

PSYCHOLOGICAL INJURY IN VETERANS AND THE LAW

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The theme of your conference is of utmost importance: on any view, the nation owes a great debt to our veterans, who have been sent in harm's way in the national interest. In the *Blackman* case in the United Kingdom, to which we shall return in greater detail, there was expert evidence that about 20–25% of combat troops deployed to Iraq and Afghanistan at some point suffered from a mental health difficulty, and that those with mental health problems were more likely to commit, or at least condone, morally reprehensible behaviour.¹ In the United States, in the period 2011–12, an estimated 8% of all inmates in state and federal prisons were veterans, a total of 181,500 people.² While the majority of them (75%) did not see combat, 48% were told by a mental health professional they had a mental disorder, including 23% with PTSD.³ In Australia, a Department of Defence study into Mental Health Prevalence among members (relying on self-reporting) found 24.9% of transitioned members met the criteria for PTSD in their lifetime⁴ – and 17.7% in the preceding 12 months – with 3% of transitioned ADF members having been arrested since transition.⁵ It is apparent, from these diverse sources, that veteran status is associated with a higher risk of psychological illness, and interaction with the legal system.

In this address, I will cover the interaction of veterans with psychological injuries with the legal system, in respect of both criminal responsibility (with reference to the *Blackman* case in the United Kingdom) and civil liability (with reference to the questions of duty of care and causation). I will then specifically consider the emergent diagnosis of moral injury, and how it may be dealt with by the law. Although moral injury is not unique to veterans, and can be found in other fields that confront moral dilemmas – including among journalists, teachers, and police officers and other first responders – service personnel are consistently referred to as more susceptible to it, due to the nature of their work and the situations in which they are placed. I hope this paper can provide a starting point for discussion of how the law will deal with veterans with moral injury.

¹ *R v Blackman (No 2)* [2017] EWCA Crim 190 at [70].

² Jennifer Bronson, Ann Carson, Margaret Noonan and Marcus Berzofsky, *Veterans in Prison and Jail, 2011-12*, US Department of Justice, 2015, at 2.

³ *Ibid*, at 7–8.

⁴ Department of Defence and the Department of Veterans' Affairs, *Mental Health Prevalence: Mental Health and Wellbeing Transition Study*, 2018, at 51.

⁵ *Ibid*, at 41.

VETERANS IN THE LEGAL SYSTEM

Typically, a veteran with psychological injury may engage with the legal system (including police, lawyers, courts and the correctional services) as a defendant in a criminal matter, or as a plaintiff in a civil matter.

It is becoming clear – as illustrated by the statistics mentioned above – that, as a class, veterans have an elevated risk of offending. According to Evan Seamone, a major in the US Army Reserve:

Because the worst symptoms of [PTSD] are often delayed until the veteran returns after combat when the body and mind have physically left the chaotic environment of the war zone, legislators, law enforcement officers, and court personnel have recognized that the civil violation often represents the first opportunity the offender has to address the remnant of their overseas combat experience.⁶

This implies that the legal system may provide a critical opportunity for intervention with veterans with psychological injury, and in turn that courts need to be educated, usually by evidence, of the effects of such injuries, and available responses to them.

Criminal responsibility

The case of Sergeant Blackman, a patrol commander in the Royal Marines, provides a powerful illustration of the potential relevance of wartime psychological injury to criminal responsibility. The facts are unedifying; as found by the Court Martial and accepted by the Court Martials Appeal Court,⁷ based on a video record of the events which was discovered on a computer in the course of an unrelated criminal investigation, in Afghanistan, an insurgent had been seriously wounded having been lawfully engaged by an Apache helicopter. When Blackman and his patrol found the insurgent, he was no longer a threat. Having removed his AK47, magazines and a grenade, Blackman caused him to be moved to a place where they were out of sight of the command post so that, to quote what Blackman was recording on video as having said at the time, they ‘can’t see what we are doing to him’. He was handled ‘in a robust manner’ by those under Blackman’s command, clearly causing him additional pain; Blackman did nothing to stop them from treating him in that way. When out of view of

⁶ Evan Seamone, ‘Dismantling America’s Largest Sleep Cell: The Imperative to Treat, Rather than Merely Punish, Active Duty Offenders with PTSD Prior to Discharge from the Armed Forces’ (2013) 37 *Nova Law Review* 479, at 482.

⁷ *R v Blackman* [2014] EWCA Crim 1029 at [31]–[33].

the command post, Blackman failed to ensure he was given appropriate medical treatment quickly and then ordered those giving him some first aid to stop.

When he was sure the Apache helicopter was out of sight, he calmly discharged a 9 millimetre round into his chest from close range, saying ‘shuffle off this mortal coil, you c...’. His suggestion that he thought the insurgent was dead when he discharged the firearms lacked any credibility and was clearly made up after he had been charged with murder in an effort to concoct a defence. Although it is possible that the insurgent may in any event eventually have died from his wounds sustained in the engagement by the Apache, Blackman gave him no chance of survival. He intended to kill him and his shot certainly hastened his death.

Blackman then told his patrol that they were not to say anything about what had just happened and acknowledged what he had done by saying that he had just broken the Geneva Convention. The Court Martial noted the ‘tone of calmness of his voice as he commented after he had shot him were matter of fact and in that respect chilling’.

In the Court Martial, Sergeant Blackman pleaded not guilty, asserting that he believed that the insurgent was already dead. He was convicted of murder, and sentenced to life imprisonment, with a minimum term of 10 years.⁸

An appeal to the Courts Martial Appeals Court – the equivalent of our Defence Force Discipline Appeals Tribunal – constituted by the Lord Chief Justice, the President of the Queen’s Bench Division, and the Vice-President of the Court of Appeal, Criminal Division, reduced the minimum term to 8 years, giving great weight to his exemplary record, that his conduct was entirely out of character, and that he was suffering from combat stress disorder, and reduced significance to the need for deterrence.⁹

A campaign by his supporters and the tabloids resulted in the case being considered by the Criminal Cases Review Committee, which referred it back to the Court Martial Appeal Court, this time constituted by the same three judges and an additional two. On this occasion, for the first time, psychiatric evidence was adduced, to found the partial defence of diminished responsibility, which had not previously been advanced. Three psychiatrists provided evidence that the appellant was ‘suffering from an abnormality of mental functioning at the

⁸ *R v Blackman* [2014] EWCA Crim 1029 at [9].

⁹ *Ibid*, at [77].

time of the killing ... [arising] from an adjustment disorder',¹⁰ and that, in the circumstances of the case, this would be 'capable of substantially impairing the appellant's ability to form a rational judgement or exercise self-control.'¹¹

It might be observed that 'adjustment disorder' is a 'sub-threshold' psychiatric disorder, and amongst the vaguest and weakest of psychiatric diagnoses. In the International Classification of Diseases, upon which the Court relied, it was defined as a state of subjective distress and emotional disturbance arising in the period of adaptation to a significant life change or a stressful life event.¹² Symptoms include a depressed mood, anxiety, worry, a feeling of an inability to cope, plan ahead or continue in the present situation, with some degree of disability in performance of the daily routine.

The Court nonetheless held that the evidence of an adjustment disorder, which had not been before the court martial at first instance, would have been sufficient to raise a doubt as to Blackman's guilt of murder, and so the verdict of murder was unsafe and must be quashed.¹³

The Court then turned to consider whether it should substitute a verdict of manslaughter by diminished responsibility, rather than remitting the matter for retrial. Accepting that the evidence established that Blackman was suffering from an adjustment disorder, it focused on whether this amounted to 'substantial impairment' for the purposes of the defence of diminished responsibility.¹⁴

On this issue, the evidence was considered in five categories. *First*, the Court considered evidence of Blackman's condition prior to his deployment to Afghanistan,¹⁵ including his good character and personal circumstances, most particularly the impact of the death of his father. *Secondly*, consideration was given to the circumstances under which he was operating in Afghanistan at the time of the offence,¹⁶ in relation both to pre-deployment preparation and to his environment once deployed, which included that colleagues in his unit that had been killed, that their base was under acute threat, and the physical pressures of the job being above and beyond training. The combination of these circumstances meant that, at least in Blackman's perception (1) there was a lack of support from command; (2) the base was not

¹⁰ *R v Blackman (No 2)* [2017] EWCA Crim 190 at [32].

¹¹ *Ibid*, at [38].

¹² ICD 10, F43.2. The definition has been revised slightly in the ICD 11.

¹³ *R v Blackman (No 2)* [2017] EWCA Crim 190 at [80].

¹⁴ *Ibid*, at [85].

¹⁵ *Ibid*, at [87]–[91].

¹⁶ *Ibid*, at [92]–[103].

physically secure, and could easily have been overrun; and (3) there was an intense feeling of isolation. *Thirdly*, reference was made to the circumstances on the occasion of the offence, notably that there had been a sustained attack by insurgents.¹⁷ *Fourthly*, regard was had to evidence of Blackman's mental state, evidenced by his interactions with others.¹⁸ And *fifthly*, Blackman's own accounts, in interviews by the psychiatrists, were considered.¹⁹

As a result of this analysis, the Court concluded that the exceptional circumstances in which Blackman was placed had substantially impaired his ability to form a rational judgment, and the Court therefore substituted a verdict of manslaughter by reason of diminished responsibility. The Court subsequently proceeded to re-sentence Blackman.²⁰ The Court's remarks on sentence emphasise that while his responsibility was diminished, he 'still retained a substantial responsibility for the deliberate killing',²¹ and the seriousness of the offence was not negated by acceptance of the psychiatric evidence.²² A determinate sentence of 7 years, with release after 3.5 years, was imposed.²³ This had the result that, given the time he had already spent in custody, he was released upon the delivery of the sentence.

This somewhat striking outcome demonstrates that evidence of psychological injury associated with operational service may significantly mitigate criminal responsibility, and have an impact both on liability (for example, through the partial defence of diminished responsibility), and in mitigation of sentence.

Civil liability

Duty of care

Courts have been slow to attribute legal liability to the Crown (or its officers or agents) in matters involving the actual conduct warlike operations. This has been called 'combat immunity'. There are, however, cases which fall outside the scope of the doctrine; it does not extend to cases outside the scope of actual military operations.

In *Weaver v Ward*,²⁴ decided in 1616, two soldiers were skirmishing in a training activity, and one was injured when another's musket discharged. The Court held that, although 'if men

¹⁷ *R v Blackman (No 2)* [2017] EWCA Crim 190 at [104].

¹⁸ *Ibid*, at [105].

¹⁹ *Ibid*, at [106].

²⁰ *R v Blackman (No 3)* [2017] EWCA Crim 325.

²¹ *Ibid*, at [10].

²² *Ibid*, at [20].

²³ *Ibid*, at [21].

²⁴ (1616) Hob 134; 80 ER 284.

tilt or turney in the presence of the king, or if two masters of defence playing their prizes kill one another, that this shall be no felony, because felony must be done *animo felonico*, nonetheless a civil action for trespass to the person would lie if in the course of military exercises one soldier were injured by another, unless the latter could show the injury had been utterly without his fault.

In *Shaw Savill & Albion Co Ltd v Commonwealth*,²⁵ Dixon J said that although, outside a theatre of war, a want of care for the safety of merchant ships exposed a naval officer navigating a naval ship to the same civil liability as if he were in the merchant service, when the matters complained of in an action of negligence against the Crown or a member of the armed forces formed part of, or were an incident in, active naval or military operations against the enemy, then the action must fail on the ground that, while in the course of actually operating against the enemy, the forces of the Crown were under no duty of care to avoid causing loss or damage to private individuals. However, the officers of a warship proceeding to anchorage or manoeuvring among other ships in a harbour, or acting as a patrol or a convoy, had a civil duty of care to navigate with due regard to the safety of other shipping, and the standard of care was that which is reasonable in the circumstances. Thus, as Dixon J noted, the commander of the destroyer *Hydra* had been held liable for a collision of his ship with a merchant ship in the English Channel on the night of 11 February 1917 – self-evidently, during the Great War – because he failed to perceive that the other ship, which showed him a light, was approaching on a crossing course, and this was so notwithstanding that the *Hydra* was on active service and war conditions obtained.²⁶

For a time, the view prevailed in Australia that no action for negligence lay by one serving member against another, nor against the Commonwealth. Following the collision in 1964 of HMAS Melbourne and HMAS Voyager off Jervis Bay during a training exercise, as a result of which 82 people – one of them a civilian – were killed, and others injured, the civilian's widow brought an action in the original jurisdiction of the High Court. In *Parker v Commonwealth*,²⁷ the widow recovered damages. However, Windeyer J – who had commanded Sydney University Regiment in the 1930s, was a battalion commander at Tobruk, a brigade commander in New Guinea and Borneo, and after the war, Commander 2nd Division and CMF member of the Military Board – distinguished the position of the victim as

²⁵ (1940) 66 CLR 344 at 361–2; [1940] HCA 40.

²⁶ *HMS Hydra* [1918] P 78.

²⁷ (1965) 112 CLR 295; [1965] HCA 12.

a civilian from the service personnel, who he considered to have no claim. His Honour wrote:²⁸

I feel bound to say that, as I see the matter at present, the law does not enable a serving member of any of Her Majesty's forces to recover damages from a fellow member because acts done by him in the course of his duty were negligently done. And if the negligent person is not himself liable, the Commonwealth in my opinion cannot be liable.

His Honour said that to allow an action between members of the force at common law would be 'destructive of the morale, discipline and efficiency of the service.'²⁹

However, those observations were disapproved by a unanimous full High Court in *Groves v Commonwealth*,³⁰ holding that, at common law, an action in negligence was maintainable against the Commonwealth by a member of the armed forces for damages caused by the negligence of a fellow member whilst on duty in peacetime. Groves, an enlisted airman in the Royal Australian Air Force, had been injured when a ladder which was part of the boarding equipment of an aircraft collapsed. At the time, the aircraft was being used to carry civil passengers (during the time of a strike by pilots of the civilian air lines). Stephen, Mason, Aickin and Wilson JJ stated the issue as whether 'the fact that the plaintiff and his fellow crewmen were all servicemen is enough to exclude the existence of that duty of care which is otherwise recognised by the common law as existing between those in a proximate relationship to one another.'³¹ Reviewing the cases which had been referred to by Windeyer J in *Parker*, their Honours concluded that while they excluded liability in respect of grievances concerning the exercise of military authority and discipline, they did not deny liability arising from breach of a general duty of care to fellow service personnel:³² in connection with routine duties in a time of peace, not involving conduct in response to a specific order of a superior officer, no policy considerations required that the court deprive the serviceman of the rights at common law which protect all other members of the community.

In *Commonwealth v Jenner*,³³ a crew member of an armed personnel carrier sustained an injury when the driver drove into a drain. Both men were army reservists, and at the time of

²⁸ (1965) 112 CLR 295 at 301–2.

²⁹ (1965) 112 CLR 295 at 302.

³⁰ (1982) 150 CLR 113; [1982] HCA 21.

³¹ (1982) 150 CLR 113 at 125.

³² (1982) 150 CLR 113 at 133.

³³ *Commonwealth of Australia v Jenner* (1989) 9 MVR 387 at 388.

the accident were operating the vehicle for training purposes pursuant to military orders. The New South Wales Court of Appeal held that the only area in which it was clear that a duty of care does not exist was in actual warlike activities.

In *Mulcahy v Ministry of Defence*,³⁴ the United Kingdom Court of Appeal held that a soldier did not owe a fellow soldier a duty of care when engaging the enemy in battle in the course of hostilities, nor was there any duty in such a situation for the Defence Force to maintain a safe system of work. The plaintiff was suing for an injury suffered in the Gulf War, as a result of the alleged negligent discharge by his section commander of a howitzer. The Court accepted that the requisite elements of proximity, and foreseeability of damage, were satisfied, but held that considerations of public policy dictated that no duty of care existed in the circumstances.

In *Re Civilian Casualty Court Martial*,³⁵ our former Chief Judge Advocate, Brigadier Westwood, held that the doctrine of combat immunity applied equally to criminal liability for negligence, including manslaughter, as members of the Defence Force do not owe a common law duty of care to private individuals during the course of armed conflict.

More recently, however, in *Smith v Ministry of Defence*,³⁶ in respect of claims against the Ministry of Defence for negligence causing the deaths of three soldiers, and injuries to another two, the Supreme Court of the United Kingdom held, by majority, that ‘combat immunity’ does not extend to failures in respect of training and equipment before actual engagement in hostilities. The negligence alleged was in respect of failures in training – both pre-deployment and in-theatre – and the provision of technology and equipment,³⁷ in respect of measures that ought to have been taken (so it was alleged) *before* the soldiers were engaged in actual hostilities. Lord Hope DPSC, with whom Lord Walker, Baroness Hale, and Lord Kerr JJSC agreed, held that:

- (1) the doctrine of combat immunity constituted a special rule which, where it applied, removed the issue of liability in negligence from the court’s jurisdiction altogether;

³⁴ [1996] QB 732; 2 All ER 705.

³⁵ (2011) 259 FLR 208.

³⁶ [2014] AC 52; [2013] UKSC 41.

³⁷ *Ibid*, at [91].

- (2) the doctrine was to be construed narrowly and applied only to action taken in the course of actual or imminent armed conflict, and there was no justification for extending it to failures at an earlier stage;³⁸
- (3) claims of negligent failure to provide available technology to protect against the risk of friendly fire, and to provide adequate vehicle recognition training, related to activities which had taken place long before the commencement of hostilities, and the rule did not apply to them;
- (4) although the claims of negligent failure to provide suitable protective equipment for soldiers on active service in Iraq related to activity closer to the theatre of war, further detail was required before a determination could be reached on liability; and
- (5) whether it would be fair, just or reasonable for a tortious duty of care to be imposed would depend on the circumstances in each case which could only be determined by evidence at trial.

After discussing the Australian decisions of *Shaw Savill* and *Groves*, as well as *Mulcahy*, Lord Hope concluded:³⁹

The question which these claims raise is whether the doctrine of combat immunity should be extended from actual or imminent armed conflict to failures at that earlier stage. I would answer it by adopting Elias J's point [in *Bici v Ministry of Defence*] ... that the doctrine should be narrowly construed. To apply the doctrine of combat immunity to these claims would involve an extension of that doctrine beyond the cases to which it has previously been applied ... I can find nothing in these cases to suggest that the doctrine extends that far.

Applying those principles to the facts:⁴⁰

At the stage when men are being trained, whether pre-deployment or in theatre, or decisions are being made about the fitting of equipment to tanks or other fighting vehicles, there is time to think things through, to plan and to exercise judgment. These activities are sufficiently far removed from the pressures and risks of active operations against the enemy for it to not to be unreasonable to expect a duty of

³⁸ There is an interesting analogy with the advocate's immunity in respect of in-court decisions.

³⁹ [2014] AC 52 at [92].

⁴⁰ *Ibid*, at [95].

care to be exercised, so long as the standard of care that is imposed has regard to the nature of these activities and to their circumstances. For this reason I would hold that the Challenger claims are not within the scope of the doctrine, that they should not be struck out on this ground and that the MOD should not be permitted, in the case of these claims, to maintain this argument.

His Lordship proceeded to discuss whether, in the circumstances, imposing such an obligation was fair, just and reasonable:⁴¹

... the question whether a duty should be held not to exist depends on the circumstances – on who the potential claimants are and when, where and how they are affected by the defendant’s acts. The circumstances in which active operations are undertaken by our armed services today vary greatly from theatre to theatre and from operation to operation. They cannot all be grouped under a single umbrella as if they were all open to the same risk, which must of course be avoided, of judicialising warfare.

The dissenting opinion of Lord Mance JSC, with whom Lord Wilson JSC agreed,⁴² warned against not underestimating the inevitable inter-linking of issues relating to the supply of technology and equipment with decisions taken on the ground during active operations;⁴³ and argued that because all the circumstances were inter-related, all should be non-justiciable. His Lordship also referred to the difficulty in characterising a decision as tactical,⁴⁴ and the impact that potential civil liability might have in the planning and preparation of operations.⁴⁵ His Lordship said:⁴⁶

The claims that the Ministry failed to ensure that the army was better equipped and trained involve policy considerations ... [that] raise issues of huge potential width, which would involve courts in examining procurement and training policy and priorities over years, with senior officers, civil servants and ministers having to be called and to explain their decisions long after they were made. Policy decisions concerning military procurement and training involve predictions as to uncertain future needs, the assessment and balancing of multiple

⁴¹ Ibid, at [98].

⁴² Lord Carnwath JSC also dissented, in a separate opinion (at [153]–[188]).

⁴³ [2014] AC 52 at [125].

⁴⁴ Ibid, at [126].

⁴⁵ Ibid, at [127].

⁴⁶ Ibid, at [128].

risks and the setting of difficult priorities for the often enormous expenditure required, to be made out of limited resources. They are only often highly controversial and not infrequently political in their nature. These may well also be influenced by considerations of national security which cannot openly be disclosed or discussed.

There is obvious potential for this issue to arise in Australia, and – especially given the difference of opinion in the Supreme Court of the United Kingdom and the force of the opinions on both sides – it is impossible to predict which view the High Court might prefer. However, I am unpersuaded *Smith* represents a major change in principle: many cases support the view that the immunity operates only in respect of actual military operations.

Under the approach adopted in *Smith*, there is scope for argument that psychological injury, although occasioned on operations, could be caused by a breach of a duty of care, if it could have been averted or mitigated by more effective pre-deployment training.

Causation of psychological injury

It is now of course well-established that personal injury for the purpose of the law of torts includes psychological injury,⁴⁷ such as PTSD.

In PTSD cases, it is usually the element of causation that is contentious. The plaintiff must prove that the symptoms are attributable to a specific event or experience. The *Voyager* cases provide an insight.

After *Parker v Commonwealth*,⁴⁸ to which I have already referred, it appeared that there would be no common law claim in respect of any of the service personnel killed or injured in the collision. However following the decision in *Groves*, a multitude of claims were brought by persons who had been injured in the collision, many whom claimed for PTSD, depression, anxiety and other psychological ailments.⁴⁹ The Commonwealth tended to admit negligence, but contested questions of causation and damages for each individual. Each plaintiff therefore had to prove that their PTSD was attributable to the collision and its sequelae, and also that

⁴⁷ See *Mount Isa Mines Ltd v Pusey* (1970) 125 CLR 383; [1970] HCA 60.

⁴⁸ (1965) 112 CLR 295; [1965] HCA 12.

⁴⁹ Cases that reached appellate courts include *Brittain v Commonwealth* [2004] NSWCA 83; *Hill v Commonwealth* [2005] NSWCA 94; *Commonwealth v McLean* (1996) 41 NSWLR 389; *Commonwealth v Stankowski* [2005] NSWCA 106; *Commonwealth v Covington-Thomas* [2005] NSWCA 299; *Commonwealth v Smith* [2005] NSWCA 478; *Commonwealth v Lewis* [2007] NSWCA 127; *Metcalfe v Commonwealth* [2008] VSCA 23; *Commonwealth v Gretton* [2008] NSWCA 117; and *Burk v Commonwealth* [2008] VSCA 29. Of course, there were many other matters which did not reach an appellate court.

consequential loss – for example early retirement on a lower pension, or alcoholism – was attributable to the PTSD.⁵⁰ As many of them had subsequently been deployed to Vietnam, this proved a high burden, particularly given that the collision occurred in 1964, while the claims were brought many decades later, during the 1990s and 2000s.⁵¹

Similar issues continue to arise in compensation claims under legislative schemes: claimants must prove that their injury was related to their operational service. For example, to sustain a claim for compensation under the *Veterans' Entitlement Act 1986* (Cth) in relation to PTSD, the veteran must establish a direct causative link. Because an element of PTSD is exposure to a traumatic event, it is necessary to prove that the event occurred. Thus it has been said:⁵²

If the question is posed as whether a veteran has suffered PTSD as a result of a traumatic event said to have occurred during the veteran's operational service, it must be answered by saying that the decision-maker must be reasonably satisfied that the traumatic event occurred before reaching the conclusion that the veteran suffered PTSD.

In *Repatriation Commission v Bawden*,⁵³ Mr Bawden was denied compensation as the Veterans' Review Board was not satisfied of the occurrence of a traumatic event. The Full Court of the Federal Court held '[w]hile there is no onus on a veteran to attach a label to the disease or injury manifest in his or her symptoms, if the disease or injury is alleged to be PTSD, the question of diagnosis is squarely raised and must be resolved.'⁵⁴ As the medical diagnosis of PTSD requires a traumatic event, the veteran must pinpoint and prove the traumatic event occurred.⁵⁵

'Adjustment disorder', which featured in the *Blackman* case, may present fewer problems of proof in this respect. In *Bawden*, the Court referred to an adjustment disorder (as a PTSD-like diagnosis) as a recognised disease.⁵⁶ The Court explained that while PTSD has a specific set of prerequisites for diagnosis, more broadly all that was required is 'the decision-maker must

⁵⁰ See, for example, *Brittain v Commonwealth*.

⁵¹ The Commonwealth also pleaded limitation defences. In *Commonwealth v Smith*, 30 matters in which application had been made for an extension of the limitation period were considered (at [148]). The Commonwealth opposed every case on the ground it would suffer prejudice by effluxion of time; but it succeeded in only three.

⁵² *Mines v Repatriation Commission* [2004] FCA 1331 at [48].

⁵³ (2012) 206 FCR 296; [2012] FCAFC 176.

⁵⁴ *Ibid.* at [45].

⁵⁵ *Ibid.* at [47].

⁵⁶ *Ibid.* at [47].

be satisfied that a collection of symptoms manifest a diagnosable disease, and if it is so satisfied, it must then consider whether the illness or disease is war-caused.’⁵⁷

Blackman suggests that proof of an adjustment disorder may be easier. The expert evidence in the *Blackman* case was that, of the 20–25% of combat troops deployed to Iraq and Afghanistan who at some point suffered from a mental health difficulty in 2012 and 2013, about one third of those with a mental health diagnosis had adjustment disorder.⁵⁸

The World Health Organisation International Classification of Diseases Version 11, published in 2018, now recognises Adjustment Disorder as a distinct disorder from both PTSD and complex PTSD (previously called ‘Enduring Personality Change After Catastrophic Experience’). There is also now a Statement of Principles concerning Adjustment Disorder, for guidance under the *Veterans’ Entitlements Act 1986*, which draws on the definition in the Diagnostic and Statistical Manual of Mental Disorders.

MORAL INJURY

In recent years, a condition said to be distinct from PTSD has been described, called ‘moral injury’. Dr Brett Litz, a professor of psychiatry and psychology at Boston University, was one of the first to describe the condition (with fellow authors), as follows:

Perpetrating, failing to prevent, bearing witness to, or learning about acts that transgress deeply held moral beliefs and expectations, which may be deleterious in the long term emotionally, psychologically, behaviourally, spiritually and socially.⁵⁹

Dr Maguen and Dr Litz further explained that this must be understood within the context of military personnel being regularly confronted with ethical and moral challenges, which even in optimal operational contexts, will ‘inevitably transgress deeply held beliefs that undergird a service member’s humanity.’⁶⁰ It is within this environment that transgressions which arise from individual acts of commission or omission, the behaviour of others, or by bearing witness to intense human suffering or the grotesque aftermath of battle leads to serious inner

⁵⁷ While this was in the context of compensation under a legislative scheme, there is no reason why the same reasoning would not apply at common law. It is a decision of the Full Court of the Federal Court, by a bench which included Keane CJ, now Keane J of the High Court, and manifests a willingness to recognise the complications and consequences of war-related injuries. If it is ‘injury’ under statute, there is no apparent reason why it would not be an ‘injury’ for the purposes of the law of torts.

⁵⁸ *R v Blackman (No 2)* [2017] EWCA Crim 190 at [70].

⁵⁹ Brett Litz, Nathan Stein, Eileen Delaney, Leslie Lebowitz, William Nash, Caroline Silva and Shira Maguen, ‘Moral injury and moral repair in war veterans: A preliminary model and intervention strategy’ (2009) 29 *Clinical Psychology Review* 695, at 700.

⁶⁰ Shira Maguen and Brett Litz, ‘Moral Injury in Veterans of War’ (2012) 23 *PTSD Research Quarterly* 1, 1.

conflict, because the experience is at odds with core ethical and moral beliefs. This is called *moral injury*.⁶¹

Broadly, there are three elements of moral injury:⁶²

- (1) a betrayal of what is right;
- (2) by someone who holds legitimate authority, or by oneself;
- (3) in a high stakes situation.

Moral injury is about serious internal conflict, associated with guilt and shame.⁶³ In this way, it differs from PTSD, where the association is with fear. On operations, the physical arousal response to fear and danger is necessary to survive. This is problematic when back in a safe environment, where crowds and noise (amongst other things) can trigger a response. Conversely, moral injury is caused by mere exposure.

War, and war-like scenarios, are naturally moral minefields. While the naming of the condition is new, its existence is as old as war itself.⁶⁴ There is evidence of it in a Sophocles tragedy, through the Civil War, and among World War II airmen tasked with bombing civilians.⁶⁵ In Tim O'Brien's book of his experience in Vietnam, *The Things They Carried*, the author reflects:

I watched a man die on a trail near the village of My Khe. I did not kill him. But I was present, you see, and my presence was guilt enough.⁶⁶

Changes in the nature of war increase the moral challenges for today's service personnel. By this I refer to ambiguity of purpose, the asymmetrical nature of modern warfare, and the increased lethality yet also discrimination of weaponry. If the purpose is ambiguous, the enemy not clearly defined, and there is enhanced capacity to be selective about who or what is hit, the scope for a soldier to experience guilt is expanded. Notably, drone pilots – who

⁶¹ Ibid, 1.

⁶² Johnathan Shay, 'Moral Injury' (2014) 31 *Psychoanalytic Psychology* 182, 183.

⁶³ Brett Litz, Nathan Stein, Eileen Delaney, Leslie Lebowitz, William Nash, Caroline Silva and Shira Maguen, 'Moral injury and moral repair in war veterans: A preliminary model and intervention strategy' (2009) 29 *Clinical Psychology Review* 695, at 698.

⁶⁴ Maggie Puniewska, 'Healing a Wounded Sense of Morality', *The Atlantic* (online, 3 July 2015) <<https://www.theatlantic.com/health/archive/2015/07/healing-a-wounded-sense-of-morality/396770/>>.

⁶⁵ Ibid.

⁶⁶ Ibid.

work from computers far removed from the battle – have already shown a prevalence for moral injury;⁶⁷ they struggle to justify the consequences of their actions.

A study by Drescher et al,⁶⁸ based on interviews with personnel who had operated in combat zones, identified a number of event themes that may contribute to moral injury. These were: betrayal,⁶⁹ – by leadership, by peers, by trusted civilians, or a failure to live up to one’s own moral standard; disproportionate violence,⁷⁰ generally relating to the mistreatment of enemy combatants and acts of revenge; incidents involving civilians,⁷¹ for example by destruction of their property and assault; and within-rank violence,⁷² such as military sexual trauma, friendly fire, and fragging. Signs and symptoms (as identified by Litz et al. and Drescher et al.), include social problems, trust issues, spiritual and existential issues, psychological symptoms, and self-deprecation.

Although moral injury, as a separate diagnosis, is new to the field of psychology:

A rapidly growing community of scholars, clinicians, and organizations assert that moral injury is a signature wound of the combat veteran, and can lead to potentially devastating issues in the ranks if left unnoticed, or unaddressed.⁷³

However, a 1991 study (by Drs Hendin and Haas), undertaken well before the concept of moral injury had been described, found five factors that were linked to post-service suicide attempts. Two of them were guilt-related: guilt about combat actions, and survivor guilt. They also found that intensive combat-related guilt was the most common explanation for PTSD, such that there was a ‘need for greater clinical attention to the role of guilt in the evaluation of suicidal veterans with PTSD.’⁷⁴ It seems to me that much of what has been treated as PTSD may well in truth be moral injury. After all, PTSD explains hyper-arousal, but it does not well-explain suicidality.

⁶⁷ Adam Henschke, ‘Modern soldiers can kill a target on computer, then head home for dinner – and it’s giving them ‘moral injury’’, *ABC News* (online, 29 September 2019) <<https://www.abc.net.au/news/2019-09-29/unmanned-combat-drone-pilots-moral-injury-warfare-dissonance/11554058>>.

⁶⁸ Kent Drescher, David Foy, Caroline Kelly, Anna Leshner, Kerrie Schutz and Brett Litz, ‘An Exploration of the Viability and Usefulness of the Construct of Moral Injury in War Veterans’ (2011) 17 *Traumatology* 8.

⁶⁹ Reported by 70% of respondents, at 11.

⁷⁰ Reported by 74% of respondents.

⁷¹ Reported by 78% of respondents.

⁷² Reported by 30% of respondents.

⁷³ Erik D Masick, ‘Moral Injury and Preventive Law: A Framework for the Future’ (2016) 224 *Military Law Review* 223, at 224.

⁷⁴ Herbert Hendin and Ann Pollinger Haas, ‘Suicide and Guilt as Manifestations of PTSD in Vietnam Combat Veterans’ (1991) 148 *American Journal of Psychiatry* 586, at 586.

While these are relatively early days in developing an understanding of moral injury and its treatment, much of the academic literature – including Litz et al. and Drescher et al., on which I have chiefly relied today – has focused on developing assumptions for models of repair. Some key tenets are, *first*, moral injury presupposes an intact moral belief system, as it is only possible if acts of transgression produce dissonance, and dissonance is only possible if the subject has an intact conscience, including expectations about goodness, humanity, and justice. Those who genuinely seek help are struggling with self-judgment, shame and withdrawal, but are still capable of reclaiming goodness and moral directedness.⁷⁵ *Secondly*, there may be two aspects of moral repair and renewal, being: (a) psychological- and emotional-processing of the memory of the moral transgression, which is a formative and constructive process, involving uncovering the meaning, significance and the implications for the individual of the experience that can be shared and acknowledged; and (b) exposure to corrective life experience, increasing the accessibility of positive judgments about the self and the world by doing good deeds and seeing others do good deeds, as well as by giving and receiving care and love, in order to counter self-expectations of moral inadequacy.⁷⁶

So how will moral injury be treated in law? My research has not discovered any consideration by a Court of moral injury. However, its treatment is likely to be informed by the manner in which courts have dealt with somewhat similar conditions, such as PTSD and adjustment disorder.

Moral injury is not currently classified in the DSM. Nonetheless, there is sufficient medical and academic literature on the question that it is likely to come to be regarded as a recognised psychological condition.

Moral injury could not, logically, reduce criminal responsibility for the act which creates the injury. Blackman was affected by his adjustment disorder prior to the unlawful killing, which reduced his responsibility. Any moral injury caused by the unlawful killing could not have contributed to his actions, which preceded any such moral injury. Unlike adjustment disorder, which according to the evidence in *Blackman* is associated with an increased likelihood of committing or condoning morally reprehensible behaviour, moral injury has not been described as having that effect.

⁷⁵ Brett Litz, Nathan Stein, Eileen Delaney, Leslie Lebowitz, William Nash, Caroline Silva and Shira Maguen, 'Moral injury and moral repair in war veterans: A preliminary model and intervention strategy' (2009) 29 *Clinical Psychology Review* 695, at 701. These therapeutic approaches, including a proposed modified cognitive behavioural therapy, are elaborated at 701-704.

⁷⁶ *Ibid.*

On the other hand, there seems to me no reason in principle why moral injury could not found civil liability, at least where the injurious event was not the claimant's own act. However, the doctrine of combat immunity would pose problems in respect of events occurring in the course of actual military operations. And by analogy with PTSD, it would presumably be necessary for a plaintiff to prove the event which occasioned the injury.

CONCLUSION

To sum up:

- Courts need to be educated, usually by evidence, of the effects of psychological injuries, and responses to them.
- As the *Blackman* case demonstrates, in a striking way, evidence of psychological injury associated with operational service may significantly mitigate criminal responsibility, and have an impact both on liability (for example, through the partial defence of diminished responsibility), and in mitigation of sentence.
- There is obvious potential for the question which was determined by the Supreme Court of the United Kingdom in *Smith v Ministry of Defence* to arise in Australia, with shortcomings in pre-deployment training, procurement and equipment being excluded from combat immunity. If so, then there is scope for argument that psychological injury, although occasioned on operations, was caused by a breach of a duty of care if it could have been averted or mitigated by more effective pre-deployment training and preparation.
- As the medical diagnosis of PTSD requires a traumatic event, the veteran must pinpoint the traumatic event and prove that it occurred. Proof of an adjustment disorder may be easier.
- Moral injury is about serious internal conflict, associated with guilt and shame, caused by perpetrating, failing to prevent, bearing witness to, or learning about acts that transgress deeply held moral beliefs and expectations. Signs and symptoms include social problems, trust issues, spiritual and existential issues, psychological symptoms, and self-deprecation. Much of what has previously been considered to be PTSD might be better understood as moral injury.
- In law, moral injury would not reduce criminal responsibility for the act which creates the injury. However, there is no reason in principle why moral injury could not found civil liability, at least where the injurious event was not the claimant's own act,

although the doctrine of combat immunity would pose problems in respect of events occurring in the course of actual military operations. By analogy with PTSD, it would presumably be necessary for a plaintiff to prove the event which occasioned the injury.

I wish you the very best for your conference and deliberations, and hope that this paper can provide a starting point for discussion of how the law will deal with veterans with moral injury.