



## Duty of care on the battlefield

By Richard Beasley SC



Photo: Australian soldiers patrol a village in Afghanistan. Photo: Able Seaman Jo Dilorenzo /Commonwealth of Australia, Dept of Defence.

### Introduction

In May of this year, following an application by defence counsel, manslaughter and other charges were dismissed against two soldiers of the 1 Commando Regiment from Sydney.

It is clear from the judgment<sup>1</sup> of the chief judge advocate, Brigadier I.D. Westwood, why the court martial proceedings could not be sustained in law against the two soldiers, who have been identified by his order only as Sergeant J and Lance Corporal D.

Although the charges fell from an appalling tragedy – the death of five Afghan children – what is arguably less clear is why these men were charged in the first place.

### 12 February 2009

In early 2009, Sergeant J and Lance Corporal D were serving in the Special Operations Task Group, based in Tarin Kowt in the province of Oruzgan in southern Afghanistan, north of the city of Kandahar.

Following orders, at about 1.00am on the morning of 12 February they approached a residential homestead near the village of Surkh Morghab, about 10km from their base. The homestead was surrounded by mud brick walls, with only a few windows. The soldiers were apparently unaware of the internal layout of the building. As it was night, they were wearing night vision goggles.

Although various press reports stated that the soldiers' mission was to search for an arms cache, this was not entirely correct. The operation – described in some reports as a 'capture or kill mission'<sup>2</sup> – was, according to the Australian Defence Force, an operation to 'disrupt Taliban activities' and to 'target a significant Taliban leader'.<sup>3</sup>

When the soldiers approached the mud-walled residential compound, it is unclear who shot first. From the judgment of the chief judge advocate, it appears that the prosecutor in the court martial alleged that an Australian soldier first opened fire upon an adult man, presumably the man thought to be the 'significant Taliban leader'. That soldier was not identified as Sergeant J or Lance Corporal D.<sup>4</sup>

What is clear is that Sergeant J and Lance Corporal D, and other force members, were then fired upon by someone inside a room in the compound. The man said to be a Taliban insurgent may have fired up to three magazines of ammunition at the Australian soldiers – something like 90 rounds of 0.62mm AK47 bullets.<sup>5</sup>

Had the manslaughter and other charges been maintained, it is understood that Sergeant J and Lance Corporal D would have called evidence to suggest that, having been fired upon in this manner, retreat would have been suicidal.<sup>6</sup> There was little or no cover for the Australian soldiers in and near the compound from

the fire coming from within. Retreat by Sergeant J or Lance Corporal D could also have exposed fellow force members to fire by retreating.

During the course of the gun battle – which may have lasted only 90 seconds – Sergeant J ordered Lance Corporal D to throw a hand grenade through a window into the room from which the shots were coming. He did. After the first grenade exploded, there was a new burst of fire from the room. A second hand grenade was thrown into the room. The shooting from within the compound then stopped.

The person who had been shooting at the Australian soldiers, later identified as a man called Amrullah Khan, was found badly wounded within a room in the compound. He was given aid at the scene by Australian soldiers, but died later at a medical treatment facility at the Tarin Kowt base. Horribly, five children, aged between 2 and 13, were killed by the grenades thrown into the compound to stop the fire. There were other civilian casualties.

Undoubtedly because of the deaths of the children, the incident attracted wide media attention both in Australia and overseas. A report was produced for SBS's *Dateline* programme, which aired in March 2010. This report included footage of distressed family members of the dead men and the children, including some of the family being shown phone-video footage of the dead man's body. The *Dateline* report suggested through witnesses it interviewed that the man Khan who had been killed was not a Taliban insurgent, but a farmer, who shot at the Australian forces in defence of his home. Allegations were made that one or more of the Australian soldiers admitted that the operation was a 'mistake' and that the attack had occurred at the 'wrong place'.<sup>7</sup> It is unclear whether the man meant to be targeted that night was a Taliban commander called Mullah Noorullah, a Taliban leader involved in numerous attacks on coalition forces and who was killed by SAS and Sydney Commando Regiment forces some two months later, in April 2009. If the dead man Khan was a farmer rather than a Taliban insurgent, he was well armed, given the 90 rounds of AK47 fire. This is not to suggest that it is unusual for many people in Afghanistan to have weapons of this kind.

### **Inquiries and charges**

Understandably, given the deaths of the five children,

inquiries took place into the operation. Immediately following it, the Chief of Joint Operations initiated an internal inquiry. This inquiry was supported by a military police officer and a legal officer, and was carried out in Afghanistan. The matter was then further referred for legal review, and then to the Australian Defence Force Investigation Service for investigation.<sup>8</sup>

On 27 September 2010, the director of military prosecutions charged Sergeant J and Lance Corporal D with the manslaughter of the children killed, a crime punishable by imprisonment of up to 20 years. They were also charged with dangerous conduct causing death, an offence punishable by imprisonment of up to two years. These charges are discussed in more detail later.

A third soldier was charged with not following instructions. Following the dismissal of the court martial against Sergeant J and Lance Corporal D, this soldier's court martial also did not proceed. It is not clear whether the orders said not to have been followed were orders from the then commander of the coalition forces in Afghanistan, US General Stanley McChrystal, which were in relation to how operations should be conducted, with a warning that the war could not be won if high rates of civilian deaths were maintained.<sup>9</sup>

### **Judgment**

Both Sergeant J and Lance Corporal D were originally charged with one count of manslaughter by negligence in relation to the killing of the five children. Later it was proposed by the prosecution to amend those charges to bring five separate counts of manslaughter.

Sergeant J was also charged under s 36(3) of the *Defence Force Discipline Act 1982* (DFDA) with one count of dangerous conduct for 'attacking with weapons an adult male located within a room of a residential compound', and being negligent as to whether this act was likely to cause the death of civilians. The particulars of this charge against Sergeant J were that he directed members of his force to throw two fragmentation grenades into a room, directed them to fire a machine gun into the room, and fired his own M4 assault rifle into the room.

The dangerous conduct by negligence charge against Lance Corporal D was centred on the allegation that he had thrown the two fragmentation grenades into the room.

In order for the manslaughter by negligence charges to be sustained, it was necessary for the prosecution to establish that the accused soldiers owed a duty of care to the children killed during the operation.

Initially it would seem that the particulars provided by the prosecution in relation to the manslaughter by negligence charges were particularised in no more than the following way: 'Each of the accused owed the five dead civilian children a duty of care not to kill or injure them.'

It was alleged, at first, that the duty of care arose under the common law. Reliance was placed on the High Court judgment of *Callaghan v R* (1952) 87 CLR 115 where the court described manslaughter by negligence in this way:

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.

Reliance was also placed on the judgment of the full court of the Victorian Supreme Court in *Nydam v R*,<sup>10</sup> where the court held:

In order to establish manslaughter by criminal negligence, it is sufficient if the prosecution shows that the act which caused the death was done by the accused consciously and voluntarily, without any intention of causing death or grievous bodily harm but in circumstances which involved such a great falling short of the standard of care which a reasonable man would have exercised and which involved such a high risk that death or grievous bodily harm would follow that the doing of the act merited criminal punishment.<sup>11</sup>

According to the judgment of the chief judge advocate, on the basis of these decisions, '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'.<sup>12</sup>

The defence counsel for Sergeant J (Major D McLure of 7 Wentworth Chambers) and for Lance Corporal D (Major J Hyde of 9 Wentworth)<sup>13</sup> brought an application to have the charges dismissed partly on the basis that neither soldier owed 'a legally enforceable duty of care to anyone for their acts in combat'. It was also asserted that the soldiers were immune from prosecution,

although it became unnecessary for the chief judge advocate to decide this point.

It would appear that in oral submissions during the application to have the charges dismissed, the prosecutor advanced 'for the first time the proposition that a duty of care arose as a result of the application of international law'<sup>14</sup> [emphasis added]. It was said that the accused soldiers' orders reflected a duty of care arising under international law. It was also asserted that the 'Rules of Engagement' were relevant as to how this duty of care arose.<sup>15</sup>



Australian soldiers patrol Shahidi-E-Hasas, Uruzgan Province. Photo: Petty Officer Pawlenko /Commonwealth of Australia / Dept of Defence.

Perhaps because of this, defence counsel immediately sought clarification as to whether the prosecution contended that the accused soldiers had breached any relevant protocols of the Geneva Convention of 1949, in particular protocols concerning the indiscriminate or deliberate attacks or threats of violence on civilian population. The prosecutor confirmed that no such allegation was made. He also confirmed that it was not alleged that either of the accused soldiers had read the 'Rules of Engagement'. In answering this, he explained how the duty of care arose in the following terms:

To save any ambiguity, as I said, in terms of a deliberate attack, no. ... 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. ... 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. ... 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 is 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.<sup>16</sup>

How clear is perhaps debatable.

If an Australian soldier's conduct violates international humanitarian law or the laws of armed conflict, it is clear that such actions are punishable under Australia's domestic laws. Chapter 8 of the Commonwealth *Criminal Code*, for example, contains detailed provisions in relation to crimes against humanity and war crimes. There are, for example, war crimes of murder, and of attacking civilians available in relation to the killing of non-combatants during non-international armed conflict: sections 268.7 and 268.77 of the *Criminal Code*. There was no suggestion that Sergeant J or Lance Corporal D would be subject to such charges, or had engaged in conduct that would warrant contemplation of such charges. Rather, they were charged with manslaughter and other charges which, as mentioned above, all parties agreed depended upon the existence of a duty of care owed to the civilians that were killed.

What is arguably not clear is how it could ever have been suggested that, in the circumstances of the operation that took place on the morning of 12 February 2009, such a duty of care could ever have been said to exist.

The High Court has held, more than once, that Australian soldiers do not owe a legally enforceable duty of care for civil damages in relation to their actions while in the course of armed conflict with enemy combatants: *Shaw Savill & Albion Co Ltd v Commonwealth* (1940) 66 CLR 344 at 361–362 per Dixon J; *Groze v Commonwealth* (1982) 150 CLR 113 at 117 per Gibbs CJ.

In *Shaw Savill & Albion*, Dixon J (with whom Rich ACJ and McTiernan J agreed) said at 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 a 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 going to action would be 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.



Australian soldiers providing security at Malalai Girls School in Tarin Kot. Photo: Able Seaman Jo Dilozenzo /Commonwealth of Australia / Department of Defence.

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.'

If there is no duty of care for civil damages arising from actual engagement with the enemy, it is difficult to immediately see how there could be said to be a duty of care arising for the purposes of criminal proceedings. It would appear that there is no authority to support such a proposition. Further, there is authority that one soldier does not owe another soldier a duty of care in relation to injury caused in the course of armed conflict.

*Mulcahy v The Ministry of Defence*<sup>17</sup> was a case where the English Court of Appeal deliberated on an action by a soldier who was injured when a gun was discharged after the soldier had been directed by a superior to proceed forward of the gun that had injured him. At page 771 of the judgment Neil LJ said:

I would echo the words of Gibbs CJ, in *Grove's case* ... 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 commonsense and sound policy.

At page 772 Sir Iain Glidwell said:

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 Ltd v The Commonwealth* ... 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 to another member of the armed forces.

What is known about the night time operation on 12 February 2009 is that Sergeant J and Lance Corporal D were ordered to target a 'significant Taliban leader'. Presumably, that is someone that they would reasonably view to be a dangerous person. This might have been confirmed to them, regardless of who started shooting, by the fact that the person they were targeting fired upon them, at close range, through the window of a building and through mud brick walls, with up to 90 rounds from an AK47. The action they took – which had awful consequences – was taken while they were fired upon. Clearly they are trained soldiers, but possibly they did not have a great deal of time to weigh, with exquisite balance, or at all, the consequences of the actions they decided to take.

Those actions were taken under pressure of the kind the vast majority of people would never experience. As the chief judge advocate said in his judgment, from the orders given to the soldiers, and through the accepted Laws of Armed Conflict, the men were authorised to use lethal force. They did so in an environment that cannot be described as 'benign', but one where '[t]here will rarely be time for calm reflection and careful weighing of risks and consequences'.<sup>18</sup> Further, the soldiers orders to target the man they were told was a Taliban insurgent

compelled them to conduct the operation they did against him. They could not, in the circumstances 'decide that they will take no further part in hostilities, or that they will refrain from engaging [in] conduct that is inherently dangerous to themselves or others, or that they will refrain from inflicting harm on enemy persons when their duty requires them otherwise.'<sup>19</sup>

Accordingly, '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'<sup>20</sup> the chief judge advocate could see no basis for distinguishing *Shaw Savill* and the other authorities he was directed to. He ruled that no duty of care was owed by the two accused soldiers to the civilians that were killed.<sup>21</sup> The suggestion that the duty of care somehow arose because of obligations under international law was rejected in short terms. Accordingly, none of the manslaughter by negligence charges could be sustained.

That the chief judge advocate found no duty of care was owed by the accused soldiers does not, on the authorities, seem controversial. The fact that the soldiers were charged with manslaughter by negligence for their conduct in a combat operation against an enemy does seem somewhat more controversial. Being shot at in armed combat, by someone you have been told is a Taliban insurgent, who you have been ordered to 'target', and who is firing an AK47 at you from close range, at least arguably seems an odd place, time and circumstance for a duty of care to arise. If such a duty is owed to civilians during a combat mission like this, how does it sit with a duty to follow orders? Or to preserve the lives of your comrades? Or, if it be relevant, to preserve your own life under enemy fire? What is the duty that is paramount, and how much time are you given to weigh up the consequences of both duty and possible breach when .62mm bullets are flying around? What standard of care is involved?

It's possible some obvious point is being missed. Perhaps an experienced soldier would understand how such a duty arises, and perhaps some lawyers would.

But not everyone. As was submitted by Major McClure in argument, 'warfare is intrinsically a reckless activity, not apt to be measured by the legal ruler of negligence'.<sup>22</sup> That seems like a reasonable submission, and was not weakened by the fact that it would appear

that no counsel appearing in the case for any party, nor the chief judge advocate, were able to find a single authority from a military tribunal in which a soldier had ever been found guilty of the war crime of negligently causing the death of civilians.<sup>23</sup>

The reason why it seems (in the face of, among other things, the High Court's decision in *Shaw Savill*) it was nevertheless contended that a duty of care arose, and

*... 'warfare is intrinsically a reckless activity, not apt to be measured by the legal ruler of negligence'.*

presumably why the soldiers were charged, was centred on the submission concerning the 'high importance that the law places on human life.'<sup>24</sup> How that notion translates into a duty of care arising on the battlefield in a combat operation does not appear to have been expanded on in detail, at least during oral submission.

Because he held that *Shaw Savill* was binding authority that no duty of care arises in connection with actual engagement in the course of armed conflict, the chief judge advocate held (applying conventional principles of statutory construction) that it 'must have been parliament's intention to restrict the operation of s 36(3) to those situations where there is otherwise a duty of care arising in law or, at least, that section 36(3) operates subject to existing law, expressly excluding a duty of care.'<sup>25</sup> Accordingly, the dangerous conduct charges under this section were also dismissed.

### Conclusion

If Australian soldiers, risking their lives in places like Afghanistan, are charged with criminal offences for their conduct arising out of armed conflict, it is at least arguable that it should be reasonably clear why they have been charged.

Based on the available material from the court martial proceedings against Sergeant J and Lance Corporal D, that matter is at least debatable.

Whether that assessment is correct or ill-informed opinion, those soldiers can nevertheless have the last word here:

Words will never adequately express our regret that women and children were killed and injured during the incident on 12 February 2009. These were people we were risking our lives to protect. However, it should not be forgotten that the casualties were ultimately caused by the callous and reckless act of an insurgent who chose to repeatedly fire upon us at extreme close range from within a room he knew contained women and children. This forced us to make split decisions, under fire, which almost certainly saved the lives of our fellow Australian and Afghan soldiers.<sup>26</sup>

### Endnotes

1. The judgment is available on-line ([www.defence.gov.au](http://www.defence.gov.au)), as are transcripts of the hearing in relation to the application to have the charges dismissed.
2. *The Australian*, 31 May 2011, Brendan Nicholson.
3. ADF Answers to SBS *Dateline* programme, 12 March 2010.
4. Judgment, page 7, lines 30–35.
5. ABC News, 30 September 2010, Michael Vincent.
6. [news.com.au](http://news.com.au) (from AAP) 16 May 2011.
7. *Dateline* transcript, 12 March 2010.
8. ADF Answers to *Dateline* questions, 12 March 2010.
9. *The Australian*, 31 May 2011, Brendan Nicholson.
10. [1977] VR 430.
11. [1977] VR 430 at 445.
12. Judgment p.10 L21–23.
13. Neither defence counsel was asked to assist in writing this article.
14. Judgment p.10 L25–28.
15. The Rules of Engagement is a classified document.
16. Judgment p.11 L33 to p.12 L 35.
17. (1996) EWCA Civ 1323; (1996) 2 All ER 758.
18. Judgment p.20 L17–20.
19. Judgment p.21 L13–17.
20. Judgment p.25 L25–29.
21. Judgment p.28 L4–11.
22. Transcript 16/5/11, p.16 L 35.
23. Transcript 16/5/11 p.21 L40–45.
24. Transcript 16/5/11 p.87.
25. Judgment p.36 L12–16.
26. Statement released on the soldiers' behalf after they were charged, from *The Australian*, 28/9/10, Mark Dodd and Jeremy Kelly.