

Judgment of the Haifa District Court (T.A. 371/05)

Between

(1) Estate of the Late Rachel Corrie

(2) Craig R Corrie

(3) Cynthia A Corrie

(4) Christopher R Corrie

(5) Sarah E Simpson

Claimants

v.

The State of Israel - Ministry of Defence

Defendant

1. In the claim before me (T.A. 371/05) the claimants, the estate of the late Rachel Corrie ('the deceased'), the deceased's parents, brother and sister, are petitioning to direct the defendant, the State of Israel, to pay them compensation for special damages and general damages allegedly inflicted upon them as a result of the death of the deceased during the incident that is the focus of this trial. In addition to the aforementioned, the claimants have petitioned to direct the defendant to pay "punitive damages".

2. Summary of the claimants' amended Statement of Claim

- a. The deceased, Rachel Corrie, born on 10 April 1979, was an American citizen, residing in Olympia, Washington. On 16 March 2003, the deceased was killed during an incident, which is the focus of this case. She was 24 years old. The deceased was an activist in the International Solidarity Movement ('the Organisation' or 'the ISM').
- b. The claimants, through their Attorney Hussein Abu-Hussein, claim that on 16 March 2003, the deceased, together with other ISM activists, arrived at the "Philadelphi Corridor" in the Rafah area of the Gaza Strip where two bulldozers and an Israeli Defence Force ('IDF') tank were conducting operational activities. The claimants claim that the bulldozers were about to demolish a house in the area and that the deceased and her fellow ISM

members stood in the path of the bulldozers in order to prevent them from carrying out their task.

- c. At paragraph 8.5 of the Statement of Claim, the claimants state:

"At 1700 hours or thereabouts, the deceased stood near the house of Dr. Samir Nasrallah, which was designated for demolition, and one of the bulldozers was positioned 10 to 15 meters from her. The bulldozer approached the deceased and pulled dirt from under her feet. The deceased fell to the ground and the blade of the bulldozer ran over her leg and afterwards ran over her body. When the bulldozer reversed, the deceased was gravely injured and bleeding extensively in several parts of her body. However, she was still breathing.

The deceased was transferred to the Al-Najer Hospital in Rafah, where her death was pronounced after 20 minutes".

- d. The claimants claim that:

*" (...) the untimely death of the deceased was brought about as a result of **the intentional use of force by the bulldozer's operator**, which was unreasonable in all the circumstances, against the deceased's body while she was still alive and without her consent. In assessing the proportionality of the harm caused to the deceased against the harm the bulldozer's operator sought to prevent, it is considered that the use of force was extremely disproportionate and entirely unreasonable. The identity of the bulldozer's operator remains unknown to the claimants at this time, but they reserve the right to amend the statement of claim to reflect naming the bulldozer's operator and the military officers present at the time as defendants, once their identities are disclosed. In any event, the claimants claim **that the defendant was negligent** in supervising the bulldozer's operator and the military officers present at the time" (my emphasis).*

- e. The claimants claim that the actions of the bulldozer's operator and the other soldiers and officers present at the scene of the incident fell below the normal standards of behaviour which could be expected of a skilled professional in the circumstances of this specific incident.

- f. Furthermore, the claimants claim that the bulldozer’s operator and his commanders breached, inter alia, the bulldozer Operational Guidelines (the Guidelines were submitted as evidence and marked as exhibit T/31), in that they allowed the presence of people near the bulldozer, and did not remove the deceased and her fellow activists who were present at the time from the scene.
- g. The claimants claim that the defendant is responsible for the incident and for the death of the deceased both under international law and under the laws of vicarious and/or direct liability.
- h. The claimants seek a ruling that *“the incident which is the subject of this claim should not be regarded as a “war-related activity” which was brought about as part of an anti- terrorist activity in circumstances where there was a risk to life and limb”*.
- i. The claimants seek a ruling that they suffered evidential damage. They state that having reviewed the Military Police’s files relating to this incident, it emerged that no substantive, robust or objective investigation had been carried out in this case.
- j. Furthermore, the claimants claim that the Military Police investigators and/or the Coroner’s staff, who are all representatives of the defendant, breached a court order in allowing the deceased’s autopsy to take place in the absence of a representative from the American Embassy.
- k. Furthermore, the claimants look to the court – *“to rule that sections 23, 35, 36 and 41 of the Civil Wrongs Ordinance (as amended) are applicable in this case. The claimants claim that in the circumstances it is just and reasonable for the court to exercise its discretion and implement section 41 of the Civil Wrongs Ordinance given the unique circumstances of the incident in question”*.
- l. The claimants claim that the defendant should be ordered to pay damages on the following grounds:
 - i. Assault contrary to section 23 of the Civil Wrongs Ordinance (as amended)
 - ii. Negligence contrary to sections 35 and 36 of the Civil Wrongs Ordinance (as amended)
 - iii. Breach of the deceased’s right to life contrary to international humanitarian law, international human rights law and the Israeli Basic

Law: Human Dignity and Liberty 1992. The claimants argue that this breach amounts to a constitutional breach of a Basic Law.

3. Summary of the defendant's grounds for resistance

- a. The defendant, through its representatives, attorneys Irit Kalman-Brom and Nir Gancherski, claims in its grounds for resistance that –
“During the relevant time, and also at present (the first grounds for resistance was submitted on 23 June 2005) the State of Israel has been engaged in an uncompromising struggle against Palestinian terrorist organisations. Since September 2000, those terrorist fractions have engaged in a cruel and bloody battle against the State of Israel and its citizens. Terrorists have committed, and continue committing, the most appalling and unprecedented acts of terror on a daily basis. Those acts of terror are directed indiscriminately against all Israelis: men, women and children. Those murderous actions include shootings, use of IED, missile and rocket attacks, terrorist attacks using vehicles or cold weapons and suicide bombings.”
- b. The defendant claims that –
“The ‘Philadelphi Corridor’ is a main transport artery which is located east of the border with Egypt and, inter alia, crosses the city of Rafah. According to the Oslo Accord, this territory is defined as a territory where Israel has complete civilian and security control. Due to its attractive location, the corridor is used for smuggling weapons and terrorists to and from the Gaza strip. The volume of terrorist activity and the attempts to harm IDF forces in this area are disproportionately high compared to its relatively small size.”
- c. The defendant claims that until 16 March 2003, when the incident took place, the following terrorist incidents had been recorded: approximately 6,000 hand grenades had been thrown at IDF forces, there had been approximately 1,400 incidents of gunfire and sniper attempts, 150 bombs were laid, approximately 200 incidents against tanks were recorded and more than 40 mortar bombs had been fired. In addition, more than 100 tunnels used for smuggling weapons and terrorists had been exposed. The defendant states that *“as a result of the horrendous and unprecedented terrorist campaign mounted by terrorist organisations against IDF forces in the ‘Philadelphi Corridor’, three Israelis were killed and dozens more injured.”*

Therefore, and in the light of the extreme dangerousness of the ‘Philadelphi Corridor’, the security forces adopted security and operational steps, including detailed working procedures and guidelines, for working in this region.

- d. The defendant states that in view of the numerous terrorist attacks in the ‘Philadelphi Corridor’ it had to employ D9 bulldozers to level the ground in order to prevent further terrorist threats. *“The purpose of the [bulldozer’s] work is to uncover bombs which have been concealed in the ground in order to kill and maim the security forces and to uncover potential hiding places for terrorists in the vicinity of the corridor. Each bulldozer is controlled by an operator and an officer, the latter’s role is to direct the operator as the field of view from within the vehicle is restricted”*.

The defendant emphasised that given the real and immediate threat to human life due to sniper attacks, appointing a soldier to direct the bulldozer (a ‘director’) **outside the vehicle** is prohibited. *“It is prohibited due to the increased risk of doing so. Appointing an external director in the “Philadelphi Corridor” would inevitably mean that the director- soldier would be exposed to the risk of sniper fire etc. and all its consequences”*.

- e. At paragraph 38 of the grounds for resistance the defendant states that-
 - i. *“On 16 March 2003 at 1400 hours bulldozers began working in the ‘Philadelphi Corridor’. Approximately one-hour later ISM activists arrived in the area carrying banners and cameras and began disrupting the on-going military operation. The army tried to disperse the protesters using loudspeaker announcements and other crowd control measures such as throwing stun grenades towards them, using tear gas and even firing warning shots towards them. The army’s attempts to disperse the demonstrators were unsuccessful and the activists remained in the area. The work of the bulldozers continued despite continuous interruptions from the protestors. The decision to continue the work of the bulldozers in spite of the presence of civilians in the area was made due to the critical nature of the task, including the immediate and future danger to the lives of soldiers operating in this area from sniper attacks.*

In order to emphasise the real danger to which the operators of the bulldozer were exposed suffice to say that one hour before the incident a deadly fragmentation grenade was thrown in the direction of the bulldozer with the sole aim of killing the soldiers in its vicinity.

ii. *From examining the circumstances of the incident it transpired that at approximately 1700 hours the deceased, Rachel Aliene Corrie, began moving towards one of the two bulldozers operating in the area. The [relevant] bulldozer, operating in accordance with the regulations and while travelling forwards, piled building waste using its front loader arm. When the bulldozer was approximately 20 meters away from the deceased, the latter sat or kneeled on the ground believing or assuming that the bulldozer would stop when it approached her. The bulldozer continued travelling forwards with the dirt pile in front of it. When the dirt pile reached the place where the deceased was sitting she began climbing the pile, but struggled to keep her balance. During her climbing attempt, but before she had reached the top of the pile, the deceased decided to get down from the pile. She turned in the opposite direction and began climbing down from the pile when, unexpectedly, her leg had become entangled in something and she fell to the ground and lay down at the bottom of the pile. At the same time, the bulldozer continued travelling at a very slow pace towards the pile using an internal director while the dirt pile began covering the deceased until she was completely covered. The deceased's friends approached the bulldozer and began gesturing and shouting at the bulldozer's operator to stop. The bulldozer's operator and his officer stopped immediately upon noticing the actions of the young people, lifted the blade and reversed. Once the bulldozer had reversed, the deceased was uncovered lying on the ground, still alive. The deceased spoke to her friends and a few minutes later was taken to hospital".*

f. The defendant claims that the incident took place while performing an 'Act of State' "the implication of which to the jurisdiction of the court in this matter is that the claim should be dismissed".

The defendant claims that in the circumstances, the incident was defined as a 'war-related activity' and as such, the state does not carry responsibility for it. The defendant claimed that from the statement of claim itself it is evident that the deceased was injured due to an activity by virtue of section 3 of the Civil Damages (Responsibility of the State) Act 1952.

- g. Furthermore, the defendant claims that the criteria for reversing the burden of proof are not met. Therefore, the defendant claims that the burden of proof is on the claimants to prove their case.
- h. The defendant claims that the IDF forces operating in the area during the time of the incident were not negligent.

The defendant claims, inter alia, that the actions of the soldiers and/or the security forces were reasonable and intended to protect themselves and/or others from unlawful use of force. The defendant states that its actions and the actions of its representatives were careful and prudent. The actions were undertaken according to the guidelines, regulations and warnings regarding the security measures appropriate for use of weapons and action in the circumstances. The actions taken were reasonable and designed to enable IDF soldiers and officers to maintain the civil and military order to ensure effective law enforcement.

- i. Further and in the alternative, it was claimed that in the circumstances it would be correct to consider the operation of section 65 of the Civil Wrongs Ordinance (as amended) because the deceased had willingly put herself at risk. Therefore, the claimants should not be awarded any damages, or alternatively that any damages awarded should be substantially reduced.

It was claimed that the deceased was injured due to engaging in a prohibited and/or unlawful activity in clear breach of a Major General Military Directive decreeing the area was a 'closed military zone' to which civilian entrance is prohibited. It was claimed that the deceased exposed herself to injury deliberately while she remained in the Gaza strip in general and in the 'Philadelphi Corridor' in particular. It was claimed that the deceased assumed the risk upon herself in view of the numerous shootings and terrorist incidents in the corridor.

- j. The State claimed that even if it was decided that there was a causal link between the injury caused to the deceased and the actions of the army during

the incident, in the circumstances the deceased should be attributed contributory negligence at a rate of 100%, which cuts the causal link completely and nullifies this claim.

- k. The State claims that the autopsy on the deceased's body was performed in the absence of a representative from the American Embassy only after the Embassy informed Professor Hiss, Chief Pathologist in the Abu-Kabir Forensic Institute, that the autopsy could proceed in the absence of such a representative.
- l. In relation to the Military Police's investigation of the incident, it was claimed that a full and thorough investigation was carried out which included consultation with several other public bodies. In addition, a re-enactment was done, tens of people and witnesses were interviewed and investigations were carried out in order to uncover the truth. In this context, it was noted that once all procedures have been exhausted, the Military Police concluded that none of the people involved should be charged with any offence.
- m. On the basis of the above the defendant stated that the claim should be dismissed in its entirety and the claimants be ordered to pay the defendant's costs.

4. The Trial

- a. The court directed both parties to submit witness statements and the witnesses were questioned on those statements. Also, expert reports were submitted by both parties and the experts were cross-examined on their opinions.
- b. The parties agreed that the trial will be split such that the question of responsibility for the death of the deceased will be decided first. If the claimants are successful in establishing their case then the question of damages will be discussed.

This judgment therefore deals solely with the question of responsibility.

5. The facts

Having considered the evidence presented to the court and studied the oral evidence given by the witnesses in this court I hereby make the following findings of fact:

a. Place and time

The place of the relevant incident is the 'Philadelphi Corridor' in the Gaza strip, near Rafah.

The time is March 2003 - a period of daily warfare, i.e. daily sniper gunfire, missile fire and IED explosions directed at IDF forces. During this period, constant attempts were being made to kidnap IDF soldiers [see witness statement of Colonel Finki Zuaretz].

At the relevant time, the 'Philadelphi Corridor' was the subject of a Military Directive made by an IDF Major General, which decreed the area a 'closed military zone' and prohibited civilian access.

b. The 'Philadelphi Corridor'

The Corridor is situated east of the border with Egypt in an area defined as a 'security facilities zone' in which Israel had full civilian and military control according to the peace treaty with Egypt (see witness statement of Colonel Zuaretz).

During the relevant time, the Corridor was a place of conflict between IDF forces and the terrorist activists operating in Gaza. It was against this background that the corridor was being used as a main artery for smuggling weapons and terrorists to and from the Gaza strip. The terrorists leaving the Gaza strip exited with the sole purpose of entering Israeli territory and committing murderous terrorist activities, including suicide attacks in its territory. The volume of terrorist attacks and terrorist attempts in the area was particularly high and accounted for approximately 70% of all terrorist activities in the State of Israel at the time. The Corridor was a daily battleground and only combat soldiers were allowed to fight there (see witness statement of Colonel Zuaretz).

At the relevant time, Colonel Zuaretz was the commander of the Southern Brigade of the Gaza division, which was responsible for this territory and all military actions therein (see witness statement of Colonel Zuaretz).

c. Terrorist activities in the ‘Philadelphi Corridor’

According to IDF records, from September 2000 to the date of the incident that is the focus of this claim (16 March 2003), nearly 6,000 grenades had been thrown at IDF forces in the Corridor, approximately 1,400 incidents of gunfire and sniper shootings had taken place, 150 IED had been placed, approximately 200 incidents of shootings against tanks had been recorded and there more than 40 occurrences of mortar fire had taken place. These aforementioned events led to the injury and death of many Israelis (see witness statement of Colonel Zuaretz).

Furthermore, from 2001 to the date of the incident 47 tunnels had been discovered from the Israeli side and 64 tunnels from the Egyptian side of the border. The tunnels are used for smuggling weapons. In addition, some tunnels had been booby-trapped and car bombs had been detonated in the area (see witness statement of Colonel Zuaretz).

d. The use of the ‘Philadelphi Corridor’

The Corridor was used for movements of IDF troops in order to secure the border with Egypt and to prevent the infiltration of terrorists through that border. During the relevant time, there was no security fence in that area. The task of IDF troops was to prevent terrorist attacks, to prevent the infiltration of terrorists into Israeli territory and to prevent smugglings across the border, including the smuggling of explosives (see witness statement of Colonel Zuaretz).

e. The dangers in the ‘Philadelphi Corridor’

The Corridor is one of the most dangerous corridors in the Gaza strip and there have been daily attempts to harm soldiers there by shootings, launching of missiles, IED etc. This terrorist activity was made possible due to the topographical layout of the Corridor, which contained a large amount of building rubble, long grass and land folds. This enabled terrorists to find hiding places and organise for terrorist action against IDF soldiers (see witness statement of Colonel Zuaretz).

f. The International Solidarity Movement (ISM)

In considering the nature of the Organisation, I rely on the opinions of Mrs Ruth Yaron, former spokesperson for the IDF during 2002-2005, and on a research paper from the Institute of Intelligence and Terrorism named after Major General Meir Amit ('MALAM'). These statements make the following observations:

ISM was established in 2001 as a voluntary organisation.

*“The Organisation’s aim (as stated in its documents and its internet website) is to work alongside the Palestinian population against the “Israeli occupation”. They purport to achieve this aim by **apparently** using non-violent methods and “direct action”.*

*As can be gleaned from various documents, the Organisation declares that “it supports the right of Palestinians to resist the Israeli violence and occupation using an armed struggle”. Notwithstanding the fact that members of the Organisation express their views orally and in writing using the rhetoric of human rights and humanitarian organisations, **the actions of its members do not match these declarations. The Organisation exploits the discourse of human rights and morality in order to blur the severity of its de facto violent actions.** By doing that, the Organisation undermines the work of other human rights organisations which operate as they should and according to procedures governing humanitarian action in combat zones” (my emphasis) (see witness statement of Brigade General Yaron)*

Mrs. Yaron notes in her statement that the ISM is known for having “defended” Palestinian families despite the fact that they were implicated in terrorism.

In her opinion and supplementary statement dated 15 May 2011, Mrs Yaron highlighted **the lacuna between the declarations of the Organisation and the true nature of its operation and actions.** In her supplementary witness statement Mrs. Yaron relied on the research paper about the Organisation

prepared by MALAM and stated that the paper: “(...) *strengthens my view in that it supports my opinion regarding the nature of the Organisation and the lacuna between the declarations made and its de facto actions. The paper supports the fact that the Organisation operates through violence, which is inconsistent with its declarations*”.

Furthermore, Mrs Yaron states in her supplementary witness statement that:

*“In my first witness statement I said that “the Organisation caused its volunteers to be consistently sent to dangerous war zones while intensive combat action was underway, thereby unlawfully putting the volunteers’ lives at risk”. Recently I learnt about a travel warning issued by the US Government **on 16 March 2003**, which warns American citizens against visiting the Gaza Strip and the West Bank. This travel warning in itself strengthens my opinion that members of the organisation knowingly chose to travel to places where there is a clear risk to life and limb” (my emphasis)*

As stated above, Mrs Yaron included a copy of the MALAM paper to her statement. The paper stated, inter alia, that:

“3. In the years 2001-2005 during the “second Intifada”, the ISM periodically recruited volunteers for intensive periods of activity in the Judaea, Samaria and the Gaza Strip areas. The volunteers, who began arriving in the “occupied territories” did not stop at aiding the Palestinian population, but “specialised” in disrupting the operational work of the IDF”.

*4. ISM’s activities included, inter alia: positioning activists to act as “human shields” for terrorists wanted by the Israeli security services, monetary, logistical and moral assistance to Palestinians, including terrorists and their families; **disrupting demolition or “sealing-off” of terrorist’s homes who have carried out terrorist activities causing multiple casualties**” (my emphasis)*

g. **What were the IDF forces engaged in on the day in question: house demolition or ground exposure?**

The claimants state that the bulldozers were intent on demolishing the house of Dr Sameer Nasralla on the day in question.

I rule unequivocally that this claim has no foundation in fact.

On the day in question the two bulldozers, assisted by a smaller armoured personnel carrier were **only engaged in ground exposure work**. The platoon commander, S.R., described their mission on 16 March 2003 as follows:

*“On 16 March 2003 around lunchtime, two bulldozers (model DR9) and an armoured personnel carrier were ordered under my command to complete a task of exposing and levelling the ground in the “Philadelphi Corridor” (‘the corridor’). The task included levelling the ground and clearing it from weeds with a view to exposing possible hiding places for terrorists, which were being used to place IED against IDF soldiers. There was an urgent need to complete this task so that the look-out soldiers could scan the area, identify terrorists and prevent the placing of IED. **The purpose of the mission was in no way house demolitions and it was clear to anyone present in the area that the bulldozers were engaged in levelling the ground as they did not touch or demolish any houses**” (my emphasis)*

In this context, see also the witness statement of Colonel Zuaetz.

I would like to emphasise that both witnesses were cross-examined by the claimants’ legal representatives at some length, and this examination did not bring about any departure from their original position. **Both witnesses struck me as very reliable and I do not hesitate to rely fully on their statements in this judgment.**

h. **“Routine action” or a “war-related activity”?**

The claimants stated in their closing submissions that “(...) *there is no significant factual dispute between the parties in relation to the circumstances*

which caused the death of the deceased, (...) (para 21 of the closing submission), i.e. that the incident took place on 16 March 2003 on the edges of the “Philadelphi Corridor” during “routine works of ground exposure and levelling” (my emphasis)

Conversely, the defendant states that the ground exposure is not a routine action at all. The State claims that exposure is an operational task which is carried out by trained fighters (see the defendant’s closing submissions).

I side with the defendant in relation to this disagreement.

S.R, the force commander, gave evidence about the nature of the action. He stated that in relation to ground exposure the claim that this is a “routine action” is not accurate at all. The witness stated that due to the dangerous nature of the area, every entry into it was an action liable to result in a complicated incident. Therefore, this was a “*combat procedure*” – “*an operation in every way*”.

Colonel Finky Zuaretz has also referred to the exposure activity as very dangerous, in light of the daily routine in the “Philadelphi Corridor” which is a combat zone.

“We are talking here about a territory where daily combat is routine. It is not a question of if or when you will be shot at - there is shooting on a daily basis. IED are placed and detonated every day. There are attempts to kidnap soldiers every day. It is a war zone!” (see witness statement of Colonel Zuaretz).

(in this context see also further references to Colonel Zuaretz’s evidence, Commander S.R.’s evidence etc.)

I find that on the day in question the two bulldozers and armoured personnel carrier were **unequivocally engaged in operational combat action of ground exposure in a dangerous and unpredictable area**. The actions of the

IDF forces **were aimed at preventing acts of hostility and terror** in order to avert the danger of having terrorists hiding in the land folds and in order to expose IED concealed therein. Both the terrorists and the IED aim to kill IDF soldiers.

- i. Moreover, while members of the Organisation were demonstrating around the task force, which was acting for their dispersal, **a live grenade was thrown at the IDF force** (see witness statement of S.R).

6. Finding of facts regarding the circumstances which led to the deceased's death

On the basis of the evidence and the credibility of the witnesses before me I find the following facts regarding the circumstances which led to the deceased's death:

- a. The claimants called four eye- witnesses who are members of ISM and were with the deceased at the relevant time. They are: Richard Purcell, Alice Quay, Gregory Shnabelle and Tom Daley.

The four witnesses said that they arrived at Rafah as part of the ISM activities in order to protest against the occupation and its impact on the civilian Palestinian population. The witnesses testified that they document as observers the impact of the occupation on the lives of Palestinians, and they engage in **non-violent action** (note the relevant witness statements).

The witnesses testified that they were not aware of the travel warnings issued by the American Foreign Office alerting members of the public against travel to the Rafah area (note relevant witness statements).

In relation to the day of the incident the four witnesses testified that they arrived at the scene **in order to prevent house demolitions by bulldozers** (note relevant witness statements)

- b. The witnesses described the chain of events where the deceased was injured as follows:

Richard Purcell testified that at 1630 hours there were two bulldozers in the area. One of the bulldozers began some sort of action to the left-hand side of a partially demolished building. He states that most members of the group were standing behind the demolished building at a range of 70 meters from each other. At this stage, according to Richard, he stood with the deceased between Dr Sameer's partially demolished building and approximately 50 meters from the bulldozer. The deceased stepped forward until she was approximately 15-20 meters in front of Richard. At this point, the bulldozer turned around so that its front was facing Dr Sameer's house and began travelling forward. The witness testified that when the deceased was approximately 20-30 meters away from the bulldozer **she kneeled** in the bulldozer's path. The bulldozer continued travelling towards her while its blade was in the rubble at a height of approximately 1.5-2 feet or half a meter. The witness said that when the bulldozer reached the deceased she climbed on a small pile of dirt while the bulldozer continued travelling forwards. The deceased turned around and began to move away with a view to climbing down from the dirt pile. However, the pile was in motion as she was climbing down and then the deceased disappeared underneath the dirt pile. The bulldozer moved forwards at least four meters; the deceased's friends ran towards the bulldozer and only then, it had stopped.

Alice Quay stated that at approximately 1700 hours, she was sitting near Dr Sameer's house and from there she had a view of the deceased. She saw that the bulldozer was approaching the deceased so she and another person named William began walking towards the deceased. William began shouting and Alice saw the deceased covered in rubble up to her chest.

Tom Daley stated that the deceased and Richard were wearing high-visibility jackets. According to him, the deceased was standing approximately 40 meters from Dr Sameer's house and the bulldozer was moving toward the house and was approximately 15-20 meters from her. The deceased advanced a couple of meters and then **kneeled**. The witness states that that the bulldozer continued travelling towards the deceased while creating and pushing a pile of dirt. According to the witness when the deceased noticed that the bulldozer was approaching her, she stood, climbed on the dirt pile and while doing so most of her head was visible above the outline of the bulldozer's blade. However, the bulldozer continued travelling forward and the

deceased began falling into the dirt pile and the bottom part of her legs was buried. Tom and his friends began shouting but the bulldozer's driver continued travelling forwards. The deceased turned around and when the dirt pile had covered her, she was facing downwards. The bulldozer continued travelling forward and the deceased disappeared underneath the pile. The bulldozer paused for a few seconds and then reversed, revealing the deceased's body.

Gregory Shnabelle stated that the bulldozer approached the deceased while she was approximately 5-10 meters away from Dr Sameer's house. According to him, the deceased was wearing a high-visibility jacket and while the bulldozer was approaching her, she was waving her arms. According to him, the bulldozer created the dirt pile approximately 25 meters from the deceased. Gregory testified that he noticed Rachel standing and beginning to climb the pile while it was being pushed towards her. The pile was as high as half the bulldozer's blade and Rachel's height was about 1.80 meters. When the bulldozer approached Rachel it began pushing the dirt underneath her legs and around her ankles. She stood up and struggled to keep on top of the pile, but she lost her balance and fell back. The deceased was trapped underneath the rubble, the bulldozer continued travelling forwards and the deceased was trapped in the rubble. The bulldozer continued travelling with the blade down and ran over her entire body from her feet up to her head.

- c. The soldier who was operating the bulldozer at the time of the incident was a military reserve man Y.P. In his statement, Y.P noted the following facts:

"9. Before going out on this mission we were briefed by the commander. During the briefing and given the location of the operation, which is known as an area where there is a real and immediate threat to life from Palestinian shootings, the commander explained that there is an absolute prohibition on leaving the armoured bulldozer, and emphasised the fact that Palestinian shooting is also aimed at the bulldozers (shootings from various weapons including hand-guns, anti-tank weapons and RPG). We were also told by the commander that there are demonstrators in the area, some of whom are foreign citizens.

10. During our operation we were disturbed by a group of 3-4 protestors. Afterwards another 8 protestors joined them. During the operation, I did not know the identity of the protestors who could have also been terrorists. They would approach the bulldozers and try to prevent us from carrying out our task by jumping before the bulldozer's blade or standing behind it. The commander told us on the radio that we should not harm them, so every time the protestors interrupted us to the extent of putting their own lives at risk, we retreated, or relocated south a number of times. The protestors then achieved their goal, which was to delay us and generally make the completion of our task more difficult. We tried to disperse the protestors in order to prevent their interruptions but even crowd dispersal measures would not deter them.

11. There were dirt piles in the area which were approximately a meter and a half tall, with tall weeds. During the works, the bulldozer pushes forward dirt piles and building waste thereby forming earth piles. During the incident in question, I pushed an approximately two meters high dirt pile forwards. The bulldozer travelled slowly and very carefully at a speed of approximately 1 km/h. Obviously, while travelling forwards I did not see anyone standing in front of the bulldozer.

12. It is important to note that the bulldozer is very noisy when operational and we were also wearing protective earphones. Therefore, we were unable to hear what was happening outside the bulldozer.

13. At some stage I reversed. Apparently, and as I learned after the event, the protestors had run towards the bulldozer. I told the bulldozer's commander to look out because I could not see anything. The bulldozer's commander could not see people behind the bulldozer so we reversed. At this stage, the bulldozer's commander told me that the people are waving their arms and told me to stop. If I had seen anyone standing before the bulldozer, I would have obviously stopped and avoided injuring them.

After we had reversed because we had seen that people were waving their arms as if trying to tell us something, and since they began taking photos of

us, I became worried that I had hit someone, so I reported it to the commander, as you can hear from the radio voice recording. I only learnt that we had hit someone from the reports on the radio.

14. I would like to point out that visibility from within the bulldozer is restricted due to its structure and its armoured construction.

15. I did not notice anyone in my travel route and I certainly did not notice anyone on the dirt pile I was pushing. I did not see where the deceased was standing and I could not have known where she was standing. One thing is clear – she was not in my line of vision. If I had noticed her, I would have stopped the bulldozer. All day we were careful not to hit the people present in the area who were disrupting our operation. We gave a lot of thought and effort to avoiding injuring them. The pile created by the bulldozer consists of a number of peaks and not just one like a pyramid. The pile separating the bulldozer and deceased and on which the deceased had climbed was a wide and uneven pile, created from rubble collected in the area. It is likely that anyone trying to climb it would sink into it straight away. Therefore, there could not be a situation where the deceased was standing for a few seconds on top of the pile in a stable manner. If the deceased had made it to the top of the pile, an event which I do not consider is likely, then it is possible that she was standing on one of the peaks of the pile (one of several) outside my line of vision because I did not see her. If the deceased had been standing in my line of vision then I would have of course seen her because I was conducting my mission very carefully. I did not see anyone of the protestors giving me any warning sign before the event took place”.

The bulldozer's operator was questioned at length about his witness statement. He was consistent in saying that he did not see the deceased standing in front of the bulldozer during the incident. The cross-examination did not change anything to his original statement. The soldier strikes me as reliable and I have no reason to doubt what he has said.

- d. **Not one of the soldiers involved saw** the deceased while she was standing in front of the bulldozer (see various statements)
- e. The radio recording, which is an unequivocal and objective piece of physical evidence, supports the defence statements and proves categorically that the bulldozer team did not see the deceased.

The video camera was not initially directed towards the location of the incident. Only after the incident had been reported, the camera was directed to find the place of the incident and homed in on it. However, from the soldier's initial report on the ground, as the radio recording documents in real time, **it is clear that at first the soldiers had no idea who had been injured and what the cause of the injury was.**

- f. The defendant submitted as evidence an expert report from the engineer Mr Yoram Menshuri (retired IDF Major). This report focused upon the visibility from armoured vehicles and their characteristics.

Mr Menshuri examined the bulldozer's field of view at various heights, which represents typical heights of people and various areas in the body. In addition, he examined the field of view from the ground.

In analysing the field of view of the bulldozer's driver/operator he found that:

"1) At the front of the bulldozer, in a horizontal line measuring 1.80 meters in height off the ground and positioned less than 10 meters from the bulldozer's operator (approximately 5.5 meters from the blade) one cannot see anything (i.e. it would have been impossible to even see the top of the deceased's head). The lower the horizontal line is (assuming the deceased was kneeling) the blind spot of vision increases to over 10 meters.

2) The most prominent factor in the operator's field of view is the engine hood (this is, in fact, similar to non armoured vehicles).

3) *At the front of the bulldozer at an angle 10-20 degrees to the right and 10-20 degrees to the left there is a blind spot because of the bulldozers pistons. The area is greater in an armoured vehicle as opposed to a civilian bulldozer because the pistons have to be armoured as well.*

4) *The blind spots at the front at an angle of 5-10 degrees to the right and 5-10 degrees to the left are because of the exhaust and the air filter hood.*

5) *While operating the bulldozer, the operator is focused on the position of the blade, especially the lower sides of the blade (the armoured structure, as shown in the field of view analysis, enabled the operator to see both sides of the blade. If a person comes from the side of the bulldozer to its front at a distance of less than 5.5 meters from the blade, there would be no chance for the operator to see this person.*

6) *The shorter the height of the operator – the more restricted the field of view is”.*

Regarding the field of view of the bulldozer’s commander, it was said that even if *“the commander has the ability to improve his field of view by dangling his upper body through the commander’s hatch”* then in this case *“the sniper threat in the area prevented the commander from taking his head out of the vehicle and therefore the entire command of the vehicle was conducted from the operator’s booth. As a result the commander could not have contributed to the operator’s field of view in the area close to the blade.”*

Furthermore, the expert report states that *“one has to consider that soldiers wear protective glasses which, during prolonged periods, get covered in steam. This makes it even more difficult to notice people at the front of the bulldozer”*; and *“while working the bulldozer produces small clouds of dust which also contribute to a restricted field of view”*.

Regarding the second bulldozer’s team and the armoured personnel carrier team, the expert noted that *“although the field of view at the front of the second bulldozer was*

checked, it does not appear to be relevant because that team was busy undertaking its own tasks and trying to avoid harming the protestors who were operating nearby. The same thing can be said about the armoured personnel carrier team which was engaged in securing the soldiers while remaining vigilant about terrorists in the perimeter area.”

For the reasons stated above, Mr Menshuri concluded, *“it is clear to me that the soldiers did not see, could not have seen and did not have a chance to see the deceased”*.

Further, the defence expert referred to the possibility of **installing cameras** in the bulldozer, which was raised by the claimants’ expert, Mr Esban. He stated that effective camera equipment could have been installed at a cost of only a few hundred shekels.

Mr Manshur ruled out this option stating –

“It is not possible to install several cameras connected to several screens due to the cameras’ limited durability and due to the inability of the operators to watch them all simultaneously while conducting operational tasks. In addition, a camera which can transmit a 360 degrees picture to one screen does not exist and therefore the recommendation made by the claimants’ expert whereby a simple and cheap camera equipment, costing only a few hundred shekels would have given the vehicle’s operator and commander a 360 degrees field of view, is impractical and ineffective”.

- g. I should point out that even the claimants’ expert, Mr Asher Esban, an expert in safety and accident investigation, stated in his report **that it is doubtful if the bulldozer’s operator and his commander had seen the deceased** while she was behind or near the pile they were pushing:

*“*It is doubtful if the vehicle’s operator and his commander had seen the deceased while she was behind or near the pile they were pushing using the bulldozer.*

**The commander of the force who was sitting in the armoured vehicle could not have seen the deceased who was beyond the dirt pile and beyond the bulldozer due to its incorrect position” (my emphasis)*

During questioning, Mr Esban was asked whether it is correct to say that given the position of the forces at the time that **they could not have seen the deceased**, he responded that -

“There was no possibility that the armoured vehicle and both D9s could have seen”

Mr Esban continued:

“From the position where the armoured vehicle and both D9s were standing they could not have seen the deceased, if the deceased was behind the dirt pile”.

- h. The behaviour of the members of the ISM organisation, including the deceased, was not only unlawful due to the fact that it was in breach of a Major General’s Directive decreeing the area a **“closed military zone”** and prohibiting the presence of civilians in the **“Philadelphi Corridor”** area, it was also irresponsible. Mrs Ruth Yaron described the situation adequately in her report:

“The tragic event which is the subject of this claim, brings to the fore the irresponsible and unlawful manner in which members of the Organisation conducted themselves and particularly, the deceased. This behaviour is typical of members of the Organisation and is expressed in its members’ willingness and consent, including that of the late Rachel Corrie, to risk their lives, whether by their presence in the “Philadelphi Corridor” which is dangerous (it is known that there is daily combat action in this area which includes: shootings, sniper fire, IEDs, missile launching, throwing of live grenades etc), or through their choice of serving as human shields from various dangers in the name of the Organisation.

In the event which is subject to this claim, Rachel Corrie, an Organisation activist, chose to be present in the dangerous “Philadelphi Corridor” without authorisation (of course) and without any protection while exposing herself to a life threatening situation. (This is a combat area and only combatant are allowed to be present). Furthermore, the deceased chose to stand in front of a large, heavy and dangerous operational vehicle. Even when the vehicle was approaching her at a snail’s pace allowing her to escape easily, she chose to remain standing. This behaviour demonstrates that the deceased was prepared to put her life at risk out of her own free will in the name of the Organisation. This behaviour, which is typical of members of the Organisation and their activities, has brought about the tragic outcome of this incident.”

- i. There is almost not dispute between the claimants’ witnesses and the evidence of Y.P., the bulldozer’s operator, and A.V., the bulldozer’s commander, regarding the circumstances in which the deceased died. Therefore, I find that the circumstances of the incident were as follows:

On 16 March 2003 IDF forces were engaged in a land exposure mission in the “Philadelphi Corridor”. **A Directive issued by an IDF Major General decreed that the area was a “closed military zone” and prohibited entry of civilians into it.** Members of the ISM Organisation breached this Directive, arrived unlawfully to the “Philadelphi Corridor” area, interrupted the bulldozers, which were engaged in ground exposure and made every effort to prevent them from doing their job. From the reports in the operational diary, it seems that crowd dispersal techniques, which were employed by the forces in the area, such as stun grenades, tear gas and even warning shots near the protestors was futile in getting the ISM members to leave the area. The IDF forces were very careful not to injure civilians. Indeed, members of the Organisation had partially achieved their aim because due to their constant interruptions the force moved the location of the mission south several times.

From the evidence before me it emerges that at approximately 1700 hours the deceased was walking and standing approximately 15-20 meters from the relevant bulldozer and kneeled. The relevant bulldozer is a large, clumsy and armoured vehicle of a DR9 make. The operator’s field of view from within the bulldozer is limited. At

some point the bulldozer turned around and began travelling towards the deceased. The bulldozer was pushing a high pile of dirt. As far as the bulldozer's operator was concerned, the deceased was standing in a "**blind spot**" in his field of view. The deceased was situated behind the bulldozer's blade and behind the pile of soil and therefore the bulldozer's operator could not have seen her.

The bulldozer was travelling at a very slow pace, around 1 km/h.

When the deceased noticed the dirt pile approaching her she did not move away from the scene, as every reasonable person would have done. Instead, she walked towards the bulldozer and began climbing on the pile. However, because the pile of dirt continued moving, as a result of being pushed by the bulldozer, and due to its loose and soft consistency, she was trapped in the pile and fell over.

At this stage when the deceased's legs were concealed by the dirt pile her friends saw that she was trapped and ran towards the bulldozers signalling by waving their arms and shouting for it to stop. By the point the bulldozer's operator and his commander noticed the deceased's friends and stopped the vehicle, a significant part of the deceased's body had already been covered in dirt.

Not all of the deceased's body was covered in dirt. The fact of the matter is that when the bulldozer reversed, the deceased's body was seen sticking out of the dirt pile, **while she was still alive.**

The deceased was taken to hospital and pronounced dead some 20 minutes later.

Professor Hiss who conducted the autopsy stated in his report that:

"Having conducted an autopsy on the body of Ms Rachel Alien Corrie, 24 year old woman, I am of the view that her death was caused by pressure to her chest ("mechanical suffocation") with fractures to the ribs and spine, the collar bones and puncture wounds to the right lung with bleeding. Additionally I found a tear in the upper lip of the mouth and a dry friction wound on the left cheek".

I unequivocally conclude that there is no basis to the claimants' argument that the bulldozer hit the deceased intentionally. This was **a very unfortunate accident and not a deliberate action.** No one sought to cause harm to the deceased. I am persuaded that the bulldozer's operator would not have continued his actions had he seen the deceased standing in front of the bulldozer, as he and his colleagues had done on previous occasions that day, when they changed the location of their operation due to the disruptions caused by members of the Organisation.

Therefore, I find that the deceased's death was caused as a result of an accident, when the deceased tried to climb the pile of dirt unsuccessfully. She got trapped in the pile and fell over. The bulldozer continued pushing the dirt pile until it stopped once the deceased's friends signalled to the operator that an accident had occurred.

These are the facts.

7. Was the ground exposure action a "war-related action"?

a. The defendant's claim

The defendant claims that according to the evidence given by soldiers and the area commander at the time, Colonel Finky Zuaertz, the IDF activity on the day in question was a "war-related action" as defined in the Civil Wrongs Ordinance (Responsibility of the State) Act 1952 (thereafter 'the Ordinance'). Therefore, the defendant argues that pursuant to section 5(a) of the Ordinance the state is not responsible for the alleged damage.

The defendant claims that from the testimonies brought before the court it is clear that the "Philadelphi Corridor" was an area where daily combat action took place. In addition, it was established that the ground exposure action could not have been postponed, given the increased threat to life. It was argued that the ground exposure action was necessary due to the cumulative threat of terrorist activity. The purpose of the action was to expose the ground with a view to preventing the placing of IED and hiding terrorists in the land folds. It is therefore a anti-terrorist action.

The defendant argues that it is clear from the nature of the mission that it is a war-related action. In this context the defendant points out that the action took place inside armoured vehicles; the military force was composed of combat troops, the force was under threat to life and as the operations diary states, a live grenade had been thrown towards the force at some point before the incident. The nature of the Corridor is war-like. The defendant's witnesses all testified about the feelings of peril and threat to life they had experienced. The troops were under strict instructions not to leave the armoured vehicles, even for the purpose of relieving themselves, due to the danger of sniper fire.

The defendant emphasised that the troops who carried out the ground exposure mission did not seek to impose law and order in the ordinary sense of the term. The aim of the mission was to prevent acts of terrorism and to protect the lives of IDF troops and Israeli citizens. The State claims that the perceived fact that the troops were not in danger from ISM members but from terrorist fractions is immaterial to the legal definition of "war-related action".

b. The claimants' claim

The claimants state that even taken at its widest the term "war-related action" could not be applicable to a situation where there is no opposing combatant force, but rather two bulldozers accompanied by an armoured personnel carrier conducting ground exposure activities, where the troops were not exposed to any danger for five hours.

The claimants cited the case of *Jamal Kassam Bney Uda v The State of Israel* 2002 (thereafter "the Bney Uda case") where a clear distinction was made between IDF actions in the territories which constitute "war-related actions", and actions which do not meet this definition. The applicable test is the **objective** risk test.

The claimants argue that according to the judgment in the Bney Uda case what needs to be considered is the essence of the action and the special risk caused by it. In order to consider whether the action which caused the damage is a war related action or not, one must consider the action itself, rather than the war. The defendant's claim that the very fact that at the relevant time IDF forces were conducting ground exposure

activities with a view to exposing IEDs does not mean that all the IDF actions in the “Philadelphi Corridor” at that time were “war-related actions”. It is not enough to say that this was a period of war in order to determine that the relevant action is necessarily a war related action. Even at times of war, it was argued, there are actions taken by the army which are not exempt pursuant to section 5 of the Ordinance.

Not all IDF actions in the territories are war-related activities. The circumstances of the incident should be examined as a whole and each incident should be decided on a case-by-case basis.

The claimants claim that in the circumstances of the deceased’s death there is no justification for determining that section 5 of the Ordinance is applicable.

In addition, the claimants claim that the troops’ sole mission was ground exposure. This was a routine action carried out several times a week. The claimants argue that even if I was to accept the state’s argument that this was an area with a history of IEDs, then in relation to this specific task, there were no reports of additional risks. Moreover, objectively speaking, it was not argued or proved that the troops were in any way facing a threat to life or limb. All that happened was that the foreigners tried to disrupt the work of the bulldozers under the assumption that they were intending to destroy Palestinian houses in the outskirts of the Corridor. In addition, the fact that the exposure activity continued for several hours proves, albeit ex-post, that the troops were not exposed to any danger from the continued presence of the foreigners around the bulldozers.

The claimants argue that the judgment distinguishes between routine operational action, which does not exempt the state from responsibility, and war-related activities where there is a grave risk to life and limb. In this case, it is clear that the foreigners did not endanger the soldiers sitting in their armoured vehicles. The incident itself cannot fall under the definition of war-related action simply because the Corridor is a dangerous area.

**8. Was the ground exposure action on the day of the incident a “war-related action”?
discussion and ruling**

- a. Section 5 of the Civil Wrongs Ordinance states:

“The state shall not be responsible in damages for actions taken through war related activities of the Israeli Defence Force”

“war related activity” is defined in section 1 of the Ordinance as “including any act of anti-terrorism warfare, hostile acts or uprisings, as well as actions for the prevention of terror, hostile action or uprising which was done in circumstances of danger to life or limb”. (This was the definition at the time of the incident. An amending order (no. 8) amended this section subsequently).

- b. The claimants’ attorney has repeatedly stated that the soldiers did not face any risk from ISM members. He stated that it was a fact that the ground exposure action had continued for some five hours and in that time the soldiers did not face any danger from the fact that the foreigners were present around the bulldozers.

I reject this argument.

The soldiers were conducting the ground exposure activity in order to prevent terrorists from hiding in the land folds and injuring IDF troops or placing IEDs which could cause casualties.

While conducting the ground exposure activity the soldiers were in real and immediate danger. This is evident by the fact that a live grenade was thrown at the forces moments before the deceased’s death. It is true that the troops were in no danger from the ISM activists, but the troops were at all times in danger from Palestinian terrorists firing sniper shots, missile shots and IED.

- c. The claimants’ attorney based his argument on the Bney Uda judgment. However, following this judgment the Israeli Parliament (the Knesset) changed the law and widened the definition of “war-related activity”. The law as it stands is significantly different from the law in force at the time of the incident. The law which is currently in force states that a “war related activity” is also:

“an activity for the prevention of terror, hostile acts or uprising undertaken in circumstances where there is a risk to life and limb”.

Therefore, the Bney Uda case cited is no longer relevant to the present case.

- d. I am persuaded by the words of Colonel Zuaertz that the ground exposure work was an action which could not have been postponed, and that any delay would have meant that people’s lives were being put at risk due to the cumulative risk from hostile terrorist activity.
- e. Even the method and character of the mission are testament to the fact that it was a “war-related activity”. In this context I should mention several facts which support that:

The action was undertaken by armoured vehicles, the military force was mainly composed of combatants; the force was exposed to a threat to life and as the operational diary states, **a live grenade had been thrown at the force shortly before the incident**. The nature of the Corridor is war-like. All the defendant’s witnesses spoke about the peril they were in and that due to the threat of sniper fire, there was an absolute prohibition to leave the armoured vehicles, not even for troops to relieve themselves.

- f. The deceased found her death in an accident which took place while she was seeking to prevent IDF troops from carrying out a ground exposure action which was essential to the prevention of terrorist actions, while the soldiers endangered themselves in order to carry out the mission.

I am persuaded that the ground exposure action by the bulldozer on the day in question was done as part of a clear operational war related activity aimed at preventing hostile and terrorist acts. Ground exposure is aimed at preventing the danger from terrorists hiding in land folds and in order to expose concealed IEDs which are **aimed at killing IDF soldiers. For the duration of the ground exposure IDF soldiers were exposed to life threat from Palestinian terrorists.**

Therefore, I rule that the ground exposure activity which the IDF force was engaged in at the time of the incident was a “**war related activity**” as defined in the **Ordinance**.

9. The outcome of the finding that the deceased died during a “war related activity”

Given the above finding, it follows that pursuant to section 5 of the Ordinance the State is not responsible for any damages caused to the claimants by the war-related activity.

It therefore follows that the remaining grounds raised by the claimants also fail.

However, notwithstanding the above, I should still consider the claimants’ remaining grounds below.

10. Evidential damage

The claimants’ case

- a. The claimants’ argument regarding the evidential damage caused to them is twofold. First, it is argued that the investigation conducted by the Military Police after the event was negligent and unprofessional, which caused the claimants evidential damage. Secondly, and this ground was supplemented to the amended claim, relates to the evidential damage caused by the conduct of the Institute of Forensic Medicine due to a breach of a judicial order and destruction of audio recording documenting the deceased’s autopsy.
- b. Dealing first with the evidential damage caused due to a breach of a judicial order by the Institute of Forensic Medicine.

On 17 March 2003, a day after the incident, the military prosecutor issued an order to open an investigation into the circumstances of the incident. An investigation team led by the witness Shalom began working on the same day. The team included three soldiers: Sergeant Major Shalom, who, as already mentioned was leading the team, Staff Sergeant Oded Nofenberg and Staff Sergeant Elad.

On 18 March 2003 the investigation team applied to the Magistrate (Hashalom) Court in Rishon Le-Zion for an order permitting an autopsy to be carried out on the body of the deceased, pursuant to section 26 of the Investigation of Cause of Death Act 1958.

The court asked the investigator to seek the deceased's family's consent to the autopsy. Indeed, the following day, investigator Elad appeared before the duty judge and informed her that the family gave their consent to the autopsy, but only on condition that the surgeon would be a civilian and not a military doctor, and that the autopsy will take place in the presence of an official from the American Foreign Office.

On this basis, HHJ Irit Weinberg-Notowitz ordered, inter alia that *“the autopsy be carried out at the Institute of Forensic Medicine in Abu Kabir by a doctor who is not a military man and in the presence of a representative from the American Foreign Office”*.

Professor Yehuda Hiss conducted the autopsy and submitted a report to the court. Professor Hiss testified that he was made aware of the conditions set by the family for carrying out the autopsy, as they were set out in a letter which he received from the family. He had also received the court order referred to above. Ultimately, the autopsy was carried out in the absence of a representative from the American embassy. Professor Hiss states that this was done after an additional fax message was received from the family where it was stated that they consent for the autopsy proceeding in the absence of an American representative.

The claimants argued that Professor Hiss' claim is incorrect. They state that a careful reading of the fax message reveals that the family only state that they consent to the autopsy taking place, but does not state that the conditions which have been set both in the court order and the letter to Professor Hiss are nullified.

It is on this basis that the claimants claim that the investigation team (and the Institute of Forensic Medicine) breached the court order. This is because there is no dispute that there was no American representative at the time of the autopsy. The state that

Professor Hiss' explanation as to why the autopsy went ahead in the circumstances should be rejected.

Furthermore, it is claimed that Professor Hiss recorded the course of the autopsy on a tape and later on after he had written the report, the audio tape was destroyed.

- c. Regarding the evidential damage caused due to the alleged negligent investigation by the Military Police:

The claimants state that the investigation was negligent. They claim that the investigating team did not visit the scene of the incident and failed to take measurements and any photographs at the scene. The vehicles involved in the incident were returned to base on the day and did not remain on the scene for inspection.

The claimants argued that despite the defendant's claim that it was impossible to go to the area given the security risks and it being hostile environment, the investigating team could have gone out in armoured vehicles accompanied with combat soldiers.

Further, the claimants state that the investigation team drew amateur drawings of the scene in script and not to scale. They relied entirely on the soldiers' evidence and failed to rely on first source information at all.

The claimants further claim negligence in the investigation team's failing to intercept the radio recording (the "Queen of Evidence" as it was called by the Claimants) and transcribing it. They claim that the tape evidences, inter alia, the things that were said by the soldiers during the incident, before and after.

The tape was only seized on 23 March 2003, i.e. seven days after the incident and despite the fact that the investigators knew of its existence at the beginning of the investigation. Investigator Oded was asked about this delay and responded that he cannot, as an investigator with the Military Police, confiscate everything he wishes to take and there are certain items which require a special authorisation. He also stated that the tape was at the hands of senior commanders.

The claimants further stated that the defendant does not have any reasonable explanation to account for the fact that no witness statement was taken from the observer who was responsible for the recording, which is further proof of the negligent investigation. The claimants claim that the first transcript of the tape, which was edited by Staff Sergeant Dror, was amateurish, partial and unprofessional. The claimants sent the tape to be transcribed by an independent professional and the result was completely different. Additionally, the claimants claim that the investigation was negligent because the content of conversation between soldiers in the five hours prior to the incident was not properly investigated (both on the radio and on mobile) and from the time the foreigners arrived from about 1200 hours.

The claimants added that the investigation was corrupted because during questioning of A.V. by Military Police, Captain (retired) Baruch entered the investigation room and ordered A.V. to stop giving evidence and not to co-operate with the investigators under the instructions of the then Major General Doron Almog.

It was further claimed that during the trial it transpired that a great number of operational investigations had been conducted following the incident, some of the before, during and after the Military Police began its investigation. These investigations were carried out as a “lessons learned” exercise for the IDF but the Military Police investigators were not allowed to use them as part of their own investigation and they therefore remained confidential. As part of the operational investigation, soldiers and commanders spoke about the incident before the Military Police became involved and it is clear that this has caused problems regarding them coordinating their stories later on.

Furthermore, the claimants claim that the defendant had been negligent in that despite the fact that senior witnesses referred to Ground Exposure Procedures, mission files and “distancing” Procedures, which governed the force’s actions on the day of the incident; those procedures were not made available to the court. The claimants state that should be held against the defendant because it is reasonable to assume that consideration of these procedures would have shed a light on the force’s standard of behaviour at the relevant time.

The claimants point to further failures on the part of the defendant such as: not investigating relevant Palestinian witnesses who were connected to the incident such as the medical team in the ambulance which arrived from Rafah and took the deceased to hospital. It did not consider the problematic background of the platoon which the soldiers came from. The claimants claim that this “desert search” platoon has historically included soldiers who have taken extensive quantities of drugs. It claims that the defendant did not consult with an accident and safety expert during the Military Police investigation and it did not seize photographs from the scene of the incident, which were taken by the deceased’s friends around the time of the event.

- d. For the above-mentioned reasons the claimants claim that evidential damage was caused to their case. Therefore they claim that justice, as well as the social need to deter potential defendants from losing evidence in this manner, requires that the burden of proof be transferred to the defendant to prove lack of negligence.

e. **The defendants submission regarding evidential damage**

- (1) The defendant argues that no evidential damage was caused in this case.
- (2) The defendant states that evidential damage cannot form the basis of a standalone claim. At most, if evidential damage is proved, then an “evidential draw” will ensue which will transfer the burden of proof.

The defendant stated that if evidential damage is raised then it is the claimants’ responsibility to demonstrate that there was a positive obligation on the part of the defendant to preserve evidence.

In this case, the defendant claims, the claimants did not so demonstrate.

- (3) Regarding the claim that the defendant should have left the vehicles where they were at the time of the incident in order to conduct the investigation and even not to evacuate the deceased, the defendant states that it is “entirely baseless”. The defendant claims that:

“The deceased was taken to hospital by Palestinians. Is it conceivable that the IDF would insist on leaving the deceased where she lay until investigators arrived? Is it conceivable that the fact that the deceased was taken to hospitals by locals would be held against the State?”

- (4) The defendant claims that investigations conducted by the police or the army are not conducted with the aim of adducing evidence to be used in a civil claim.
- (5) The defendant claims that the claimants’ expectation that it would locate radio tapes which documented the moments before the incident were unrealistic. This is because the radio network is not routinely recorded.
- (6) Regarding the claimants’ claim that the Military Police investigators failed in their task in not investigating the procedures they had confiscated; the defendant claims that the Military Police located the procedures, considered them and concluded that they were not relevant to war related activities. This is because those were work procedures which referred to training and learning, rather than military operations or war.
- (7) Regarding the claimants’ claim that the video recording was only intercepted by the Military Police several days after the event, the defendant argues that the claimants made claims without any evidential basis as if an invisible hand had edited the recordings.

The defendant claimed that –

“The routine purpose of the recording is to scan the area in order to identify threats to IDF forces in the “Philadelphi corridor”. Therefore, at the time of the incident the camera was not directed to the location of the incident as it was not its purpose and it was also not recording”
(see para 17 of S.R’s statement)

Moreover, from listening to the tape it is evident that the bulldozer's operator did not see the deceased before the bulldozer.

(8) Regarding the alleged evidential damage due to the actions of the Institute of Forensic Medicine:

The defendants state that the claimants' arguments are bewildering because the claimants expressed their reluctance to the autopsy taking place to begin with. Indeed, when they eventually received the deceased's body it was cremated.

The defendant states that it was the Military Police which initiated the autopsy as part of the investigation, rather than the family.

The defendant claims that the family did not express a preference as to who should be present at the autopsy and what their qualifications should be.

The defendant claims that the ultimately, Professor Hiss conducted the autopsy after he had received a letter from the Consulate stating that the autopsy could go ahead without the family's representative.

The defendant claimed that –

“Although the Institute of Forensic Medicine did not strictly speaking follow the court order which stated that a representative for the family must be present, the institute as far as the family's wishes were concerned, caused no damage because the family agreed to forgo the representative stipulation”.

(9) The defendant states that the conduct of the authorities in question was beyond reproach. The claim regarding evidential damage is being put forward only to add volume to the claim. The defendant stated that the criteria for evidential damage are not made out. The claimants did not prove that they had other available sources to prove their claims during the trial. In this case, there is ample evidence.

The defendant also claims that even if the court had ordered switching the burden of proof in this case, it still considers that it has been successful in contradicting the claimants' arguments and proving its arguments categorically.

(10) The defendant states that while conducting the trial the claimants chose not to call relevant witnesses (such as eye-witnesses to the incident, Mrs Silvia Hammond, the American congress member who was the liaison between the claimants and the Tel Aviv embassy regarding the autopsy; Attorney Orna Cohen who accompanied the activists during the Military Police investigation; Simon Biton who edited a documentary in relation to the incident and the ambulance crew who took the deceased to hospital) and chose to call only a minimal number of witnesses.

(11) Further, the State claims that the claimants chose to hide from the court a great number of documents, including:

Correspondence with the Senate; a document from the US State Department which allegedly evidences the family's wishes to have a representative present on its behalf during the autopsy; a documentary on the circumstances of the deceased's death; a witness statement from Gregory Shnabelle which was signed shortly after the incident through Attorney Rajy Surany; Richard Purcell's witness statement to the Palestinian Centre for Human Rights; Richard Purcell's witness statement to the El-Wazen Institute; a video on the D9 bulldozer; a documentary directed by Simon Biton which contains testimonies regarding the incident, photographs from the day of the incident and a letter from Colin Powell which refers to the autopsy.

On the basis of the above the defendant argues that the claimants' case does not meet the criterion required for the doctrine of evidential damage to be triggered and as such, there is no justification for switching the burden of proof.

11. Evidential damage – discussion and ruling

- a. The most recent precedent of the Supreme Court in relation to the doctrine of evidential damage was given on 24 October 2011. HHJ Gronis stated:

“8. (...) the doctrine of evidential damage shifts the burden of persuasion regarding those facts which the defendant undermined the claimant’s ability to prove. In order to shift the burden of persuasion according to this doctrine the claimant in tort has to fulfil two cumulative conditions: firstly, the claimant must demonstrate that evidential damage was indeed caused which undermined his ability to prove his claims; secondly, it must be proved that this evidential damage was caused as a result of the defendant’s negligent omission/failure.

9. In his summing up, the appellants’ representative pointed to two failures by the State which allegedly undermined the appellants’ ability to prove the damage caused. The first failure was that the State did not conduct a full written investigation regarding the question whether the appellant was injured as a result of the impact of the stun grenade, following its detonation. The second failure was the failure to conduct a “scientific examination” which could have revealed the cause of the appellants’ injury. The court of first instance ruled that the State was indeed negligent in failing to complete a written and comprehensive operational investigation regarding the circumstances of the incident. However, it was decided that this failing did not actually cause evidential damage in practice. This was because the sources of information which could have been available to the investigators around the time of the injury, such as the appellant’s family, the doctors who attended to him and the security forces who were dealing with the security breaches, were fully available when the case was considered at first instance. In this appeal, the appellants did not explain how a real time investigation could have assisted their case. Indeed, the appellants’ pointed in their summing-up to the absence of the stock lists of crowd dispersal tools. Those could have pointed to the use of the same means of crowd dispersal. However, the use of crowd dispersal means was never in dispute. Those lists could not have shed a light on the matter in dispute, which was whether the appellant was injured as a

result of using those means by the security forces. I therefore consider that the court of first instance was correct in rejecting the appellants' submissions that the burden of proof should be shifted according to the evidential damage doctrine".

10. I have reached a similar conclusion in relation to the Police's failure to conduct a "scientific examination". The appellants' representative failed to state what scientific examination he was referring to, which could have uncovered the cause of injury, and why such an examination was available to the State but not to the appellant. In these circumstances, it is not possible to determine that the appellant's case was subject to evidential damage. Even if I was of the view that such damage had been caused, the appellants failed to cite a source which would suggest that it is the responsibility of the State to carry out a physical examination each time physical damage is alleged as a result of actions of the security forces. In the absence of such source it is not possible to find that the State's failure to carry out such an examination was a negligent failure."

I will follow the precedent set above when considering whether the conditions for evidential damage doctrine have been made out in the case before me.

- b. Having considered the evidence before me and the arguments made by the parties' representatives, I have concluded that the claimants' ground should be rejected in full.
- c. As per the precedent set out above in order for a claim for evidential damage to succeed two cumulative conditions must be established: **first**, the claimant must demonstrate that evidential damage was caused to his case which damaged his ability to prove his claim; and **second**, that the evidential damage was caused as a result of the defendant's negligent failure.
- d. It was also ruled that the claimant must point to a positive obligation in law which would indicate that the defendant had a duty to preserve the evidence [citing authority].
- e. Regarding the Military Police investigation, having reviewed the evidence and hearing the representatives' arguments I conclude that the investigation was conducted professionally by skilled investigators and in a thorough manner.

- f. I should also note in this context that in order to successfully argue the evidential damage ground, the claimants should have submitted the full investigation file in its entirety to the court. This is in order to allow the court to form its own opinion regarding the investigation. Otherwise, how could I be certain that what was done by the Military Police was sufficient? But it was the claimants who objected to the submission of the full investigation file despite the fact that the defendant had agreed to its disclosure. In these circumstances, it was the claimants' own doing that a vitally important tool for checking their claims was not available to the court.
- g. From the evidence before me it transpired that the Special Investigation Team headed by Shalom began operating a day after the event. Shalom explained in his evidence that the reason for the passage of time was the fact that the army is a large organisation and once a decision is made, it needs to be authorised through several levels of command before it is executed. Shalom explained that it was not possible to reach the scene of the incident in the "Philadelphi corridor" due its dangerousness. Only combatants are allowed into the area and in any event, they are prohibited from leaving their vehicles. Notwithstanding that, the investigation team observed the location of the incident from a nearby army base using special technological tools. From an external examination, which was carried out on the bulldozer in question on the day of the incident, no blood marks or any other indication that the vehicle had hit a person were found.
- h. The claimants complained about the fact that the bulldozers were moved and claimed that they should have been left where they were in order to conduct the investigation. I consider that in making that claim the claimants' representative is treating the scene of the incident as if it were the centre of a major town in Israel. It is plain that this was not the case. Shalom explained during his testimony that this is a war zone where there is constant shooting and it is not possible to leave any vehicles or anything else, which belongs to the IDF unattended in the area. There was also no possibility to leave soldiers to remain guarding the vehicle for this purpose.

Furthermore, I am not convinced that had the bulldozer been left at the scene and had been examined by the Military Police it would nullify the evidential damage the claimants claim.

- i. Apart from the danger the Military Police investigation team would have been exposed to at the “Philadelphia corridor”, it was proved that the investigators were not operationally fit to work in that dangerous area.
- j. A day after the event the investigation team began questioning the combatants who were operating at the time of the incident (i.e. the bulldozer’s operator and commander, the squad commander and more senior officers).
- k. As part of the investigation, it was necessary to conduct an autopsy. Therefore, an application was made to the court in order to receive a judicial order for the same.
- l. During the Military Police investigation, witness statements were taken from all the teams who were on the ground at the time, including the division commander, four experts in the field of operating mechanically engineered vehicles and other commanders. In addition, witness statements were taken from the six ISM members present during the incident who provided their testimony in the presence of a lawyer. The ISM members had an opportunity to report their account in a more relaxed and elaborate manner.
- m. I cannot accept the claimants claim that the investigation was corrupted during the interviews. In this context, I refer to the evidence of Shalom from 7 October 2010. Shalom told the court why stopping the investigation was justified. This was because, according to IDF rules, the Military Police does not have authority to investigate the circumstances of a death in operational activity unless under the order of the chief legal adviser to the IDF or his deputy, in consultation with an officer of at least Major General rank.
- n. Indeed, on the first day while the interviews with the commander and operator of the bulldozer were taking place, their commanders entered the interview room and asked for the interviews to be stopped. However, this was towards the end of the interview and the main questions had already been asked and responded to. Shalom even stated that after the investigation was stopped they waited to receive the appropriate authorisation and when it had arrived, a few minutes later, they continued with their investigation. Furthermore, it is clear that the Military Police investigators stopped taking notes at the relevant time, which is proves that they were honest and adamant to document everything.
- o. I agree with the defendant that the claimants’ expectation that the Military Police should locate radio tapes, which document the moments before the event, was unrealistic. In this context, I refer to the evidence given by the force commander who

gave an explanation about the radio network and how recordings are carried out. I also refer to the testimony of Shalom who explained that usually radio communication is not recorded. The female soldier responsible for operating the equipment usually listens to several networks simultaneously. When an incident is announced on the radio, the soldier would try and find out the location and which force is operating in the area. She would then direct the camera to that area and record the radio traffic.

- p. The claimants' argument regarding failures in the investigation process arising out of the investigators' failure to consider the relevant procedures is also rejected, I find that the said procedures are not relevant to matters of war related activities, such as this incident. This is because the work procedures refer to drills and training scenarios rather than operational real-life scenarios where the forces working are exposed to real threats. In this context, see Shalom's evidence.
- q. The claimants claim regarding the failures concerning the tape is also rejected. As can be seen from watching the tape, the camera only began recording after the event. This was because, as S.R., the force commander who was responsible for the ground exposure, explained:

“the routine purpose of the cameras is to scan the landscape in order to identify various threats to IDF forces in the “Philadelphi Corridor”. Therefore, at the time of the event the camera was not directed to the place where the incident occurred, because this was not its purpose. From studying the tape it is evident that the camera was only directed to the area when a radio report was received about the incident”.

- r. Therefore, even if the tape had been seized by the Military Police it would not have provided a picture of the events leading up to the incident. Furthermore, it must be remembered that the tape should not be regarded as the central and sole piece of evidence in this case. There is other ample evidence available, including the testimonies of eye-witnesses who were at the scene, and there is no real dispute between the parties regarding the circumstances leading to the deceased's death.

Furthermore, from what we can hear on the tape we can see that the bulldozer's driver did not see the deceased and that when he had realised that he had hit someone he even thought he had hit a man. The tape also confirms that the combatants were first

informed that someone was hit when they heard the messages on the radio. At the time of the event, the camera was not directed towards the incident and did not capture the incident itself.

- s. The claimants' claim regarding evidential damage caused by the Institute of Forensic Medicine seems puzzling because the father of the deceased had himself testified on 24 March 2010 that the family had no intention of carrying out an autopsy on their daughter, and that they intended to use diplomatic channels in order to find out what had happened to her.
- t. The Institute of forensic Medicine carried out the autopsy, as already stated. Professor Hiss produced a pathological report in which he concluded on the basis of the findings of the autopsy the deceased died as a result of "*pressure to her chest ("mechanical suffocation") with fractures to the ribs and spine, the collar bones and puncture wounds to the right lung with bleeding.*"

In his evidence on 14 March 2010 to the court Professor Hiss explained that since he could not find any markings on the deceased's body, he concluded that she had not been directly hit by the bulldozer, but rather by the dirt pile which was being pushed towards her.

- u. Professor Hiss stated that since the American Consulate failed to send a representative for the autopsy, the latter was carried out with the family's consent in the absence of such a representative. He stated that the consulate sent a fax confirming that the autopsy could be carried out without the family's representative.

I should note that the deceased's family had apparently no interest in the identity or qualifications of the representative during the autopsy. They wanted there to be a representative and it was immaterial if this had been a typist or a secretary. I base this on Mr Corrie's evidence on 24 March 2010.

- v. The fax in question stated:

"Rachel Corrie's parents have agreed that an autopsy be preformed. This permission was given to Ms. Sylvia Hammond, Chief of the American Citizen Services Unit, by telephone, afternoon of March 19. They will not be sending an additional fax. Thank you for your assistance."

Professor Hiss explained that the fax was sent to him only after he had telephoned the American Embassy and requested that an American doctor is sent to observe the autopsy. According to his testimony, the Embassy did not think to do so. Professor Hiss sought the family's permission and then the above fax was received. The fax plainly states that the deceased's family agree to the autopsy and that no additional faxes will be sent.

- w. In the circumstances Professor Hiss was entitled to conclude that the deceased's family gave up on having a representative present during the autopsy. As stated by Mr Craig Corrie, the family's wish was to receive the deceased's body as soon as possible. Indeed, the family did not instruct that a further autopsy be carried out when the body was received, and instead it was cremated.
- x. I am aware that that the language of the magistrate's court order regarding the autopsy included a specific stipulation concerning the presence of a representative from the American Embassy. However, when it became clear that the embassy would not send a representative, and since the fax stated that the family had given consent to the autopsy, it is easy to understand why Professor Hiss concluded that there was no reason not to carry out the autopsy in the absence of a representative from the Embassy. There is no doubt that the proper thing would have been to go back to the magistrate's court to receive an amended court order reflecting the change in circumstances. However, in the circumstances, I am not clear what the evidential damage was caused to the claimants.
- y. I have not found any merit in the claimants' claims regarding the tapes documenting the autopsy. Those are audio (rather than video) tapes that Professor Hiss had used in preparing his report. This is because during the autopsy while his hands were bloodied and occupied with scalpels etc. it is not possible to take notes. It transpired that the relevant recording no longer exists due to budgetary constraints at the Institute which mean that tapes have to be recycled. In the circumstances, I am not clear what evidential damage was caused to the claimants as a result of the draft report being deleted.
- z. I consider that the state has demonstrated that the actions both the investigative authorities and the Institute of Forensic Medicine, was beyond reproach. They operated according to procedures and met the standards expected of them.

I am content that the conditions for applying the doctrine of evidential damage are not fulfilled in this case. The claimants failed to prove that they had other available resources to prove their claims during the trial. I consider that in this case there was ample evidence.

The claimants failed to demonstrate that they suffered evidential damage which harmed their ability to prove their claims. They also failed to prove that the State caused by its action or omission a “lack” of relevant evidence. The claimants did not point to a legal source imposing a positive obligation on the State, which would compel it to produce or preserve evidence. In this context, I accept the State’s position that investigations conducted by the police or the army are not done with the aim of securing evidence for those seeking to make a civil claim.

In summary, the claimants failed to prove the existence of the two cumulative conditions; they failed to prove that evidential damage was caused to them which harmed their ability to prove their claim. They also failed to prove that the defendant caused, as a result of a negligent omission, the claimed evidential damage.

I therefore conclude that, given all of the circumstances before me there is no reason to apply the doctrine of evidential damage in this case.

12. Have the claimants managed to prove the required elements of assault?

a. The claimants’ case

The claimants claimed in their summing-up that “*given the circumstances of the incident it appears that the claimants proved the elements required for a civil claim of assault as defined in section 23 of the Civil Wrongs Ordinance, while the defendant has not demonstrated any specific defence under section 24 of the Ordinance*”.

According to the claimants, the injury to the deceased was as a result of use of force and without a doubt unlawful. “*it is clear that the State did not authorise the soldiers to injure the deceased, but the soldiers’ actions were causally linked to their activities*

and were as a result of an improper activity. Therefore, on the basis of the above, the State is directly vicariously responsible for the actions of the soldiers”.

b. The defendant’s case

The defendant responded to this argument briefly.

The defendant claimed that one of the elements of the tort of assault according to section 23 of the Ordinance is **deliberate** use of force. *“In the case before us there was no deliberate injury to the deceased, as confirmed by the claimants’ expert witness. As this element cannot be made out, the tort cannot be made out”.*

Furthermore, the defendant stated that in this case the required elements of the tort including the mental element of malice do not arise. It claims that in the tort of assault, there is an additional requirement and it has been decided that the intention should be behavioural and not consequential.

The defendant claims that in this case the deceased was injured unintentionally by a dirt pile which was pushed towards her. The deceased assumed that risk by standing in front of a bulldozer.

The State claims that from the witness statements heard in court it emerged that the IDF soldiers operating in the area did everything within their power in order to avoid injuring any of the activists and the bulldozer’s operator testified that he did not notice any person standing in his way, and certainly not the deceased.

In the circumstances, the State claims that the claimants’ claim in relation to the tort of assault should be rejected.

c. Discussion

Section 23(a) to the Civil Wrongs Ordinance states:

“An assault is a deliberate use of force of any kind, against the body of a person by hitting, touching, moving or any other way, whether directly or indirectly, without the person’s consent or with consent which has been obtained fraudulently; as well as an attempt or a threat by action or movement

to use said force against the body of a person when the assailant causes the person to reasonably assume that he is indeed willing and able to carry out the threat” (my emphasis)

Given the wording of section 23 of the Ordinance and on the basis of my previous finding that the deceased was not intentionally injured and that her death was caused due to an unfortunate accident, I must conclude that the tort of assault does not arise in this case.

13. Does the tort of negligence arise in this case?

a. The claimants’ argument in relation to negligence

The claimants state that from the totality of the evidence in this case it is plain the forces acting in the area that day owed a duty of care to the defendant. They claim that a person who operates a bulldozer, which is a heavy work vehicle, in the presence of civilians and in breach of procedures, can reasonably foresee that damage would occur as a result.

The claimants state that the requirement to take reasonable precautions forms part of the relevant procedure. This procedure places an obligation upon the security forces, in circumstances such as the incident in question, to operate in a certain way. Any deviation from the procedure is negligent and in breach of the duty of care.

The claimants state that by moving towards the deceased when she was 15-20 meters from him, the bulldozer’s driver acted against the IDF procedures which set the safety standard. For example, para 8.3 of the procedure states that during daylight hours no person should be standing 20 meters in front or behind the vehicle, or at a range smaller than 5 meters from the sides of the vehicle.

The claimants stated that they presented ample evidence that the bulldozers were operated when the foreign protestors were in close proximity. The bulldozers’ operators were given a clear command that they should not stop the works at any cost, regardless of the danger to the foreigners from the continuing works. The claimants

state that reasonable and cautious bulldozer operators and their commanders should have anticipated that continuing to operate the bulldozers in the circumstances, which have been created, could lead to injury of the foreigners, including the deceased. It was also claimed that those who created the risk should have also created a supervision mechanism to prevent and mitigate that risk, by way of installing cameras on the vehicles and stopping the work, even for a short while, until the foreigners have moved away.

The claimants state that the defendant failed to persuade the court that the ground exposure work was necessary on the day in question. It certainly failed to persuade the court of the reasons why the work of the bulldozers could not have been stopped completely or for a short period of time, until the foreigners have left the area.

The claimants added that even if Y.P., the bulldozer's driver, mistook the situation and imagined that the foreigners were not in the proximity of the bulldozers, then if he had examined circumstances correctly, as he was supposed to have done, he would have concluded that the foreigners were nearby and stopped the work. The claimants state that in the circumstances the bulldozer operator should have followed his conscience, which prohibits injury to life, over following the order given by his commander to continue with the work. It was claimed that the command to continue with the work under any circumstances was a "black flag" and constituted an unlawful command, which should not be obeyed.

The claimants added that even if the court was persuaded the vehicle procedures were not relevant (because it was relevant for training and not wartime circumstances, as argued by the defendant), it is still possible to determine the actions of the bulldozer's operator *"on the basis of the reasonable expectation that one should avoid causing risk of harm to their neighbour as a result of acts or omissions, if there is a danger that the neighbour could be harmed from the continued activity of the bulldozer"*

On this basis the claimants claim that the injury which caused the deceased's death was due to a breach in the safety norms and procedures. They claim that studying the evidence reveals that the bulldozers' operators were not familiar with the safety procedures and each of them provided a different answer to the question of the safe

operational range of the vehicles. It was argued that commanders S.R and S.R were completely unfamiliar with the safety guidelines. This indicates, according to the claimants, that there was “**a moral chaos**” in relation to what was permitted and what was not in the “Philadelphia corridor” in the context of the relevant activity and in relation to dealing with foreign protestors.

Therefore, the claimants state that the deceased’s injury by the bulldozer was in breach of the required safety norms and the defendant is responsible for that.

Finally, the claimants stated that the State is liable because the Military Police is also responsible for the negligence. As stated above, in relation to evidential damage, the claimants attribute omissions in the investigation to the Military Police. The claimants stated that the investigation team failed to meet the behavioural standards which could be expected, that they behaved unreasonably and inappropriately. It was claimed that the Military Police investigators breached the duty of care to the claimants. Therefore, they claimed, the defendant should carry responsibility for the incident also because of the negligent way in which the investigation was carried out.

b. The defendant’s response to the negligence claim

The defendant stated that the state has not been negligent in the circumstances because it did not breach the duty of care.

The defendant states that the question of breach of duty of care should be examined only in relation to the activities of IDF forces.

The defendant claims that the duty of care placed upon IDF soldiers is to act reasonably in the circumstances in which the force was operating. They advise that caution should be exercised when considering whether the duty of care was breached when examining the soldiers’ behaviour.

The defendant states that it did not breach the vehicle safety procedures by allowing the activists to approach the vehicles. It claims that the procedures are entirely irrelevant to the incident because the procedures do not address operational circumstances.

The defendant states that in a re-enactment carried out after the event it was concluded that due to limitations in the soldiers' field of view they could not have seen the deceased before she was injured and died.

The defendant added that in the circumstances the soldiers took all necessary precautions to protect the activists.

The defendant claims that the mission team was briefed in advance and it was made clear to them that it was possible that civilians might be present in the area who would interrupt their work. The team was briefed to stay clear from the foreign citizens and not harm them.

The defendant states that they have established that the soldiers acted in a proportionate and reasonable manner.

In considering the claimants' claim that the soldiers should have abandoned the mission, the defendant again states that this was a necessary operational mission which could not have been stopped.

The defendant states that all measures were taken to improve the bulldozer's team's field of view.

The defendant claims that the necessary precautions are not a fixed element but one that changes with circumstances. In this case, it was claimed that this was a war situation and an exposure activity, which is a dangerous operational action in every way. The public interest in carrying out these tasks is incredibly important and little more needs to be said about that. It was claimed that the IDF is a moral army and that during the mission all reasonable steps were taken in order not to harm innocent civilians. Nevertheless, unfortunately, during times of war, innocent civilians sometimes come to harm. In this case, the State claims that the activists and especially the deceased, made every conceivable effort to impede the IDF's presence and actions in the area. The activists were willing to put themselves in harm's way in the name of the ideology they were seeking to promote. The activists, and among them, the

deceased, acted through indifference and complacency and in full knowledge of the dangers brought about by their actions.

In the circumstances, the defendant claimed that there was no negligence on the part of the state or its representatives.

14. The claim for negligence – discussion and ruling

a. Having reviewed the evidence and the arguments from both parties I have concluded that the elements of a negligence claim do not arise in this case.

b. Section 35 of the Ordinance states:

“A person acting in the same circumstances that a reasonably intelligent person would not have acted, or a person omitting to act in the same circumstances where a reasonably intelligent person would have acted is negligent” (my emphasis)

c. Therefore, the legislator tells us that the duty of care should be examined against the background of the IDF’s activities and the conditions surrounding it (section 35 states “*in the same circumstances*”). In this context, I will mention that I have already assessed the circumstances in the “Philadelphi corridor” area and the danger in being present in the area and I do not see the need to repeat that.

d. I considered the ground exposure work and ruled that it was a “war-related activity”. The mission carried out that day by the soldiers was a necessary action. The significance of postponing this mission would have meant exposing IDF soldiers and Israeli citizens to harm.

e. As has already been mentioned, the Organisation’s activists wanted to impede the ground exposure work in any way they could. The IDF soldiers invested a great deal of effort in order not to harm them. I consider that in the circumstances, the tragic result of the deceased’s death was caused only due to the defendant exposing herself to risk and the careless and irresponsible manner in which she acted when she chose to place herself in front of the bulldozer and kneel before it, in circumstances where the bulldozer driver could not have seen her. The deceased could have run away from the bulldozer and the dirt pile but chose not to do so. In the circumstances I cannot see how the defendant breached the duty of care or how it has been negligent.

- f. When the court considers whether a person's conduct amounts to a breach of duty of care, it must examine whether the behaviour was reasonable. Reasonableness is a relative term. It is determined by identifying and balancing the relevant considerations. Reasonableness cannot be determined in a void – it is always fact sensitive. Reasonableness does not call for taking every step possible in order to remove the risk. Rather, reasonableness demands taking reasonable precautions in order to remove the risk.

Indeed, in this case the IDF soldiers acted reasonably in the circumstances in which the mission force was operating. It was not possible to separate the behaviour from the conditions surrounding it. It cannot be transferred into “lab conditions”. It should be recalled that the IDF forces operating in the area were acting under double pressure. On the one hand, they were exposed to danger from the Palestinian terrorists waiting for an opportune moment to take sniper shots at them or use other weapons in order to harm them. On the other hand, they had to deal with activists of an organisation operating against the law who were intent on disrupting the soldiers from fulfilling their task which was intended to prevent hostile and terrorist activities.

- g. As I have already mentioned above, I accept the defendant's case that the vehicle safety procedure is not relevant to this case. This is because the said procedures are not applicable in operational circumstances. See S.L's witness statement.

See also Y.A's witness statement who testified that the IDF safety guidelines were intended for routine and training situations, and not to war activities such as the one the soldiers were in.

Therefore, I do not find a breach of the duty of care arising out of the allegation that the bulldozer's driver failed to adhere to the guidelines.

- h. In spite of the fact that the soldiers' task was not house demolition on the day in question, they were briefed in advance that foreign civilians might be present in the area and disrupt the work. The instructions were that the civilians should be avoided and not injured. While carrying out the mission, and when the foreigners approached the team, the soldiers took a number of actions in order to make it clear to the activists

that their presence in the area is prohibited, and that they should disperse. Initially, the soldiers used a loudspeaker to tell the activists to stay away, then the soldiers threw a stunt grenade and fired warning shots. Since those actions did not yield the desired effect, the soldiers used crowd dispersal methods. The soldiers even retreated south several times in order to avoid getting near the foreigners until they backed up very closely to the base they came from.

I cannot accept the claimants' case that the bulldozer's driver, even if he considered that the foreigners were not in the bulldozer's proximity, should have stopped the work. The IDF force was engaged in operational action. It was careful not to harm civilians and acted in order to keep them away. It could not be expected from an army acting under circumstances of daily war in a dangerous area, such as the "Philadelphi corridor", to stop its essential work for state security every time a group of civilians acts unlawfully, breaches a Major General's Directive, and interrupts it from fulfilling its mission, even when the force is persuaded at that particular moment that it can continue operating without harming civilians. If the army was to operate as suggested by the claimants' representative then the IDF could not have fulfilled its duty to maintain state security. This would mean a dereliction of state security due to the unlawful action of civilians whose opinions differ from that of Israeli security forces.

The claimants claim that the soldiers should have arrested the activists on the ground is not acceptable and I reject it. As has been said before, it was proved that due to risk to life the soldiers were completely prohibited from leaving their vehicles (the testimony of Colonel Zuaretz).

I determine that the IDF force operated on the day in question in a reasonable and cautious manner in all the circumstances and I do not see any reason to attribute any carelessness to it.

- i. I am persuaded that the ground exposure action was necessary and pressing and could not have been stopped at any given moment, as has been suggested by the claimants' representative.
- j. My impression is that the defendant took reasonable steps in order to improve the bulldozer team's field of view. As the latter was lacking, and since there was a

complete prohibition to position an external director during the works in the “Philadelphi Corridor”, a team of two soldiers, a commander and an operator was required in order to improve the bulldozer’s field of view (the defendant’s expert witness, Yoram Manshuri). Therefore, approximately two years ago the process of installing cameras on the bulldozer in order to improve the field of view was under development. As it turned out, on the one hand it was very expensive and on the other hand, its effectiveness was highly questionable in light of the strong vibrations of the bulldozer (see Yoram Manshuri’s testimony).

On the basis of the material before me I am persuaded that bringing additional forces and/or vehicles to the area, in order to deal with the limited field of view would not have helped and would have in fact put the IDF soldiers and those around the vehicles in greater danger (see S.R’s testimony and Major Zualetz’s testimony).

I am persuaded that in the circumstances the actions of the force was beyond reproach. Indeed, the bulldozer’s driver’s field of view was restricted. However, the deceased’s field of view, while she was standing in front of the bulldozer and kneeling, was not. The deceased could have stepped away from danger without great difficulty. However, she chose to endanger herself as has been described above, and eventually found her death in this way.

- k. The head of the IDF Warfare Theory, Weapons and Skills division, Y.A. wrote in his statement that after the incident he was in charge of the re-enactment in order to check the restriction in the soldier’s field of view. He states, *“the conclusions of the re-enactment prove that in view of the restricted field of view, and due to the deceased’s position behind a pile of dirt, the soldiers in the bulldozer were unable to see her and prevent the incident”*.
- l. I am persuaded that in the circumstances the soldiers acted in a proportionate and reasonable manner and made every effort not to harm the civilians around them. However, it seems as though the ISM activists, including the deceased made every effort to impede the IDF mission. They were prepared to risk themselves in the name of the ideology they were seeking to promote. They acted through indifference and complacency and in full knowledge of the dangers brought about by their actions.

In light of the circumstances, I consider that it was not the negligence of the defendant or its representatives which caused the deceased's death. I therefore reject the claimants' claim for negligence.

15. Volenti non fit injuria or "willing endangerment"

The defendant's case

- a. The defendant claims that the deceased's behaviour during the incident amounted to Volenti non fit injuria as defined in section 5(a) of the Ordinance.
- b. The defendant states that all its witnesses have unanimously commented upon the foreign activists' behaviour, including the deceased, to expose themselves wilfully to risk. The witnesses stated that the deceased and the other activists were aware of the risks and acted irrationally while risking their own lives.

The defendant states that some of the claimants' own witnesses confirm that they were aware of the dangers in the area and were willing to take the risk to life and limb upon themselves, with all the consequences arising from it.

The claimants' case

- a. The claimants state that none of the three criteria required in law for Volenti non fit injuria operate in this case. Those criteria are that the injured party should have had detailed knowledge of the risk he was being exposed to, actively exposed himself to the risky circumstances both physically and lawfully and he should have done so willingly and out his own volition.
- b. The claimants state that relying on Volenti defence has been unsuccessful both in Israel and in other common law countries and has been interpreted narrowly. Therefore, it could only be said in exceptional circumstances that a reasonable person has willingly forgone the legal right to claim compensation for injury.
- c. The claimants state that in this case it is very difficult to say that the deceased was complexly aware of all the facts and circumstances which exposed her to injury, before the injury had occurred. It was possible that the deceased had a probable knowledge about the bulldozer's operator's negligence, but she did not know for certain that negligence was going to occur. *"Moreover, it is very difficult to prove that she had any foresight of the nature and degree of the bulldozer's operator's*

unreasonable behaviour and the nature and extent of the risk which could be caused as a result of such behaviour”.

- d. The claimants state that *“it is very difficult to determine that it has been established that the deceased was aware of all the elements of risk to which she had exposed herself when standing before the bulldozer while it was travelling, in order to stop it from continuing to travel, which resulted in her being buried in the pile of dirt”.* In addition, *“it is insufficient for the tortfeasor to prove that the injured party was in a situation where he had consented to a certain level of negligence arising out of existing risk, but he ought to prove that the injured party could foresee precisely that specific negligence and has knowingly consented to assume the risk for it materialising”.*
- e. The claimants state that the deceased and two of her friends wore high-visibility jackets on the day in question in order to ensure that they were visible to the bulldozer operators. They were carrying banners protesting against house demolitions and waved their arms in order to alert the bulldozers’ operators to their presence. Therefore, the claimants’ state that the deceased and her friends had every desire to continue living, and had done everything in their power in order to alert the bulldozers’ operators to their presence.
- f. On this basis the claimants claim that the Volenti defence should be rejected.

16. Volenti non fit injuria – discussion

- a. Section 5(a) to the Ordinance states:

“It shall be a complete defence of Volenti non fit injuria where a claimant has full knowledge or it can be assumed that he had full knowledge of the circumstances which gave rise to injury, and he has exposed himself, or his property, to these circumstances voluntarily”.

Precedent has indicated that this defence depends on establishing three criteria:
The claimant’s knowledge about the circumstances giving rise to risk, including assessing the nature of the risk;
The claimant’s exposure to the legal implications of the risk;
The claimant’s willingness to expose himself to the risk without compensation

(case of *Akhasha Mahmood v the State of Israel*)

- b. I have considered the parties' arguments and the evidence the defendant has referred me to in its summing up. I remain unpersuaded that in this case all three criteria are fulfilled.

Therefore, I conclude that in this case *Volenti non fit injuria* has not been successfully argued.

Nevertheless, I have already ruled that it was not the defendant or its representatives' negligence which caused the deceased's death. Therefore, notwithstanding the fact that the above defence does not apply to this case, it is insufficient in order to change my ruling about dismissing the claim.

17. Contributory negligence

a. The defendant's case

The defendant states that "*the deceased's contributory negligence was significant to a degree of 100%, which severs any causal link (even if one had existed) and nullifies the claim. This is pursuant to sections 65 and 68 of the Ordinance 1068*" [error in the original text].

The claimants referred the court to the case *Mutual Funds Limited v Awad* 1990 where it was determined that contributory negligence was established using the reasonable person test.

The defendant states that in this case it was proved that the soldiers acted in a reasonable manner, took every reasonable step in order to avoid injuring innocent parties and all in accordance with the risk and the circumstances they were faced with given the war which waged in the Corridor.

By contrast, the deceased and her friends had behaved in an unreasonable manner which exacerbated the damage which was caused. The deceased and her friends arrived in a war zone which was decreed as a closed military zone and did not adhere

to any of the soldiers' attempts to persuade them to leave the area. The deceased acted against the IDF soldiers' instructions. She saw the heavy bulldozer operating in the area. A reasonable person would have kept away from this large vehicle, but the deceased approached it, kneeled and chose to climb the pile of dirt.

Therefore, the defendant states that in view of the cautious and reasonable behaviour of the soldiers, the deceased and her friends were acting entirely carelessly, while showing complete contempt to the instructions of the IDF soldiers and to any minimal safety instructions. The deceased and her friends were indifferent to the inevitable outcome of their careless behaviour. It was claimed that the deceased had knowingly exposed herself to risk because she knowingly and deliberately entered a military zone in order to interrupt the soldiers' ground exposure mission and therefore a particularly high contributory negligence factor should be determined at a rate of 100% (see for example the case of *Yasswe Shath v The state of Israel* 1998).

b. The claimant's case

The claimants addressed contributory negligence only in their closing remarks.

The claimants state that the defendant's basic assumption in relation to the soldiers' reasonable behaviour in the circumstances is entirely erroneous. The claimants state that the opposite is true, that the soldiers' negligence in the circumstances was on its face extreme and unreasonable. It was claimed that the soldiers grossly violated the IDF safety procedures whereby it is completely prohibited to operate the bulldozers where there are people in the proximity who could be harmed as a result. The claimants state that there is no more criminal negligence than that.

Furthermore, the claimants referred the court again to defence witness statements, which allude to the fact that a conscious decision was made to continue operating the bulldozers in spite of the danger to civilians and protestors present in the area. The operations diary presents irrefutable proof that the decision to continue with the ground exposure activity was made out of fear that a "dangerous precedent" will be set and not due to the military necessity as the defendant argues.

Precedent states that the burden of proof for establishing contributory negligence lies with the defendant. When the court examines whether or not contributory negligence has been established, it must weigh the actions of the claimant and the defendant side by side and examine each side's actions and omissions.

In this case, the claimants claim, it was established that the moral culpability of the defendant is immeasurably larger than that of the deceased. All the deceased sought to do was to exercise her right to protest against house demolitions. The defendant, conversely, had grossly violated the most basic safety procedures which it created itself, by operating the bulldozer.

In any event, the claimants state this claim is not solely based on the law of tort, but on other sources of law including human rights law, the Israeli Basic Law: Human Dignity and Liberty and the right to life. Therefore, since this is a fundamental breach of constitutional law, there is no place for contributory negligence.

Further, and in the alternative, the claimants state that even if it was determined that the deceased's behaviour gave rise to contributory negligence, then in any event the defendant's own negligence was more crucial in the circumstances. The defendant's witnesses stated that they were aware that the protestors were present in the area for a number of hours, the deceased and her friends were wearing high-visibility prominent jackets and the deceased was holding a loudspeaker and banners for a significant proportion of the incident.

18. Contributory negligence – discussion and ruling

I consider that the issue of contributory negligence should not have been brought before the court during the present discussion.

At this stage we are only dealing with the question of responsibility and precedent states that:

“Contributory negligence is a complete defence for the tortfeasor not from the responsibility for personal injury, but from the duty to compensate the injured party fully for its injury” (Y England)

In the circumstances, I do not see any need to discuss at this stage the question of contributory negligence.

19. Constitutional wrongdoing, proportionality and international law.

The claimants state that the defendant breached the deceased's right to life and as such, acted against the principles set in the Israeli Basic Law: Human Dignity and Liberty.

The claimants state that in the case of a breach of a constitutional right, which is a basic right carrying greater protection than normal legislation, compensation is due as a result of the actions of the State even if it had been determined that it was not negligent.

The claimants state that "the right to life is a basic constitutional right given to every person. The right is inextricably linked with the principle of the sanctity of life, which is part of the Israeli judicial system. The constitutional status of this right is based in a ruling of section 1 of the Basic Law: Human Dignity and Liberty which determines that *"the fundamental rights of persons in Israel are founded upon the recognition of the value of man, the sanctity of life and freedom..."* The right to life is also founded in section 4 of the basic law, which states:

"every person is entitled to protection of his life, his body and his integrity"

Furthermore, the claimants state that the right to life has been expressed in international human rights law in two international treaties which Israel is signatory to and has ratified.

Regarding the applicability of international humanitarian law on this case, the claimants state that as an occupying power and as the effective ruler of the territories, the state of Israel must guarantee the safety and security of the residents of the territories. This duty, it was claimed, is founded in international treaties which Israel is signatory to.

According to Israeli law, international law forms part of the domestic law and falls to be considered, providing it does not contradict Israeli legislation. In addition, the claimants state that according to the “compatibility principle” the courts must interpret domestic law, as far as it is possible, as compatible with Israel’s international obligations, as expressed in the international treaties and customary international law.

The claimants state that intentional humanitarian law is applicable in the Gaza strip, including the “Philadelphi corridor”. Those are occupied territories and as such, the rules of international humanitarian law are applicable. Precedent states that even during times of war, the rules of international humanitarian law must be respected.

Accordingly, the claimants state that the State should compensate citizen who were injured in the occupied territories. The duty is a positive one, which includes preventing injury to the occupied population and to act in order to ensure their safety and security.

The claimants addressed in their closing submission to the principle of “distinction” which distinguishes between soldiers and civilians at times of war and prohibits harming of civilians. This is a principle which has been clearly expressed in the treaties Israel is signatory to which is part of the customary law accepted around the world. According to this principle, a soldier’s right to kill is limited only to enemy soldiers. It is absolutely prohibited to physically harm any non-combatants. It is completely prohibited on all combating sides to attack non-military targets.

A complimentary principle to the [distinction principle] is the duty to take precautions. This duty obligates parties to take every possible precaution in order to prevent or mitigate the risk to the lives of civilians or civilian targets. In this case, the claimants claim that if the bulldozer’s aim was “operational war activity” as the defendant claims, then the principle of distinction and the duty of caution should have applied to the situation.

In addition, the claimants referred in their closing submissions to the principle of proportionality decided by the Supreme Court, and claimed that the State’s struggle

against the Palestinian organisations does not happen in a vacuum, but according to laws and procedures. In all the circumstances where the State conducts combat against hostile fractions, the rule is that injuring innocent civilians must, inter alia, take account of the principle of proportionality. This principle states that attacking innocent civilians is prohibited, and this is done by weighing the damage caused against the military benefit achieved.

The claimants state that putting the above principles and tests into practice leads one to the conclusion that in view of the totality of the circumstances as stated above, it is difficult to demonstrate that the soldiers were in any real danger in any of the three armoured vehicles on the ground. The deceased did not risk the life of the bulldozer operator. The deceased's death was caused in circumstances where flawed discretion and skewed consideration of the various risks arising from the ground exposure action. The claimants state that the deceased's death raises a moral question of great significance since due to the State's need to continue the ground exposure work at any cost, the death of an innocent individual was caused. It was claimed that this behaviour was disproportionate and the defendant should not be allowed to use the defence of war related activity as a crutch.

20. Constitutional wrong – discussion

- a. In considering this part of the judgment I would like to point out that the defendant failed to refer to this matter at all in its submissions. Therefore, I do not know the State's position in relation to this matter.
- b. Indeed, the question of whether or not it is inappropriate to rule, in a suitable case, that compensation is payable even without negligence for those whose constitutional rights have been breached and who have suffered injury was raised in previous cases, but without reaching a ruling (see case of *Kibbutz Malika v State of Israel* 2000)

In the case above HHJ Theodor Or stated that the question remains to be considered but “(...) *in the judicial literature and obiter comments a trend is emerging whereby where a constitutional right is breached, legislative comfort might be given*”.

However, this ruling is relevant to those whose constitutional right have been breached.

Indeed, the deceased found her death in the incident which is the subject of this claim. However, in this case the defendant did not breach the deceased's right to life. The deceased put herself in a dangerous situation. She stood in front of a large bulldozer in a spot where the bulldozer's driver could not have seen her. Even when she saw the dirt pile approaching her and endangering her she did not move away from the area unlike any reasonable person would do in the circumstances. She began to climb the pile of dirt, fell over and finally found her death.

The deceased's death was caused due to an accident the deceased has brought upon herself. This was despite the attempts made by the IDF forces to remove her and her friends from the area.

I consider that in these circumstances there is no justification to oblige the State to pay compensation for damages which the deceased could have prevented but preferred not to, and as such endangered her life in the way that she did.

Therefore, I dismiss the claim to order the State to pay compensation based on a constitutional wrong.

21. Conclusion

On the basis of the above I reject this claim.

Due to the circumstances in which the deceased found her death I will avoid awarding costs against the claimants and instead order that each party will bear its own costs.

A summary of this judgment was read in public in the presence of the lawyers, Attorneys Hussein Abu-Hussein, Jamil Dakwar and Reem Masawara for the claimants, Attorneys Irit Kalman-Brom and Nir Gancharski for the defendant. A typed copy of the judgment was handed to the parties.

28 August 2012

Signature of
Judge Oded Gershon