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TRANSCRIPT OF PROCEEDINGS
TRANSCRIPT-IN-CONFIDENCE

AUSTRALIAN DEFENCE FORCE

DEFENCE PLAZA, SYDNEY, NEW SOUTH WALES

PRE-TRIAL DIRECTIONS HEARING

BRIG I D WESTWOOD, Chief Judge Advocate

LTCOL T BERKLEY, with LTCOL H DEMPSEY and SQNLDR J LIDDY, Prosecutor
MAJ D McLURE, with CAPT K WOLAHAN, appearing for the First Defendant
MAJ J HYDE appearing for the Second Defendant
MR T BEGBIE appearing for the Commonwealth

0930 FRIDAY 20 MAY 2011
DAY 8

TRANSCRIPT VERIFICATION

I hereby certify that the following transcript was made from the sound recording of the above stated case and is true and accurate

Signed..... Date .....(Chief Judge Advocate)

Signed.... S. Johnson **..... Date ....20/05/11.....(Recorder)**

Signed..... V. D'Amico **..... Date ....20/05/11.....(Transcriber)**

Signed..... Millyard **..... Date ....20/05/11.....(Transcriber)**

Signed..... J A Cone **..... Date ....20/05/11.....(Transcriber)**

EXHIBIT LIST

Date: 20/05/11

Number **Description** **Page No.**

RESUMED **[0930]**

CHIEF JUDGE ADVOCATE: Please be seated and you may remove headdress. I have one preliminary matter before I rule on those applications, and that is that yesterday I received through the registry a copy of the Commonwealth's documents in connection with the protective orders sought. If there's no objection, I'll simply propose to mark those for identification 33.

PROSECUTOR: If the court pleases.

#EXHIBIT MFI 33 - COMMONWEALTH'S DOCUMENTS RE PROTECTIVE ORDERS SOUGHT

CHIEF JUDGE ADVOCATE: Pursuant to the Defence Force Discipline Act section 141(1)(b) the accused men have entered certain objections to the charges brought by the prosecution. Before detailing those applications, I shall refer to the charges and the prosecution applications to amend them.

Each accused man was originally separately charged with a principal count of manslaughter contrary to DFDA section 61(3) and the Crimes Act 1900 ACT section 15 and, in the alternative, with dangerous conduct with negligence as to the consequences, contrary to DFDA section 36(3). There was a further principal count against each man. As with the alternative counts, these further principal counts were charged as being contrary to DFDA section 36(3). There are issues with the drafting of the charges and, by minute dated 11 April 2011, the prosecution has foreshadowed an application to amend. Because of the objections taken to the charges, I shall deal with the application to amend in conjunction with the current objections by the accused men.

As against each accused man, the manslaughter charges were originally pleaded as follows: being a Defence member at Sorkh Morghab, Uruzgan Province, Islamic Republic of Afghanistan on 12 February 2009, did kill five persons, namely, two male children aged between 6 and 13 years, one female child aged between six and 13 years, one male infant aged approximately two years, and one female infant aged approximately two years. The amendments foreshadowed by the prosecution include severing those charges so as to bring separate counts of manslaughter in connection with each of the five persons allegedly killed. The charges will otherwise be particularised in the same way as the original charges.

The pleading of these charges is in accordance with section 275 of the Crimes Act which provides relevantly:

> *In an indictment for manslaughter it shall not be necessary to set out the way in which or the means by which the death alleged was caused but it shall be sufficient in an indictment for manslaughter to charge that the accused did kill the deceased.*

In the case of SGT J, the charge against section 36(3), being the second charge on the charge sheet as originally framed and brought in the alternative to the principal count of manslaughter, is pleaded as follows: being a Defence member at Sorkh Morghab, Uruzgan Province, Islamic Republic of Afghanistan on 12 February 2009, did engage in dangerous conduct by attacking with weapons an adult male located within a room of a residential compound and was negligent as to whether this act was likely to cause the death of civilians within that room. Particulars of attacking: (a) directing members of Force Element Charlie to post an F1 fragmentation grenade into the room; (b) directing members of Force Element Charlie to fire a machine gun into the room; (c) directing members of Force Element Charlie to post a second F1 fragmentation grenade into the room; (d) firing his M4 assault rifle into the room.

If the original first charge is severed in the manner foreshadowed by the prosecution, this will become the sixth charge and it is intended it will be pleaded in the alternative to the first, second, third, fourth and fifth counts. It is also intended that this charge will relate only to those civilians whose alleged deaths have been made the subject of the earlier manslaughter counts. Accordingly, it is proposed to amend the charge so as to provide the following particulars of civilians within the room: (a) two male children aged between 6 and 13 years; (b) one female child aged between six and 13 years; (c) one male infant aged approximately two years; (d) one female infant aged approximately two years.

What was originally the third charge against SGT J but which would become the seventh charge following the amendments foreshadowed by the prosecutor is brought as a further principal count. It is in the same terms as the original second charge, save that here it is alleged that his act was likely to cause grievous bodily harm to civilians within that room. It is the prosecution's intention that that charge will apply to persons allegedly in the room but not the subject of the manslaughter counts. Accordingly, the prosecution have foreshadowed an amendment so as to provide the following particulars of civilians within the room to who this charge is intended to relate: (a) two adult females; (b) one female child aged approximately four years; (c) one female child aged approximately

10 years.

In the case LCPL D, the alternative charge, the second charge on the original charge sheet, is pleaded as follows: being a Defence member at Sorkh Morghab, Uruzgan Province, Islamic Republic of Afghanistan on 12 February 2009, did engage in dangerous conduct by attacking with explosives an adult male located within a room at a residential compound and was negligent as to whether this act was likely to cause the death of civilians within that room. Particulars of attacking: (a) posting an F1 fragmentation grenade into the room; and (b) posting a second F1 fragmentation grenade into the room.

As with the charges against SGT J, the prosecution application to sever the manslaughter count would mean that this would become the sixth charge. It would be pleaded in the alternative to the severed original first count. As with the sixth charge against SGT J, it is intended that this alternative count will relate only to those civilians alleged to have been the subject of the earlier manslaughter counts. As with the charges against SGT J, the original third charge is in the same terms as the second charge, save that it is alleged that the act was likely to cause grievous bodily harm to civilians within that room.

Again, the prosecution now propose that this count will become the seventh charge against LCPL D. It will be brought as a further principal count and it is intended to relate only to civilians to have alleged to have been within the room but who were not the subject of the earlier manslaughter counts. The civilians concerned will be particularised in the same way as they are in the proposed seventh charge against SGT J.

In the course of oral submissions, the prosecutor conceded that there might be some issue with the current pleading of the charges against DFDA section 36(3), by reason of these alleging conduct by attacking, but has made no further formal application to amend, pending my ruling on the matters currently before the court.

On the basis of the application to amend the charges, foreshadowed by the prosecutor, the accused men make the following applications:

> *(a) Pursuant to DFDA section 141(1)(b)(iv), the accused object to the charges on the grounds that they do not disclose a service offence or are otherwise wrong on law.*

In summary, the accused contend that:

1. *The homicide offences in the Crimes Act 1900 ACT, picked up by DFDA section 61, and the offences provided by DFDA section 36 do not apply to the conduct of soldiers in combat causing the death of civilians not taking a direct part in hostilities, because conduct of that kind is more specifically proscribed in Division 268 of the Criminal Code 1995 Cth.*

2. *Alternatively, soldiers acting in the course of the duties are immune from prosecution from causing death or injury to others, in the course of combat, unless their conduct contravened customary international law, that is, the laws of armed conflict and international humanitarian law.*

3. *Alternatively a charge, having a fault element of negligence against soldiers for their conduct in combat is wrong in law, because soldiers do not owe a legally enforceable duty of care to anyone for their acts in combat.*

(b) alternatively, pursuant to DFDA section 141(1)(b), objection is taken to the charges on the grounds that they are duplicitous.

(c) alternatively, pursuant to DFDA section 141(1)(b), objection is taken to charges 6 and 7 against both accused, on the grounds that acquittal or conviction on charge 6 would entitled the accused to a defence of autrefois acquit or autrefois convict, on charge 7.

(d) alternatively, pursuant to DFDA section 141(1)(b), the accused object to the charges on the grounds that the prosecution had declined to provide essential particulars.

(e) on these grounds, the accused seek an order that the charges be dismissed, or permanently stayed.

The objection that the prosecution has declined to provide essential particulars related originally to the application made on 30 March this year. In that application, each accused man asserts that the prosecutor is required to provide particulars of alternate courses of action that the prosecution say he could have adopted to avoid what is said to be an outcome attracting criminal sanction. The prosecution resists this application. The application was subsequently extended to the amended particulars supplied by the prosecutor.

I would make some general observations concerning the accused men's

submissions. They submit as core propositions, inter alia, that:

> *Subject to the laws of armed conflict, soldiers engaged in combat during armed conflict may lawfully kill or wound enemy combatants and attack military objectives, even when it is known that the attack will cause civilian deaths or injuries, if those expected deaths or injuries are proportionate to the anticipated military advantage.*

In support of that proposition, the refer to article 43(2) of Additional Protocol 1 of 1977 to the Geneva Conventions, which provides:

> *Members of the armed forces of a party to a conflict, other than medical personnel and chaplains, covered by Article 33 of the third convention, are combatants. That is to say, they have the right to participate directly in hostilities.*

They also refer to the decision in United States v Lindh (2002) Federal Supplement, 2nd Series 541 at 553, where the court referred to combatant immunity in the following terms:

> *Lawful combatant immunity, a doctrine routed in the customary international law of war, forbids prosecution of soldiers for their lawful belligerent acts committed during the course of armed conflicts against legitimate military targets.*

The first observation that I would make is that the conduct of a member of the Australian Defence Force is not regulated solely by the restrictions and limitations of the law of armed conflict. It is open to the parliament, through legislation, or to proper military authority, through lawful orders, to further restrict and regulate the conduct of Defence members.

Legislation, even if in contravention of generally acknowledged principles of international law, is binding upon, and must be enforced by, the courts of this country. I rely, for that proposition, on the observations of Latham CJ in Polites v The Commonwealth (1945) 70 CLR 60 at 69.

The second observation is that in terms of the decision in US v Lindh, the prosecution case is that the actions allegedly perpetrated by the accused men were not lawful, belligerent acts against legitimate military targets.

Before proceeding further, it is convenient to look at the legislative provisions creating the offences. The primary counts of manslaughter brought against each man are incorporated as service offences by the operation of DFDA section 61(3). That subsection provides:

A person who is a Defence member or a Defence civilian is guilty of an offence if:

(a) the person engaged in conduct outside the Jervis Bay territory, whether or not in a public place, and

(b) engaging in that conduct would be a territory offence if it took place in the Jervis Bay territory, whether or not in a public place.

The territory offences incorporated into the DFDA, by operation of section 61(3), include those created by the Commonwealth Criminal Code. The offence of manslaughter arises under the Crimes Act 1990 ACT, section 15, which provides, relevantly:

1. Except if a law expressly provides otherwise, an unlawful homicide that is not, under section 12, murder, shall be taken to be manslaughter.

2. A person who commits manslaughter is guilty of an offence punishable, on conviction, by imprisonment for 20 years.

DFDA, section 36, creates the offence of dangerous conduct. It regulates in a descending hierarchy of seriousness certain dangerous conduct. Section 36(1) provides:

A person who is a Defence member or a Defence civilian is guilty of an offence if:

(a) the person engages in conduct; and

(b) the conduct is in or in connection with -

(i) the operation, handling, service or storage, or

(ii) the giving of directions with respect to the operation, handling, servicing of storage

of a ship, aircraft or vehicle or of a weapon, missile, explosive or other dangerous thing or equipment; and

(c) the conduct causes or is likely to cause the death of or grievous bodily harm to another person, and

(d) the first mentioned person knows of the matter mentioned in paragraph (c); and

(e) where the person mentioned in paragraph (c) is an enemy person the conduct is not in the execution of the first-mentioned person's duty.

Subsections (2) and (3) of section 36 are in identical terms to subsection (1), save that the fault element attaching to the accused person's awareness of the causation or likely causation of death or grievous bodily harm to another person is in subsection (2) recklessness and subsection (3) negligence. The maximum punishment on conviction for an offence against subsection (1) is 10 years imprisonment. For an offence against subsection (2) is five years imprisonment and for an offence against subsection (3) is two years imprisonment.

DFDA section 3(1) defines "enemy person" to mean:

(1) a representative or agent of the enemy or (2) a member of an armed force of a body politic that constitutes the enemy or an armed force or other force that constitutes the enemy.

"The enemy" is defined to mean:

A body politic or an armed force engaged in operations of war against Australia or an allied force and includes any force, including mutineers and pirates, engaged in armed hostilities against the Defence Force or an allied force.

In order to fully understand the basis on which the accused men's applications are made it is necessary to refer briefly to some aspects of the case foreshadowed by the prosecutor. The prosecution case is that the conduct giving rise to the charges took place during a night-time operation within a residential compound in Afghanistan. Prior to the conduct on the part of the accused men alleged to give rise to the charges, a member of the force commanded by SGT J is said to have fired upon an adult male located within a room within the compound. The adult male returned fire. That fire continued, at least sporadically, until the posting of the second grenade.

The adult male was killed as a result of the actions alleged on the part of the accused men. No charge is brought concerning his death. The prosecution alleges that the room in which the adult male was located also contained civilian non-combatants, including children. It is alleged that the accused men's acts resulted in the deaths of certain of the children and

was otherwise such as to fall within the conduct proscribed by section 36(3).

The prosecution case against each of the accused men is one of involuntary manslaughter by criminal negligence and dangerous conduct with negligence as to consequences. The prosecution does not allege that either intended to occasion the death of or grievous bodily harm to the alleged victims or to unlawfully kill or injure any other person.

As Simpson J noted in R v Sood Ruling No. 3 (2006) NSWSC 762 at paragraph 43:

> *The elements of manslaughter by criminal negligence may be stated as follows: (1) The accused did an act or omitted to do an act. (2) As a result of which a death of a person was caused. (3) The accused was under a duty of care to that person. (4) The act or omission constituted a breach of the accused's duty of care to that person of such magnitude as to warrant being punished by a criminal justice system.*

The prosecution does not have to establish that the accused's actions were otherwise unlawful. The negligence required to establish the manslaughter charges is governed by the common law. In particular, it is the test enunciated by the Full Court of the Supreme Court of Victoria in Nydam v R (1977) VR 430. For the purposes of DFDA section 36(3), negligence is governed by the provisions of the Commonwealth Criminal Code section 5.5.

That codification in the Criminal Code was based on the common law position in Nydam and for current purposes it will suffice if I refer simply to the codified provision. The code at section 5.5 provides:

> *A person is negligent with respect to a physical element of an offence if his or her conduct involves (a) such a great falling short of the standard of care that a reasonable person would exercise in the circumstances and (b) such a high risk that the physical element exists or will exist that the conduct merits criminal punishment for the offence.*

While the accused men have raised the issue of whether or not a duty of care was owed to the civilians as an alternative argument to certain other propositions, it is convenient to start with that issue. If, as a matter of law, there is no duty of care, then the proposed manslaughter charges disclose no offence and there would be no requirement to consider combatant immunity from prosecution or a potential conflict with other criminal

provisions.

Under cover of a minute of 11 April 2011 - and this is marked for identification 15 - the learned prosecutor formally withdrew the particulars that had been provided at documents marked for identification 8 and 10. And these have become exhibits 2 and 5 on the application for particulars dated 30 March. Those earlier particulars had asserted that a duty of care towards the Afghan civilians allegedly impacted by the accused men's actions was imposed through their orders.

The particulars provided under cover of the minute of 11 April simply assert in connection with the charges of manslaughter by negligence at paragraph 14:

> *Each of the accused owed the five dead civilian children a duty of care not to kill or injure them.*

So far as the offences brought against DFDA section 36 are concerned, the prosecution says at paragraph 23:

> *Each of the accused owed the five dead civilian children a duty of care not to kill or injure them.*

And at paragraph 32:

> *Each of the accused owed the civilian survivors a duty of care not to kill or injure them.*

The particulars include a general reference to the accused men's orders and instructions at paragraph 18 in connection with the manslaughter counts and at paragraphs 28 and 36 in connection with the offences against DFDA section 36(3). These particulars are in the same terms and provide - and I quote from those given at paragraph 18:

> *The matters to which the court martial panel may have regard in deciding whether the accused men were negligent are not limited by subsection 11(2) of the DFDA vide subsection 11(3)(b) of the DFDA. These include but are not limited to orders and instructions and training relating to the use of force and limitations on the use of force such as Rules of Engagement, the six-step targeting process and verbal instruction.*

The particulars do not further describe how it is said by the prosecution that the accused men's orders and instructions were relevant. In the course of oral submissions it was common ground that a duty of care was

required for the manslaughter counts but the learned prosecutor resiled from the position in the particulars that a duty of care was required for the purposes of section 36(3). However, if I were to rule that a duty of care had as a matter to be established, he would submit that it arose on the same basis as that which the prosecution says arises to found the manslaughter counts.

I shall deal firstly with the manslaughter counts. In the case of the manslaughter counts the prosecution initially asserts that the duty of care arises as a matter of common law. In Callaghan v R (1952) 87 CLR 115 Dixon CJ and Webb, Fullagar and Kitto JJ refer with approval to the summing up to a jury by Sir James Fitzjames Stephen explaining the neglect which may make a man guilty of manslaughter as follows:

> *Manslaughter by negligence occurs when a person is doing anything dangerous in itself or has charge of anything dangerous in itself and conducts himself in regard to it in such a careless manner that the jury feel that he is guilty of culpable negligence and ought to be punished.*

The prosecution says that the accused men were doing something dangerous in and of itself and that a duty of care therefore arose to those who might be impacted by their conduct.

In the course of oral submissions the prosecutor advanced for the first time the proposition that a duty of care arose as a result of the application of international law. As I understand the basis on which this submission was ultimately refined, reliance was placed on the accused men's orders which was said to reflect a duty of care arising under international law. In light of these submissions, the defence sought answers from the prosecutor to the following questions. This is from the document marked for identification 32.

> *(1) Does the prosecution say that the duty of care referred to in paragraph 2 of the minute, i.e. a common law duty of care not to harm the civilian occupants of room 6 when engaging the fighting aged male, was a duty owed in relation to the manslaughter charges as well as the dangerous conduct charges?*
>
> *(2) Does the prosecution still maintain that a duty of care arises from the fact that the accused were engaged in a dangerous activity?*
>
> *(3) Does the prosecution contend that on 12 February 2009 the*

accused attacked the civilian occupants of room 6 within the meaning of article 13 of Additional Protocol 2 to the Geneva Conventions of 1949 and articles 48 to 51 of Additional Protocol 1 to the Geneva Convention of 1949?

(4) Does the prosecution contend that the accused were ever shown the Rules of Engagement?

(5) In relation to ADDP 06.1, Rules of Engagement, and ADDP 06.4 Law of Armed Conflict -

and these were certain policy manuals of the department -

does the prosecution contend that (a) these publications constitute orders binding the accused; (b) the accused read these documents at any time before 12 February 2009?

The learned prosecutor responded - and this is from the transcript for 18 May, pages 33 to 35:

In relation to point 1, consistently with our submissions, the duties owed in relation to the manslaughter charges, but consistently with our proposition that there is no duty in respect to the section 36 charges.

I then sought some clarification from the prosecutor and in effect I asked him to confirm whether it was the case that if I were against him in connection with that, that he would assert that the duty arose in the same way as he asserted it arose for the manslaughter to which the response was given yes on both bases, which answers question 2. The answer to that is yes. The answer to 3 is as follows:

In relation to a deliberate attack as described in Article 49 of Protocol 1 and Article 13 of Protocol 2, no. In relation to question 4, does the prosecution contend that the accused were shown the Rules of Engagement, that document? No. In relation to question 5, in relation to the documents, the answer to (a) would necessarily be in part because I put them to you as some parts are compulsory, some parts are merely policy. In relation to paragraph (b), no.

MAJ McLure raised the prospect of there being some ambiguity in connection with answer 3 and the learned prosecutor responded:

To save any ambiguity, as I said, in terms of a deliberate attack,

no. And a deliberate attack is described I think in article 49 of Additional Protocol 1 and it's not further described in Protocol 2. Remember we're using the Nydam test here. We are saying that engaging the fighting aged male such a great situation of danger was occasioned to other occupants of the room that their actions were such a great falling short. Now, I don't think I can put it any more explicitly than that.

He subsequently in answer to a question from me said:

We say that there is evidence that they did know that there were civilians there or that they did appreciate the likelihood. But whatever that may bring in the course of the case, we say the evidence would reveal that a reasonable person would have known of their likely presence or their actual presence. It's always been our case that in engaging the fighting aged male they created the danger to the civilians and that, as we've said, gave rise to the duty to them at common law.

There was a further question asked in connection with a question going to the protocols. The learned prosecutor responded:

I don't think that you can answer it yes or no. We are not suggesting that it is relevant at all to the case whether there was an intentional attack on the civilians. It is simply irrelevant. We are saying that this is a negligent situation. If the question asked if this on the behalf of the accused: are we saying that we breached that specific article of the protocol? No. The articles of the protocol are mentioned as being part of a fabric of duties which we say gives rise to a duty of care, not each and every one of them, but they are, such as the articles that we have pointed out, give rise to proportionality are part of this fabric, and that's how I put it. I want it to be clear they are part of the fabric. As to those particular ones, no, of course not; I think that should be clear.

The ongoing changes of approach by the prosecution are perhaps indicative of the difficulties inherent in a prosecution for allegedly negligent acts said to have been committed in the course of armed conflict. While of course it is not determinative, I think the fact that the prosecution is unable to refer me to any cases where charges of negligent manslaughter have been brought in connection with actual combat situations is also illustrative of the difficulties in this regard.

The accused men submit that, as a matter of law, there was no duty of

care. The learned authors of Thomson Reuters, the Laws of Australia - and this at paragraph 10.1.151 - say in connection with the duty of care to the victim that must be established for manslaughter by criminal negligence:

> *In the case of death occasioned by an omission a legal duty to take positive action to avoid causing death or injury to the victim must be established. Where death is caused by a positive act, the duty of care to the victim may be established on the basis that a person is under a general tortious duty to act in such a way as not to cause harm to another.*

They say that this conclusion is implicit in the test of criminal negligence expounded by the court in Nydam v R and from Sir James Stephen's summing up in a matter of R v Doherty [1887] 16 Cox's Reports 306 at 309. As his Honour the Chief Justice at common law, McClellan CJ and Howie JA observe in Burns v R (2011) NSWCCA 56 at paragraph 96:

> *Gross negligence manslaughter depends upon the offender owing the deceased a duty of care: Kelly v Rex [1923] 32 CLR 509 at 515; R v Taktak (1988) 14 NSWLR 226 at 357; R v Hall (1999) NSWSC 738 and (1999) 108 A Crim R 209 at 211-212. The duty must be recognised by common law or statute. Not every moral duty amounts to a legal duty: R v Instan [1893] 1 QB 450 at 453, a judgment of Coleridge CJ.*

For reasons to which I will come subsequently, I consider the issue of whether the duty of care can be established to be of fundamental importance. It is not asserted that there was a statutory duty of care for the purposes of the manslaughter charges.

In Rex v Bateman [1925] 19 Cr App R 8, a decision of the United Kingdom Court of Criminal Appeal comprising Lord Hewitt CJ and Salter and Fraser JJ, the court draws no distinction between the duty of care required to establish tortious liability and that required to establish criminal negligence. The court said at page 10:

> *In expounding the law to juries on the trial of indictments for manslaughter by negligence, judges have often referred to the distinction between civil and criminal liability for death by negligence. The law of criminal liability for negligence is conveniently explained in that way. If A has caused the death of B by alleged negligence then, in order to establish civil liability, the plaintiff must prove, in addition to pecuniary loss caused by the death that A owed a duty to B to take care, that the duty was*

not discharged and that the default caused the death of B.

To convict A of manslaughter, the prosecution must prove the three things abovementioned and must satisfy the jury in addition that A's negligence amounted to a crime. In the civil action, if it is proved that A fell short of the standard of reasonable care required by law, it matters not how far he fell short of that standard. The extent of his liability depends not on the degree of negligence but on the amount of damage done. In a criminal court on the contrary, the amount and degree off negligence are the determining question.

That statement of the law was approved more recently by the House of Lords in R v Adomako (1995) 1 App C 171. It also reported at (1994) 3 All ER 79. In that matter Lord McKay went on to say - and this is from page 86 of the All England Report:

On this basis in my opinion the ordinary principles of the law of negligence apply to ascertain whether or not the defendant has been in breach of a duty of care towards the victim who has died.

In Re Milgate (1994) 118 FLR 77 Higgins J, sitting in the Supreme Court of the ACT, followed Bateman in dealing with an application under the Criminal Injuries Compensation Act 1983 ACT. In the matter of Burns, to which I have already referred, the New South Wales Court of Criminal Appeal was concerned with whether the supplier of a prohibited drug owes a duty of care to a person to whom they supplied the drug and who, in their presence, takes the drug. The court notes at paragraph 99 that there is debate as to whether the duty of care in gross negligence manslaughter is to be equated with the duty giving rise to a liability in tort.

At paragraph 100 their Honours refer to the argument of Messrs Herring and Palser in their article the Duty of Care in Gross Negligence (2007) Criminal Law Review 24 at 37 that:

The nature of criminal proceedings necessitates a different approach to the question of duty of care that is appropriate in civil proceedings.

At paragraph 102 the Court of Criminal Appeal that it was not necessary to explore the issue in that case. They do, however, at paragraph 111 cite for approval a portion of the judgment handed down by Lord Judge in R v Evans (Gemma) (2000) EWCA Crim Div 650, which includes the following passage:

In our judgment, consistent with R v Adomako (1995) 1 Appeal Cases 171, and the link between civil and criminal liability for negligence, for the purposes of gross negligence manslaughter, when a person has created or contributed to the creation of a state of affairs which he knows, or ought reasonably to know, has become life threatening, a consequent duty on him to act, by taking reasonable steps to save the other's life will normally arise.

At the time of the alleged conduct giving rise to the charges, the accused men were on active service in Afghanistan. It is agreed, for present purposes, that the accused men were participating in an armed conflict of a non-international character. It is common ground that, subject to their orders, they were authorised to use force, including lethal force. In these circumstances the question arises as to whether there is a duty of care to private individuals.

In Shaw Savill & Albion Company Ltd v The Commonwealth (1940) 66 CLR 344, the High Court considered an action for negligence, brought against the Commonwealth, following a collision between HMAS ADELAIDE and the motor vessel Coptic.

Dixon J, with whom Rich ACJ and McTiernan J agreed said, at page 361:

It could hardly be maintained that during an actual engagement with the enemy, or a pursuit of any of his ships, the navigating officer of a King's ship of war was under a common law duty of care to avoid harm to such non-combatant ships as might appear in the theatre of operations.

It cannot be enough to say that the conflict or pursuit is a circumstance affecting the reasonableness of the officer's conduct as a discharge of the duty of care, though the duty itself persists.

To adopt such a view would mean that whether the combat be by sea, land or air, our men go into action accompanied by the law of civil negligence warning them to be mindful of the person and property of civilians.

It would mean that the courts could be called upon to say whether the soldier, on the field of battle, or the sailor fighting on his ship, might reasonably have been more careful to avoid causing civil loss, or damage.

No one can imagine a court undertaking the trial of such an issue

either during or after a war. To concede that any civil liability can rest upon a member of the armed forces for supposedly negligent acts or omissions in the course of an actual engagement with the enemy, is opposed, alike, to reason and to policy.

His Honour went on to say, at 361-362:

The principle must extend to all active operations against the enemy. It must cover attack and resistance, advance and retreat, pursuit and avoidance, reconnaissance and engagement.

Subsequently, at 362:

But when, in an action of negligence against the Crown, or a member of the armed forces of the Crown, it is made to appear to the court that the matters complained of formed part of, or an incident in, active naval or military operations against the enemy, then, in my opinion, the action must fail on the ground that while in the course of actually operating against the enemy, the forces of the Crown are under no duty of care to avoid causing loss or damage to private individuals.

In Groves v The Commonwealth (1982) 150 CLR 113, Gibbs CJ said, at page 117:

I have no difficulty in accepting the correctness of what was said by Dixon J in Shaw Savill & Albion Co Limited v The Commonwealth.

That approach of the High court, in Shaw Savill, was more recently applied by the England & Wales Court of Appeal (Civil Division) in Mulcahy v The Ministry of Defence (1996) EWCA Civ 1323. That case involved an action by a soldier who was injured when a Howitzer gun was discharged after the soldier had been directed by a sergeant to proceed to the front of the gun concerned.

Neill LJ, with whom the other members of the court agreed, specifically rejected a suggestion by counsel, and this is from page 770 of the report in the All England Reports, the citation for the All England Reports is (1996) 2 All ER 758.

It's been submitted, by the plaintiff in that matter, that the right approach, it was suggested, was to allow the claim to proceed and then to have an investigation, at the trial, into the particular circumstances surrounding the firing of the gun to see whether there had been any breach of a duty of

care. The exigencies of battle might well provide an excuse for what, in other circumstances would constitute a breach of duty. The court specifically rejected that argument.

This approach, which was rejected in both Shaw Savill and in Mulcahy, in the case of civil actions for negligence, is, of course, the approach for which the learned prosecutor contends. He says that there is a duty of care and that the court martial can consider all of the relevant circumstances, including the fact of armed conflict, and decide whether or not it is satisfied, beyond reasonable doubt, that criminal negligence is established.

Neill LJ went on to say, and this is from page 771 of the All England Reports:

> *The question then becomes is a duty of care to be imposed in such conditions so as to make one serviceman liable for his negligent act towards another.*
>
> *In my opinion, despite the careful arguments addressed to us on behalf of the plaintiff, there is no basis for extending the scope of the duty of care so far.*
>
> *I would echo the words of Gibbs CJ, in Groves case (1982) 150 CLR 113 at 117 to hold that there is no civil liability for injury caused by the negligence of persons in the course of an actual engagement with the enemy seems to me to accord with common sense and sound policy.*

In that same matter, Sir Iain Glidewell observed, and this is at page 772:

> *Indeed, it could be highly detrimental to the conduct of military operations if each soldier had to be conscious that even in the heart of battle he owed such a duty to his comrade. My reasons are thus, in essence, those expressed by Dixon J in the passage from his judgment in Shaw Savill & Albion Co Limited v The Commonwealth.*

And his Honour continues:

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

Shaw Savill and the other cases in which it was applied were of course

concerned with civil liability for the test of negligence. The learned prosecutor submits that the cases should be distinguished on that basis and he referred me to a number of United Kingdom authorities in which the observations of Lord McKay in Adomako, to which I have referred, were considered.

The principal case on the point was R v Wacker (2002) EWCA Crim 1944. The Court of Appeal was there considering a case of negligent manslaughter in connection with the deaths of a number of illegal immigrants being smuggled into the United Kingdom. They were conveyed by the accused in a cargo container. With a view to evading detection, the accused closed the air vent to the container and they suffocated. Those who died had been willing collaborators with the accused in the illegal activity concerned.

The court below had proceeded on the basis that the ordinary principles of the law of negligence did not recognise a duty of care owed between those involved in a criminal enterprise. This approach was taken on what was said to be a strict application of the principles from Adomako to which I have referred. The Court of Appeal started with a consideration of public policy. They say at paragraph 30:

> *There are occasions when it is helpful when considering questions of law for the court to take a step back and to look at an issue of law that arises without first turning to and becoming embroiled in the technicalities of the law. This is such a case. We venture to suggest that all right-minded people would be astonished if the propositions being advanced on behalf of the appellant correctly represented the law of the land.*

At paragraph 35 they say:

> *Thus looked at as a matter of pure public policy, we can see no justification for concluding that the criminal law should decline to hold a person as criminally responsible for the death of another simply because the two were engaged in some joint unlawful activity at the time, or indeed, because there may have been an element of acceptance of a degree of risk by the victim in order to further the joint unlawful enterprise. Public policy, in our judgment, manifestly points in totally the opposite direction.*

At paragraph 37 they conclude:

> *Adomako was a case where an anaesthetist had negligently brought about the death of a patient. It therefore involved no*

> *element of unlawful activity on the part of either the anaesthetist or the victim. We have no doubt that issues raised in the case we are considering would never had crossed the minds of those deciding that case in the House of Lords. Insofar as Lord McKay referred to ordinary principles of the laws of negligence, we do not accept for one moment that he was intending to decide that the rules relating to ex turpi causa were part of those ordinary principles. He was doing no more than holding that in an ordinary case of negligence the question whether there was a duty of care was to be judged by the same legal criteria as governed whether there was a duty of care in the law of negligence. That was the only issue relevant to that case and to give the passage more extensive meaning accepted in the court below was, in our judgment, wrong.*

Consistent with Adomako and unlike the facts in Wacker and the other cases to which I was referred, these being R v Gemma Evans - and I think I have already given the citation for that - and R v Willoughby (2005) 1 WLR 1880, there is no element of otherwise unlawful activity alleged against the accused men. There is no contention that they were not authorised by their orders to engage the fighting aged male and their actions, aside from the result alleged to have been occasioned or which was said to have been likely to have been occasioned, are not asserted to have been otherwise unlawful.

Again, unlike the situation in Wacker, I do not consider that public policy relating to whether or not a duty of care should exist for the purpose of a criminal offence allegedly committed in the course of armed conflict is necessarily different from that applied by the High Court in determining the same question for the purposes of civil liability.

In the case of a duty of care asserted to exist in connection with armed conflict, it seems to me that the public policy considerations are identical insofar as either the prospect of civil suit or criminal charges might restrict what would otherwise be lawful conduct directed towards engaging the enemy. Indeed, it would seem an extraordinary position if members of the Defence Force engaged on actual operations against the enemy had no duty of care such as to give rise to an action for negligence sounding only in damages because, to quote from Dixon J:

> *To adopt such a view would mean that whether the combat be by sea, land or air, our men go into action accompanied by the law of civil negligence warning them to be mindful of the person and property of civilians.*

Yet a duty of care existed for the purposes of the criminal law where breach could constitute negligent manslaughter and result in 20 years imprisonment.

In considering the approach that was taken by the High Court in Shaw Savill, I think it important to bear in mind that members of the Defence Force are in a unique position under Australian law when actually engaged in armed conflict on the authority of the Commonwealth. Subject to applicable laws of the Commonwealth, their orders and the accepted Laws of Armed Conflict, they are authorised to offensively apply force, including lethal force.

It is accepted that they will not be doing so in a benign environment. Rather, there is an inevitable and real risk of death or injury either as a result of the inherently dangerous tasks that they may be ordered to undertake to attack the enemy or as a result of enemy action. There will rarely be time for calm reflection and a careful weighing of risks and consequences in exchanges with life and death consequences for all. They are compellable on pain of penalty to conduct operations against the enemy.

I refer, for example, to the specific provisions contained in the DFDA at part 3, relating to offences, these being Division 1, Offences Relating to Operations Against the Enemy.

I will not quote extensively from these, but I shall refer to two of them. Section 15 creates the offence of abandoning or surrendering a post. It provides that:

> *A Defence member or a Defence civilian is guilty of an offence if the person has a duty to defend or destroy a place, post, service ship, service aircraft or service armoured vehicle and the person knows of that duty and the person abandons or surrenders to the enemy the place or thing mentioned.*

There is a defence, as with most of the offences created by Division 1, with the onus on the accused, on the balance of probabilities, to establish that he or she had a reasonable excuse for the relevant conduct.

Section 15(f) relates to failing to carry out orders.

> *A person who is a Defence member or a Defence civilian is guilty of an offence if the person is ordered by his or her superior officer to prepare for or to carry out operations against the enemy, or is otherwise under orders to prepare for or to carry out*

operations against the enemy and the person does not use his or her utmost exertions to carry those orders into effect.

These offences carry a maximum punishment of 15 years' imprisonment, as do a number of the other offences contained in Division 1, relating to operations against the enemy. In my view, they speak of parliament's clear intention that members of the Defence Force are to do their utmost in attacking and resisting the enemy, subject, of course, to accepted principles of the laws of armed conflict and to specific laws of the Commonwealth, such as those contained in the Commonwealth Criminal Code, Division 268.

Members of the Defence Force cannot simply decide that they will take no further part in hostilities, or that they will refrain from engaging conduct that is inherently dangerous to themselves or others. Or that they will refrain from inflicting harm on enemy persons when their duty requires otherwise.

In the different situation of aid to the civil power, Lord Diplock expresses the contrast between the position of the soldier and the civilian, in these terms, and this is referenced under section 48A of the Criminal Appeal (Northern Ireland) Act 1968, No 1 of 1975 and it's reported at (1976) 2 All ER 937. This, of course, related to the difficulties in Northern Ireland at the time of the IRA terrorist attacks. His Lordship says:

In theory, it may be the duty of every citizen when an arrestable offence is about to be committed in his presence, to take whatever reasonable measures are available to him to prevent the commission of the crime. But the duty is one of imperfect obligation and does not place him under obligation to do anything by which he would expose himself to risk of personal injury. Nor is he under any duty to search for criminals or seek out crime.

In contrast to this, a soldier who is employed in aid of the civil power in Northern Ireland is under a duty, enforceable under military law, to search for criminals, if so ordered by his superior officer, and to risk his own life, should this be necessary in preventing terrorist acts.

For the performance of this duty he is armed with a firearm, a self-loading rifle, from which a bullet, if it hits the human body, is almost certain to cause serious injury, if not death.

The armed conflict in which a member of the Defence Force might find

him or herself will potentially range from situations where the security of the nation is under real and imminent threat to situations where, together with our allies, Australian forces enjoy technical and tactical superiority.

It could not be suggested that the situation faced by the accused men fell at the former end of the spectrum, but the principles of law must apply equally to all situations of armed conflict. The potential of what is at stake may be gleaned from some observations of Sir Isaac Isaacs, sitting in the High Court, in a matter of Farey v Burvett (1916) HCA 36.

This was a case about rationing at the time of the 1914-18 war. His Honour said, at page 9:

> *A war imperilling our very existence, involving not the internal development of progress, but the array of the whole community in mortal combat with the common enemy, is a fact of such transcendentant and dominating character as to take precedence of every other fact of life. It is the ultimo ratio of the nation.*

While the learned prosecutor sought to rely upon obligations arising under the international laws of armed conflict, in aid of his contention that a duty of care applied, I do not consider that this is the position under that law, at least for the purposes of establishing criminal liability.

I see that we are not at almost 10 minutes to 11. It might be convenient if I were to take the morning tea adjournment at this point and I will look to resume at a quarter past 11.

ADJOURNED **[1048]**

RESUMED **[1116]**

CHIEF JUDGE ADVOCATE: Before the adjournment I was about to move to my reasons for having concluded that the position under international law was such that it did not give rise to a duty of care, at least for the purposes of establishing criminal liability.

The international obligations assumed by Australia as a signatory to Additional Protocol 1 to the Geneva Conventions of 12 August 1949 were subsequently made the subject of the Geneva Conventions Act 1957. Article 51 provides the civilian population and individual civilians with general protection against dangers arising from military operations, relevantly, 51(2).

> *The civilian population as such, as well as individual civilians, shall not be the object of attack, acts or threats of violence, the primary purpose of which is to spread terror among the civilian population are prohibited.*

And 51(4):

> *Indiscriminate attacks are prohibited. Indiscriminate attacks are: those which are not directed at a specific military objective; those which employ a method or means of combat which cannot be directed at a specific military objective; or those which employ a method or means of combat, the effects of which cannot be limited as required by this protocol, and, consequently, in each such case are of a nature to strike military objectives and civilians or civilian objects without distinction.*

The commentary to Article 51, the protection of the civilian population, at paragraph 1934 provides:

> *Thus, in relation to criminal law, the protocol requires intent and, moreover, with regard to indiscriminate attacks, the element of prior knowledge of the predictable result.*

In the matter of the Prosecutor v Blaskic IT-95-14-T for 3 March 2000 at paragraph 180, the trial chamber of the International Criminal Tribunal for the former Yugoslavia said that the mens rea required for an offence based on breach of the protection of its civilians by the laws and customs of war, as prescribed by Article 3 of the tribunal's statute:

> *Such an attack must have been conducted intentionally in the knowledge or when it was impossible not to know that civilians or civilian property were being targeted not through military necessity.*

At paragraph 170 of its judgment the trial chamber held that Article 3 of its statute covered the additional protocols. In the corresponding matter of Prosecutor v Gaelic IT-98-29-T of 5 December 2003 at paragraph 42, the trial chamber held that the above quote from Blaskic is applicable to Article 51(2) of Additional Protocol 1. Similarly, in incorporating into Australian domestic law the obligations arising under Additional Protocol 1 by way of the provisions inserted into the Commonwealth Criminal Code at Chapter 8, Offences Against Humanity and Related Offences, fault elements of intention, knowledge or recklessness are required. Mere negligence will not suffice.

A duty of care giving rise to criminal responsibility for negligent acts committed in the course of armed conflict would be more onerous than the duty imposed by the accepted law of armed conflict and the international agreements to which Australia is a signatory. It would also be more onerous than the specific war crimes regulating armed conflict of a non-international character through Division 268 of the Commonwealth Criminal Code.

I have given careful consideration to the fact that criminal negligence requires a far greater departure from the standard of the reasonable person that is required to establish civil negligence and the extent to which this might ameliorate the concern expressed by Dixon J in Shaw Savill, such that the existence of a duty of care for the purposes of the criminal law should be distinguished from the position held to exist for tort. I do not consider that it does. While the departure from the standard of the reasonable person necessary to found civil liability is less than that necessary to found criminal liability, so too are the consequences. Insofar as a member of the ADF might, as a consequence of a duty of care, be required to be mindful of persons and property, I do not think any rational distinction can be drawn.

The difficulties inherent in a member of the ADF engaged in actual combat having a duty of care, whether in tort or for the purposes of manslaughter, is pointed out by MAJ McLure's submissions as to the potential conflict between duties to one's comrades and duties to others on the battlefield. It begs the question of which duty is paramount and would run the real risk of causing members in such a situation to hesitate in circumstances where that might prove fatal and give enemy forces a corresponding advantage.

Similarly, in connection with the receipt of orders and the obligation to obey them, the subordinate only knows for certain what he or she can detect through his or here own senses from a potentially limited perspective of the battlefield. He might anticipate other factors, for example, the presence of non-combatants from experience or from intelligence. He will not know what possibly more current or detailed information or broader perspective of the battlefield as a whole, including threats of which he or she may be unaware is informing the superior's orders. He or she is compellable on pain of penalty to obey lawful orders and DFDA section 14 provides a defence in these terms:

> *A person is not liable to be convicted of a service offence by reason of an act or omission that (b) was in obedience to a lawful order or an unlawful order that the person did not know and*

could not reasonably be expected to have known was unlawful.

A corresponding provision exists at the Commonwealth Criminal Code section 268.16(3). If a member of the Defence Force is held to owe a duty of care to others on the battlefield, with the exception of enemy personnel, it seems to me that in any situation where he or she can envisage the possibility of one of his comrades or a non-combatant being injured or killed through compliance with the order, he or she would be required to question the orders to ascertain the basis on which they were founded or run the risk of breaching a duty of care and be left hoping to avail him or herself of the defence under section 14 if a prosecution were brought.

This would be an invidious position, particularly when hesitation may yield the advantage to the enemy and lead to death or injury of the subordinate or his or her comrades. So far as the giving of orders is concerned, it may be necessary for subordinates to be ordered into harm's way. If a duty of care exists in armed conflict to one's comrades and subordinates, such orders would run the risk of exposing the officer, warrant officer or senior non-commissioned officer concerned to criminal charges in the event of their death or serious injury. It may be that negligence would not in fact be established, but the risk of facing trial and the uncertainty as to the outcome would again likely cause hesitation where perhaps advantage would be afforded to the enemy.

In summary, having regard to the restrictions on the soldier, sailor or airman's ability to choose to refrain from inherently dangerous conduct, his or her positive obligation to conduct operations against the enemy and the life and death ramifications of hesitation, I can see on basis on which to distinguish the approach taken by the High Court in Shaw Savill. For the same reasons that it is opposed alike to reason and policy to concede a tortious liability, it is in my view contrary to reason and policy to impose a criminal duty. If it were to be imposed clear words would be needed by the parliament.

In the alternative to a duty of care arising as a matter of common law, the prosecution asserts that such a duty may be imposed by orders and was in fact imposed in this case. At page 42 of the transcript for 18 May the learned prosecutor agreed with my summary of his position that as a subsidiary proposition he asserted that the orders reflected international law. For the reasons given earlier, I do not consider that a duty of care for negligence is imposed by the applicable principles of international law.

So far as the orders are concerned, in essence, the prosecution case is that the accused men's orders required them to act in a particular way and they failed to do so. Failure to act for the purposes of manslaughter by

criminal negligence was considered by the New South Wales Court of Criminal Appeal comprising Yeldham, Carruthers and Loveday JJ in R v Taktak (1988) 34 A Crim R 334. The court overturned a conviction for manslaughter by criminal negligence founded on failure to act. At page 357 Carruthers J referred to the necessity for the Crown to prove that the appellant owed a duty of care in law to the deceased. Yeldham at 345 said:

> *Thus, although manslaughter is usually defined in terms of the doing of an act causing death, and indeed is usually committed by a person so acting, it can be committed by an omission to act. What must be established is that the defendant was under a legally recognised duty arising from the common law or from statute to act in a certain way but omitted to do so, that as a result of this omission to act death resulted and that by the defendant's omission to act the defendant exhibited culpability associated with one of the relevant heads of manslaughter.*

This was confirmed by the New South Wales Court of Criminal Appeal in Burns v R in the passage to which I referred earlier. In particular, the court observed that so far as gross negligence manslaughter is concerned, the duty must be recognised by common law or statute. While orders impose obligations enforceable on pain of penalty under service law, I do not consider that a duty purportedly implied by exercise of such military authority could be categorised as imposing an obligation arising from the common law or from statute.

Certain of the material to which I have been referred is no more than policy guidance and could not constitute an order. There are, however, directions capable of constituting orders. I think it is clear that if they were so construed the orders in question would constitute general orders within the terms of the definition of "general order" DFDA section 3(1), being an order issued by the Chief of the Defence Force.

Compliance with general orders is mandated by DFDA section 29. While that section applies strict liability to the fact of the order and to the failure to comply with it, this is subject to a statutory defence where the accused person proves on the balance of probabilities that he or she neither knew, nor could reasonably be expected to have known, of the order. There is no scope in the operation of manslaughter by criminal negligence for some corresponding defence.

Rather, it would seem that if an order could impose the duty to act in a particular way for the purpose of manslaughter, then the order would be elevated to the status of an obligation imposed by law where ignorance of

the law or legal obligation concerned would not constitute a defence. This would be a fundamental shift from the operation of DFDA section 29. The potential for injustice is readily apparent if one takes the case of a validly issued order which has not been promulgated to a Defence member who ultimately is alleged to have failed to discharge a duty of care said to be imposed by operation of the order.

In the course of submissions I did ask the learned prosecutor whether he was aware of any authority in connection with the relevance of orders issued to police officers in connection with negligence in the discharge of their duties. At the time I had forgotten about the relevant authority and I shall refer to it now. I do not think that it significantly affects reasons. It is a matter of Knightly v Johns (1982) 1 All ER 851 and it is a case to which the court referred in the matter of Mulcahy, to which I have already referred. A police officer had ordered his subordinates to travel in the opposite direction of a tunnel in order to close it off to traffic. This order was contrary to police force standing orders for road accidents and vehicle breakdowns in the Queensway Tunnel.

Now, as I read the case, the orders themselves were not seen to be the source of a duty but, rather, indicative of the standard of care required. Failure to comply with the order was not seen as the foundation for establishing negligence.

So far as the duty of care is concerned, Stephen LJ held, at 857:

> *In considering the duty to take care, the test is reasonable foreseeability, which I understand to mean foreseeability of something of the same sort being likely to happen, as against it being only a possibility which would never occur to the mind of a reasonable man or, if it did, would be neglected as too remote to require precautions or to impose responsibility.*

In any event, that decision of Knightly v Johns was brought to the attention of the Court of Appeal in Mulcahy v Ministry of Defence.

This was in the context of a submission by the plaintiff that one of the matters that would need to be investigated was whether the sergeant operating the gun had been in breach of some recognised rule or standing instruction, notwithstanding the fact that this was not established, one way or the other, the court went on to dismiss the case, according to the principles established in Shaw Savill, and to which I have already referred.

I think it follows that regardless of what might have been regulated by

orders or instructions, the Court of Appeal did not consider that it could impose a duty of care, having regard to the Shaw Savill principles.

For these reasons I do not consider that the accused men had a duty of care to the civilians allegedly impacted by their actions so as to give rise to the charges of manslaughter by criminal negligence. This ruling affects the manslaughter charges, as originally framed, and those proposed, following amendment. Accordingly, I uphold the objections taken to the manslaughter counts, pursuant to DFDA section 141(b)(iv) on the basis that the charges do not disclose service offences.

Having so ruled, I propose to refer those charges back to the Director of Military Prosecutions, in accordance with section 141(8), but I shall take submissions before doing so.

I turn now to section 36(3). So far as the offences against section 36(3) are concerned, I think it is clear that the legislation itself purports to make Defence members and Defence civilians accountable for intentional conduct of the kind regulated by the section which causes, or is likely to be the cause of death or grievous bodily harm to others in circumstances where the perpetrator is negligent as to that result, or likely result, occurring.

The issue, for the purposes of the present application, is whether section 36(3) applies to the conduct alleged against the accused men and, if it does, must section 36(3) yield to the provisions of the Commonwealth Criminal Code, chapter 8, Division 268?

This is a somewhat different issue from whether or not there is a duty of care, but must be considered against the background that, for the reasons given in connection with the other charges, I do not consider that a common law duty of care arises to situations of actual engagement in the course of armed conflict.

Neither the explanatory memorandum, nor the second reading speech, nor the 1973 Working Party report provides assistance on whether section 36(3) was intended to apply to situations of armed conflict and, if it was, the scope of that application.

Because of the specific reference in the section to enemy persons, it seems plain that the parliament must have intended the provision to have some application to situations of armed conflict, but the scope of that application is unclear. However, having regard to my conclusion that there is no common law duty of care by a member of the ADF during armed conflict, in accordance with the principles identified in Shaw Savill,

I consider this silence surprising if it were parliament's intention to change the law.

Section 36(3) does not, in its terms, expressly impose a duty of care. It can be contrasted, for example, with section 265 of the Western Australian Criminal Code, which provides for the duty of persons doing dangerous acts n the following terms:

> *It is the duty of every person who, except in a case of necessity…*

And it then continues. The purpose of my reference to it is the specific statutory provision for a duty.

As I have already observed, the learned prosecutor resiled from his earlier assertion that a duty of care is required for the operation of the subsection, and now contends that the concept of negligence should be resolved simply by reference to the Commonwealth Criminal Code and that resort cannot be had to the common law in interpreting it.

I do not think that this is a correct statement of the law, relating to the operation of the code and it's interpretation. For example, in R v LK and R v RK (2010) HCA 17, French CJ concluded, at paragraph 57, that section 11.5(2) of the code operated upon the common law concept of conspiracy, although it could not be taken as defining the elements of the offence.

In that same matter, as noted by the learned author of Odgers Principles of Federal Criminal Law, 2nd edition, at paragraph 0.0.210, Gummow, Hayne, Crennan, Kiefel and Bell JJ, with whom Hayden J substantially agreed, emphasised the proposition that the common law may be taken into account when considering:

> *Expressions that have an accepted legal meaning and that meaning may not be specifically set out in the code.*

The Commonwealth Criminal Code, section 5.5, which defines negligence was, as the Model Criminal Code Officers Committee stated, in relation to the proposal on which the provision is based, based closely on Nydam. Nydam was plainly concerned with the application of negligence to the alleged breach of a duty of care.

Be that as it may, my concern here is not with the proper interpretation of the Code, section 5.5, but, rather, with the interpretation of section 36(3). The subsection does not seek to absolutely proscribe the operation of the things regulated by the section or the giving of directions concerning that

operation. Rather, it seeks to regulate the operation of such things or the giving of direction concerning their operation only where that conduct causes or is likely to cause the death of or grievous bodily harm to another person and the principle is negligent as to that result.

In my view there must be a duty of care before the fault element of negligence can operate for the purposes of that subsection. This follows from the fact that negligence requires the tribunal of fact to determine what a reasonable person would have done in the circumstances. In my view, that question can logically be addressed only where there is a duty of care. Without a duty of care the concept of negligence is meaningless in terms of the section because it is impossible to objectively fix a standard of care that the reasonable person would exercise to avoid the stated outcomes without a corresponding duty. If one does attempt to fix a standard, there is a de facto in position of a duty of care if the accused is to be held liable for having fallen short of that standard.

The latter point is illustrated by considering omissions or failure to act. In Taktak, the New South Wales Court of Criminal Appeal refers to Professor Geddes Criminal Law, the 1985 edition, at page 32, where it is said:

> *That at common law a person does not in general incur criminal liability for a failure to intervene and prevent or attempt to prevent the occurrence of harm. In this context a person who sees a strange child drowning in a shallow pond and fails to rescue the child does not incur criminal liability.*

If the question could legitimately be asked as to what a reasonable person would have done in the case of the child, it would be open to find that a reasonable person would have attempted some rescue, notwithstanding that there was no duty to do so. If the person who failed to act could then be judged against that standard, there would be a de facto in position of a duty of care where none existed.

It seems to me that a duty of care for the purposes of section 36(3) might be construed to arise in one of two principal ways: the first is that the section is read to imply a duty of care to all those who suffer or who are likely to suffer death or grievous bodily harm by way of the conduct regulated by the section; the second is that the section be read to apply only where there is otherwise a duty of care at law to the persons concerned.

A variation on the first interpretation would be to read it down to exclude instances where a duty of care would have been specifically excluded at

common law. The section must be interpreted in light of subsection 36(3)(3). This subsection specifically applies the operation of section 36(3) to enemy persons where the impugned conduct of a Defence member or Defence civilian is not at the execution of that person's duty. I have already quoted the relevant statutory provisions.

As originally enacted, the exception now contained in subparagraph (3) was contained in a general provision - subsection (4) relating to section 36 as a whole - in the following terms:

> *This section does not apply in relation to any behaviour of a person in the execution of a person's duty by reason only that the behaviour causes or is likely to cause the death of or grievous bodily harm to an enemy person.*

The section and the specific provision for enemy persons was amended by the Defence Legislation (Amendment) Application of the Criminal Code Act 2001. Again, the explanatory memorandum provides little assistance in interpreting the intended application of section 36 in general or section 36(3) in particular.

So far as the provision now contained in section 36(1)(e), (2)(e) and (3)(e) is concerned, it says:

> *Paragraphs (1)(e), (2)(e) and (3)(e) replace the provisions contained in subsection 36(4) which applies to all three variations of this offence. This means that the service tribunal must consider whether the victim was an enemy and whether injury was occasioned in the course of the defendant's duty.*

In my view, the intended operation of subparagraph (e) is problematic. To sensibly the apply the provision, a fault element of absolute liability must be applied to the requirement that the person said to be affected by the impugned conduct was an enemy person. The subsection does not do this. Consequently, subparagraph (e) would be deconstructed in accordance with the Code and section 5.6 to attribute a fault element of recklessness to the requirement that the person concerned was an enemy person. It would follow that a Defence member acting otherwise and in the course of his or her duty who kills an enemy soldier in a way sought to be regulated by the section but is not at least reckless as to that person's status would be exempted from the operation of the section, whereas if he or she was aware of the status or reckless as to it, he would fall within the section.

An example is provided by the case of a soldier who has taken a service vehicle without authority for personal reasons and runs down a person on

the side of the road. It transpires that the person was an enemy person; section 36(3)(e) would operate, but on the facts in this scenario it might not be possible to establish that the accused was at least reckless as to the other person's status as an enemy in such a case that the charge would not be made out. This is not relevant to the present matter but it is illustrative of the difficulties inherent in the drafting of the provision.

If section 36(3) is interpreted as imposing a broad duty of care to all those who suffer or who are likely to suffer death or grievous bodily harm by way of the conduct regulated by the section, subparagraph (e) and its predecessor (4) would prevent the absurd situation where the provision would otherwise apply to conduct in the course of duty directed to enemy persons. However, having regard to the nature of armed conflict, it seems unlikely that parliament would have sought to impose by implication rather than specific provision a wide-ranging duty of care to enemy persons, albeit subject to the operation subsection (4) as originally enacted and subsection (3)(e) in its current form.

It is also unlikely that such a duty of care would be imposed by implication towards individual civilians who take up arms against Australian forces or those non-combatants whose incidental or collateral death or injury would be otherwise permitted under accepted international principles of armed conflict, particularly if, as the learned prosecutor contends, section 10.5 of the Criminal Code would not operate to provide a defence other than one expressed provided by statute.

Of course a duty to enemy persons will otherwise arise in particular circumstances such as under the Geneva Conventions where an enemy person is hors de combat or has surrendered. In my view, in accordance with the principles identified in Shaw Savill, this duty would be capable of constituting a duty of care for the purposes of section 36(3), at least in situations other than an actual engagement with other enemy forces.

The inclusion of the limiting word "only" in section 36(4) as originally enacted would leave the way clear for that form of the exclusion to have extended the operation of the negligence provisions to such enemy persons to whom a duty of care was owed even if the section as a whole is construed in the second of the ways to which I have referred. Similarly, section 36(3)(e) as currently drafted is capable of operating to leave the application of section 36(3) to such enemy persons if this narrow construction is preferred.

It is an accepted principle of statutory interpretation that there is a presumption against the alteration of common law doctrines. Professors Pearce and Geddes in their "Statutory Interpretation Australia" 6th edition

at page 183, paragraph 5.24, refer to the following authorities: Burchett and Ryan JJ in Thompson v Australian Capital Television Pty Ltd (1994) 54 FCR 513 at 526. And this is an internal quote:

> *Statutory reforms removing a particular plank from the edifice of the common law do not necessarily bring down whole sections of the structure just because a rule expressly changed or abolished had an historical or a logical connection with other rules of the common law. To forbid such a consequence the rule has been established and should be adhered to (Corporate Affairs Commissioner of New South Wales v Yuill (1991) 100 ALR 609 at 610 per Brennan J) . That acts altering the common law should be construed as doing so only so far as is necessary to give effect to their provisions (Hocking v Western Australian Bank (1909) 9 CLR 738 at 746; American Dairy Queen (QLD) Pty Ltd v Blue Rio Pty Ltd (1981) 37 ALR 613 at 616.)*

The learned authors then refer to a decision of the Full High Court in Balog v Independent Commissioner Against Corruption (1990) 169 CLR 625 at 635-6 where the court observed:

> *That where two alternative constructions of legislation are open, that which is consonant with the common law is to be preferred.*

MAJ McLure referred me to another decision of the High Court in Daniels Corporation International Pty Ltd v Australian Competition and Consumer Commission (2002) HCA 49. The court was there considering whether a particular provision of the Trade Practices Act disposed of legal professional privilege. McHugh J held at paragraph 39 that:

> *It is an elementary rule of statutory construction that courts do not read general words in a statute as taking away rights, privileges and immunities that the common law or the general law classifies as fundamental unless the context or subject matter of the statute points irresistibly to that conclusion.*

At paragraphs 43 to 44 his Honour went on to state:

> *Courts do not construe legislation as abolishing, suspending or adversely affecting rights, freedoms and immunities that the courts have recognised as fundamental unless the legislation does so in unambiguous terms. In construing legislation the courts begin with the presumption that the legislature does not interfere with these fundamental rights, freedoms and immunities unless it makes its intention to do so unmistakably clear. The courts will*

hold that the presumption has not been overcome unless the relevant legislation expressly abolishes, suspends or adversely affects the right, freedom or immunity or does so by necessary implication. They will hold that the legislature has done so by necessary implication whenever the legislative provision would be rendered inoperative or its object largely frustrated in its practical application if the right of freedom or immunity were to prevail over the legislation. A power conferred in general terms, however, is unlikely to contain the necessary implication because general words will almost always be able to be given some operation even if that operation is limited in scope.

Consistent with those authorities, I consider that clear and unambiguous language was required if section 36(3) was intended to take away the relief from any duty of care that might otherwise have existed in actual combat granted by the High Court in Shaw Savill.

I am reinforced in this approach by the provisions of section 15AA of the Acts Interpretation Act 1901 Commonwealth. That provision provides that:

In the interpretation of an act a construction that would promote the purpose or object underlying the Act, whether that purpose or object is expressly stated in the Act or not, shall be preferred to a construction that would not promote that purpose or object.

The DFDA is stated in the preamble to be an Act relating to the discipline of the Defence Force and for related purposes. In my view, where there are competing interpretations as to its provisions, then preference should be given to that which impedes as little as possible the freedom of operation of members of the Defence Force to engage in armed conflict at the Commonwealth's behest subject to the accepted principles of the Law of Armed Conflict.

So far as international law is relevant to the interpretation of domestic law, Mason CJ and Deane J observed in Minister for Immigration & Ethnic Affairs v Teoh (1995) 183 CLR 273 at 287 that:

Where a statute or subordinate legislation is ambiguous, the courts should favour that construction which accords with Australia's obligations under a treaty or international conventions to which Australia is a party, at least in those cases in which the legislation is enacted after entry into or ratification of the relevant international instrument. This is because parliament, prima facie, intends to give effect to Australia's

obligations under international law. It is accepted that a statute is to be interpreted and applied so far as its language permits so that it is in conformity and not in conflict with the established rules of international law (Polites v Commonwealth at 68-69, 77, 80-81). The form in which this principle is expressed might be thought to lend support to the view that the proposition enunciated in the previous paragraph should be stated to require the courts to favour a construction as far as the language of the statute permits that is in conformity and not in conflict with Australia's international obligations. This indeed is how we would regard the proposition that is stated in the preceding paragraph. In this context, there are strong reasons for rejecting a narrow conception of ambiguity.

So far as this principle is concerned, I note that at the time of Royal ascent to the Defence Force Discipline Act, Australia had implemented the Geneva Conventions into domestic law by the Geneva Conventions Act 1957. Civilians caught in armed conflicts were protected by the provisions of the 4th Geneva Convention, relative to the protection of civilian persons in time of war, for international armed conflicts, and common Article 3 for armed conflicts not of an international character.

By 1991 additional Protocol 1 was also implemented into the Geneva Conventions Act 1957. These stood as the general obligations, with respect to war crimes under domestic law, when chapter 2 of the Commonwealth Criminal Code was made applicable to the DFDA in 2001.

In the following year the Rome Statute for the International Criminal Court was implemented into Australian law, via the Commonwealth Criminal Code. This brought with it a raft of offences which were known to Australian law previously as breaches of the Geneva Conventions Act, but also new offences regarding crimes against humanity and genocide.

In both the commentary to additional Protocol 1, at paragraph 1934, and Article 30(1) of the Rome Statute, the requisite fault elements for crimes involving the death of civilians in armed conflict are intent and knowledge. Interpretation of section 36(3) to impose, by implication, a broad duty of care would not be in direct conflict with these international obligations in that such an interpretation would restrict the freedom of operations of members of the ADF more narrowly than required by the international obligations. In my view, consistent with Polities, it would be open to parliament to do so, but I would expect this to be done clearly, rather than by implication.

If I am wrong in concluding that a duty of care is required before the concept of negligence, under the Criminal Code section 5.5 can operate, it seems to me that in any event if section 36(3) is to operate to proscribe conduct that causes, or is likely to cause, death or grievous bodily harm to another person, it necessarily creates a duty of care to those persons.

For the reasons given more generally, concerning duty of care, I consider that in the absence of plain words, any such duty would have to be read down to at least exclude cases where the law had previously expressly excluded, as opposed, perhaps, to failing to apply a duty of care.

Having regard to these matters I believe that it must have been parliament's intention to restrict the operation of section 36(3) to those situations where there is otherwise a duty of care arising at law or, at least, that section 36(3) operate subject to existing law, expressly excluding a duty of care.

For the reasons already given in connection with the manslaughter charges I consider that Shaw Savill is binding authority that such a duty of care does not exist in connection with actual engagement in the course of armed conflict. For these reasons, I uphold, pursuant to DFDA section 141(b)(iv), the objections taken to the charges on the basis that the charges do not disclose service offences.

Having so ruled, I propose to refer the charges back to the Director of Military Prosecutions, in accordance with section 141(8), but I will take submissions before doing so. If that referral back were made, there would be no charged before the court martial, but I think it would follow that it would be dissolved by operation of law.

In light of these rulings it has not been necessary to deal with certain other of the objections raised by the accused men. Without reaching a view on the applicability of combat immunity, I do consider, on the basis of Ellias J's consideration of the concept in Bici v Ministry of Defence (2004) EWHC 783, a decision of the Queen's Bench Division, at paragraph 84 and following, that the concept, potentially, has broader application than the prosecution submission that it was limited to prisoners of war.

I would conclude these remarks by saying that the ruling does not detract from the personal tragedy inherent in the prosecution allegations, or diminish the importance of the lives concerned. Both the domestic law of Australia and international law of armed conflict hold members of the ADF accountable for their conduct on operations, but criminal culpability, in such circumstances, requires proof and fault elements of at least recklessness or intention. In the absence of a duty of care imposed by

statute, mere negligence, even if established, will not suffice to establish criminal culpability in the case of actual engagement in armed conflict. And I so rule.

Now, gentlemen, I regret that I do not have a typed copy of that ruling that you might take away and consider at this point. I am afraid you will have to wait until the transcript is issued.

Now, it also occurs to me, particularly Mr Prosecutor, so far as the prosecution is concerned, that you might want some time to consider the ruling, and any further course of action that you propose to take. If that is so, subject to hearing from your friends, I would propose to adjourn these proceedings.

If nothing further was done to disturb the ruling, I would then propose, without reconvening the court, to take the action that I foreshadowed of sending the charges back to the Director. I wouldn't think it was necessary to sit publicly in order to do so.

PROSECUTOR: I agree.

CHIEF JUDGE ADVOCATE: Would you be amenable to that call?

PROSECUTOR: Yes.

CHIEF JUDGE ADVOCATE: The other matter that I raise with you, and I shall raise with your friends, is that - it's a matter that we touched on earlier in these proceedings. Ordinarily transcripts of the proceedings before a court martial would not be generally made available to the public. Their release would be governed under the Freedom of Information provisions.

It occurs to me, in connection with this matter, that do enable the media to report accurately on the ruling, there might be some merit in making a copy of the transcript of this decision available through the court staff.

PROSECUTOR: We have no objection to that, sir, as long as it's confined to your carefully worded decision.

CHIEF JUDGE ADVOCATE: So long as it's confined to the ruling, you'd have no difficulty?

PROSECUTOR: That's right.