

Keoghs secures “astonishing” FD win and dismissal of £3.7million claim

Brian Muyepa v Ministry Of Defence [2022] EWHC 2648 (KB)

On 21 October 2022, Mr Justice Brian Cotter sitting in the Royal Courts of Justice, King’s Bench Division, handed down judgment in the case of Brian Muyepa -v- Ministry of Defence and dismissed Mr Muyepa’s claim pursuant to Section 57 of the Criminal Justice and Courts Act 2015.

The case was handled by Carrie Hoey, Partner, and Liam Walsh, Solicitor, on behalf of Keoghs LLP and represents the highest value Non-Freezing Cold Injury (“NFCI”) claim ever advanced. The [full Judgment](#) should be regarded as essential reading for all PI litigators. It deals with several key issues, namely: pathology of NFCI and diagnosis, reliability and the use of witness evidence, disclosure and third party disclosure, surveillance evidence, expert Part 35 duties, care evidence and necessity, and military employment evidence and quantum.

Mr Muyepa was a former soldier in the British Army, who enlisted on 03 September 2007, and pursued a claim against the Ministry of Defence. He alleged that he sustained NFCI in his hands and feet whilst undertaking a tactical training exercise in Sennybridge, Wales in March 2016. Mr Muyepa alleged that he suffered an exacerbation of his NFCI whilst working in cold hangars over the winter of 2016/17 which resulted in Mr Muyepa requiring the use of a walking stick and being discharged from the Army on medical grounds on 16 January 2018.

During examination and interview with the Parties’ respective experts (10 in total), accounts were given by Mr Muyepa, and supported by his wife Mrs Rachel Muyepa, that he:

- Suffered from constant pain in his hands and feet due to peripheral nerve damage, with the pain being no different in the summer or winter, thereby rendering Mr Muyepa housebound;

- Was unable to walk without the use of a walking stick and/or assistance from his wife and/or furniture whilst indoors;
- Lived with his wife and was unable to undertake personal and/or domestic tasks and required significant care and assistance from his wife (which included shopping, help with his children);
- Did not assist with the care of his disabled daughter;
- Could not transfer in/out of the car without assistance;
- Could not make it to the toilet and would use a sports bottle (or similar) to urinate in;
- Did not have good/bad days; and
- Was no longer capable of employment.

Mr Muyepa served a Schedule of Loss claiming circa £3.7million in compensation, of which circa £2million represented his claim for care.

The Ministry of Defence were initially alerted to a potential fraud following inconsistent examination findings, and a feigned fall, during examination with the defendant neurologist; Dr Colin Mumford. Cognisant of the evidential burden to prove Fundamental Dishonesty, Keoghs arranged for several periods of surveillance and undertook Intel searches. Requests for specific disclosure were made in relation to social media, WhatsApp messages, employment records of a non-party, non-party DWP records, and Local Authority/Social Services records.



Keoghs uncovered a plethora of evidence and pleaded a positive case of Fundamental Dishonesty on the basis that:

1. The evidence regarding the use of a walking stick was inconsistent;
2. The evidence relating to Mr Muyepa's levels of pain were inconsistent;
3. Mr Muyepa was recorded at a summer BBQ dancing and holding a plate of food whilst wearing a chef's apron;
4. Mr and Mrs Muyepa did not live together and misled the care experts;
5. Mr Muyepa signed, and re-affirmed, a declaration to the DWP that he provided more than 35 hours care per week for his disabled daughter (whilst claiming significant levels of care during the same period);
6. Mrs Muyepa was recorded as working a significant number of hours and was highly unlikely to have been physically able to provide the levels of care to Mr Muyepa that she alleged and was claimed in the Schedule of Loss;
7. Video surveillance showed Mr Muyepa shopping at two local supermarkets, transferring in/out of his car with little or no issue, and no assistance from Mrs Muyepa (or anyone of that matter), and dropping his children at school in his car; and
8. He feigned a fall during examination with the Ministry of Defence's neurological expert; Dr Mumford.

Mr Muyepa opposed the Ministry of Defence's Application to rely upon the surveillance, and Intel evidence, arguing the evidence amounted to an "ambush". The Application was granted (see Brian Muyepa v Ministry of Defence [2021] EWHC 2236 (QB)) and in turn generated significant media attention. As a consequence, Keoghs were able to secure additional evidence, which included:

1. Lay witness evidence of Mr Muyepa talking at a BBQ as to how to potentially engineer a medical discharge from the Army (with emphasis on the steps to take in preparation of the infrared thermography testing at the Institute of Naval Medicine);
2. Lay witness evidence of Mr Muyepa having been seen on several other occasions mobilising without a walking stick and functioning without issue;
3. Lay witness evidence of Mr Muyepa attending a wedding in June 2019 where he was walking without a stick and dancing during the event; and
4. A short video of the wedding which showed Mr Muyepa walking without a stick and with a normal gait.

Mr Muyepa denied the MOD's allegations and adduced witness evidence from 29 lay witnesses, who were predominantly friends, family and ex-military, and some of whom had already received compensation awards for the same injury, albeit at a much lower level. Prior to the Trial, Mr Muyepa served a Final Schedule of Loss in excess of £2.9 million.

The case was heard by Cotter J. in the Royal Courts of Justice over a period of three weeks. The MOD relied upon two independent witnesses (Ms Mgomezulu and Mr Lessey) and the Court heard from 10 experts in the fields of Neurology, Psychiatry, Pain Management, Care and Employment.

It was clear from the evidence heard at the Trial, from both lay and expert witnesses, that Mr Muyepa faced an uphill struggle to succeed in his claim. In an ill-fated attempt to defeat the claim for Fundamental Dishonesty, Mr Muyepa served a revised Schedule of Loss which reduced the care claim, and heads of loss associated with Ms Amanda Kerby's care evidence, by circa £2million (compared against the £3.7million Schedule) the evening before the defendant's Closing Submissions. This served to re-inforce the MOD's case that the care claim was a fraud.

Cotter J. found Mr Muyepa to be Fundamental Dishonesty and dismissed the claim in its entirety. Cotter J. found the following:

NFCI diagnosis and symptoms

- NFCI is a subjective condition. Diagnosis is reliant on honest reporting and it is not a condition likely to deteriorate without further cold exposures. Furthermore, one would not accept "too great a swing of the pendulum" to account for episodes of greater functionality;

Lay Witness Evidence

- He preferred a qualitative approach to witness evidence rather than one that was quantitative. Notwithstanding the fact that the claimant relied upon evidence from 29 witnesses, Cotter J. found that large swathes of Mr Muyepa's evidence, and his wife's, could not be accepted as truthful;
- The defendant's two lay witnesses were found to be independent and unshakeable. It was accepted that the claimant was walking at a wedding in June 2019 without a walking stick.



Fundamental Dishonesty

- Mr Muyepa had suffered a mild NFCl whilst on exercise in Sennybridge, Wales, but thereafter fraudulently plotted to exaggerate his symptoms in order to engineer a medical discharge and to inflate the size of his personal injury claim.
- Paragraph 176 says: "Together the evidence of Dr Mumford, Dr Friedman and Dr Edwards painted a coherent and consistent picture of conscious, deliberate, prolonged and significant exaggeration which I much prefer to the overly benign and, I regret to say, at times partisan, analysis of Dr Carey, Dr Baggaley and Dr Sidery."
- Mrs Muyepa was complicit in the fraud and misled the experts as to the living arrangements which impacted upon the level of care that Mrs Muyepa was said to be providing and the living arrangements of their disabled daughter. Further, when faced with a question over how many hours she was capable of working in a week, replied that she was able to work 200 hours (in a 168 hour week). This was evidently false;
- The claim was dismissed on the ground of Fundamental Dishonesty. Mr Muyepa could walk, dance and assist with cooking. The use of a walking stick was no more than a "prop". Paragraph 162 says: "...I agree with Mr Ward's submission that the clip at the wedding in June 2019 showing the Claimant walking normally in a casual fashion across and back a room with a drink in his hand was devastating for the Claimant's credibility as the Defendant's experts found it to be..Whilst the change was not quite as dramatic as the miracle at Capernaum, it was as Dr Mumford described 'astonishing'".

- If the claimant had not been Fundamentally Dishonest, Cotter J. would have awarded only £97,595.33 (i.e. 3% of the amount claimed).

Expert Witness Evidence

- The judgment reiterated the core principles upon which care claims need to be assessed. Ms Amanda Kerby's evidence did not satisfy the test of "reasonableness" in respect of levels of care, aids and equipment. Ms Kerby failed to address the social media and surveillance evidence which was an unrealistic approach and/or revise her opinion having heard Mr and Mrs Muyepa's oral testimony. At paragraph 302, Cotter J. advised that "Ms Kerby's experience of giving evidence should stand as a warning".
- In contrast, Cotter J. highlighted the fair and balanced approach of the MOD's five experts: Dr. Colin Mumford (Neurologist); Dr. Neal Edwards (Pain Management); Dr. Trevor Friedman (Psychiatrist); Mrs. Jill Ferrie (Care); and Mr. Alasdair Cameron (of HJS Personnel Services – Employment);
- The judgment criticises all of the claimant's experts for being partisan, at times, and neglectful of their CPR Part 35 duties to the Court.

Quantum

- There was a step away from an analysis of the future loss of earnings claim on a multiplier / multiplicand basis. Instead, Cotter J. would have limited the claimant to a Blamire award, having rejected the claimant's Army 'career model' approach;

Keoghs LLP instructed Andrew Ward, of Exchange Chambers, to represent the MOD. Andrew provided excellent advice throughout the case and was impressive on his feet at Trial.

Carrie Hoey, Partner, commented:



This is a truly outstanding outcome for the MOD and sends a clear message to fraudulent claimants across the personal injury sector. The judgment delivers insight in respect of the various elements of the evidence and helpful commentary on robustly challenging fraudulent claims. This case is a significant example of how rigorous due diligence and a forensic analysis of the evidence, along with a joined up approach between Solicitors, Intel, Counsel and the MOD, will ensure fundamentally dishonest claims are fully scrutinised and robustly defended to ensure the integrity of the public purse.



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