

Written evidence submitted by Clare Stevens, Partner JMW Solicitors LLP (DOC0009)

Executive Summary

1. The Ministry of Defence continues to enjoy immunity from prosecution under the *Health and Safety at Work Act 1974* and exemptions under the *Corporate Manslaughter and Corporate Homicide Act 2007*.
2. Since 2016, when the Committee published its report *Beyond Endurance? Military Exercises and the Duty of Care*, there have been a further 12 deaths which occurred whilst Armed Forces personnel were training or on exercise¹.
3. During 2018/19 there were 13,461 injuries, ill health and health and safety incidents and 7,530 near misses, i.e. events not causing harm but potential to cause injury, ill health or death. The rate of injury and ill health reported for UK Armed Forces has increased since 2014/2015.²
4. Between the 1 April 2015 and 31 March 2019, 3,126 service personnel were identified as suffering from either a heat or cold injury³.
5. This submission considers whether lessons are being learnt and monitored, heat and cold injuries and whether the use of Crown Censures are justified.

About the Author

6. I am a Solicitor and Partner at JMW Solicitors LLP, a national full-service law firm. I have represented seriously injured military personnel and their families, almost exclusively, for over 10 years.
7. I have significant experience in inquest representation, both in relation to training and operational deaths. I represented families during the operations in Afghanistan and in relation to training accidents, more recently, I represented the father of Corporal James Dunsby at the inquest following his death in the Brecon Beacons in 2013 and the widow of Corporal Darren Neilson who died during a live firing exercise at Castlemartin Firing Range in 2017.

Learning Lessons

8. The recent inquest touching the death of Corporal Joshua Hoole, who tragically died on 19th July 2016, revealed, inter alia, a continued lack of awareness of Joint Service Publication 539: Heat Illness and Cold Injury: Prevention and Management (JSP 539)⁴ and concern in relation to assessment of risk.
9. It is important to note the timing of the Corporal Hoole's death as it occurred after a number of extensive inquiries had taken place following the deaths of Corporal James Dunsby and Lance Corporals Craig Roberts and Edward Maher, namely; this

¹ Training and Exercise deaths in the UK Armed Forces 01/01/2000-29/02/2020 published 26/03/2020

² MOD Health & Safety statistics: Annual Summary & Trends Over Time 2014/15- 2018/19 published 14/11/19

³ Freedom of Information Request dated 11 October 2019

⁴ Regulation 28 Report to Prevent Future Deaths Senior Coroner Birmingham and Solihull 1/11/19

Committee's Report; an Article 2 inquest⁵ following which the Senior Coroner for Birmingham and Solihull wrote a Regulation 28 Report to Prevent Future Deaths⁶ to which the MOD responded⁷; the Defence Safety Authority issued an Urgent Safety Advice on 6th August 2015⁸ and the Health & Safety Executive issued a Crown Censure. A Service Inquiry was also carried out but published subsequently.

10. Climatic Injuries can be serious, life-changing and career-ending injuries. They are, according to the MOD's own guidance, largely preventable. Yet, despite the aforementioned extensive inquiries and reassurance that lessons would be learnt, the same failings were revealed at the inquest touching the death of Joshua Hoole and in the Regulation 28 Report⁹.
11. Moreover, a Freedom of Information request I made on 11th October 2019, a copy of which is annexed to this submission, reveals that between 1st April 2015 and 31st March 2019, there were 3,126 service personnel identified as suffering from either a heat or cold injury. During that same period, £1,995,945 was paid out by the MOD in common law compensation to those suffering heat injuries. In relation to non-freezing cold injuries, between 1st April 2015 and 31st March 2018, £27million was paid in common law compensation. The amount paid to MOD lawyers for both injuries for the respective periods was in excess of £7.5million. Aside from the significant personal cost to those injured, on average, these injuries are costing the MOD over £5.9million per year (this is an undervaluation as it excludes a claimant's legal fees which will also be paid by the MOD in a successful claim).
12. In my own practice, we continue to receive instructions relating to heat and cold injuries which follow a common theme, use of generic risk assessment, no dynamic risk assessment and an apparent lack of knowledge or understanding of JSP 539.
13. This raises concerns that there has not been an increased awareness of JSP 539 and that lessons are not being learnt or the system for disseminating lessons and safety information is failing.
14. The Defence Safety Authority Urgent Safety Advice dated 6th August 2015, referred to above, was issued "*to ensure all commanders are aware of the importance of adhering to JSP 539*"
15. The distribution list for the Advice appears at the end of the document. It is unclear how and in what manner this information was disseminated beyond that distribution list.
16. It is imperative that safety information and lesson learning is shared collaboratively across regiments and also all Services.
17. A recently published Service Inquiry¹⁰ into the fatal shooting of a soldier in Iraq on the 2 January 2017 highlights this. The Service Inquiry refers to two previous similar incidents, one in December 2013 following which a Learning Account was prepared and a RAF led Service Inquiry conducted. However, neither the Learning Account nor

⁵ An inquest where Article 2 of the European Convention of Human Rights is engaged.

⁶ Report dated 20/7/2015

⁷ Response from Penny Mordaunt MP, Minister of State for the Armed Forces dated 14/9/2015

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https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/481374/20151109-Urgent_Safety_Advice_doc.pdf

⁹ Regulation 28 Report to Prevent Future Deaths, Senior Coroner Birmingham and Solihull 1/11/19

¹⁰

https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/844426/20191104-SI_Taji_Redacted-FINAL.pdf

RAF led Service Inquiry, which contained recommendations to prevent recurrence, were distributed to the DSA, nor were they readily available in the Maritime and Land domains. Furthermore, just eight months prior to the fatal shooting in January 2017, an unintentional discharge from the same weapon system occurred in the same accommodation block. A Learning Account acknowledged risks that were relevant to the January 2017 incident, yet the Learning Account was not issued or distributed and consequently potential lessons that would have been relevant and possibly prevented the incident January 2017 were not known or learnt.

18. The Service Inquiry also raises disparities in Learning Accounts in that the Learning Account prepared following the incident in January 2017 made no attempt at an initial assessment of why the incident may have occurred and consequently no recommendations to prevent recurrence. The Platoon Commander had also not contributed to or read the Learning Account. The Service Inquiry described this as *“another example of an immature Learning Culture in which the utility of Learning Accounts as mechanisms for learning from experience are not recognised”*.¹¹
19. The Service Inquiry recommends that observations and lessons from all Learning Accounts, Defence and Front Line Command Service Inquiries and Non-Statutory Inquiries, are captured on a common lessons information management system to ensure observations and lessons are available across Defence¹². Whilst this may assist with collection of information, the key is the process by which the information, once collated, will be used and shared.
20. In other professions, personnel are required to undergo continued professional development. From my own enquiries it does not appear that the MOD operate a similar system which would revisit policies, changes to policies and ensure training and refresher training is provided.
21. It is my submission that there should be an overarching system to collate, review and monitor lessons and recommendations from within Defence but also made externally, such as by Coroners to ensure that opportunities are not missed. The implementation of recommendations should be monitored and audited. This system should inform training and refresher training.
22. Risk assessments are a common theme in the cases I conduct; they are often generic and not specific enough to the activity being assessed, inadequate in terms of scope or not revisited dynamically. Risk assessments were raised at the inquest, in 2018, following the death of two soldiers at the Castlemartin Firing Range in 2017. The Health & Safety Executive raised that advanced or developed risk assessment techniques¹³ had not been applied. In the response¹⁴ to the Coroner’s Regulation 28 Report, the Secretary of State, advised that a need had been identified to review Safety Cases to ensure the appropriate risk assessment methodology was being used.
23. A Training Needs Analysis was undertaken following Cpl Hoole’s death in relation to risk assessment, resulting in a report on Safety Risk Management being published in October 2019 and training being carried out.¹⁵

¹¹ Paragraph 1.4.303

¹² Paragraph 1.4.305

¹³ Regulation 28 Report to Prevent Future Deaths , Senior Coroner for Birmingham & Solihull dated 18/7/2018

¹⁴ Response dated 27/9/2018

¹⁵ Secretary of State Response to Regulation 28 Report dated 27th January 2020.

24. It is submitted it would be useful for the Committee to consider the Safety Risk Management report and implementation along with the review of risk assessment methodology referred to above.

Crown Censure

25. The MOD enjoys immunity from prosecution under the *Health and Safety at Work Act 1974* and exemptions under the *Corporate Manslaughter and Corporate Homicide Act 2007*. There is no justification for the immunity from the 1974 Act, in my opinion. A Crown Censure is effectively an administrative exercise carried out “behind closed doors”, there is no public scrutiny or accountability. It is possible for an individual to be prosecuted which makes it absurd that the MOD cannot be. One of the purposes of punishment is deterrent and it is my view that immunity allows a “reluctance to change” culture to exist and a failure to improve standards and learn lessons. Crown Censures cannot be considered a deterrent given the number of incidences of climatic injuries that have occurred since the Crown Censure was issued following the deaths of Cpl Dunsby and L/Cpls Roberts and Maher.
26. In previous evidence to the Committee, Humphrey Morrison, Head of Legislation at the MOD, advised that one of the areas in which the MOD is held to account is through civil claims. Furthermore, the Government, in response to the Committee’s Third Report stated, “*The MOD invariably implements any corrective measures identified by the HSE and treats Crown Censure as a matter of the utmost seriousness. It is not therefore clear how the proposed amendments to the Actwould result in an tangible improvement to the safety of military training....These safeguards, together with the ability to bring civil claims for negligence against the MOD, where a breach of duty occurs.....provide a strong system both for discouraging failure by the MOD and for learning lessons where things go wrong.*” However, claims are often settled out of court with no public knowledge. Using climatic injuries as an example, it does not appear, given the frequency and costs involved, that civil claims act as a deterrent or are reflected on in a way to bring about change.
27. The Government also justifies the immunity on the basis “*it is not always easy to distinguish between a training activity and operations; the connection between training and the carrying out of an operation is often a seamless one*”. However, the civil courts have been able to make this distinction for years through the doctrine of combat immunity.
28. In relation to the exemptions under the *Corporate Manslaughter and Corporate Homicide Act 2007*, where gross negligence occurs there can be no justification for immunity. In relation to Specialist Military Units, given an individual can be prosecuted relating to the activities of a Specialist Military Unit, it must follow that the MOD can be prosecuted. The immunity has been justified with reference to issues of security and confidentiality, however, those issues apply in the same way to the prosecution of an individual and, therefore, the distinction from corporate responsibility cannot be defended.

End

8 April 2020

Appendix



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Clare Stevens

11 October 2019

Dear Clare Stevens

Thank you for your letter of 17 September requesting the following information:

1. How many incidences of heat illness/injury have been recorded between the dates 1st April 2015 to 31st March 2019.
2. How many new compensation claims were brought in respect of this injury between 1st April 2015 and 31st March 2019
3. How many compensation claims brought in respect of this injury were settled between 1st April 2015 and 31st March 2019?
4. How much was paid out in compensation for the aforementioned cases.
5. How many of the aforementioned cases were contested at a trial on liability.
6. How much was paid to MOD Lawyers to defend the aforementioned cases during that period (1st April 2015 to 31st March 2019).

We should also be grateful to receive the following information:-

7. How many incidences of non-freezing cold injury have been recorded between the dates 1st April 2015 and 31st March 2019?
8. How many new compensation claims were brought in respect of this injury between 1st April 2015 and 31st March 2019
9. How many compensation claims were settled during that period in relation to claims for non-freezing cold injuries?
10. What was the value of damages paid out in respect of those personal injury cases between 1st April 2015 and 31st March 2019.
11. How many cases were taken to trial on liability during that period in relation to non-freezing cold injuries.
12. How much was paid to MOD Lawyers to defend those cases during that period (1st April 2015 to 31st March 2019)."

I am treating your correspondence as a request for information under the Freedom of Information Act 2000 (FOIA). Thank you for your clarification e-mail of 19 September, confirming that you are happy to receive the number of people that have been identified as having a heat illness/injury or NFCI in the specified time period as we are unable to provide the number of incidences. Thank you also for confirming that your request concerns common law compensation claims brought for heat illness/injury or NFCI. It should therefore be noted that this response does not cover any compensation paid out to current and former service personnel under the no-fault Armed Forces Compensation scheme (AFCS). The AFCS came into force on 6 April 2005 to pay compensation for injury, illness or death attributable to Service that occurred on or after that date. It replaced the

previous compensation arrangements provided by the War Pensions Scheme (WPS) and the attributable elements of the Armed Forces and Reserve Forces Pensions Scheme.

A search for the information has now been completed within the Ministry of Defence, and I can confirm that information in scope of your request is held.

1. How many incidences of heat illness/injury have been recorded between the dates 1st April 2015 to 31st March 2019.

Between 1 Apr 2015 and 31 Mar 2019, **1,339** service personnel were identified as having suffered a heat illness. Figures have been supplied by Defence Statistics Health. Please see background notes at the foot of this letter.

2. How many new compensation claims were brought in respect of this injury between 1st April 2015 and 31st March 2019

There were seven common law claims brought in relation to heat injury/illness. Our current contractors who handle the majority of Employer's Liability -Service claims since 1 May 16 do not currently hold data that classifies claims in terms of heat illness/injury. This figure should therefore be treated as a minimum.

Under Section 16 (Advice and Assistance), it should be noted that there have been individual heat injury/illness cases that have resulted in multiple claims brought during the period. Therefore the seven claims brought against the MOD relate to fewer than five individuals.

3. How many compensation claims brought in respect of this injury were settled between 1st April 2015 and 31st March 2019?

Nine common law claims in respect of heat illness/injury were fully settled in relation to damages and associated legal costs during the time period. Our current contractors who handle the majority of EL-Service claims since 1 May 16 do not currently hold data that classifies claims in terms of heat illness/injury. This figure should therefore be treated as a minimum.

Under Section 16 (Advice and Assistance), it should be noted that there have been individual heat injury/illness cases that have resulted in multiple claims brought during the period. Therefore the nine claims settled relate to six individuals.

4. How much was paid out in compensation for the aforementioned cases.
£1,995,945 has been paid out in compensation in connection with the nine settled claims.

5. How many of the aforementioned cases were contested at a trial on liability.
The claims management systems that we use do not record cases that have run to trial.

6. How much was paid to MOD Lawyers to defend the aforementioned cases during that period (1st April 2015 to 31st March 2019).
£458,230.60 was paid in MOD legal fees and disbursements including Counsel fees and expert fees (inclusive of VAT), in connection with these nine cases.

7. How many incidences of non-freezing cold injury have been recorded between the dates 1st April 2015 and 31st March 2019?

Between 1 Apr 2015 and 31 Mar 2019, **1,787** service personnel were identified as having suffered a cold injury. Of which, **1,349** service personnel were identified as having suffered a non-freezing cold injury. Figures have been supplied by Defence Statistics Health. Please see background notes at the foot of this letter.

8. How many new compensation claims were brought in respect of this injury between 1st April 2015 and 31st March 2019?

The data provided below is for the period 1 April 2015 – 31 March 2018 as the Claims Official Statistics have not published data for FY18/19. The number of NFCI claims brought in the period is 425 based on the latest data from MODs contractors.

Under Section 16 (Advice and Assistance), the figures presented in this response have been compiled from live data, which are continually updated and cleansed by MOD contractors. Figures were correct as at 9 October 2019. Therefore, figures may differ from those previously published.

9. How many compensation claims were settled during that period in relation to claims for non-freezing cold injuries?

I can confirm that 373 NFCI claims were fully settled on damages and associated legal costs in the period 1 April 2015 – 31 March 2018.

Under Section 16 (Advice and Assistance), the figures presented in this response have been compiled from live data, which are continually updated and cleansed by MOD contractors. Figures were correct as at 9 October 2019. Therefore, figures may differ from those previously published. It is possible the total may not match with figures previously published. Late payments are made on occasions for example, recoverable benefits or on a late legal cost bill. The contractors will overwrite the claims closed date with the late payment date which can lead to the same claim being shown as settled in more than one Financial Year within the published figures.

10. What was the value of damages paid out in respect of those personal injury cases between 1st April 2015 and 31st March 2019.

The amount of compensation that has been paid out in the cases specified in the 373 fully settled cases is £27m between 1 April 2015 - 31 March 2018. Please note that there may be other NFCI cases where damages have been settled in the timeframe but as the costs have not yet been settled, they are not included in this response.

11. How many cases were taken to trial on liability during that period in relation to non-freezing cold injuries.

The claims management systems that we use do not record cases that have run to trial.

12. How much was paid to MOD Lawyers to defend those NFCI cases during that period (1st April 2015 to 31st March 2019)."

MODs own legal costs relating to NFCI claims over the time period 1 April 2015 - 31 March 2018 are around £7.1m.

If you are not satisfied with this response or you wish to complain about any aspect of the handling of your request, then you should contact us in the first instance at the address above. If informal resolution is not possible and you are still dissatisfied then you may apply for an independent internal review by contacting the Information Rights Compliance team, Ground Floor, MOD Main Building, Whitehall, SW1A 2HB (e-mail CIO-FOI-IR@mod.uk). Please note that any request for an internal review must be made within 40 working days of the date on which the attempt to reach informal resolution has come to an end.

If you remain dissatisfied following an internal review, you may take your complaint to the Information Commissioner under the provisions of Section 50 of the Freedom of Information Act. Please note that the Information Commissioner will not normally investigate your case until the MOD internal review process has been completed. Further details of the role and powers of the Information Commissioner can be found on the Commissioner's website, <http://www.ico.org.uk>.

Yours sincerely,

Common Law & Policy Team