

NOTICE OF FILING

This document was lodged electronically in the FEDERAL COURT OF AUSTRALIA (FCA) on 22/11/2018 2:24:43 PM AEDT and has been accepted for filing under the Court's Rules. Details of filing follow and important additional information about these are set out below.

Details of Filing

Document Lodged: Defence - Form 33 - Rule 16.32
File Number: NSD1826/2018
File Title: BEN ROBERTS-SMITH v JOHNATHAN PEARLMAN
Registry: NEW SOUTH WALES REGISTRY - FEDERAL COURT OF AUSTRALIA



A handwritten signature in blue ink, reading 'Warwick Soden'.

Dated: 22/11/2018 2:24:47 PM AEDT

Registrar

Important Information

As required by the Court's Rules, this Notice has been inserted as the first page of the document which has been accepted for electronic filing. It is now taken to be part of that document for the purposes of the proceeding in the Court and contains important information for all parties to that proceeding. It must be included in the document served on each of those parties.

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Defence to Statement of Claim

No. NSD1826 of 2018

Federal Court of Australia
District Registry: New South Wales
Division: General

Ben Roberts-Smith

Applicant

Jonathan Pearlman

Respondent

The Respondent relies upon the following facts and assertions in answer to the Statement of Claim filed by the Applicant on 28 September 2018 (the **Statement of Claim**):

1. The Respondent admits the allegations contained in paragraph 1 of the Statement of Claim.
2. The Respondent admits the allegations contained in paragraph 2 of the Statement of Claim.
3. The Respondent admits the allegations contained in paragraph 3 of the Statement of Claim.
4. In answer to paragraph 4 of the Statement of Claim, the Respondent:
 - (a) admits that on about 6 September 2018, he authored the first matter complained of; and
 - (b) otherwise does not admit the allegations contained in paragraph 4.

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[Form approved 01/08/2011]

5. In answer to paragraph 5 of the Statement of Claim, the Respondent denies that the first matter complained of, in its natural and ordinary meaning:
 - (a) was reasonably capable of conveying, or in fact conveyed, any of the imputations set out in paragraph 5 of the Statement of Claim; or
 - (b) was reasonably capable of being, or was in fact, defamatory of the Applicant, in the sense alleged in the imputations set out in paragraph 5 of the Statement of Claim or otherwise.
6. In answer to paragraph 6 of the Statement of Claim, the Respondent:
 - (a) admits that on about 6 September 2018 he authored the second matter complained of; and
 - (b) otherwise does not admit the allegations contained in paragraph 6.
7. In answer to paragraph 7 of the Statement of Claim, the Respondent denies that the second matter complained of, in its natural and ordinary meaning:
 - (a) was reasonably capable of conveying, or in fact conveyed, any of the imputations set out in paragraph 7 of the Statement of Claim; or
 - (b) was reasonably capable of being, or was in fact, defamatory of the Applicant, in the sense alleged in the imputations set out in paragraph 7 of the Statement of Claim or otherwise.
8. The Respondent denies the allegations contained in paragraph 8 of the Statement of Claim.
9. The Respondent denies that the Applicant is entitled to the relief claimed in paragraph 9 of the Statement of Claim or any relief at all.
10. Further and in the alternative, the Respondent says that insofar as, and to the extent that, it may be found that the first matter complained of and/or the second matter complained of (collectively, the **matters complained of**) were published of and concerning the Applicant and to be defamatory of him in their natural and ordinary meaning, or as bearing one or more of the imputations in paragraphs 5 or 7 of the Statement of Claim (which is denied), but otherwise without admission, the Respondent relies on the following defence:

(a) Justification – section 25 of the *Defamation Act 2005 (NSW)* (Defamation Act)

Each of the imputations in sub-paragraphs 5(a), 5(b), 5(c), 7(a), 7(b) and 7(c) of the Statement of Claim is substantially true.

(b) Contextual truth – section 26 of the *Defamation Act*

(i) The third, fourth, fifth and sixth matters complained of each carried the following other imputations in addition to the Applicant's imputations (**Contextual Imputations**):

(A) The Applicant broke the moral and legal rules of military engagement and is therefore a criminal.

(B) The Applicant disgraced his country Australia and the Australian army by his conduct as a member of the SASR in Afghanistan.

(ii) Each of the Contextual Imputation is substantially true.

(iii) By reason of the substantial truth of the Contextual Imputation, each of the imputations pleaded by the Applicant which are found to have been conveyed as alleged by the Applicant, defamatory of him and not substantially true do not further harm the reputation of the Applicant.

11. Further and in the alternative, if (which is denied) the Applicant suffered any damage as a result of the publication of the matters complained of and/or the imputations pleaded in paragraphs 5 or 7 of the Statement of Claim, then the Respondent intends to rely upon the following facts and matters in mitigation of such damage:

(a) the substantial truth of the imputations in sub-paragraphs 5(a), 5(b), 5(c), 7(a), 7(b) and 7(c) of the Statement of Claim (or so many of them as are established by the Respondent to be substantially true);

(b) the Applicant's general bad reputation within the Special Air Service Regiment (**SASR**) of the Australian Defence Force (**ADF**), being that of:

(i) a person who broke the moral and legal rules of military engagement;

(ii) a bully;

(iii) a hypocrite in that he held himself out publicly in a manner not consistent with how he conducted himself within the SASR; and

(iv) a person not deserving of the good reputation he enjoyed publicly.

- (c) the facts, matters and circumstances proven in evidence in support of the defences pleaded in this Defence;
- (d) the circumstances in which it is proved the matters complained of were published;
- (e) the background context to which (a) to (d) above comprised.

PARTICULARS OF TRUTH

The Applicant

- (1) The Applicant was formerly a member of the SASR.
- (2) The Applicant's final rank within the SASR was Corporal.
- (3) As a member of the SASR the Applicant conducted six operational tours to Afghanistan including:
 - (a) rotation 3 from about May to September 2006;
 - (b) rotation 9 from about March to July 2009;
 - (c) rotation 12 from about March to July 2010;
 - (d) rotation 18 from about June to November 2012.

The Geneva Conventions

- (4) At all material times the Commonwealth of Australia has been a High Contracting Party to the Geneva Conventions, including the conventions entitled:
 - (a) "Convention relative to the Treatment of Prisoners of War" (the **Third Geneva Convention**); and
 - (b) "Convention Relative to the Protection of Civilian Persons in Time of War" (the **Fourth Geneva Convention**).
- (5) The Respondent relies upon the terms of the Third Geneva Convention and the Fourth Geneva Convention for their full force and effect.
- (6) Article 3 of the Third Geneva Convention provides, in substance, that persons taking no active part in hostilities, including members of armed forces who have laid down their arms and those placed out of action due to sickness, wounds, detention or any other cause, shall in all circumstances be treated humanely.

- (7) Article 3 of the Third Geneva Convention further provides, in substance that the following acts (amongst others) are prohibited at any time any in any place with respect to persons taking no active part in hostilities, including those persons referred to in the preceding paragraph:
- (a) violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture; and
 - (b) the passing of sentences and the carrying out of executions without previous judgment pronounced by a regularly constituted court affording all the judicial guarantees which are recognised as indispensable by civilised peoples.
- (8) Article 4 of the Third Geneva Convention provides, in substance, that prisoners of war in the sense of the Third Geneva Convention, are persons who have fallen into the power of the enemy belonging to certain categories including (amongst others) members of the armed forces of a party to the conflict, members of militias or volunteer corps.
- (9) Article 13 of the Third Geneva Convention provides, in substance, that prisoners of war must at all times be treated humanely, and that any unlawful act or omission by the detaining power causing death or seriously endangering the health of a prisoner of war will be regarded as a serious breach of the Convention.
- (10) Article 13 of the Third Geneva Convention further provides, in substance, that prisoners of war must at all times be protected, particularly against acts of violence or intimidation.
- (11) Article 17 of the Third Geneva Convention provides that no physical or mental torture, nor any other form of coercion, may be inflicted on prisoners of war to secure from them information of any kind whatsoever and that prisoners of war who refuse to answer may not be threatened, insulted, or exposed to unpleasant or disadvantageous treatment of any kind.
- (12) Article 3 of the Fourth Geneva Convention provides, in substance, that persons taking no active part in hostilities, including members of armed forces who have laid down their arms and those placed out of action due to sickness, wounds, detention or any other cause, shall in all circumstances be treated humanely.
- (13) Article 3 of the Fourth Geneva Convention further provides, in substance that the following acts (amongst others) are prohibited at any time any in any place with

respect to persons taking no active part in hostilities, including those persons referred to in the preceding paragraph:

- (a) violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture; and
- (b) the passing of sentences and the carrying out of executions without previous judgment pronounced by a regularly constituted court affording all the judicial guarantees which are recognised as indispensable by civilised peoples.

(14) Article 4 of the Fourth Geneva Convention provides, in substance, that the persons protected by the Fourth Geneva Convention are those who, at a given moment and in any manner whatsoever, find themselves, in case of a conflict or occupation, in the hands of a party to the conflict.

Rules of Engagement

- (15) At all material times the members of the ADF serving in Afghanistan were bound by the Rules of Engagement issued by the Chief of the Defence Force to the Chief of Joint Operations relating to the conflict in Afghanistan (**ROE**). The ROE are classified as protected information of the Commonwealth and accordingly their precise terms are not known to the Respondent.
- (16) The ROE define the circumstances under which ADF personnel are permitted to use lethal force.

Bullying of Person 1

- (17) At all material times prior to the deployment of rotation 3, the Applicant was acrimonious towards Person 1, who was a small and quiet soldier, as the Applicant did not consider Person 1 to be capable of performing as a water operator within the SASR.
- (18) On about 31 May 2006 the Applicant and the patrol of which he was a member were conducting a mission overwatching the Chora Pass for a larger American mission.
- (19) The purpose of an overwatch mission is to remain in place undetected in order to observe and provide intelligence.
- (20) During the mission, on about 2 June 2006, Person 1 and Person 2 were stationed at the observation post (**OP**). The Applicant and the remainder of the patrol were in the laying up position (that is an area behind the OP where the patrol members eat, perform administration etc).

- (21) Whilst Person 1 and Person 2 were stationed at the OP they noticed an unarmed teenage boy of about 13 or 14 walking along a goat track about 70 metres below the OP. Person 2 whispered into his radio, in substance "all call signs, single individual, moving from right to left in front of the OP". The boy then picked up a sack and moved back in front of the observation post. Person 2 sent another whispered message on the radio, in substance "all call signs, same male, now moving from left to right in front of the OP". Person 1 and Person 2 considered that the boy had not seen them and that the observation post had not been compromised.
- (22) At or about this time the Applicant and the late Matt Locke ran towards the OP and said to Person 1 and Person 2 in substance "why the f*** didn't you shoot him? Which way did he go?" The Applicant and Matt Locke then ran after the boy and shot him.
- (23) The shots caught the attention of Taliban fighters and shortly after Taliban fighters started patrolling out of the valley below to get up the hill. A fierce gun battle between the Applicant's patrol and a number of Taliban fighters followed.
- (24) During the battle Person 1 engaged an enemy insurgent. The first two times Person 1 attempted to fire his gun the belt had not been seated in the feed plate properly and it did not fire. After re-cocking the gun it fired on the third attempt.
- (25) The fact that the OP was compromised as a result of the Applicant's involvement in chasing and shooting the teenage boy reflected poorly on the Applicant.
- (26) The Applicant has subsequently falsely alleged, in substance, that the reason he was required to engage so fiercely was because Person 1 was unprepared for battle. In particular, the Applicant has alleged, in substance, that Person 1 had not oiled his gun.
- (27) Shortly after the Chora Pass battle the Applicant said to members of his patrol, in substance "[Person 1] better be careful because there may be a mistake out there [on a mission in the battlefield] and he gets a bullet in the back of his head".
- (28) From at least the time of the Chora Pass battle the Applicant has treated Person 1 with a high degree of contempt including by ostracising him, being openly rude and dismissive towards him and saying negative things about him to others including, in substance:
- (a) "He's a coward".
 - (b) "He's not up to the standards of being an SAS soldier"

- (c) "He's undeserving of his position as a water operator".
- (29) Further to the particulars in the preceding paragraph, from at least the time of the Chora Pass battle the Applicant consistently made insulting and threatening remarks to Person 1, including in substance:
- (a) "We're going to f*** you off out of the unit".
- (b) "You're not going to be a water operator anymore".
- (c) "You better watch your back".
- (30) Further to the particulars in the preceding two paragraphs, from at least the time of the Chora Pass battle the Applicant, on more than one occasion, approached Person 1 in an aggressive manner and made a gun gesture toward Person 1 by putting two fingers into the side of Person 1's head.
- (31) In or about late 2006 or early 2007 the Applicant approached Person 1 at a pub in Cottesloe, WA, grabbed him and held him by the throat up against a wall and said in substance that he wanted him out of his patrol.
- (32) Shortly after the incident in the preceding paragraph Person 1 was transferred to another patrol.
- (33) During rotation 12 in 2010, Person 1 was standing outside the ready room (an area where soldiers keep their armour, gear and weapons on base) when the Applicant exited the ready room and aggressively pushed Person 1 in the chest with his gear and said to Person 1 in substance "'get out of my way you c*** or I'll f***ing kill ya".
- (34) The Applicant's conduct in respect of Person 1 constituted bullying.
- (35) The Applicant's bullying of Person 1 continued up until about 2013. In about 2013 Person 1 filed a complaint with ADF authorities in relation to the Applicant's conduct towards him, which resulted in a mediation being arranged between and attended by Person 1 and the Applicant.
- (36) It may be inferred that the Applicant's conduct in respect of Person 1 was, in part, to detract attention from the Applicant's own responsibility for directing the Taliban's attention towards the observation post by shooting the teenager.

Rotation 9

- (37) During rotation 9 the Applicant held the position within his patrol of Second in Command.

Assault of Person 3

- (38) Prior to the deployment of rotation 9 the Applicant came to believe that Person 3 said something offensive about the Applicant's wife.
- (39) In or about April 2009 the Applicant encountered Person 3 in the hallway of the base in Tarin Kowt, Afghanistan. The Applicant said to Person 3 in substance "What did you say about my missus?" Person 3 replied, in substance "What are you talking about?" and attempted to walk away. The Applicant then punched Person 3 in the back of the head.

Incident on Easter Sunday 2009

- (40) On or about 12 April 2009 the Applicant and the troop of which he was a member conducted a mission providing commentary and sniper support to the infantry who were trying to get across a river.
- (41) In or about the late afternoon the Applicant and the troop of which he was a member were instructed to assault a compound code-named Whiskey 108. The Applicant's patrol was one of the patrols responsible for conducting the assault.

"Blooding the rookie"

- (42) Rotation 9 was Person 4's first deployment. Person 4 was a member of the Applicant's patrol.
- (43) At various times throughout rotation 9 the Applicant and his patrol commander, Person 5, made statements, in substance that they needed to "blood the rookie" (referring to Person 4).
- (44) "Blooding" refers to initiating a person in the practice of killing, or giving them the taste for killing.
- (45) During the mission in relation to Whiskey 108 an Afghan male (**Afghan Male 1**) was detained.
- (46) In the presence of the Applicant Person 5 ordered Person 4 to execute Afghan Male 1. Pursuant to that order Person 4 placed Afghan Male 1 on his knees and shot him in the back of the head. Person 4 was ordered to execute Afghan Male 1 so that he could be "blooded". The Applicant did not say or do anything to encourage Person 5 to withdraw the order or to stop Person 4 following the order. In these circumstances, and in the circumstances set out in particular 43 above, it may be inferred that the Applicant was complicit in and approved of the order.

- (47) In the circumstances, by his conduct with respect to Afghan Male 1, the Applicant breached:
- (a) Articles 3 and 13 of the Third Geneva Convention; or
 - (b) Alternatively, Article 3 of the Fourth Geneva Convention.
- (48) In the circumstances, by his conduct with respect to Afghan Male 1, the Applicant was complicit in and responsible for murder.

Murder of Afghan Male 2

- (49) After the assault was complete and the patrols were conducting SSE (sensitive site exploitation, being a process post-assault where a detailed and thorough search of the site is performed in order to gather intelligence) the Applicant carried an Afghan male with a prosthetic leg (**Afghan Male 2**) outside the compound and threw him on the ground. The Applicant then shot Afghan Male 2 approximately 10-15 times with a F89 LSW. A F89 LSW is a light machine gun.
- (50) Afghan Male 2 was a "PUC" (person under control) who posed no imminent threat, particularly given that Afghan Male 2 was physically impaired and the Applicant was able to carry him outside of the compound and throw him to the ground.
- (51) In the circumstances, by his conduct with respect to Afghan Male 2, the Applicant breached:
- (a) Articles 3 and 13 of the Third Geneva Convention; or
 - (b) Alternatively, Article 3 of the Fourth Geneva Convention.
- (52) In the circumstances, the Applicant's conduct with respect to Afghan Male 2 constituted murder.

Assault of an unarmed Afghan male during rotation 12

- (53) During rotation 12 the Applicant held the position within his patrol of Second in Command.
- (54) In or about March 2010 the Applicant and the troop of which he was a member conducted a mission in an area named Deh Rafshan targeting a medium value Taliban leader.
- (55) The target fled from the compound as the helicopters were landing.

- (56) As they were clearing the target compound Person 7 and Person 8 came across an Afghan male (who was not the target) (**Afghan Male 3**). Afghan Male 3 was sitting cross-legged in a carpeted room in the compound and was not armed. It was the intention of Person 7 and Person 8 to "PUC" (meaning arrest; "PUC" meaning "person under control") Afghan Male 3 for questioning. After Person 7 and Person 8 directed Afghan Male 3 to stand up and put his hands behind his back, Afghan Male 3 moved himself into the foetal position and made a whimpering sound. Afghan Male 3 was not exhibiting any threatening conduct but rather was exhibiting signs of fear.
- (57) Person 7 and Person 8 attempted to place Afghan Male 3's hands behind his back so that they could be handcuffed (with plastic cables), however, exhibiting signs of fear, Afghan Male 3's body was stiff and he remained in the foetal position. Person 7 and Person 8 let go of Afghan Male 3 in the hope that he would relax his body and then after a period of time repeated the attempt.
- (58) As Person 7 and Person 8 were attempting to arrest Afghan Male 3 in the manner described in the preceding paragraph the Applicant entered the room wearing Kevlar gloves. The Applicant walked up to where Person 7 and Person 8 were attempting to arrest Afghan Male 3, got down on one knee and drove several punches hard into Afghan Male 3's face around his cheek bone and eye. A lump/swelling appeared in the area around Afghan Male 3's cheek bone and eye socket almost instantly. The Applicant then drove his knee into Afghan Male 3's abdominal area two to four times. As the Applicant did this Afghan Male 3 made a sound as though the wind had been knocked out of him. Person 7 said to the Applicant words in substance "Whoa, whoa, whoa what are you doing? Get out of here we are looking after this!" The Applicant then left the room.
- (59) In the circumstances, by his conduct with respect to Afghan Male 3, the Applicant breached:
- (a) Articles 3 and 13 of the Third Geneva Convention; or
 - (b) Alternatively, Article 3 of the Fourth Geneva Convention.
- (60) In the circumstances, the Applicant's conduct with respect to Afghan Male 3 constituted an unlawful assault.

Rotation 18

- (61) During rotation 18 the Applicant held the position within his patrol (Gothic 2) of Patrol Commander.

Mock execution in pre-deployment training for rotation 18

- (62) In or about May 2012 the Applicant and the troop of which he was a member engaged in a training exercise at the Lancelin Defence Training Area, Perth. At about the conclusion of that training exercise the exercise involved a scenario that a compound had been cleared and a detainee had been taken. The detainee, being played by Person 9, was squatted in a corner of the compound with handcuffs on. The Applicant then walked to the other end of the room, grabbed Person 10, who was preparing for his first deployment, and brought him back to where the detainee was squatting. The Applicant said to Person 10, in substance, "kill him". Person 10 looked taken aback, however he complied with the order and jokingly simulated killing the detainee by gesturing and saying "bang" to indicate he had shot the detainee. The Applicant then grabbed Person 10 by the shoulder and said in substance "You good with that? Because that's how it's gonna be when we get over there."
- (63) In the circumstances, in the event that this scenario was real, the Applicant's conduct would constitute a breach of Articles 3 and 13 of the Third Geneva Convention, or alternatively Article 3 of the Fourth Geneva Convention.

Kill board

- (64) Throughout rotation 18 the Applicant maintained a "kill board" on the back of the door to his patrol room (which he shared with the other members of his patrol). The kill board comprised of tally marks made on the back of the door corresponding to the number of people members of the patrol had killed on rotation 18.

Statement to Person 7

- (65) On or about 2 July 2012 Sergeant Blaine Flower Diddams was killed during an engagement with insurgents on operations in Afghanistan.
- (66) On or about 5 or 6 July 2012 the Applicant and Person 7 were in the ready room and the Applicant said to Person 7 in substance "I'm going to talk the talk, make sure I walk the walk. Before this trip is over I'm going to choke a bloke to death and watch the life drain out of his eyes."

Bullying of Person 10

- (67) Rotation 12 was Person 10's first deployment. At the commencement of the rotation Person 10 was a member of the Applicant's patrol.
- (68) On about 15 July 2012 the Applicant and the troop of which he was a member conducted a mission in the Chora Valley. The mission was planned by the Applicant.

- (69) The mission involved the Applicant's patrol (Gothic 2) and another patrol (Gothic 3)... [set out in the Confidential Annexure to the Defence].
- (70) On the way to the ambush positions on or about 14 July 2012 Person 10's radio failed such that Person 10 had no communications for the remainder of the mission. When the Applicant's patrol moved into their positions at the ambush position the Applicant positioned Person 10 in a position pointed towards an aqueduct. Prior to the mission the troop had been informed of intelligence to the effect that the Taliban use the aqueduct system to move around.
- (71) Gothic 3 were located near the aqueduct in the direction (from Gothic 2) in which the Applicant had pointed Person 10.
- (72) At about 6:05am on about the morning of 15 July 2012, a member of Gothic 3 (positioned near the aqueduct) engaged an armed fighting aged male, that is, fired his weapon. The shot from Gothic 3 impacted near a member of Gothic 2. Person 10 believed the shots came from an enemy insurgent using the aqueduct and shot two short bursts of two to three shots each from his weapon in accordance with standard training. The Applicant yelled out "check fire" and Person 10 stopped firing.
- (73) As the shots fired by the member of Gothic 3 and Person 10 were fired in the direction of another patrol the incidents were "blue on blue incidents" (that is, an attack by one's own side that has the potential to harm one's own forces). Nobody was injured or harmed as a result of the blue on blue incidents.
- (74) Shortly after Person 10 stopped firing a woman and child walked into the vicinity of the ambush positions at a distance of about 200-300 metres.
- (75) The mission was deemed a failed mission.
- (76) As the patrol commander responsible for planning the mission, the fact that the mission failed and that it involved a blue on blue incident reflected poorly on the Applicant.
- (77) After the troop returned to base, the Applicant called his patrol into the patrol room. The Applicant came into the patrol room and shut the door behind him. Person 10 was sitting on a chair. The Applicant directed Person 10 to stand up, which he did. After Person 10 stood up the Applicant punched Person 10 hard in the face, belittled him and verbally abused him in front of the patrol. After assaulting Person 10, the Applicant said to him in substance "not a word of this [referring to the assault that had just occurred in the room] is to leave this room".

- (78) In debriefing meetings and in an investigation into the blue on blue incident the Applicant falsely alleged, in substance, that Person 10 was overwhelmed in the situation and fired shots in an uncontrolled manner whilst ignoring commands from the Applicant.
- (79) As a result of the Applicant's claims in relation to Person 10, Person 10 was placed on administrative duties and was restricted from going outside the wire (that is, outside of the base on operational missions).
- (80) On or about 14 February 2013 the Applicant threatened Person 10, in substance, that if he reported the assault or did not support the Applicant's version of the blue on blue incidents the Applicant would (falsely) report Person 10 to the Hague for war crimes for firing at women and children.
- (81) The Applicant's conduct in respect of Person 10 constituted bullying.
- (82) It may be inferred that the Applicant's conduct in respect of Person 10 was to detract attention from the Applicant's own responsibility for planning a tactically flawed mission which contributed toward the blue on blue incident.

Assault of an unarmed Afghan male civilian

- (83) On about 29 August 2012 a member of the Afghan Army, Sergeant Hekmatullah (**Hekmatullah**), opened fire at Patrol Base Wahab killing three Australian soldiers and injuring two others.
- (84) In about the period 29 August 2012 to early September 2012 the Applicant and the troop of which he was a member conducted a mission in a village in the north-west of the Oruzgan province in search of Hekmatullah.
- (85) [Set out in the Confidential Annexure to the Defence].
- (86) [Set out in the Confidential Annexure to the Defence].
- (87) One of the detainees (**Afghan Male 4**) was a civilian who had a young girl with him. The Applicant asked Afghan Male 4 in substance if the girl was his daughter and what her name was. Afghan Male 4 responded in substance that the girl was his daughter but hesitated in giving her name. The Applicant then grabbed Afghan Male 4 by the front of his clothing, picked him up and forcefully pushed his head into the mud wall of the compound one or two times.

- (88) In the circumstances, by his conduct with respect to Afghan Male 4, the Applicant breached:
- (a) Articles 3, 13 and 17 of the Third Geneva Convention; or
 - (b) Alternatively, Article 3 of the Fourth Geneva Convention.
- (89) In the circumstances, the Applicant's conduct with respect to Afghan Male 4 constituted an unlawful assault.

Darwan mission - 11 September 2012

- (90) On or about 11 September 2012 intelligence had been received to the effect that Hekmatullah was in, or had been at, a village named Darwan.
- (91) On or about 11 September 2012 the Applicant and the troop of which he was a member conducted a mission in Darwan in search of Hekmatullah (the **Darwan mission**).

Execution of an unarmed Afghan

- (92) Shortly after the commencement of the Darwan mission a member of the overwatch patrol, being a patrol stationed at a higher position to keep a watch over the mission, sent a message over the radio to the effect "We've got a squirter, he just ran out of the green and crossed the river and we can't see him anymore, he is on the other side to us." The message did not indicate that the 'squirter' was armed or (explicitly or impliedly by its terms or tone) that he was a threat. A 'squirter' is a person who leaves the scene of the mission when soldiers approach.
- (93) The Applicant responded to that message, in substance "Roger that, I'll look after it".
- (94) At some time after that radio communication the Applicant crossed the Helmand River in search of the 'squirter'. The Applicant located an Afghan male (**Afghan Male 5**) hiding amongst the rocks on the other side of the Helmand River, stood over him and shot him in the head from close range. At the time the Applicant shot Afghan Male 5 he was standing so close to Afghan Male 5 that the Applicant was splattered with his brain matter and some of it entered the Applicant's mouth.
- (95) It may be inferred that the 'squirter' and Afghan Male 5 (who may or may not have been the same person) were unarmed and/or posed no risk in circumstances where:
- (a) the overwatch patrol had not seen the 'squirter' carrying any weapon;
 - (b) the Applicant was prepared to go after the 'squirter' by himself without the assistance or protection from another member of his patrol;

- (c) the Applicant was prepared to place himself in a vulnerable position by crossing the river to locate the 'squirter', in circumstances where he would have been at great risk of being shot if the 'squirter' were armed;
 - (d) Afghan Male 5 was hiding amongst the rocks when located by the Applicant;
 - (e) the Applicant was able to get as close as he did to Afghan Male 5.
- (96) Further, it may be inferred that the Applicant would have been able to arrest Afghan Male 5 in circumstances where:
- (a) Afghan Male 5 was hiding amongst the rocks when located by the Applicant;
 - (b) the Applicant was able to get so close to Afghan Male 5.
- (97) In the circumstances, by his conduct with respect to Afghan Male 5, the Applicant breached:
- (c) Articles 3 and 13 of the Third Geneva Convention; or
 - (d) Alternatively, Article 3 of the Fourth Geneva Convention.
- (98) In the circumstances, the Applicant's conduct with respect to Afghan Male 5 constituted murder.

Murder of Ali Jan

- (99) [Set out in the Confidential Annexure to the Defence].
- (100) Once the mission was complete a request for extraction (helicopters) was communicated.
- (101) [Set out in the Confidential Annexure to the Defence].
- (102) [Set out in the Confidential Annexure to the Defence].
- (103) [Set out in the Confidential Annexure to the Defence].
- (104) At or about this time the Applicant retrieved an Afghan male who had been detained in the centralised holding compound (**Ali Jan**). Ali Jan was still handcuffed. The Applicant caused Ali Jan to be placed at the edge of a small cliff and forced him into a kneeling position. The Applicant then took a number of steps back before he moved back towards Ali Jan and kicked him hard in the midriff causing him to fall back over the cliff and land in the dry creek bed below. The impact of the fall to the dry creek bed below was so significant that it knocked Ali Jan's teeth out of his mouth.

- (105) The Applicant, together with a number of soldiers under his command including Person 4, Person 11, a member of the Afghan Partner Force, Person 12 and an interpreter, Person 13, then walked down into the creek bed to inspect Ali Jan, who was still alive. The Applicant directed a soldier under his command to kill Ali Jan, which he did.
- (106) Person 4 then performed SSE (sensitive site examination), that is, took photos of Ali Jan's body, before he and the Applicant returned to their patrol's helicopter landing zone for extraction.
- (107) The Applicant then sent a signal over the radio, in substance, "11, this is 211, we've just engaged a spotter, that is 1 EKIA" (enemy killed in action).
- (108) It may be inferred that Ali Jan was not a spotter in circumstances where:
- (a) he was retrieved from the centralised holding compound by the Applicant;
 - (b) his hands were hand-cuffed when he was retrieved from the holding compound and kicked off the small cliff;
 - (c) he was not seen to be using any mobile telephone or radio (which is a common feature identifying a spotter);
 - (d) no spotter was seen by the Apache helicopter;
 - (e) prior to Ali Jan's death the Applicant did not send any message to the effect that a spotter had been located so that the extraction could be aborted until it was safe;
 - (f) in his radio communication sent after Ali Jan was killed the Applicant did not indicate any concern for who Ali Jan may have passed a message to (which is the threat a spotter poses) or give any indication that there was a threat such that the extraction should be aborted until it was safe;
 - (g) the mission was complete and it was unlikely a spotter would have approached the village or the compounds, which were under the control of Australian SAS soldiers, at that time;
 - (h) it was unlikely a spotter would have come within such a short distance of the village such that he was able to be killed in the manner he was (spotters ordinarily operate from several hundred (500-1000) metres away);

- (i) it was unlikely a spotter would have come within such a short distance of the village such that the Applicant could get to his body to perform SSE and return to his patrol's helicopter landing zone within three minutes.
- (109) Further, whilst it is permissible to kill a spotter under the ROE, it is not permissible to kill any spotter in an inhumane manner such as kicking them off a cliff.
- (110) Further, whilst it is permissible to kill a spotter under the ROE, it is not permissible to kill the spotter if the spotter is detained, hand-cuffed, unarmed and poses no threat or danger.
- (111) In the circumstances, by his conduct with respect to Ali Jan, the Applicant breached Article 3 of the Fourth Geneva Convention.
- (112) Alternatively, in the event that Ali Jan was a spotter (which is not accepted), the Applicant breached Articles 3 and 13 of the Third Geneva Convention.
- (113) In the circumstances, the Applicant's conduct with respect to Ali Jan constituted murder.
- (114) Alternatively, by his conduct with respect to Ali Jan the Applicant was complicit in and responsible for murder.

Execution of an unarmed Afghan in October 2012

- (115) On or about 12 October 2012 the Applicant and the troop of which he was a member conducted a mission in Khaz Oruzgan.
- (116) Towards the end of the mission the Applicant, together with his patrol, the interpreter Person 13 and a number of members of the Afghan Partner Force including Person 12 were questioning an Afghan male in a compound (**Afghan Male 6**) as they were waiting for the helicopters to extract them from the mission. Afghan Male 6 was not exhibiting any signs of being a threat or violent. Whilst the Applicant was questioning Afghan Male 6, Person 14, a member of the Applicant's patrol noticed an area in the wall of the compound which looked like a wall cache (being a false wall with a cavity behind it where items can be hidden). Person 14 kicked the wall cache and a number of weapons including rocket propelled grenades and warheads fell out. The Applicant saw the weapons fall out. He then said to Person 13, in substance "tell him [referring to Person 12] to shoot him or get his men to or I'll do it". Following instructions from Person 12, a member of the Afghan Partner Force then shot Afghan Male 6 four to six times.

- (117) It may be inferred that the Applicant was able to detain Afghan Male 6 in circumstances where:
- (a) Afghan Male 6 was not exhibiting any signs of being an imminent threat or violent;
 - (b) Afghan Male 6 was seriously outnumbered; and
 - (c) the Applicant had enough time to issue the direction referred to in the preceding paragraph.
- (118) In the circumstances, by his conduct with respect to Afghan Male 6, the Applicant breached:
- (a) Articles 3 and 13 of the Third Geneva Convention; or
 - (b) Alternatively, Article 3 of the Fourth Geneva Convention.
- (119) In the circumstances, by his conduct with respect to Afghan Male 6 the Applicant was complicit in and responsible for murder.

Execution of an unarmed Afghan Adolescent on about 21 October 2012

- (120) In or about October 2012 the Applicant said to the members of his patrol, in substance "Hey fellas, we're on 18, we need two more to get to 20". In saying this the Applicant was referring to the kill board.
- (121) In or about October 2012 the Commanding Officer of the troop, Person 15 expressed concern to the troops that the number of persons killed in action during rotation 18 was too high.
- (122) On or about 21 October 2012, during the last mission conducted by the Applicant and the troop of which he was a member, a Toyota Hilux was intercepted by a number of members of the troop, including Person 16. The Hilux contained four Afghan males, including a male of approximately 15 to 18 years old (**Afghan Adolescent**). The Afghan Adolescent was searched and detained by Person 16 and then handed over to the Applicant's patrol for questioning, together with the other occupants of the Hilux. At the time the Afghan Adolescent was visibly extremely nervous.
- (123) Shortly after the occupants of the Hilux were handed over to the Applicant's patrol the Applicant sent a radio communication, in substance, "two EKIA's".
- (124) One or two days after the mission Person 16 said to the Applicant, in substance, "What happened to the young bloke who was shaking like a leaf?" The Applicant responded, in substance, "I shot that c*** in the head. Person 15 told me not to kill

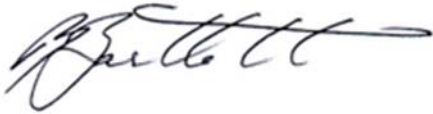
any c*** on that job so I pulled out my 9mm and shot him in the head. It was the most beautiful thing I've ever seen."

- (125) In the circumstances, by his conduct with respect to the Afghan Adolescent, the Applicant breached:
- (a) Articles 3 and 13 of the Third Geneva Convention; or
 - (b) Alternatively, Article 3 of the Fourth Geneva Convention.
- (126) In the circumstances, the Applicant's conduct with respect to the Afghan Adolescent constituted murder.

Imputations

- (127) The imputation pleaded in sub-paragraphs 5(a) and 7(a) of the Statement of Claim - "*The Applicant while a member of the SASR in Afghanistan engaged in criminal conduct by violently assaulting Afghan prisoners and bullying Australian soldiers*" (**Imputation 1**) is substantially true by reason of the facts and matters set out in particulars 1-126 above.
- (128) The imputation pleaded in sub-paragraphs 5(b) and 7(b) of the Statement of Claim and in paragraph 18(b)(i)(A) above - "*The Applicant while a member of the SASR in Afghanistan engaged in criminal conduct by abusing unarmed civilians*" (**Imputation 2**) is substantially true by reason of the facts and matters set out in particulars 1-16, 37, 40-61 and 83-126 above.
- (129) The imputation pleaded in sub-paragraphs 5(c) and 7(c) of the Statement of Claim and in paragraph 18(b)(i)(B) above - "*The Applicant while a member of the SASR in Afghanistan engaged in criminal conduct by killing detainees in Afghanistan*" (**Imputation 3**) is substantially true by reason of the facts and matters set out in particulars 1-16, 37, 40-52, 61-66 and 92-126 above.
- (130) The contextual imputation in sub-paragraph 10(b)(i)(A) above - "*The Applicant broke the moral and legal rules of military engagement and is therefore a criminal*" is substantially true by reason of the facts and matters set out in particulars 1-126 above.
- (131) The contextual imputation in sub-paragraph 10(b)(i)(B) above - "*The Applicant disgraced his country Australia and the Australian army by his conduct as a member of the SASR in Afghanistan*" is substantially true by reason of the facts and matters set out in particulars 1-126 above.

Date: 22 November 2018

A handwritten signature in black ink, appearing to read 'Peter Bartlett', with a long horizontal flourish extending to the right.

Signed by Peter Bartlett
Lawyer for the Respondent

This pleading was settled by Lyndelle Barnett of counsel.

Certificate of lawyer

I Peter Bartlett certify to the Court that, in relation to the defence filed on behalf of the Respondent, the factual and legal material available to me at present provides a proper basis for:

- (a) each allegation in the pleading; and
- (b) each denial in the pleading; and
- (c) each non admission in the pleading.

Date: 22 November 2018

A handwritten signature in black ink, appearing to read 'Peter Bartlett', with a long horizontal flourish extending to the right.

Signed by Peter Bartlett
Lawyer for the Respondent