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Immunity

Battlefield Immunity Fights Rage On, CIA Torture Case Shows

BY DANIEL SEIDEN

The beatings, sleep deprivation, and sensory abuse Abdullah Salim says he endured from the CIA while detained in Afghan prisons for al-Qaida suspects don't matter, two psychologists will argue this month.

The CIA controlled everything that happened to Salim, and therefore the psychologists should be found immune from his lawsuit, they will tell a judge July 28 in a Spokane, Wash., courtroom.

Battlefield contractors have successfully invoked immunity defenses to block lawsuits related to their support of U.S. military action in Iraq and Afghanistan over the past 15 years, but plaintiffs' recent success should give Salim hope, attorneys said.

Major decisions over the past decade and a half have illustrated the overwhelming federal interests that are at stake when government contractors accompany forces into a foreign war zone, said Alex R. Sarria, special counsel and government contracts litigator with Covington & Burling LLP, Washington.

Allowing "garden-variety tort claims to invade the battlefield actually undermines the military imperative of maintaining unified command and control over every aspect of an operation, including the work of contractors," he told Bloomberg BNA.

However, the pendulum recently has swung in plaintiffs' favor, said Michael Patrick Doyle of Doyle LLP, Houston, who has represented plaintiffs trying to recover damages from battlefield contractors.

When plaintiffs have been allowed to build their cases through discovery, he said, "the evidence that the contractor was given and exercised discretion over its own conduct has shifted the trend toward fewer findings of immunity for those government contractors."

Convoy Attacks, Abu Ghraib Should Iraqi prisoners and U.S. soldiers get their day in court for battlefield contractors' alleged wrongdoing and negligence? Or is it common sense now to view battlefield contractors as seamlessly fused with the government — which can't be sued for battlefield conduct and decisions?

Military and intelligence agencies have relied enormously on contractor personnel since the Sept. 11, 2001, terror attacks and the wars that followed.

Contractor personnel in Afghanistan and Iraq outnumbered uniformed service members in March 2011, according to a government report.

Contractors received \$138 billion to support the Iraq War effort, according to CNN, including at least \$39.5 billion for Kellogg Brown & Root Services Inc., a military logistics support contractor that has repeatedly defended itself against tort lawsuits.

Fairly or not, contractors' presence and conduct made them targets for lawsuits involving convoy attacks by insurgents, soldiers' toxic chemical injuries, and detainee abuse.

The contractors responded by invoking several immunity defenses:

- **Political question doctrine:** *A court won't resolve a dispute if doing so would require second-guessing the wisdom of military or executive branch decisions. The doctrine barred claims that KBR was responsible for a soldier's electrocution on a base in Iraq, the Fourth Circuit said in 2011 in Taylor v. Kellogg Brown & Root Services Inc.*

- **Derivative sovereign immunity:** *Contractors performing government work may be immune from suit if the government directed a contractor to perform the action that is the subject of a lawsuit. A Navy contractor that failed to adhere to explicit performance instructions couldn't rely on this defense, the U.S. Supreme Court said in Campbell-Ewald Co. v. Gomez in January 2016.*

- **Combatant activities exception to the Federal Tort Claims Act:** *Contractors integrated into combatant activities over which the military has authority can't be sued under the Federal Tort Claims Act, as stated by the D.C. Circuit in Saleh v. Titan Corp., which blocked torture claims against Abu Ghraib interrogation contractors in 2009.*

- **Defense Base Act exclusivity:** *The Defense Base Act, which provides workers' compensation coverage to contractor employees who are injured while working overseas, can preempt personal injury claims. The act's exclusivity prevented convoy drivers attacked by insurgents in Iraq in 2004 from suing KBR for negligence and fraud, the Fifth Circuit ruled in Fisher v. Halliburton in 2012.*

Risky Environments The U.S. Constitution authorizes the executive branch, not courts, to determine whether a contractor performed satisfactorily on a foreign battlefield, Sarria said.

"War zones are inherently risky environments, and both the military and its contractors need the certainty and predictability of answering to a single chain of command," he said.

Lack of Supreme Court and congressional guidance will cause these doctrines to continue to come up in litigation, David M. Gunn, a partner with Beck Redden LLP, Houston, told Bloomberg BNA.

“Congress passed the Federal Tort Claims Act many decades ago, and a similar kind of enactment would be desirable here so that courts can have clearer guidance,” he said.

Military Control The “most far-reaching and influential battlefield contractor decision of the past 15 years” is *Saleh*, said Lawrence S. Ebner, founder of Capital Appellate Advocacy PLLC in Washington, an appellate litigation firm that represents companies in federal procurement disputes.

“During wartime, where a private service contractor is integrated into combatant activities over which the military retains command authority, a tort claim arising out of the contractor’s engagement in such activities shall be preempted,” wrote Judge Laurence Silberman.

“Military ‘control’ seems to have emerged from the case law as a key factor in enabling battlefield contractors to successfully assert pretrial defenses, including the political question doctrine,” Ebner said.

Therefore, the most important takeaway from existing battlefield contractor law is that “military contractors should establish and maintain systems for creating and preserving contemporaneous records of the nature and extent of U.S. military direction and control over their long-term and day-to-day contractual activities,” he said.

Strong Trend for Plaintiffs Invoking the immunity defenses, from 2003 until early this decade, tended to keep contractors out of trouble. “But since then, both trial and appellate courts have subjected the claims to greater scrutiny,” said Doyle, who represented Iraq War veterans from Oregon in a case that may have sparked this pro-plaintiff shift.

The 2010 ruling allowed the veterans to sue KBR for their injuries after exposure to toxic chemicals at an oil production facility in southern Iraq because the contractor didn’t perform its infrastructure restoration contract in accordance with precise government specifications.

“Where, before, contractors would often file motions to dismiss under seal with supporting documentation and affidavits, and in many cases convince the reviewing court that no discovery on the claims was needed, the strong trend is to permit basic discovery on the merits of the claims,” Doyle said.

Trial courts have become less likely to grant pretrial dismissal without giving plaintiffs a chance to access information in discovery and make their case, Ebner said.

Other major instances of plaintiff success include:

- The Fourth Circuit’s 2014 reinstatement of claims accusing KBR of harming military personnel with their use of burn pits to dispose of waste;

- The Fourth Circuit’s 2016 reinstatement of Abu Ghraib detainees’ torture claims against interrogation services contractor CACI Premier Tech Inc.;

- The Fifth Circuit’s 2017 conclusion that a dining hall subcontractor could sue KBR for breach of contract without forcing a court to scrutinize a security agreement between Iraq and the U.S. or any government action.

When allowed, discovery has consistently “showed daylight between government contractual requirements and conduct” by the contractors, Doyle said.

These rulings give hope to plaintiffs trying to separate contractors’ conduct from the blanket of government control and the liability shield that comes with it.

“Although the defense contracting industry keeps pressing novel theories to try to evade accountability, the developing federal jurisprudence, taken as a whole, adheres to the teachings of the Supreme Court decision in *Boyle v. United Technologies Corp.*,” said Susan L. Burke, a litigator who represented the plaintiffs in *Saleh*. “That is, the touchstone is whether the government and the public interest are furthered by insulating the contractor from liability.

“If the facts show that a contractor violated the terms of the contract, the public interest cannot be served by extending immunity to a for-profit contractor,” she said.

Know the Risks Battlefield contractors have learned to spend more time preparing for litigation risks when bidding on military support contracts, Sarria said.

“Most contractors now conduct formal pre-award assessments of the tort risks and liabilities that could emerge from such contracts, which include a ‘gap analysis’ of their commercial insurance coverage and a review of the immunity, indemnity, and cost recovery mechanisms that may be available from the government,” he said. “By focusing on these risk-mitigation measures at the outset of a procurement, and consciously developing facts throughout contract performance that lay the groundwork for federal defenses, these contractors are far more prepared to respond to tort suits down the road.”

Depression and Flashbacks Salim wants a jury trial against the psychologists, and all the damages a jury would see fit, for the suffering he says he experienced and the depression and flashbacks he says he continues to endure.

Keeping the case alive into the trial stage won’t be easy. The psychologists, in addition to raising political question and derivative sovereign immunity defenses, told the court their program wasn’t designed for or used on Salim and other plaintiffs.

The case’s chances rest largely on Salim’s ability to separate the psychologists’ conduct from the CIA’s direction and oversight.

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