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Non-Freezing Cold Injury

In from the cold

Ryan Bird, Partner in our Legacy department, considers the judgment in Brian Muyepa v Ministry of Defence [2022] EWHC 2648 (KB) – a claim for Non-Freezing Cold Injury successfully defended by Keoghs and the Ministry of Defence.

The judgment of Cotter J in Brian Muyepa v Ministry of Defence [2022] EWHC 2648 (KB) is a thorough assessment of several key areas of personal injury litigation. There is a detailed discussion on the approach to evidence of fact and the use of witness evidence generally, as well as the role and duties of experts to the court. The central issue, of course, is one of fundamental dishonesty.

However, hidden in the background of all those issues, there is also some helpful guidance on the subject of the claim itself – Non-Freezing Cold Injury ('NFCI').

What is NFCI?

NFCI occurs when tissues are exposed to cold, often (but not necessarily) wet conditions and in temperatures ranging from just above freezing to around 15°C, for a sustained period. It can occur in anyone who spends sufficient time in such conditions – such as fishermen, mountaineers and soldiers. It can lead to symptoms of pain, numbness and paraesthesia in the extremities (most commonly the feet or the hands). Although it dates back to WW1 (when it was more commonly known as trench foot), it remains a relatively little known condition. There are also alternative diagnoses that present with similar symptoms (Raynaud's Phenomenon).

There is currently no "gold standard" objective test to diagnose NFCI (in contrast to for example, an audiogram in a claim for noise induced hearing loss). It is a largely subjective condition and, as pointed out by Cotter J, any diagnosis is heavily reliant on the reliability of the patient, their presentation, the history of the cold exposure and description of symptoms. A clear, consistent history is key, with corroborating medical records, examinations and of course, supportive symptoms. As the claimant's expert put it in Muyepa, diagnosis is roughly "80% history, 10% examination and 10% investigation." That can make the condition difficult to assess and consider.

Helpfully, the judgment does provide some useful comments in respect of NFCI generally, and in particular, regarding prognosis. As Cotter J set out[1]:

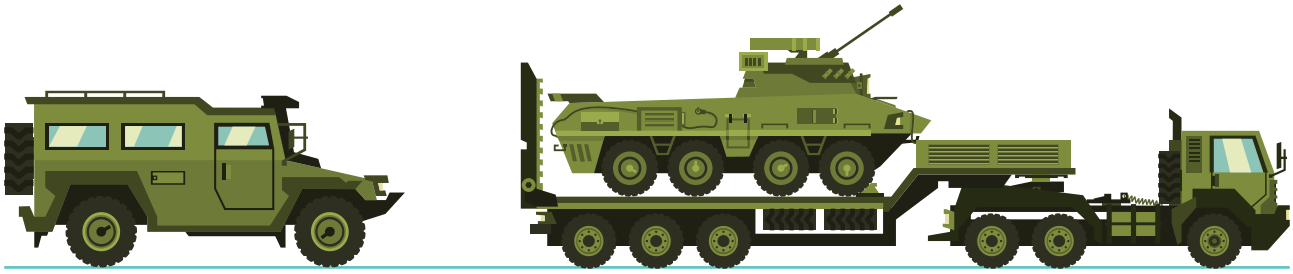
- NFCI is generally not a deteriorating condition absent further cold exposure;
- In mild to moderate conditions, it is not uncommon for there to be a recovery over time and full recovery is possible;
- Symptoms should not fluctuate to any great degree – there should be no "too great a swing of the pendulum" in terms of functionality

There are also general comments throughout the judgment that those service personnel with a mild NFCI, are capable of being retained by the services. A NFCI does not automatically mean the end of a military career.

Those comments are helpful to any litigator dealing with a claim for NFCI.

Quantum

There is also helpful guidance as to the approach a court may take in respect of quantum – and in particular, in relation to any claim for an alleged loss of military career/earnings, congenial employment, clothing and PSLA. Of course the caveat here, and as expressed by Cotter J in his judgment, is that it is very difficult to determine damages in a claim where fundamental dishonesty is established. Nevertheless, the judgment does provide assistance as to how a court may approach those heads of loss & damage.



1. Paragraph 210 of the Judgment of Cotter J

PSLA

Billett v Ministry of Defence (2015) offered some guidance as to the level of PSLA in a minor NFCI to the feet alone. Billett also suggested that assistance may be gained by comparing awards for HAVS/VWF.

Since the decision in Billett, the 16th edition of the Judicial College Guidelines have been published. They now include a specific section for cold injuries. It states:

Section (C) - Cold Injuries

These injuries encompass freezing cold injuries (such as frostnip or frostbite) and non-freezing cold injuries.

(a) Less serious cases of long-term cold sensitisation of the hands only or feet only, resulting in intermittent discomfort or pain in cold conditions which are manageable with warm clothing or by limiting cold exposure.

Around £15,000

(b) Aggravating features taking an award above that level will include: (i) symptoms affecting both hands and feet; (ii) an inability to manage the symptoms (with warm clothing or heating); (iii) continuous (rather than intermittent) discomfort or pain in cold conditions; (iv) the additional immediate impact of a freezing cold injury; (v) effect on employability or amenity. Cases involving a combination of aggravating features will justify greater awards. The combination of chronic pain and sweating in hands and feet with difficulty being outdoors in colder months, acute psychological symptoms, and probable acceleration of future joint problems warrants an award **in the region of £32,500**.

(c) The most severe cases, resulting in permanent neuropathic pain and significantly impaired mobility or dexterity, should be assessed by reference to Chapter 9: Chronic Pain.

The judgment in Muyepa is the first reported to consider the application of the guidelines.

Despite the claimant alleging symptoms in both his hands and his feet, with it also being accepted that he had suffered a time limited adjustment disorder (as a result of the development of his NFCI), the claimant was only awarded £15,000 – the top end of bracket (a).

Loss of Congenial Employment

This is a head of loss often pleaded in military claims, and in the tens of thousands. Despite the claimant having served for over 10 years, Cotter J ultimately determined that the claimant would have left the Army in any event, regardless of any NFCI. The claimant was awarded £250.

Past and Future Earnings

The approach to future loss of earnings, benefits and pension in a military claim is a subject worthy of its own article – for another day! There are various approaches that can be considered, depending on the nature and severity of the claim. A court may adopt a "career model" approach, and thereon apply an Ogden based multiplier/multiplicand calculation. In the alternative, a lump sum approach could be taken – as it was in Billett (which applied a Smith v Manchester award).

In Muyepa, Cotter J set out the difficulty in assessing both the claimant's past and future loss of earnings, due to the exaggerated presentation of the NFCI and the claim generally. He could not assess the claim based on the "true" level of symptoms/NFCI. There were also various arguments as to how long the claimant would have served for (even with a mild NFCI), whether he intended on leaving the services in any event and his future earning capacity with a mild (improving) NFCI, and without it. Some of these questions are common to most military claims (i.e. length of service and reason(s) for leaving) and are relevant to any quantum exercise.

Ultimately, given the various issues, Cotter J found the position to be "imponderable". He therefore adopted a Blamire (lump sum) approach for past loss of earnings and benefits. The claimant was awarded £30,000 for past earnings and military benefits (accommodation and health, fitness and medical) against a pleaded sum of £133,553 – recovering 22.5% of the pleaded case.

In terms of future loss of earnings/earning capacity, Cotter J rejected the "career model" approach put forward by the claimant, again favouring a lump sum approach due to the imponderable factors (mainly due to the dishonest exaggeration). It was recognised that the claimant's mild NFCI was likely to improve, but some symptoms would persist in cold weather. They "could have some impact on the open labour market". Doing the best he could, Cotter J awarded a lump sum of £50,000 for loss of earning capacity and pension loss.

There are also helpful comments in relation to the approach to future loss of earnings/career claims, and employment expert evidence. Despite the claimant averring that he would have, absent any NFCI, stayed in service and completed 22 years' service, Cotter J found that he would have left in any event, for various family and personal reasons. Cotter J also commented briefly on the use of statistics and scenarios – and the assistance that a variety of "length of service" scenarios provides the court (for example, that 46% of soldiers leave before the 20 year point). It is not always a given that a soldier would therefore complete a full career – indeed, statistics suggests otherwise.

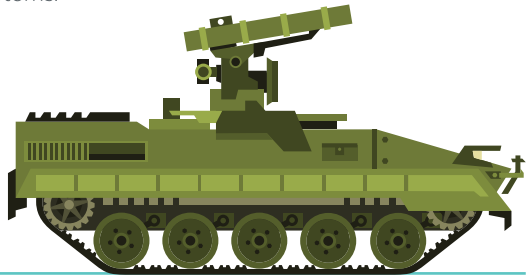
Additional Clothing

The claimant also sought an award for increased warm weather clothing (socks and gloves) as a result of his NFCI. A similar claim was advanced in Billett, where an award of £250pa was made for the claimant's lifetime. Here, the claimant was awarded £75 for past losses, and £15 on a reduced multiplier, to reflect the decreasing need for the additional clothing, as the condition improved.

Other Losses

The claimant also claimed for gardening and DIY losses, as he claimed he could not undertake such services with his symptoms. That claim was rejected, as Cotter J stated that the claimant could cut his own lawn with mild NFCI symptoms.

The claim for care and assistance was also rejected, based on the assessment of Cotter J of the claimant only having mild symptoms.



Summary

Muyepa is an important and informative judgment on a number of wide ranging issues – experts, witnesses, and quantum. It also provides helpful guidance in respect of NFCI claims. The judgment provides some solace to patients that mild to moderate NFCI can recover – even to the extent of possibly a full recovery. Those with a mild NFCI can be retained by the service. Further, NFCI should not deteriorate, as long as further exposure to the cold (through PPE and other mitigating factors) is avoided.

In terms of quantum, it is interesting that the claimant would have only been awarded the top end of the lower bracket of the JC Guidelines – despite having mild NFCI symptoms in both his hands and his feet, as well as an aggravating feature in the form of an adjustment disorder.

The approach taken on clothing and other losses also provides support and guidance on those heads of loss – which, whilst smaller in terms of the overall schedule, quickly add up to claims pleaded in the tens of thousands. In particular, the future sum of £15 for clothing (gloves and socks) is particularly notable, and a departure from the £250 used in Billett. It was also on a reduced multiplier, rather than for the remainder of the claimant's life.

Finally, and as in Billett, the court favoured a lump sum approach over a career model/Ogden assessment for future loss of earnings, benefits and pension. There is consistency in that respect between the court's approach in Billett and Muyepa – and a recognition that mild NFCI is likely to improve.

Of course, Muyepa had the issue of fundamental dishonesty and exaggeration, which played a part in the assessment of quantum. Had the claim been genuine, the outcome may have been different. However, the judgment nevertheless provides useful guidance and an insight as to the approach a court may take on a claim for NFCI.

For more information please contact:

Ryan Bird
Partner
T: 0247 665 8165
E: rbird@keoghs.co.uk

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