a very helpful case for future guidance and removes some of the embarrassments of the past".⁷⁰ The decision was to remain good law until 1968 although some concessions were made in the meantime by the government.⁷¹ Its deferential approach to claims for government secrecy was duly followed in a number of common law countries, including the United States.⁷²

An account of the events surrounding this landmark case indicates how the wartime increase in government powers had had a profound effect on the administrative landscape in Britain. Jacob in his examination of the background to the Crown Proceedings Act has outlined the pivotal position of the civil service lawyers whom he described as "a small, tightly knit group of ostensibly apolitically motivated men"⁷³ and an examination of the events surrounding *Duncan* gives further evidence of this. As civil service departments became organisations in their own right there was an increasing tendency to assume the features of a professional elite. The lawyers reflected a growing civil service professionalism with all its concomitant emphasis on secrecy, confidentiality and intermingling of professional and public interests.⁷⁴ The Second World War, when the whole system of government became significantly *étatiste*, created the conditions to extend much further

⁶⁹ TS32/110. Blatch to Lawton, 15/5/1942.

⁷⁰ TS32/110. Dowson to Lawton, 21/5/1942.

⁷¹ See M. Baber *Public Interest Immunity Research Paper 96/25* 22 February 1996. Home affairs Section, House of Commons Library, a paper prepared for the Scott Inquiry.

⁷² *US v Reynolds* 345 US 1 (1953), see also K. Taymor, "Military State Secrets Privilege" (1982 1 *Yale Law Journal* 570. Taymor writes, at 571 "The exact origins of the state secrets privilege are unclear . . . its modern use stems from English precedence established during World War Two". It is interesting to note that the decision in *Reynolds* is now under challenge in the courts on the grounds that declassified documents show the government lied in invoking national security. See <<http://www.rcfp.org/news/2003/0304.petiti.html>>. Accessed 28/9/2004.

⁷³ Joseph M. Jacob "The Debates behind an Act: Crown Proceedings Reform, 1920-47" [1992] *Public Law* 452 p.457.

⁷⁴ See D. Vincent, *The Culture of Secrecy: Britain 1832-1998* (1998 OUP). However, Vincent, like most historians of the history of official secrecy, largely ignores the development of Crown privilege.

the pre-existing culture of secrecy.⁷⁵ Government lawyers were not so much interested in finding out what happened on the *Thetis*, but in asserting an executive right to control the flow of information. In this case of course the Crown itself was not being sued, the existence of the contested documents was only known about since they were records of commercial transactions in the hands of a private party, Cammell Laird. The plaintiffs not surprisingly resented the defendants having this advantage. The ruling in *Duncan* was to be of inestimable value when the law was changed so that the Crown itself became a potential defendant. There was, as Jacob shows, an ongoing internal debate on discovery before the Crown Proceedings Act was passed and the 1942 decision was enlisted as part of this.⁷⁶ In 1945 as the proposals for the legislation were being put together Simon had pointed out to Sir Granville Ram, First Parliamentary Counsel:

“At first sight I do not appreciate the necessity of including in the Bill elaborate provision about discovery; the principle surely is the principle which we laid down recently in the “*Thetis*” appeal, and it would seem . . . much wiser, if possible to leave it there.”⁷⁷

Jacob argues, “Resting as it did on Lord Simon’s speech in *Duncan* the 1947 Act required us to believe that there was a public interest in the public not knowing some particular fact or that someone held a particular opinion.”⁷⁸ The constitutional conventions were formally preserved since Ministers were considered to be principled champions of that public interest and challengeable in Parliament for any failings. Equally civil servants were expected to give reliable impartial advice. Simon in the House of Lords debate on the Bill stated:

“What we have to rely on – and I would willingly devise any other method if one occurred to me – is the uprightness of Ministers who are properly advised by skilled, fearless, loyal, independent members of the Civil Service...In common practice, I think, the Treasury Solicitor is asked to join in the consultation in cases of difficulty. For my part, I speak only of the Treasury Solicitors I have known and I would put the greatest confidence in their complete independence of judgement. They would most certainly prevent a Minister who from personal reasons, Party reasons or improper reasons wanted to prevent a document from being produced.”⁷⁹

⁷⁵ See Harris n 50 at 90. She writes on wartime Britain: “Centralised control over people and resources far exceeded that of any other combatant power with the possible exception of Russia. By a strange irony of history the United Kingdom, with her tradition of scepticism and hostility towards state power, generated a far more powerful centralised wartime state than any of her more metaphysically minded, state exulting continental enemies.”

⁷⁶ Joseph M. Jacob “From privileged Crown to interested public”[1993] *Public Law* 121.

⁷⁷ LCO2/3361. Simon to Ram, 2/10/1944. Quoted in Jacob *sup cit* at 133.

⁷⁸ *Sup cit* p.150.

⁷⁹ H.L. Deb Vol 146 col 929 (March 31, 1947).

The discussion surrounding *Duncan v Cammell Laird* however suggests that Simon's description is a rather minimalist version of the role of the civil service lawyers. It was not just that they were watchdogs against impropriety on the part of Ministers. They had a more influential position. Civil servants' perception of the need for confidentiality as a necessary ingredient of good administration largely determined the development of the law on Crown privilege in this period. The departmental papers in the National Archives reveal the extent to which middle ranking officials were engaged in influential decision making.⁸⁰ As far as the government was concerned it was important that the formal constitutional position of Ministerial accountability was preserved. In 1947 Attlee was to promulgate a Memorandum stressing the primacy of political decision making in demands for Crown Privilege. It read:

"It cannot be too strongly emphasised that the decision whether or not a document is to be withheld from production is the responsibility of the Minister himself. It has been suggested that matters of this kind may properly be left to an official of the Department. This is not so, and the Minister must personally consider the document and form his own judgement with such advice as he thinks fit to take. . ."⁸¹

But this was not what happened. In *Duncan* the original refusal of disclosure of the documents was initiated in the Treasury Solicitor's department whose reasoning was to be an almost complete anticipation of Simon's House of Lord's judgment. Further, as this article has argued, it is misleading to separate disclosure from more general considerations of the administration's perception of the public interest. There was, officials argued, an overwhelming public interest in protecting the Crown from unwelcome judicial challenge, a claim indeed very difficult to refute in wartime when national survival it seemed depended on downplaying sectional and individual demands in the name of patriotism and collectivity. But in reality the national security considerations in the case were somewhat peripheral to the contested issues. The case turned on the legal implications of human error, not the blueprints of the submarine design, and the litigants arguably did not need to present any more sensitive information about the *Thetis* design than what was already in the public domain. Just as the legal principles articulated in the Lords' ruling on Crown privilege were wider than the rationale of the case demanded so the government demand for non disclosure in *Duncan* was wider than the negligence suit required. It covered both obviously sensitive and possibly irrelevant documents, such as the design features of the external torpedo tubes, as well as those both relevant and arguably harmless to national security such as the dates in the contract and the notebooks of the ship's painters. As the above account shows Counsel for the plaintiffs was to complain that he would not have appealed to

⁸⁰ See R. Lowe (1997) 8 *Twentieth Century British History* 2, pp.239-265. He makes interesting observations about the limited extent to which the release of papers in the Public Record Office leads to new discoveries about policy making. He suggests that their main value is in revealing the level of administration at which decision making operated.

⁸¹ TS32/233. Crown Proceedings Act. Memorandum by the Prime Minister. CP(47) 321 8/12/1947.

the House of Lords if he had known some of the documents were to be released at trial. Ironically the 1942 ruling had probably little effect on the outcome of the plaintiffs' negligence suit which was undermined more by an uncritical adoption of the original Admiralty version of how the bow door came to be opened. For the administration the case presented a very powerful opportunity to prevent unwelcome litigation and establish incontrovertibly by the highest authority the legal principle which Lawton for one had decided was already good law. The principle was that government secrecy would be judicially preserved if claimed by ministerial edict. Lord Simon obliged by neatly eliding national security and the public interest into one.⁸² *Conway v Rimmer* went some way to disentangle the two and subsequent courts have questioned ministerial claims of the latter and clearly abusive claims of the former. Apart from the obvious excesses exposed by the trial judge in the Matrix Churchill trial in 1992, national security claims are in many ways the last frontier of judicial non interference, so their current potential for abuse is beyond inspection. The argument for abstention still rests in part on the strangely enduring legend of *Duncan v Camell Laird*.

⁸² See A.L. Goodhart, "The Authority of *Duncan v Camell Laird*" 79 *Law Quarterly Review* 153,155. A.W.B. Simpson draws the connection between *Duncan* and *Liversidge v Anderson* [1942] AC 206 in *In the Highest Degree Odious: Detentions without Trial in Wartime Britain* Clarendon, Oxford 1992.