



MINIMAL EFFECT

Theo Huckle QC and Christopher Johnson examine the *de minimis* argument in claims for NIHL

A defendant facing a personal injury claim may argue that an accepted physical change to the claimant's body is not significant or material enough to amount to a compensatable injury. This has become known as the *de minimis* argument. This article considers ten recent cases in the County Court in which the *de minimis* argument was invoked by defendants facing claims for noise-induced hearing loss (NIHL), with varying success.

It is worth noting from the outset that these decisions do not constitute binding precedent. Firstly, one County Court judge is not bound by the decision of another on a point of law, still less a decision dependent on the facts of the case: *Howard De Walden Estates v Aggio* [2007] EWCA Civ 499. Secondly, whether or not an injury is *de minimis* is from first to last a question of fact and degree: *Rothwell, Johnston et al. ("Pleural Plaques")* [2007] UKHL 39.

Despite this, these decisions are being repeatedly cited in the County Court. The confusion caused by these citations undermines the task of the instant court (to consider the *de minimis* question afresh), a task that frequently arises in fast track trials with limited amounts of evidence before the court.

Technical background – noise, human hearing and speech

NIHL typically takes the form of a reduction in perceptible sounds (judged against individuals of the same age as the sufferer) at certain frequencies (usually in the 3kHz – 6kHz range). To understand the effect of NIHL on the sufferer, it is important to consider both the volume and the frequency of sounds.

Volume

The measurement of noise in decibels is drawn on a logarithmic scale, so that a 3dB increase represents a doubling of sound pressure, and a 10dB increase represents a tenfold increase in sound pressure. Thus 93dB is twice as 'loud' as 90dB in terms of the force being applied to the structures of the ear, though the brain does not hear it like that.

As to speech: a whisper is at around 20dB; normal conversation at around 60dB; shouted conversation at around 90dB.

Frequency

It is generally accepted that the range of hearing in children and young adults is c. 20Hz – 20kHz, with hearing above 8kHz fading with age, though into quite late age it is common for adults to be able to hear sounds at above 10kHz.

As to speech: the human voice is capable of producing sounds within a frequency range of about 60Hz – 7kHz; most human speech falls within the range 250Hz – 3.3kHz.

It is relatively well established that sound at 4kHz can also play a significant part in speech recognition (particularly in busy settings), and many doctors consider that sound at 6kHz is also important.

A report of the expert hearing group for the Department of Health and Children (Ireland) concluded in 1998 that all frequencies between 250Hz and 4kHz contribute to speech comprehension, with 2kHz being the most important frequency. The same expert hearing group also concluded that frequencies of 6kHz and 8kHz carry no information

for speech comprehension, but this is not universally accepted.

'Noise-induced' hearing loss

Noise-induced hearing loss (NIHL) is hearing loss caused or contributed to by exposure to noise. NIHL is not itself a diagnosis. The form of hearing loss, and hence the correct diagnosis, is sensorineural hearing loss - that is hearing loss operating at the interface between the movement response to sound in the middle ear, and the consequent neural signalling to the brain.

Whether sensorineural hearing loss is noise-induced is a matter of aetiology (medical) or causation (legal).

Hearing loss is capable of measurement through testing, typically pure tone audiometry. This test involves playing successive tones at different frequencies, beginning inaudibly, and increasing in volume, until the subject indicates that they can hear.

Whereas overall hearing loss may be measured by audiometry, experts may only estimate the component of that hearing loss which is noise-induced.

NIHL principally affects higher frequencies (around 4kHz).

The legal principles behind the *de minimis* argument

The principle authority on *de minimis* is the decision of the House of Lords in *Rothwell v Chemical and Insulating Co* [2007] UKHL 39. The issue before the Court was summarised by Lord Hoffman as follows:

'The question is whether someone who has been negligently exposed to asbestos in the course of his

employment can sue his employer for damages on the ground that he has developed pleural plaques.

'These are areas of fibrous thickening of the pleural membrane which surrounds the lungs.

'Save in very exceptional cases, they cause no symptoms. Nor do they cause any other asbestos-related diseases.

'But they signal the presence in the lungs and pleura of asbestos fibres which may independently cause life-threatening or fatal diseases such as asbestosis or mesothelioma.

'In consequence, a diagnosis of pleural plaques may cause the patient to contemplate his future with anxiety or even suffer clinical depression.'

The House of Lords held that pleural plaques did not constitute damage, and so could not found a cause of action.

To paraphrase, Lord Hoffman held that 'damage' sufficient to found a cause of action requires the claimant to be worse off, physically or economically, so that compensation is the appropriate remedy.

He said that whether an injury is serious enough to found a claim for compensation, or too trivial to justify a remedy, is a question of degree.

He added that evidence that physical changes are not felt by the claimant - and may never be felt - suggests that the damage will come within the principle of *de minimis non curat lex*. On the other hand, evidence that in unusual exertion or at the onset of disease he may suffer from his hidden impairment, suggests that the damage will be considered substantial.

Lord Rodger stated the test as whether or not there was 'material damage'.

The *de minimis* principle in NIHL

In NIHL cases, the *de minimis* principle tends to be invoked where: (1) it is agreed that NIHL has been suffered; but (2) that hearing loss affects only the frequencies above 3kHz.

Since NIHL occurs typically around 4kHz, this argument is potentially relevant to the majority of such claims.

Essentially the argument goes that human speech is primarily within the 1kHz – 3kHz band, and so a minor loss of hearing outside that range

is insufficiently serious to merit compensation.

Instinctively, this is problematic. First, as noted above, hearing at 4kHz is widely regarded as important in understanding human speech; second, the court should be considering more than simply the claimant's ability to understand speech – his ability (or not) to hear other noises is, of course, highly relevant.

Parkes v Meridian

Before *Rothwell*, the *de minimis* argument was considered by the High Court in the NIHL test case of *Parkes v Meridian* [2007] EWHC B1 (QB). The argument was not accepted. HHJ Inglis remarked that NIHL will amount to damage 'where the impairment has led or will lead to some level of disability, even if only minor.' HHJ Inglis then remarked on the relevance of hearing loss at higher frequencies, stating:

'I do not accept that impairment at 4kHz (or even at 6kHz...) is irrelevant because it will not have any practical effect on the claimant. As to 4kHz in particular, I found the evidence of Dr Rajiput convincing.

'As a result of extensive clinical experience she attaches great importance to 4kHz, so much so that she used 4kHz to arrive at an average in the one case she was concerned with. She was supported in that approach by Mr McCombe. Both he and Dr Yeoh included 6kHz as being in the range of frequencies important to speech.'

It is suggested that this approach remains correct after *Rothwell*. In particular, it appears that HHJ Inglis was rightly using 'disability' as synonymous with *symptoms* or *impairment*, rather than requiring a claimant to be actually 'disabled' (in any broader sense) by their hearing loss.

The claimant's perception of their loss

As Lord Hoffman put it in *Rothwell*: 'Evidence that [physical] changes are not felt by [the claimant] and may never be felt tells in favour of the damage coming within the principle of *de minimis non curat lex*'.

It is suggested that this dicta should be treated with care in the context of sensory loss, which, by its very nature, the claimant may not be subjectively aware of. In particular, the court should be slow to equate a lack of subjective

knowledge of sensory loss with that loss not being 'felt' by the claimant.

The court must consider the effect of hearing loss on the claimant's life. It may find that the effects are not significant or material, and the loss is not compensatable. But the court should be careful in doing so, and should make such a decision solely based on the evidence before it.

The recent cases

Hughes v Rhondda Cynon Taff CBC (2012) Unreported, 3 August

In closing submissions, counsel for the claimant abandoned reliance on hearing loss at 1-2-3 kHz, which was not proven on the basis of the evidence before the court. Instead, the claimant relied on losses at 4kHz (which, apparently, had been advanced by the claimant's expert for the first time in oral evidence).

It was common ground that there were a few decibels of loss at 4kHz caused by negligent exposure to noise, but defence counsel argued that while there was 'impairment', there was no relevant 'disability'. Recorder Grubb agreed on the basis of the joint statement, stating:

'The joint report then continues: "Any disability he now has is largely due to the effects of age associated or idiopathic loss. As his hearing is fundamentally a little better than average for his age... he does not have a disability..."

'There, the experts jointly acknowledge that the claimant has "better than average" hearing for his age and, therefore, does not have a disability.'

Thus the evidence before the court was that, although there was a recognised hearing loss at 4kHz, the claimant was not suffering from a disability. In light of this, it is hardly surprising that the recorder found as he did.

The claimant's expert evidence in *Hughes* was poor, and various lessons can be learnt:

- (1) the expert instructed by the claimant should not allow the defence expert to draft the joint statement;
- (2) the expert must be instructed to address the actual legal test (ie. 'significant or material injury' rather than 'disability');

(3) where a claimant relies on hearing loss at 4kHz, evidence of the importance of hearing at this frequency should be cited.

Holloway v Tyne Thames Technology (2015) Unreported, 7 May

In this case, the primary issue before the court was whether the claim failed as the injury was *de minimis*.

HHJ Freedman accepted the test to be applied was whether the claimant was *appreciably worse off* by reason of the noise component of his hearing loss, in accordance with *Rothwell*. He agreed with the claimant’s counsel’s summary that:

‘... it is a question of fact and degree for the court to determine... minor injuries are compensatable [though] the odd scratch or bruise would not be considered to be compensatable being a transient and utterly trivial injury.’

This cannot be criticised.

The quantification of the claimant’s hearing loss was disputed, but the court agreed with the defendant’s expert that the claimant’s NIHL was 1.3dB (binaural 1-2-3 kHz average), and 12dB (binaural 4kHz average).

The evidence of the defence expert was that while the claimant might notice the loss, it would be so rarely that *he could not accept that she was materially affected*. The judge agreed, and the claim failed.

There are a number of troubling aspects of this case and the way the evidence appears to have come out.

First, the accepted hearing loss at 4kHz was directly referable to the sorts of hearing problems the claimant reported. The judge noted:

‘[The claimant] finds it difficult to hear sounds clearly and therefore has difficulty in conversation, particularly when there is background noise... she requires the volume of the television turned up... and... she struggles somewhat to hear on the telephone.’

Second, it is clear that the debate as to whether hearing loss at 4kHz was material was conducted solely by reference to speech. It was accepted by the defence that the claimant’s ability to hear whispered conversation was impaired, but the defence relied on the idea of ‘loudness recruitment’ to contend that the claimant’s ability to hear spoken conversation was no less than someone without hearing impairment.

Given the evidence, it is suggested that the judge’s conclusion on *de minimis* was probably incorrect. Loss of the ability to hear whispered speech cannot readily be dismissed as *negligible*, or not ‘*appreciable*’.

However, once again, lessons can be learnt from the way in which the claimant’s case was presented:

(1) while loss of ability to understand speech is important, an expert should also consider the claimant’s lost ability to hear other sounds – birdsong, high musical notes and so forth;

(2) the claimant’s expert should be instructed to deal properly with the issue of loudness recruitment, or their evidence may be undermined.

Hinchcliffe v Cadbury UK Ltd (2015) Unreported, 12 May

This claim was dismissed on the basis that the claimant had failed to prove that his hearing loss was noise-induced. However, HHJ Gosnell briefly addressed the *de minimis* issue.

The evidence in the case was that the claimant sustained 1.7dB of NIHL over 1-2-3kHz plus a loss of c. 10-15dB at 4kHz.

The experts agreed that the 1.7dB hearing loss was not noticeable. They also agreed that the claimant’s need for hearing aids had been accelerated, although the defence argued that this was by two years, while the claimant argued five years.

The judge held that the injury was not *de minimis*, noting in particular:

‘Both experts felt that the claimant’s need for a hearing aid had been brought forward by two or five years respectively. This begs the question why this would be necessary if her hearing were not already worse.’

It is interesting to note that the judge’s approach seems to have been to consider whether the noise-induced element of the overall hearing loss was making a *material contribution* to the effects of the overall hearing loss, rather than simply considering the effect of the marginal increase due to NIHL. We suggest this is a perfectly proper approach.

Lomas v London Electric Wire Company & Smiths Ltd (2015) Unreported, 22 June

The claimant claimed damages for NIHL and tinnitus.

The claimant’s expert had initially calculated binaural NIHL over 1-2-3 and 4kHz at 11.5dB. In his oral evidence, the claimant’s expert ‘accepted that he had not undertaken a proper calculation... and that the proper average over 1, 2 and 3kHz bilaterally was 3 decibels’. The claimant’s expert went on to concede that the claimant ‘would have no appreciation of any harm or

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diminution of his hearing whatsoever' caused by the 3dB loss at 1-2-3kHz.

The defence argued that the NIHL of 3dB at 1-2-3kHz was *de minimis*. Recorder Hincliffe QC agreed. This is entirely unsurprising on the evidence. But the recorder also found (on the basis of the unchallenged evidence of the claimant's expert) that the tinnitus was caused by tortious exposure to noise.

There are two curious aspects to this case:

(1) prima facie, the difference between the 1-2-3-4kHz average and the 1-2-3kHz average would appear to be consistent with a substantial loss at 4kHz. If so, it is curious that this was not pursued;

(2) the concession by the claimant's expert about the effect of 3dB hearing loss at 1-2-3kHz does not accord with medical consensus.

Briggs v RHM Frozen Food Limited (2015) Unreported, 30 July

The claimant's hearing was said to be 'normal' between 1-3kHz. HHJ Coe QC found NIHL of 'between 10-15dB' at 4kHz. The defendant argued *de minimis*. The parties agreed that the test was whether or not the noise-induced element of overall hearing loss 'materially contributed' to the claimant's symptoms.

The claimant's expert emphasised the significance of loss at 4kHz:

'[4kHz] is a critical frequency for hearing and in [the claimant's expert's] view represents the cause of the claimant's disability. He specifically states that any dismissal of there being any importance of impaired hearing at 4kHz would be an opinion that would be outside of mainstream ENT and audiological opinion. He considers this to be very basic knowledge within audiology...'

The claimant's expert also relied on the so-called 'speech banana', a well-known diagrammatic illustration of the hearing levels required to pick out the typical sounds of speech at various frequencies.

The defendant's expert argued that, in the claimant's case, the speech banana was incorrect, and the claimant's noise-induced loss at 4kHz would not have an impact. The judge preferred the more clinically

conventional, research supported views of the claimant's expert, and the *de minimis* argument was dismissed.

Roberts v Prysmian Cables and Systems Limited (2015) Unreported, 30 October

In this case the evidence of the claimant's expert was unclear, and altered considerably in the course of several reports. But the judge accepted that there was NIHL at 4kHz of some functional significance. The defence did not adduce its own expert evidence, instead seeking to argue *de minimis* by citing *Holloway*. This was robustly rejected by HHJ Keyser QC in what seems to us to be the clearest analysis of the issue and the flaws in the way this argument is often put:

'First, decisions of the County Court do not constitute precedents; that is of course true of this decision also.

'Second, a decision as to what does and does not constitute an actionable injury is a matter of fact and degree and must turn on the evidence in the particular case. A finding on the evidence in one case is not a proper basis for a finding in another case where the evidence has been different. I have not had evidence of the kind that Judge Freedman had and cannot decide this case on the basis that was before him.

'Third, the dictum appears to have been obiter.

'Fourth, and with great respect, if the dictum means that a loss of hearing that is capable of being subjectively appreciated by the hearer may not be compensatable, I should be reluctant to agree.

'The critical point in *Johnston* was that the physical changes caused neither functional impairment nor any symptoms. A hearing loss that is imperceptible, though scientifically measurable, and has no functional impact would be in the same case. However, an impairment of the sense of hearing that is perceptible by the hearer would seem to be a different situation, even if it did not result in any apparent functional impairment...'

This approach is to be commended, subject to the hopefully obvious point that even a sensory loss of which the claimant is unaware may still be compensatable. Indeed, it is of the very essence of sensory loss

that the person no longer detects that sound/sight/feeling.

Child v Brass & Alloy Pressings (Deritend) Ltd (2015) Unreported, 21 December

This case was heard on the fast track, with oral evidence from only the claimant himself. It is worth noting this, as such is the basis upon which we can now expect many NIHL claims to proceed.

The claimant's expert found average NIHL of 2.02dB over 1-2-3kHz. He added:

'...the [claimant's] need for hearing aids has been accelerated by five years as a result of exposure to loud noise... [the claimant] has NIHL of moderate severity. This will have a moderate effect on his ability to enjoy social, domestic and recreational activities.'

The defence did not adduce its own expert evidence, nor seek to question the claimant's expert. However, they still argued *de minimis*, citing *Rothwell*, *Holloway*, *Hinchliffe* and *Briggs*.

The defence was unsurprisingly rejected. DJ Kelly noted that:

'The conclusion as to whether or not the loss is *de minimis* is very fact specific... [the claimant's expert's] evidence is the only medical evidence I have before me... Accepting [that] as I do... it does seem to me that the claimant is appreciably worse off...'

Matthews v Gardwell Coatings Limited (2016) Unreported, 11 March

Here, Recorder Lowe QC found against the claimant on causation, but briefly considered the *de minimis* issue. The NIHL component was around 3dB. The judge said:

'...the loss might be small but it was real in the sense of permanent deprivation of quality of hearing, albeit marginal, at the higher register of sound and observable if one is listening to bird song etc... Although [the claimant] did [not subjectively] experience these features of the resulting hearing loss, I would have concluded that it stood on the other side of the *Rothwell* divide, and just into the category of compensatable personal injury.'

It is worth noting that the hearing loss being considered appears similar to that in *Holloway*, yet a different

result was reached as the debate did not focus solely on understanding of speech, but hearing in its totality. The fact that the claimant was not subjectively aware of his sensory loss did not mean he did not have one.

Ross v Lyjon Ltd & Ors. (2016) Unreported, 23 September

This is a case principally about *latency* of injury and subsequent emergence, but HHJ Wood made obiter comments on the *de minimis* issue, indicating that he would have regarded NIHL of 10dB at 4kHz as compensatable.

Harbison v The Rover Company (2016) Unreported, 13 October

The case was allocated to the fast track. The only issue at trial was *de minimis*.

The claimant’s expert evidence was as follows:

- (1) the claimant’s hearing loss at 1-2-3kHz was 1dB and that ‘would not generally give rise to any noticeable subjective effect or material disability’;
- (2) hearing loss above these frequencies *could* have an impact on the claimant’s hearing, but, crucially,

the expert did not elaborate on that and gave no opinion as to whether this was in fact the case for the claimant. The defendant adduced no expert evidence.

HHJ Wall correctly identified that *Rothwell* required a claimant to prove he was ‘appreciably worse off’ as a result of the injury. Unsurprisingly on the evidence, she found that the claimant had not met that test.

Of course, it is for the claimant to prove his case, and on that expert evidence he was unable to do so. This case once again reinforces the importance of ensuring that the expert witness comprehensively addresses the relevant legal questions in the reports.

Conclusions

Of the ten recent cases considered above, only in *Holloway* do we make any significant criticism of the approach taken by the court. In two further cases, (*Hughes* and *Harbison*) we criticise the approach taken by the expert witnesses.

Throughout this review, we have emphasised, as have the judges, that *de minimis* is a question of fact

and degree. As such, it does not turn on legal precedent (as is clear from *Child* and *Roberts*), but on the case-specific evidence before the court.

Thus the proper approach when arguing or resisting a defence of *de minimis* is to obtain comprehensive expert evidence, addressing the facts based on the uncontroversial legal test of what is ‘injury’. Claimant lawyers in particular must ensure that their expert properly explains the nature of the sensory loss on which the claim is based. This should not be considered solely by reference to the ‘principal speech frequencies’ 1-2-3kHz, nor to the subjective awareness of the claimant (although ‘symptoms’ are always important of course), but rather by an objective appraisal of whether the claimant is ‘appreciably worse off’ overall.

For a more detailed review of the issues and cases summarised here, please see the full article at <http://bit.ly/2g8YPuv>.

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