

## Forensic Corner 6: The Increasing Weight of Subjectivity in Military Torts

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### Introduction

In a previous Forensic Corner (1) we presented and discussed the Israeli Supreme Court's decision in the OA case (5343/00), where the causal connection between the outbreak of a soldier's mental illness and the conditions to which she was exposed during her non-combat military service was dealt with. This decision established the guidelines according to which every court of law in the State of Israel needs to rule while dealing with this type of case.

In this previous discussion it was noted that the basis upon which this decision rests is the concept that the issue of causal connection is a medico-legal one, and that the courts have to issue their rulings in such cases where there are both objective and subjective elements for it. The subjective element is connected with the personality of the claimant as well as with the fact that his/her mental illness may have been latent or undetected. The objective element refers to the conditions of the military service to which he was exposed. The assessment of the weight of these elements in each individual case must be made, in the final analysis, by the court, and its deliberations are dependent on the specific circumstances of each and every case. However, the Supreme Court did rule the following in the OA Case:

“A trivial event which occurred to a soldier during his military service will not be recognized by the Court as the cause of the outbreak of a constitutional illness. The causal

relationship to military service – being, as it is, military service – must have a minimum force before it can be recognized as being the cause of the outbreak of a constitutional illness.”

It follows, therefore, that it is necessary to prove the objective existence of a cause of at least “minimum force” when trying to establish a causal relationship between the outbreak of a constitutional mental illness which occurs during military service and the military service itself. This principle is of importance when a person makes a claim to the Compensation Officer of the Ministry of Defense to be recognized as suffering from a disability related/caused by the conditions of his military service.

When the disability is of an emotional or psychiatric nature, the claim is usually based on the medical opinion of a psychiatric expert, both in respect of the medical diagnosis and also of the causality between the diagnosis and the circumstances of the claimant's military service.

The specific characteristic of the OA case was the Supreme Court's acceptance of the legal concept that the external cause does not need to be a combat event or a major accident. In that case, the accepted external cause was the insufficient training of using a computer to perform a clerical task, a factor which was felt by the claimant to be a major stressing condition. This new approach of the Supreme Court increased significantly, by implication, the weight of subjectivity in military torts.

This time, we would like to describe a judgement which was handed down in May 2006 by

the Haifa District Court (2) in an appeal that was lodged against the 2004 decision of the Appeals Committee according to the Disability Law (Compensation and Rehabilitation) of 1959. This judgment illustrates a legal interpretation of the term “minimal force” which we mentioned earlier, the significance of which is the implicit increase in the weight given to subjectivity in military torts.

### Circumstances of the Case

The appeal was lodged by a man born in 1959 who was drafted into National Army Service in 1978 and completed it as an officer with the rank of lieutenant. In 1981, immediately on completion of his National Military Service, the plaintiff volunteered to continue as a professional soldier in the IDF. He served continuously in the IDF for 19 years until August 2000. He completed his military career at the rank of colonel. His final job in the IDF was that of regional maintenance commander.

In 1998 the then Chief of Staff (Commander in Chief) personally appointed him to head a certain project, which was performed on an experimental basis by the IDF. The claim of the plaintiff was that in the course of this project, wishing to carry out his job in the best possible manner, especially since he was personally approached to be in charge by the CIC, and wishing to maintain the high standards of performance of similar projects in other units, he felt intense emotional stress and developed a psychotic episode. This episode first appeared in the claimant in 1998, and he was subsequently diagnosed as suffering from schizoaffective disorder. During the course of this episode, he also carried on an extensive correspondence with the Accounts Department of the IDF regarding his salary, since he felt that various errors had been made in the calculation of his salary, thus discriminating against him in comparison to other officers of his rank.

The claimant sued the Compensation Officer on the basis of the Disability Law to recognize him as suffering from an emotional injury which, he claimed, occurred during his IDF military service and as a direct result of this service. The Compensation Officer turned down his claim for recognition under the Disability Law based on a medical report which found no causal link between the

claimant's mental disorder and his army service conditions. The claimant then appealed to the Appeals Committee according to the Disability Law. At this hearing he brought up his argument regarding the conditions of his military service and even produced for the committee a medical opinion supporting his claim. After discussion of his appeal the Committee decided, in October 2004, to reject the appeal lodged by the claimant. The claimant then lodged an appeal against this decision with the District Court.

Just as he did before the Appeals Committee, the subject claimed before the District Court that his mental illness had been caused by the mental strain he had been under, both due to the weighty assignment he had been handed by the Commander in Chief, and also due to the correspondence he had carried out with the Accounts Department on the issue of his salary. These were, according to him, the two reasons for which the IDF should be held responsible for his mental disability which, according to him, occurred during and as a result of his military service.

The Compensation Officer did not object, in his response to the Court, to the fact that the Chief of Staff entrusted the claimant with an “extra assignment” or to the fact that there was a conflict between the Accounts Department and the claimant regarding his salary. The Compensation Officer argued that the difference of opinion between the two sides was centered on the question as to whether or not the work load that was put on the claimant could have been the trigger which led to the outbreak of his psychotic episode. Moreover, he asked whether the service conditions of the claimant contained the required legal relationship to the cause of the illness when examined objectively (i.e., whether in the case of the claimant the necessary objective and subjective elements were present to make the claim of the existence of a causal link, as mentioned above).

The Compensation Officer argued that there was no need to interfere in the decision of the Appeals Committee, which preferred the medical report presented to it on behalf of the experts for the Compensation Officer over the medical report presented to it on behalf of the claimant, and that it was inappropriate that this appeal level intervene

in the preference of the Appeals Committee. Moreover, he argued that in the case of the claimant, the approach which should be adopted is that of the medical expert of the Compensation Officer, according to which a heavy work or intensive work load are not recognized as a risk factor for the outbreak of the claimant's illness, especially since the work was not exceptional in nature as it was commonly found among the regular duties expected of the claimant.

### The Court's Decision

On May 2006 the Court ruled that the difference of opinion which existed between the claimant and the Accounts Department over salary was not of the weight necessary to be considered an objective basis for the existence of a causal connection, even if it were to be assumed that, subjectively, i.e., because of the constitutional makeup of the claimant, he was more sensitive, emotionally, to events within his environment, than another person might be (in legal terms: he had a "thin skull").

On the other hand, the Court ruled that with regards to the carrying out of the special project that was assigned to him by the Commander in Chief, there were present the required elements for the recognition of causal connection between the claimant's military service and the outbreak of the mental illness of which he suffered. The Court ruled that during the period in which he was handling the project, the claimant was under considerable pressure in his military capacity and this pressure necessitated his investing meaningful emotional efforts. The Court found that at that time the claimant experienced "events which were not trivial and were not normal for his usual work schedule, but which were events of sufficient weight as to support the conclusion that the illness from which he suffered... was caused by his military service." The Court also found that up until the period during which the claimant was assigned that particular project, the conditions of his military service, per se, and over a period of years, did not constitute a source of pressure for him. Nevertheless, that specialized mission, which was given him during his final stretch of command duty, created in him a specific stress which had a connection, both in

respect of the timing of the outbreak of the illness and of the content matter of the psychotic episode, to the appearance of the illness.

The Court found that there were no grounds to consider the special project which was assigned to the claimant "a regular task, equal in weight to all other tasks" that fell under the claimant's responsibility during the long years he served in the Army. It also was the opinion of the Court that it was even proved that, from the point of view of the claimant, the special project was, in fact, an unusual and unique event. According to the guideline ruling of the Supreme Court in the OA case, the claimant only needs to prove the existence of a causal relationship with the conditions of his IDF service that are at least of "minimal power" which, when added to the subjective basis lying dormant in the claimant himself, could cause the outbreak of the illness.

In conclusion, the District Court unanimously upheld the appeal of the claimant, cancelled the ruling of the Appeals Committee, and ruled that the mental illness from which the claimant suffered was caused during and as a result of his service in the IDF.

### Practical Implications

The ruling presented here can be added to the body of previous rulings in relation to a sensitive theme in the Israeli situation, i.e., the link between military service and psychotic mental illness. It appears that the Courts tend to adopt the approach that psychotic illnesses, despite the many problematic and unclear issues that still exist today regarding both their etiology and everything connected with exact diagnosis, should be seen in a broad perspective which encompasses within it bio-psycho-social aspects (3, 4). There are additional points to consider when looking at the causal relationship between military service and the outbreak of a psychotic illness. In order to prove the existence of such a relationship in a specific case, it is necessary to identify the existence of at least minimal force (the external and unusual traumatic factor) in the military service conditions of the plaintiff (the objective basis), as well as the subjective element. It must be pointed out that the District Court decided

that the special project handled by the claimant was in fact an external and unusual event and not, as the Compensation officer claimed, part of the usual work.

The case chosen for this paper is basically different from the OA case. In that case, the claimant was a young conscript who was requested to do a type of work she was not properly trained to perform and who saw herself as being incapable of refusing the job. In the present case, the plaintiff was a high ranking professional officer with many years of service, who accepted willingly the responsibility for a project in the field of his specialty. He could most probably have refused to take the responsibility without fearing reappraisal or major detrimental effects for his military career. Taking into consideration these characteristics, it seems that the District Court gave an increased weight to subjectivity in relation to the OA case.

Frequently, in Israel, psychiatrists are requested to give an expert opinion on psychiatric invalidity and on the causal relationship between it and the military service. The "last say" lies with the Court (the decision maker), as it does with all disagreements between the citizen and the State's representatives. However, standard procedure dictates that the Courts pass down their decisions based on the experts' evidence that is presented to them, as well as on their interpretation of the law as it has developed by precedents from previous cases.

Knowledge of these legal precedents (Court decisions), combined with an understanding of the currents of thinking underlying them, can be useful in the formulation of professional reports that will stand up in court. This means that the psychiatric

expert, when evaluating causation factors in military torts, should take into consideration the evolution of the legal concepts on the subject for two main reasons: a) improving the dialogue between the medical man and the legal man; b) helping his/her client to obtain what he/she rightfully deserves.

Moreover, changes in psychiatric conceptualizations should also be taken into consideration, e.g., the difference between DSM-IV-TR and ICD-10 when dealing with causation of post-traumatic stress disorder.

A final practical comment is in place here. Although the weight attributed by the Israeli courts to subjectivity in military torts seems to be increasing, it is advisable that the psychiatric expert expressing his/her opinion on causation will rely on the presence of unusual traumatic external conditions (even of a moderate/minimal weight) whose objective existence is corroborated by witnesses' testimony or documentation accepted by the court (5).

## References

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