When is an injury not an injury?

The overworking of the *de minimis* argument in noise-induced hearing loss claims shows the need for proper evidential preparation and some clearer guidance from the senior courts following *Rothwell*.

Introduction

1. There has recently been a sustained series of County Court decisions concerned with what are called *de minimis* arguments in noise-induced hearing loss ("NIHL") claims. Tactical advantage is clearly seen by the defence insurers and advisers in this area, and the arguments are now regularly deployed to defeat or minimise the value of claims.
2. Proper consideration and analysis of these cases is important not only for this area of practice, but more generally as a "taking stock" of what personal injury really *means* in the different contexts in which personal injury lawyers need to consider it.
3. This article seeks to analyse the various approaches of the courts and to derive any principles of general application. It concludes by offering observations on how defendants and claimants, respectively, will best approach contested cases on this issue.

"Authority"

4. In the 9 recent cases referred to here, Defendants have succeeded on this issue in 2[1] and claimants in 7, although in 2 cases[2] the judge's comments on *de minimis* were not part of the decision, and in another[3] the judge expressed himself "uncomfortable" with deciding this issue on the evidence before him. It would, of course, be very useful if one of these cases was taken to the Court of Appeal for truly authoritative guidance.
5. It is important to note that none of these decisions are binding on other tribunals as a matter of the law of precedent, and the citation of them should be treated with great care by other judges. In *Howard De Walden Estates v Aggio (2007)*[4] the Court of Appeal issued an addendum note to its judgment, directed at the question of how precedent works as between the High Court and the County Court. Its conclusion was that the County Court is bound by decisions of the High Court. In

1 *Hughes* and *Holloway*; they might say 3; in the *Lomas* case the judge found no compensatable hearing impairment, but did find tinnitus caused by the assessable NIHL, so that an award followed.

2 *Matthews* and *Ross*; in both cases the claim was rejected on causation grounds with the court not satisfied that the Claimant had suffered NIHL at all. Applications for permission to appeal are pending in both.

3 *Hinchliffe*

4 [2007] EWCA Civ 499

that case, as recorded by the Court of Appeal, two judges sitting separately in the County Court had asserted that the County Court was not bound by the decision of a (Deputy) High Court Judge also sitting as a court of first instance, "although [the High Court's decision] would, *as a matter of judicial comity*, *usually* be followed by a judge in the County Court *unless convinced that the decision was wrong*." (My emphasis added.) The Court of Appeal considered this correct so far as concerned "co-ordinate courts of first instance" (eg. High Court and High Court, County Court and County Court) but not as between County Court and High Court, the latter binding the former. The issue of "judicial comity" and its effect was not explored in full, but the principle of *law* is that co-ordinate courts of first instance do not bind each other, and one judge at the same level is free to depart from the decision of another.

6. This is implicit in the decision of Nourse J in the Chancery Division in *Colchester Estates (Cardiff) v Carlton Industries plc (1986)*[5], cited as supportive by the Court of Appeal, even though it suggests (rather oddly) that a second decision of the High Court becomes binding on High Court judges where it has itself departed from a contrary first decision. I am not sure how that works logically, but I need not trouble about it now. For our purposes it suffices to record that one County Court judge is not bound by a decision on a point of law of another, still less a decision dependant upon the facts of the case.

7. As will appear below, it is my view that a proper analysis shows that these *de minimis* NIHL cases are, indeed, very fact-sensitive, and that the legal principles established by the higher courts (which truly are authoritative and properly cited as "authority") are not altered by them in the slightest.

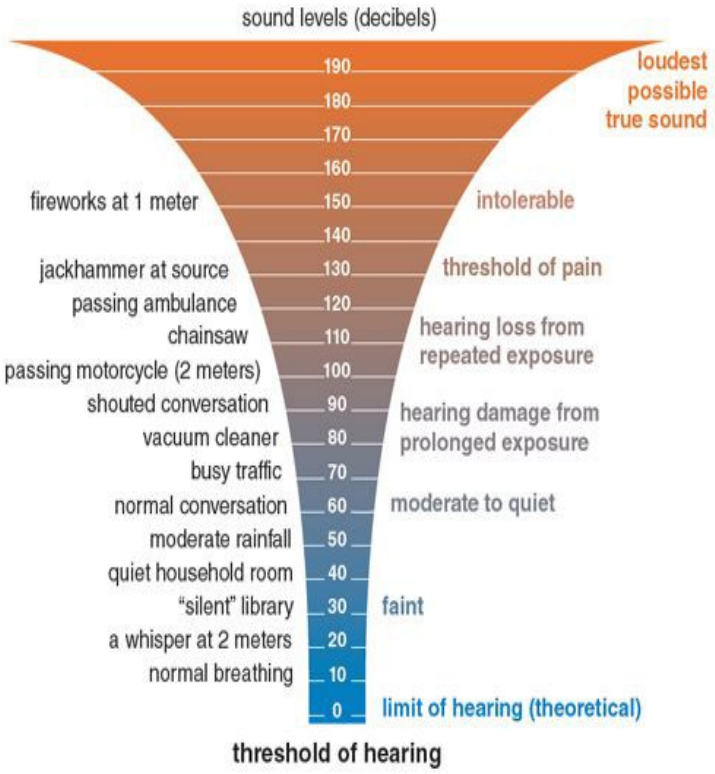
8. However, the confusion caused by them in their repeated citation undermines the task of low level courts now required to consider these issues, frequently in fast track trials with limited amounts of evidence before them. I ask rhetorically whether the decision of one judge to accept poorly opposed expert evidence is to be used as a basis for accepting the evidence of the same expert in a case where s/he is properly opposed on different facts? I doubt it. A number of the judges have made this point; see especially the citations from *Roberts* below.

5 [1986] Ch 80

Technical background – Noise, human hearing and speech

9. As far as loudness is concerned, some (simplistic) illustrations can be offered as to how noisy things are:

Volume levels of common sounds	
Whisper	20dB
Refridgerator	40dB
Speaking (average)	60dB
City traffic	80dB
Lawn Mower	90dB
Chain Saw	110dB
Firecracker	140dB
Shotgun	160dB



10. It must be noted that the measurement of noise in decibels is drawn on a logarithmic scale, so that a 3 dB increase represents a *doubling* of sound pressure. Thus, 93 dB is *twice* as "loud" as 90 dB in terms of the force being applied to the structures of the ear, though the brain does not hear it like that (or we would all, perhaps, go mad). Similarly, 10 dB up or down represents a multiple of 10, so that 90 dB is *10 times* as "loud" as 80 dB and a *tenth* of the loudness of 100 dB. 110 dB is *100 times* louder than 90 dB. And so on...

11. As to frequency or pitch, it is generally accepted that the human range of hearing is between c. 20 Hz-20 kHz in children and young adults but with the high range frequencies at 8 kHz and above fading with age, though into quite late age it Is common for adults to be able to hear sounds at above 10 kHz.

12. The human voice produces sound within a frequency range of about 60 Hz-7 kHz but most human speech falls within the range 250 Hz - 3.3 kHz. Nevertheless, the voices of females and children commonly have a higher frequency component which characterises their speech as "higher" and the listener needs to be able to hear those tones to understand – and enjoy – their speech properly. However, the primary importance of sound within the human speech frequency range of 250 Hz –

c. 3 kHz is internationally recognised in the transmission of speech through telecommunications networks with transmission limited within that range only. Again, one should bear in mind that when communicating in this way it is usually "1-to-1" with both sides able to concentrate on that sound and that sound only, which obviously aids comprehension.

13. However, it is relatively well established that sound at 4 kHz can also play a significant part in speech recognition, and many doctors also consider that 6 kHz is also important, though less so than 4 kHz. An Irish Expert Hearing Group[6] concluded in 1998 that all frequencies between 250Hz-4 kHz contribute to speech comprehension, and the most important frequency for understanding speech in a quiet environment is 2,000Hz with the other frequencies, 250 Hz, 500 Hz and 4 kHz, being less important. The same Expert Hearing Group concluded that frequencies of 6 kHz and 8 kHz carry no information for speech comprehension, but as noted above this is not a universal view. Hearing aid manufacturers have introduced 'extended bandwidth' hearing aids specifically to amplify sounds between 6-8 kHz, presumably because they think those frequencies aid hearing. Any expert report supporting or responding to *de minimis* arguments based on maintained levels at 1-3 kHz should, of course, set all of this out, but may well not do; see below as to evidential considerations.

14. It should also be remembered that the NIHL losses do not just occur at the measured frequencies, but across the range. It is a matter of history and clinical management that audiometry is undertaken at the set frequencies 0.25, 0.5, 1, 2, 3, 4, 6, 8 kHz, but nature does not work or respond – or make sounds - in that way.

Technical analysis and computation of measures of hearing loss

15. Emeritus Prof. Lutman's recent attempt to develop the diagnosis Guidelines ("CLB")[7] he and Prof. Coles and Mr Buffin issued in 2000, in order to attempt a form of *quantification* of the NIHL losses, has resulted in recent publication of the "LCB Guidelines" on quantification of NIHL[8]. It is useful, but it has its limitations. It uses fixed anchor points for the analysis at 1 and 8 khz, whereas for diagnosis purposes the CLB permitted selection of alternative anchors, essentially 0.5 kHz, 1 kHz, and 6 kHz, where 1 and 8 kHz did not appear to be stable. Generally, the attractions of easy quantification and determination of whether or not a claim is good by reference to a fixed computed standard are obvious for both claimant and defendant lawyers. The fixation on such computations, however, is in some ways

6 Hearing Disability Assessment, Report of the Expert Hearing Group, Department of Health and Children (Ireland) 1998. The Group heard evidence from Professors Alberti, Coles and Luttman among others.

7 "Guidelines on the diagnosis of noise-induced hearing loss for medico-legal purposes" (2000) 25 Clin. Otolaryngol. 264-73; the paper is also known as the "Coles Lutman Buffin Guidelines", or sometimes "the Coles paper".

8 "Guidelines for quantification of noise-induced hearing loss in a medico-legal context" (2016) 41 Clin. Otolaryngol. 347-57

the antithesis off a proper holistic approach to whether an individual claimant has suffered loss. It may not pass the "what if it was my mum" test, which I hope is the hallmark of the decent citizen and good lawyer.

16. You will note I do not use the expression "measurable loss". One of the first things to be learned by anyone entering into the murky world of NIHL claims (and HHJ Inglis described it as sometimes "smoke and mirrors" when trying *Parkes v Meridian – the Notts and Derbyshire Deafness Litigation [2007]*[9]) is that NIHL cannot be measured. What the experts offer is at best an estimate of the noise element of an overall hearing loss, usually with very little information as to the frequency profile of the noise exposure. It is the *overall hearing levels* of a claimant/patient which may be measured using audiometry, <u>not</u> the noise portion.

17. Indeed, NIHL is not a diagnosis at all. The form of hearing loss - and hence the correct *diagnosis* - is "sensorineural hearing loss", operating at the interface between physical movement response to sound in the middle ear and the consequent neural signalling to the brain, principally due to damage to the cochlea overwhelmed by high energy impulse from sound. NIHL is not a separate condition but rather one form of the condition. Whether it is *noise-induced* is a matter of *aetiology* (medical) or *causation* (legal).

18. What is also not a diagnosis is "idiopathic sensorineural hearing loss". "Idiopathic" is not a medical diagnosis but an admission of defeat. It simply means the cause/s of a particular condition cannot be identified. It is a "we don't know" conclusion. It can readily be seen that when there are clear causative factors, such as ageing and exposure to damaging noise, to introduce the concept of additional "idiopathic" factors is often deliberately confusing and logically inappropriate. It does not accord with the Occam's Razor principle of scientific and philosophical analysis, which amounts to an injunction to look to the identified potential causes, not speculate about unknowns. Another important point is that the statistical data for age-related levels <u>must</u> include these "unknown" factors causative of hearing loss within the population, since they cannot be identified to screen them out in the selection of data subjects. Thus the comparison of the Claimant's hearing with AAHL is a comparison of his/her hearing with levels associated with age *and idiopathic factors*. The net result should be that derived from any identifiable causes screened from the data, most particularly *noise* damage. This is well understood by defence doctors, though it is perhaps a *little* surprising how often they do not explain it to the court in their reports.

19. In the case of noise damage, this affects principally higher frequencies, depending in part upon the frequency profile of the damaging noise. In this way it is precisely the same type of loss as is suffered by everyone as part of the ageing process. This is why noise damage is often said to have an "ageing effect", a bringing forward of

9 [2007] EWHC B1 (QB). This litigation led to the Supreme Court case in *Baker v Quantum [2011] UKSC 17; [2011] ICR 523*.

losses that would have been suffered wholly or partly in any event with later age. It is also why noise damage is often thought to be pretty much overtaken by or subsumed in advancing age loss for most people by about age 80. It is nonetheless serious for that, of course. It is one thing to suffer hearing losses which exclude you from ordinary conversation in hubbub when you are in your 70s or 80s and possibly less inclined to go "clubbing", quite another to become isolated from ordinary socialising in lively bars and other crowded places when in early middle age and sometimes younger.

20. The number of claims for NIHL was until recently on a sharp upward trajectory, though the *data* (as opposed to the hyperbole) show that it is declining again now. The claims are often of relatively low value, and indeed when conducted on a "turnover" business basis by barely-qualifieds, sometimes in danger of being quite seriously undervalued. They commonly reflect years of tortious failure by employers to guard against noise injury to employees, and the emphasis on "access to justice" should be as heavily put upon "justice" as it is upon "access". Be that as it may, the costs to claim value ratio is high, and this has been of obvious concern to EL insurers. As one experienced defence lawyer has put it[10]:

    The rise in NIHL claims has been created by a combination of a number of factors. The recent Jackson reforms to the litigation process have slashed the profitability of bread-and-butter personal injury claims for claimant law firms. NIHL claims are relatively cheap and easy to come by through the use of screening campaigns, with many claimant firms commissioning mobile screening facilities to visit working mens' clubs and other potentially rich seams of new business. In addition, rightly or wrongly such claims have perhaps been seen by many in the claims industry as being "easy wins". This might have been in the case in the past, but broadly speaking the defendant claims industry has upped its game considerably in recent years, with many teams now able to put forward cogent medical arguments to defeat many claims without having to resort to costly medical experts. At the start of this recent surge, many of the claims were strong. However, it appears that as the numbers of the better claims were depleted, some claimant firms seem to now be reduced to scraping the bottom of the barrel and putting forward the more borderline or even downright hopeless claims in the hope of recouping the investments they made gathering them in.

21. It is easy to see how the battle lines have become drawn. It is common for every issue of defence to be kept alive by Defendants for quite a long time as a general discouragement to sue and encouragement to settle cheap including with global offers. *Pour encourager les autres* perhaps.

The meaning of "personal injury"

22. NIHL claims (as other disease claims) are complex for business and medical/audiological/technical reasons, but the governing legal principles of liability and quantum are no different from any other claims. In particular for present purposes, the identification of a compensatable[11] injury is a matter of general principle, discussed in depth in the asbestos cases, and in particular, the House of

10 Nick Mallen: "The recent surge of NIHL claims", Geldards LLP website, 11 January 2015

11 Like Lord Hoffman cited below, I prefer this form, though others prefer "compensable".

Lords' decision of *Rothwell v Chemical and Insulating Co Ltd [2007] UKHL 39*, *[2008] AC 281. Rothwell* was one of ten cases brought by claimants who suffered from pleural plaques. The issue was summarised by Lord Hoffman in the House of Lords 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.

23. At first instance, Holland J had held that the existence of pleural plaques showed that the lungs had been permanently penetrated by asbestos fibres and, in accordance with the decision in *Cartledge v E Jopling & Sons[1963] AC 758,* this would not itself found a cause of action. However, a *combination* of the *physiological damage* caused by such permanent penetration, *coupled with an assessable risk* of physical symptoms developing *and the associated anxiety* of fear of contracting far worse cancerous conditions, was enough to sustain a cause of action.

24. On appeal, Lord Phillips CJ and Longmore LJ (Lady Justice Smith dissenting) held that *Cartledge* was correct, and that pleural plaques did not satisfy the *de minimis* test and so did not amount to harm or damage that constituted a cause of action. Lord Phillips CJ said at paragraph 21:

The principle that judges used to describe as "*de minimis non curat lex*" is one of policy. It is but one of a number of principles of policy which are of relevance to this appeal. The courts will not allow their process to be used to pursue a claim unless what is at stake justifies the use of the process. A claim for negligence will only lie where damage has been caused that is worth suing for.

It is worth bearing in mind this expression “worth suing for”; in the types of permanent sensory loss cases with which we are here concerned, one does not really encounter awards of less than £1,000 and even one as low as £1500 is quite rare. Lord Phillips went on:

In Cartledge v Jopling [1963] AC 758, Lord Pearce said: 'The cause of action accrued when it reached a stage, whether known or unknown, at which a judge could properly give damages for the harm that had been done.

It seems to us that this comes close to the definition of 'significant injury' in section 14(2) of the Limitation Act 1980, namely injury in respect of which a claimant: 'would reasonably have considered it sufficiently serious to justify his instituting proceedings for damages against a defendant who did not dispute liability and was able to satisfy a judgment.

Indeed, in Patterson v Ministry of Defence (unreported, 29 July 1986), Simon Brown J held that material damage sufficient to set time running was the same as damage 'necessary to complete a claimant's cause of action in negligence'.

Accordingly, it was held that pleural plaques did not give rise to a cause of action even when their existence was coupled with the chance that harm or damage might develop and corresponding anxiety. Lord Phillips said:

There is no legal precedent in this country, beyond first instance decisions, for aggregating three heads of claim, which individually, could not found a cause of action, so as to constitute sufficient damage to give rise to a legal claim.

25. This was pithily summarised in argument and in subsequent commentary as "zero + zero + zero = zero". The Court of Appeal went further, applying *Page v Smith [1996] AC 155* and referring to *Fletcher v Commissioners of Public Works [2003] 1 IR 465* in deciding that a claimant who suffered a depressive illness as a result of an anxiety that he *might* develop a related disease cannot recover for this illness as it was not a reasonably foreseeable consequence of the defendant's breach of duty since a person of reasonable fortitude would not have reacted in this way.

26. The House of Lords upheld the decision of the Court of Appeal. Lord Hoffman summarised the position as follows at paragraphs 2 to 9:

2. Proof of damage is an essential element in a claim in negligence and in my opinion the symptomless plaques are not compensatable damage. Neither do the risk of future illness or anxiety about the possibility of that risk materialising amount to damage for the purpose of creating a cause of action, although the law allows both to be taken into account in computing the loss suffered by someone who has actually suffered some compensatable physical injury and therefore has a cause of action. In the absence of such compensatable injury, however, there is no cause of action under which damages may be claimed and therefore no computation of loss in which the risk and anxiety may be taken into account. It follows that in my opinion the development of pleural plaques, whether or not associated with the risk of future, is not actionable injury. The same is true even if the anxiety causes a recognised psychiatric illness such as clinical depression. The right to protection against psychiatric illness is limited and does not extend to illness which would be suffered only by an unusually vulnerable person because of apprehension that he may suffer a tortuous injury. The risk of the future disease is not actionable and neither is a psychiatric illness caused by the contemplation of that risk. ...

7. ... a claim in tort based on negligence is incomplete without proof of damage. Damage in this sense is an abstract concept of being worse off, physically or economically, so that compensation is an appropriate remedy. It does not mean simply a physical change, which is consistent with making one better, as in the case of a successful operation, or with being neutral, having no perceptible effect upon one's health or capability.

8. How much worse off must one be? An action for compensation should not be set in motion on account of a trivial injury. *De minimis non curat lex.* But whether an injury is sufficiently serious to found a claim for compensation or too trivial to justify a remedy is a question of degree. Because people do not often go to the trouble of bringing actions to recover damages for trivial injuries, the question of how trivial is trivial has seldom arisen directly. It has however arisen in connection with the Limitation Act, under which the primary rule is that time runs from the date on which the cause of action accrues. In an action for negligence, that means the date upon which the claimant suffered damage which cannot be characterised as trivial. To identify that moment was the vital question in Cartledge v E Jopling & Sons Ltd[1963] AC 758, in which the employees had suffered death or serious injury from damage to their lungs caused by exposure to fragmented silica. At a date earlier than the commencement of the limitation period their lungs had suffered damage which would have been visible upon an X-ray examination, reduced their lung capacity in a way which would show itself in cases of unusual exertion, might advance without further inhalation, made them more vulnerable to tuberculosis or bronchitis and reduced their expectation of life. But in normal life the damage produced no symptoms and they were unaware of it. The House of Lords

affirmed the view of the trial judge and the Court of Appeal that a cause of action had arisen and the claims (as the law then stood) were statute-barred.

9. The members of the Court of Appeal and the House of Lords used slightly different words to express the degree of injury which must have been suffered. In the Court of Appeal ([1962] 1 QB 189) Harman LJ spoke (at p 199) of loss or damage "not being insignificant" and Pearson LJ said (at p 208) that the cause of action accrues when "the plaintiff concerned has suffered serious harm". In the House of Lords ([1963] AC 758) Lord Reid said (at pp 771-772) that the cause of action accrues when the wrongful act has caused personal injury "beyond what can be regarded as negligible." Lord Evershed (at p 774) spoke of "real damage as distinct from purely minimal damage". Lord Pearce (with whom all the rest of their Lordships agreed) said (at p 779): "it is for a judge or jury to decide whether a man has suffered any actionable harm and in borderline cases it is a question of degree" It is a question of fact in each case whether a man has suffered material damage by any physical changes in his body. Evidence that those changes are not felt by him and may never be felt tells in favour of the damage coming 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 tells in favour of the damage being substantial.'

Lord Rodger of Earlsferry went further and set out the test as follows:

87. In summary, three elements must combine before there is a cause of action for damages for personal injuries caused by a defendant's negligence or breach of statutory duty. There must be (1) a negligent act or breach of statutory duty by the defendant, which (2) causes an injury to the claimant's body and (3) the claimant must suffer material damage as a result.

27. Since *asymptomatic* pleural plaques were found to be *de minimis* in Rothwell, there is a danger of treating that decision as authority for the proposition that the presence of symptoms is in itself sufficient to make an injury or condition cross the threshold of materiality. However, put in that way this is not our law. Lord Hope (with whom Lords Rodger and Mance agreed) said:

47. … In strict legal theory a wrong has been done whenever a breach of the duty of care results in a demonstrable physical injury, however slight. But the policy of the law is not to entertain a claim for damages where the physical effects of the injury are no more than negligible. Otherwise the smallest cut, or the lightest bruise, might give rise to litigation the costs of which were out of all proportion to what was in issue. The policy does not provide clear guidance as to where the line is to be drawn between effects which are and are not negligible. But it can at least be said that an injury which is without any symptoms at all because it cannot be seen or felt and which will not lead to some other event that is harmful has no consequences that will attract an award of damages. Damages are given for injuries that cause harm, not for injuries that are harmless..

It is perhaps obvious that “the smallest cut, or the lightest bruise” is a matter of somewhat subjective judgment about which I fear different judges may well have very different views. In any event, I remain of the view that it will be a rare case where tortiously inflicted harm gives rise to symptoms yet does not result in entitlement to at least modest damages, and this is particularly so in cases of demonstrable sensory deficit.

When is NIHL personal injury?

28. This brings me to the issue in NIHL cases. That is whether someone complaining of NIHL has, albeit that it is agreed that NIHL has been occasioned, suffered compensatable loss. This argument often proceeds upon an analysis of the claimant's hearing in the frequency range 1-3 kHz, said to be "normal" or "within normal ranges", the latter especially within the interquartile range[12] of levels for non-noise effects (loosely equated to the effects of ageing, or "age associated hearing loss" = "AAHL"). Those frequencies are said to be the "principal speech frequencies", most required for everyday comprehension of speech. Conventionally then, *dis*ability in hearing terms is equated with losses in that frequency range. Disability, of course, is not the test of entitlement to damages for personal injury. I can successfully sue you for damages for a minor injury which no-one would sensibly consider "disabling".

29. Another point to bear in mind is what we used to call the "Lynford Christie point", or perhaps more up to date the "Usain Bolt point", namely that if some physical affect caused me to be able to run 100m in 9.99 seconds, I would not consider that an injury, but Usain Bolt undoubtedly would if it happened to him. Concepts of what hearing is "normal" have to be treated with care, since just as with other examples of biological variation described in statistical centile distributions, this is only an approximation by reference to the 50% of people within the interquartile range, so that even the least able within that range may be considered "normal" for these purposes, yet may be considerably "worse off" than those at the top of the range of "normal".

30. As to relevant frequencies, it should be remembered that even in the early bulk cases of NIHL, those against the Ford Motor Company heard mainly by HHJ Paynter-Reece in the 1970s and 1980s, the court admitted evidence about, and considered, reductions of hearing at 1, 2 and 3 kHz, but also at 1, 2 **and 4** kHz. The classical indicator of a noise-induced impairment of otherwise "normal" hearing was then, and has consistently since, been accepted to be "notching" or "bulging" of the shape of the claimant's audiogram around the 4 kHz frequency, because that is understood to be the part of the frequency spectrum where the human inner ear (cochlea) is *most* vulnerable to damage by noise, so that a *relatively* larger effect is shown there, appearing as the notch or bulge. This does not mean, of course, that hearing at other frequencies is not also noise affected, and the original CLB article was clear in pointing this out and indicating that its use was confined to "diagnosis" (strictly *causation analysis* for the reasons noted above about the true diagnosis) rather than quantification. In essence the notch was a matter of pattern, not quantum.

12 That is between the 75th (upper or better) and 25th centiles (lower or worse) representing 50% of the data subjects in the data distribution.

31. However, it follows also that concentration on particular frequency ranges is legally difficult. The court is not concerned to evaluate only specific types of impairment , but to consider whether the claimant is – overall - *appreciably, or more than negligibly, worse off* because of the noise damage element of overall hearing levels, and then do its best to assess and compensate for the extent of such adverse effect, whether that be serious or minor, provided more than *negligible*.

32. I pause to note that negligible is a very low standard. If I assault you and bruise you, then it would be a rare judge who suggested that even the painless bruise did not merit any award for the invasion of your bodily integrity (though I accept that the act of assault is itself generally worthy of compensation for that reason). Lord Hope suggests that "mere" bruise is insufficient for compensation, and certainly it is common for bruising and grazing to be treated as "one of those things" particularly amongst manual workers or those undertaking contact sports, for example. However, this is very much a matter of degree, and it does not take much to merit a damages award. Indeed, this was the very point that Dame Janet was making in her dissent in *Rothwell* in the Court of Appeal, namely that a very minor and indeed symptomless physiological change externally would usually merit a damages award, albeit not of great amount. Her contention was that the invisible internal physiological change should likewise be compensatable as an alteration of bodily integrity. The House of Lords disagreed, but this does not elevate "more than negligible" to any higher standard. To borrow the Prime Minister's recent mantra, negligible means *negligible*.

33. It is right to note that real but very short lived, or transient, physical symptoms without physiological change and caused by variable anxiety/stress not itself at actionable level may be considered negligible and not compensatable, but such cases can be expected to be very rare: see *Hussain v West Mercia Constabulary [2008]*[13]. In that case, the psychiatric evidence was that whilst the claimant did not have a current psychiatric diagnosis, nevertheless he experienced significant anxiety symptoms at stressful times, including irritability and physical discomfort, probably deriving from perceived muscular tension in the left arm and leg. The Court of Appeal upheld the judge's rejection of the claim, holding that the numbness of the left arm and leg were transient, affecting him only when under stress and that did not take his case beyond those in which the only symptoms were (non clinical) stress, anxiety and the like. Similarly, the numbness referred to was not physical injury or damage so as to amount to material damage.

34. Accordingly, whilst of course those with major disabling hearing loss will inevitably have such loss in the "conventional" 1-2-3 kHz range, this is not to say that those with losses appearing at other frequency ranges (consistent with noise damage) have no compensatable loss. As noted, 4 kHz is the frequency most likely to be worst affected by noise injury and it is rather unsurprising if losses consistent with

13 [2008] EWCA Civ 1205

damage affecting perception at around that frequency are most common. Whilst originally it seemed to be accepted generally by advising clinicians (usually ENT surgeons/otolaryngologists) that this was an important frequency for "shaping" or "giving structure to" speech sounds (often referred to as "discrimination") in mixed noise situations, not so important in 1-to-1 conversation but vital in busy pubs, this seems more in dispute now in some quarters. One way it is put is that the 1-2-3 kHz average "gives a much better reflection of everyday hearing ability". Whilst this may be true, and it is relevant to consideration of the extent of a loss, it does not of itself answer the questions as to what is the claimant's loss and whether it should be considered negligible so as to prevent recovery of even modest damages, despite the assumed finding (or commonly admission) that some estimable NIHL has been caused to him/her by the tortfeasor. On the other hand, one of the experts most associated with defence instruction has (again) conceded in evidence very recently that:

The evidence suggests that significant loss at 4 kHz will cause people some difficulty in perceiving speech clearly in a noisy background.

What is "significant" must surely be a matter of expert evidence in the individual case against the background of the claimant's account of any symptoms of hearing loss (and or tinnitus) experienced.

35. Amongst many issues before him, HHJ Inglis J was asked to address the question in *Parkes v Meridian*. He said:

125. This debate … did not arise in a satisfactory way. If there is work to be published in the future, then I think any effect on awards of damages in hearing loss cases must await such publication and peer review. I do not accept, however, the argument for the Defendants based on *de minimis*. The smallness of a level of risk may be relevant in assessing how an employer should act in particular circumstances. It does not prevent compensation for hearing loss being appropriate where the impairment has led or will lead to some level of disability, even if only minor. For small amounts of noise damage that will lead to awards at the bottom end of the damages scale, the key decision in my judgment is whether a real degree of noise induced impairment can be confidently diagnosed on the balance of probability. I have said in that connection where there are low noise exposures in particular that the approach to that decision, in order to pass the standard of proof, must be robust. If it is sufficiently robust, then there will be a characteristic degree of impairment, typically at 4 kHz, but certainly in the range 3-6 kHz. There is likely also to be a threshold at least at one frequency raised above what would be expected by age alone. I accept that such impairment will, either at the time of examination, or later with the development of presbyacusis, result in disability that develops earlier and is more severe at the time of life it develops than would otherwise be the case. The reference to small degrees of noise induced loss being overwhelmed is misleading. In time, depending upon the degree to which presbyacusis develops, it may be. But the evidence of Prof. Lutman that noise induced loss and age related loss are broadly additive at least up to about a threshold of 40dB is borne out by ISO1999, and as explained by Prof. Robinson in his 1987 paper. I do not accept that impairment at 4 kHz (or even at 6 kHz in those cases where the degree of impairment at that frequency will support a diagnosis in a low noise case) is irrelevant because it will not have any practical effect on the claimant. As to 4 kHz in particular I found the evidence of Dr Rajput convincing. As a result of extensive clinical experience she attaches great importance to 4 kHz, so much so that she used 4 kHz 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 6 kHz as being in the range of frequencies important to speech.

36. It has been suggested that HHJ Inglis, deciding that case prior to their Lordships' decision in *Rothwell* was "wrong" but I do not see how. The judge was finding and asserting that minor injury still merits compensation. In particular he posited that what is required for compensation is that "the impairment has led or will lead to some level of disability, even if only minor" and that he had to find "a real degree of noise induced impairment". He linked this to the "diagnostic" process, requiring in his judgment a notch (= relative deficit to that expected for age) of 10 dBHL around 4 kHz. This is clearly correct. It is only if the claimant has had, now has or only ever will have some *negligible* level of symptoms/loss of amenity that compensation is not due upon proof of breach of duty causing NIHL.

37. As noted above, that use of the word "disability", though causing no difficult as used by HHJ Inglis, has led to problems elsewhere and can distract from the true issues here. A claimant does not have to be "disabled" to be entitled to compensation, save where "disabled" is used in a very narrow and highly technical way, more or less equal to (more than negligible) "inability" or "inhibition". Noise damage causes sensory loss of hearing which is permanent and which, by virtue of the audiometric findings, is almost always "appreciable" by clinicians even if the claimant is or has at times been unaware of it subjectively. To what extent that has *effects* upon the life of the claimant is something the court must investigate when asked, and it *may* find that the effects are negligible in the *Rothwell* sense, but it should be very careful in doing so, and only upon the evidence before it, certainly not decisions of lower courts themselves decided upon different and limited evidence.

38. There is a major difference between a lack of symptoms or subjective awareness in sensory loss cases compared with more conventional tissue-damage injuries. It is of the essence of loss of sensory perception that one is not or may not be aware of it. If a loss of perception is established on the evidence which means that the claimant's life is in fact diminished, whether or not, or for how long, s/he is or has been aware of that, or the extent of that awareness, are factors which of course go to the severity of the injury. Lack of awareness should not, however, be the ultimate test of injury or negligible effects. The logic of such a proposition is that someone injured at birth and rendered deaf or blind so as never to have heard or seen has no claim for damages for those sensory deficits That also is not our law, and there is a balance to be struck here by the court in considering whether the claimant has or has not suffered injury more than "negligible". I do not consider it "negligible" if someone is unable to hear the textured harmonics of musical notes above 3 khz and hence the rich timbre of different instruments, or unable to hear birdsong, whether or not s/he was a musician or ornithologist.

39. In the end, the question of whether the claimant has suffered appreciable injury, whose effects are more than merely negligible, so as to be compensatable under the law upon proof of tortious causation, is a *question of fact* for the fact-finding

tribunal upon the evidence adduced before it. Individual decisions are accordingly unlikely to provide any more than illustrations, and should be treated with extreme care. They will, of course, be cited by parties who wish the instant tribunal to accept the same or similar evidence as was accepted by that/those other judge/s, but the instant judge is hearing *this* evidence, not *that* evidence, and it is forensically dishonest to present these other cases in any other way.

The recent cases

Hughes

40. Our current hare was set running in the decision of Recorder Grubb sitting at Cardiff in *Hughes v Rhondda Cynon Taff CBC (2012)*[14]. The claimant claimed for NIHL arising from exposure to excessive noise during employment with the defendant as a builder's labourer between 1969-1986. He started to experience difficulties in hearing speech against a noisy background from 2009 at age 60. Breach of duty was admitted but causation was disputed. None of the 5 audiograms considered by the court showed any significant hearing "disability" across the 1-2-3 kHz frequency range, applying the sometimes controversial 'Black Book'[15] method for assessment of hearing "disability". It is noteworthy that the judge cited extensively from the joint report, including the following (with my emphasis added):

> **If the audiograms taken after ear protection was issued or analysed by the 'Black Book' method, *which is well-known to over-estimate hearing disability*, only the last gives a positive disability assessment so, by this method, there is no disability due to NIHL.**

It is clear from this that Mr Jones, the defendant's expert, drafted the joint statement. The Black Book is not "well-known" to do that; it provides a proposed measure of disability which is rather artificial, partly because it focusses purely upon the 1-3 kHz range. The problem with it is its artificiality in application to all situations, not its inherent "generosity". Those acting for claimants should always be extremely unhappy with any expert instructed for the claimant who permits the defence expert to draft the joint statement. We have too much experience of those claimant experts afterwards saying "I didn't mean that" or "I didn't agree that".

41. In the case, unsurprisingly, claimant's counsel abandoned reliance on loss over 1-2-3 khz in his closing submissions. However, for the first time apparently, in oral evidence the claimant's medical expert had advanced the argument that losses at 4 kHz gave rise to a "disability". It might be thought that the late introduction of this contention was forensically difficult. It was common ground that there were a few decibels of loss at 4 kHz caused by noise but defence counsel argued that whilst

14 Unreported, 3 August

15 Guidelines for Medico-legal Practice: Assessment of Hearing Disability (1992), King, Coles, Lutman & Robinson.

there was "impairment" there was no relevant "disability". The judge agreed. He recorded again what had apparently been agreed in the joint statement:

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, compared with average for his age, he does not have a disability, while compared with young human hearing he does. The average man of his age does not need hearing aids."
49.There, the experts jointly acknowledge that the claimant has "better than average" hearing for his age and, therefore, does not have a disability.

42. This is, in fact, a *non-sequitur*, and does not address whether this claimant has suffered sensory deficit, but given the state of the medical evidence it is not surprising the Recorder reached that view, and it was the end of the claim. He held that the claimant was not "appreciably worse off" and the change in hearing fell within the *de minimis* principle so as not to be actionable.

43. It is unsurprising that good defence lawyers saw here a way of defeating badly evidenced claims, and the case gave rise to much comment in the online publications and reliance upon this decision as "authority". *Hughes* had clearly demonstrated that *de minimis* defences can succeed in NIHL claims.

44. It is important to note that the relevant claimant's expert evidence before the Recorder was both late and limited, which is not an unusual circumstance when the courts seek to restrict expert evidence in enthusiastic reliance upon CPR35.1 despite its test of what evidence is "reasonably required". In particular, that evidence does not appear to have included any reference to the studies which support the significant role of hearing at 4 kHz for speech recognition.

Holloway

45. Next, in *Holloway v Tyne Thames Technology (2015)*[16], HHJ Freedman found that the defendant was in breach of duty throughout the claimant's employment from 1993 to 2006. The medical experts were agreed, and Judge Freedman accordingly found, that the claimant had sustained NIHL during her employment. The primary issue for determination was whether the claim failed as *de minimis*. Judge 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 claimant counsel's summary that

10. … 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.

46. The medical experts were divided on two issues: firstly, the quantification of the noise loss itself; secondly, whether the claimant *noticed* her additional noise loss at

16 Unreported, 7 May

4 kHz. As to quantification, Prof. Homer for the claimant said the claimant had either a 6 dBHL (binaural 1-2-3 kHz DHSS mean) or 9 dB (1-2-4 kHz) noise loss, by using median statistics for age 60 individuals from the Modified ISO 7029 (1984) tables, although the claimant was aged 68 at the time of examination, because there were other indications that absent noise damage Mrs Holloway's hearing was better than the median statistical data for her actual age. Prof. Lutman contended that the noise loss was 1.3 dB (binaural 1-2-3 kHz average) using age 70 statistics and did not consider this loss to be significant or have a material effect on the claimant. If Prof. Lutman's approach was preferred by the court, Prof. Homer agreed the claimant's hearing loss over 1-2-3 kHz would not be noticeably different over those frequencies. Judge Freedman was persuaded by Prof. Lutman's evidence and found that there was NIHL excess to age at 4 kHz of 11 and 16 dBHL respectively on the right and left , thus a binaural DHSS mean of 12 dBHL attributable to noise damage. Prof. Homer contended this loss was sufficient to show an appreciable or non-negligible loss but Prof. Lutman did not agree, and told the judge 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 was preferring the Lutman view and preferred this one; the claim failed.

47. There are a number of troubling aspects of this case and the way the evidence appears to have come out. For example, where there was clearly demonstrated NIHL, namely at 4 kHz, was the frequency area directly referable to the sorts of problems the claimant was reporting. At paragraph 14 of the judgment the judge recorded:

    14. Secondly, the account given by the claimant that she finds it difficult to hear sounds clearly and therefore has difficulty in conversation, particularly when there is background noise, is not open to question. Such emerges from her witness statement and what she told Prof. Homer. It also appears in her witness statement and in Prof. Homer's first report that she requires the volume of the television turned up in order to hear and that she struggles somewhat to hear on the telephone.

48. Moreover, it is clear that the debate as to whether 4 kHz "mattered" was conducted solely by reference to speech. There was much discussion of specific consonant sounds, especially "s", and the judge was impressed by Prof. Lutman's explanation of the technical concept of *loudness recruitment* and view that in hearing the "s" sound she was "scarcely disadvantaged". As he put it:

    40. … Of course [Prof. Lutman] accepted that in that small window between 30 and 45 decibels, at the level of 4 kHz, Mrs. Holloway would have impaired hearing. But that has to be looked at in the context of the real world which Mr. Cooper reminds me. Conversation at that level does not happen. Prof. Lutman told me that speech cannot be produced between 35 or 40 decibels that is speech which involves vocalisation; only whispering is at that level.

49. Thus in the result the judge concluded that a NIHL of 12 dBHL out of a mean overall level of 41 dBHL made no difference to her ability to perceive sound. This is counterintuitive, not consistent with many other cases, and I regard it as a wrong

approach to the question of "appreciably worse off" in the context of sensory loss. I do not live in the same "real world" clearly. The "what if it was my mum" test suggest that if my mum can no longer hear whispered speech because of a tortiously inflicted hearing loss, she should be compensated for that loss. The proper answer to an "all a fuss about nothing" case is for the defendant to buy it off cheaply and protect itself as to costs, not for the court to fail to mark the tort with an award. I venture to suggest that had their Lordships in Rothwell been dealing with pleural plaques which caused the claimant any measure of pain even at long intervals of intermittence, then an award would have followed.

50. Moreover, speech is important, but it is not all that life holds. There appears to have been no discussion at all in this case as to loss of perception of higher pitched sounds themselves (ie. in the range 4-10 kHz), such as birdsong, higher pitched musical notes (and attendant harmonics) and higher pitched voices such as those of females and children. It goes without saying, however, that if these matters are not raised in the evidence before it, the court will not consider them.

51. One additional practice point which emerges from this case concerns the issue of *loudness recruitment*. The judge summarised:

40. Prof. Lutman explained the phenomenon of loudness recruitment. I do not think this was a phenomenon which was challenged by [claimant counsel]. Put shortly, it comes to this. Once the level of intensity is 15 decibels above the threshold hearing level, so in this case broadly 55 or 60, Mrs. Holloway will be able to hear as well as someone who has no noise-induced hearing loss. It is a gradual process to recruit or recover the ability to hear. But if that is right (and, as I say it is not challenged) then if "s" is being spoken at or around 55 or 60 decibels then on the figures presented to me by Prof. Lutman, the claimant is scarcely disadvantaged. ...
41. … I do not criticise Prof. Homer for not being able to provide any data, but the fact remains that all he can do is express an opinion without providing any research or science to support what he says. Of course, he relies upon what is taught to medical students about the importance of a 4 kHz frequency but that, as I say, does not answer the question as to whether loss of decibels at the level of 10 or 15 in the range of 30 to 45 would produce a material as opposed to a minimal hearing loss.

It does not appear that on the evidence available to him, claimant counsel was in a position to challenge the views expressed by Prof. Lutman. The practice point is that a claimant expert should always consider this aspect and advise on its relevance to the position of an individual claimant. One might say that something that is habitually "taught to medical students" might cause the tribunal to be cautious about accepting an opposite proposition, but the poor court can only work with the evidence it is given.

52. Again, it is unsurprising that the defence lawyers were very pleased with this additional string for their *de minimis* bow. One suggested that it "[might] well be a significant weapon in combatting the rising tide of NIHL claims." [17] However, perhaps this is best viewed as a case in which the claimant's expert's evidence simply did not impress the judge, who reacted by accepting that of the defendant.

17 BC Legal, "Disease News".

It offers no new principles of law, which appeared to be agreed.

Hinchcliffe

53. Within 5 days, HHJ Gosnell, sitting in Leeds, dismissed another claim on the basis that the claimant failed to prove noise causation: *Hinchliffe v Cadbury UK Ltd (2015)*[18]. The judge accepted as reliable a post-exposure workplace audiogram which, if accurate, indicated no NIHL at that stage. However, he also addressed the *de minimis* issue briefly, though in a way which provides even less of a basis for "authority" than some of the other cases. The judge considered the test of whether the claimant is "appreciably worse off', and interpreted this test as meaning there must be "real damage as distinct from damage which is purely minimal". The judge considered that the claimant was reporting symptoms caused by hearing loss which were "appreciable and more than minimal". The evidence in the case was that the claimant sustained 1.7 dBHL of NIHL averaged over 1-2-3 kHz plus a loss of about 10-15 dBHL at 4 kHz and the experts *agreed* that the 1.7dBHL loss *could not be noticeable*. I note that this is dangerous territory where the difference computed between that level and a "noticeable" level is perhaps 1.3 dBHL (up to, say, 3 dBHL average) in circumstances where that level is not being measured but estimated, and the actual measured levels are each subject to a margin of error of 10 dBHL (5 each way in the testing process). However, they also agreed that the needs for hearing aids had been accelerated by between 2-5 years and, on the Coles/Worgan scale of disability, the claimant reached stage 1. HHJ Gosnell said:

23. I feel very uncomfortable in making an assessment as to the effect of this particular hearing loss as I had not been able to read the academic papers that Mr Zeitoun relied on. However, I have his evidence that, in his professional opinion, having read and considered the five papers he referred to, the loss of hearing at that frequency is a contributing factor to an individual's hearing handicap which he placed in the witness box at about 25% of the total. There is evidence from the claimant that she has difficulty talking to other people on the telephone and across the table and it seemed to me she was describing difficulty in speech recognition and intelligibility of the type described in the various papers referred to by [Mr] Zeitoun. If Mr Zeitoun is right then the claimant is reporting symptoms caused by hearing loss which are appreciable and more than minimal.

24. I have considered Mr Jones's arguments on this issue but they seem to me to be based mainly on assertion. His retort that he was not an expert on sensory psychology may of course be accurate but it is not a convincing response to academic papers which report the influence of high frequency hearing loss on speech intelligibility. I have to accept his point that the Black Book assessment only normally measures the frequencies at l, 2 and 3 kHz but a Coles and Worgan assessment can also take into account slight difficulty with speech in noise which would move the assessment from 0 to 1. This was Mr Zeitoun's assessment of the claimant on that scale. It should also be borne in mind that 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.

54. Counsel had agreed that the quantum for such loss at £2,800 and it is implicit that this is the award which would have followed had causation generally been

18 Unreported, 12 May

established by the claimant. It is, perhaps, of particular interest that the expert, and the judge, both appear to have taken an approach considering that the NIHL element of the overall hearing thresholds/levels was making a *material contribution* (25%) to the effects of those overall levels, rather than simply considering it from the point of view of whether the marginal increase due to the NIHL was itself perceptible.

Lomas

55. Within 6 weeks Recorder Hincliffe QC [19]was asked to consider the issue in *Lomas v London Electric Wire Company & Smiths Ltd (*2015)[20]. Here the claimant claimed damages for NIHL and tinnitus. The defendants argued that if the claimant had developed tinnitus it was not proved on the balance of probabilities that it arose as a result of his exposure to harmful levels of noise and they claimed that the hearing loss was *de minimis*.

56. The claimant's expert, Mr Lloyd, initially computed the claimant's average binaural NIHL over 1-2-3 **and 4** kHz at 11.5 dBHL. However, in his oral evidence he conceded that his calculation was "incorrect" - I infer in the very limited sense that the standard DHSS calculation is undertaken over 1-2-3 kHz - which he calculated to produce binaural mean of only 3 dBHL. This is of course entirely consistent with the greatest measured deficit being at 4 kHz but the recorder does not appear to have been asked to consider this:

17. In his oral evidence today when giving evidence in chief [Mr Lloyd] accepted that he had not undertaken a proper calculation in relation to all of the available audiometry and his evidence this morning was that the proper average over 1, 2 and 3 kHz bilaterally was 3 decibels. That, of course, is a substantial alteration to the overall hearing loss and it is that alteration to his evidence that has led the defendant to submit, with a degree of force, that the extent to which the claimant has suffered any damage is such that it is de minimis and is so low as not to attract any award of compensation. I have no doubt that this change resulted in the defendants deciding not to call Prof. Lutman to give evidence.

20. … The significant frequencies for speech and speech perception in this case on the evidence before me are the frequencies of 1, 2 and 3 kHz. I have not been burdened with the dispute that sometimes takes place as to the significance of hearing loss at 4 kHz...

57. The defendant referred the judge to *Rothwell* and *Holloway* and pleaded *de minimis*, and as to the 3 dBHL of NIHL, the recorder agreed, although it will appear from the other cases that that is not the medical consensus for average loss of that amount over the critical speech frequencies, and it may mean a significant bringing forward of the future need for aiding. However, crucial in this regard was Mr Lloyd's concession that there was "no diminution in his hearing whatsoever", far more important in *Rothwell* terms than the inherently artificial number:

26. The first point to make is that I can only deal with this case on the basis of the evidence that I have

19 One "h" not two; not to be confused with the case of Hinchcliffe.
20 Unreported, 22 June

before me and insofar as I am dealing with the claim in relation to hearing loss it is Mr Lloyd's evidence which I accept. That is that the claimant, having suffered a bilateral hearing loss of 3 decibels at 1, 2 and 3 kHz, would have no appreciation of any harm or diminution in his hearing whatsoever. Mr Lloyd was clearly attempting to do the best he could to assist the claimant but ultimately it was his very clear evidence that there would be no appreciable harm or loss.

58. However, the defendant's tactical ploy backfired, because the the judge went on to find (upon the basis of Mr Lloyd's unchallenged evidence on the point) that the *tinnitus* was caused by the tortious exposure to the harmful levels of noise. The claimant was awarded £3,000 for the tinnitus.

Briggs

59. Within 3 months, HHJ Coe QC decided the case of *Briggs v RHM Frozen Food Limited (2015)*[21] at Sheffield. The claimant alleged she sustained NIHL whilst employed by the defendant between 1981 and 2006. Breach under the Noise at Work Regulations 1989 was established for the period 1990-1999, from which time the claimant was provided with training and wore hearing protection. Pre 1990 exposure was non-negligent. The claimant's hearing was said to be essentially "normal" between 1-3 kHz and typical for her age, but HHJ Coe QC crucially found there was NIHL of "between 10-15dB" at 4 kHz, which probably means 10 dBHL on one side and 15 on the other, though this is not clear from the judgment. She recorded the evidence of Prof. Homer:

16. In respect of the quantification of loss and loss of function Prof. Homer agrees that a calculation over 1, 2 and 3kHz is "slightly" preferred by the "Black Book" but emphasises that this method does not imply that hearing loss is restricted to those frequencies or that frequencies outside that range do not confer a disability. He cites ... support from ISO 1999, Lutman and Coles, the British ENT Association and the British Society of Audiology for the value of a calculation over 1, 2 and 4 kHz.

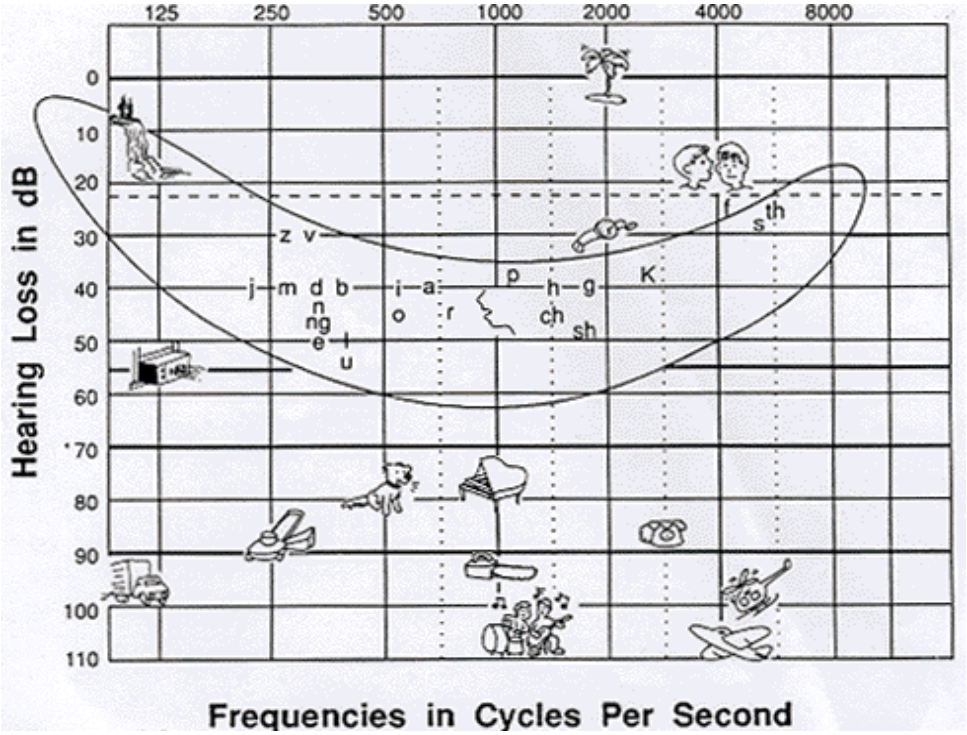
17. He goes on to suggest that considering the loss at 4 kHz itself may be useful. This is a critical frequency for hearing and in his view represents the cause of the claimant's hearing disability. He specifically states that any dismissal of there being any importance of impaired hearing at 4 kHz would be an opinion that would be outside of mainstream ENT and audiological opinion. He considers this to be very basic knowledge within audiology and refers to the "speech banana". He considers that the claimant's description of her symptoms is entirely consistent with a loss at 4 kHz. …

22. … He acknowledged that there is no measurable loss at 1, 2 and 3 kHz, but said that this has always been his view. There is significant loss at 4 kHz which correlates exactly with the symptoms the claimant reports and which is of consequence to her. His view was that if the claimant's account is credible then the loss at 4 kHz in her case is significant.

60. Prof. Homer also placed reliance on the claimant's loss at 4kHz falling within the well known "speech banana", and advised the court that, in adults, hearing levels falling within the speech banana can affect a person's ability to follow what is being said. The "speech banana" is a figure drawn audiometrically to represent the intensity and frequency of sounds of speech or "phenomes" in language, forming a

21 Unreported, 30th July

banana-like shape:



61. Mr Phillip Jones, expert for the defendant in this as in many other recently fought cases, argued that a 15dB loss at 4kHz would cause "no significant disability", and whilst a marked high-frequency loss above 2kHz would have a significant effect on speech perception, a loss of a few decibels at 4 kHz is of no great importance, particularly with good hearing at 1-3 kHz. He also considered that in respect of disability in the claimant's case that the "speech banana" was incorrect, stating that the effect of this level of loss at 4kHz would not have an impact and there was nothing to suggest that it would.

62. HHJ Coe QC, however, preferred the more clinically conventional, research supported views of Prof. Homer that the NIHL element *materially contributed* (the test agreed by the defendant) to the claimant's overall hearing levels and hence significant symptoms:

43. … I should say that I accept Professor Homer's evidence about the significance of loss at this frequency and I accept his evidence about the usefulness of the "speech banana". It seemed to me that Mr Jones' rejection of the accuracy of the speech banana was not founded on current clinical practice and experience. It is agreed, of course, that there is no fixed method of assessing disability. Professor Homer and Mr Jones are not experts in sensory psychology. Professor Homer felt that some people might be able to adapt, but that some people would have a significant disability with a loss at 4 kHz. In his report (although not in his oral evidence) Mr Jones seemed to allow for the possibility of some significant effect. As I have already indicated I accept the claimant's evidence. She describes a hearing disability. It is not suggested that she is not straightforward in this regard.
44. To some extent there has been a rehearsal of the arguments dealt with by His Honour Judge Gosnell in the case of Hinchcliffe v Six Continents. In this case I accept that it is appropriate to look at the loss at 4 kHz for the reasons identified by Professor Homer. I accept the claimant's evidence. I accept Professor Homer's

evidence that she is likely to need hearing aids sooner than would otherwise have been the case. In the circumstances I conclude that the claimant's difficulties outlined above and the future sooner need for hearing aids make her appreciably worse off. She has suffered damage which is more than de minimis.

63. The judge made an apportioned award of damages for pain and suffering and loss of amenity based on a full loss figure of £4,000.

Roberts

64. Three months passed. Now HHJ Keyser QC was asked to grapple with all of this at Wrexham. In *Roberts v Prysmian Cables and Systems Limited (2015)*[22] he had the joy of seeing 8 audiograms, 7 of which were carried out using Bekesy self-recording decay audiometry[23] during the claimant's employment with the defendant between 1986 and 2004, the other by the only professionally administered pure tone audiometry[24] in 2012, upon which the claimant's expert Mr Tomkinson provided his initial report. This case is of especial note in that Mr Tomkinson never examined the claimant but only reported on the documents provided to him. He calculated NIHL of 10-11 dBHL over 1-2-3 kHz. When later provided with the 7 workplace audiograms suggesting far better hearing than the later 2012 audiogram, he concluded that all of them (except one which he considered wholly unreliable) showed a consistent *pattern* for NIHL, but that the NIHL over 1-2-3 kHz was in fact nil or minimal. He did, however, consider there was *some damage* at the higher frequencies of 4 and 6 kHz, which might contribute to difficulties with conversation in noisy environments. He also found that the 2012 results showed that deterioration since 2004 was due to factors other than noise. In a fourth report, however, he sought to assert a NIHL over 1-2-3 kHz of 3-5 dBHL estimated by reference to all the audiometry, despite his expressed reservations about relying upon the workplace audiograms *for computational purposes*. In the second report he had considered all audiograms but not offered this estimate. Later still, he invited the court to disregard all of the workplace audiograms unless so heavily adjusted (by 15-20 dBHL at each frequency) as to bring them into line with the 2012 pure tone audiometry.

65. HHJ Keyser QC was unimpressed that the second report had not been disclosed until after Mr Tomkinson had been questioned upon the disclosed first report. Even the answers to the questions had not revealed the second report or its impact. The

22 Unreported, 30 October

23 Békésy audiometry, also called decay audiometry, is audiometry in which the subject controls increases and decreases in intensity as the frequency of the stimulus is gradually changed so that the subject traces back and forth across the threshold of hearing over the frequency range of the test. The test is quick and was frequently used in military and industrial contexts.

24 Pure tone audiometry is a standardized hearing test in which air conduction hearing thresholds in decibels (db) for a set of fixed frequencies between 250hz and 8,000hz are plotted on an audiogram for each ear independently. A separate set of measurements is made for bone conduction. Amongst others, the British Society of Audiologists issues guidelines for adoption of correct conditions and procedures for testing.

judge was similarly unimpressed with the expert's late change of position in the fourth report and clearly felt that it was given due to the nature of the (leading) questions put by the claimant's solicitors:

19. I may note at this stage the considerable extent to which Mr Tomkinson's stated opinions have altered, with regard in particular (a) to the use of the Bekesy audiograms for the purpose of assessing the extent of the noise-induced hearing loss, (b) to the adjustment necessary to the Bekesy results if they are to be used for that purpose, and (c) to the explanation for the marked difference between the results recorded in 2004 and in 2012.

20. … Mr Tomkinson has altered his position considerably...the terms in which he has sought to argue Mr Roberts' case on points of evidence (notably in respect of answers recorded on the occupation health records) suggests that in doing so he has acted more as a partisan advocate than as an impartial expert.

66. The judge did not allow the claimant to rely upon the assessment of "3-5 dBHL" within the fourth report, but he did not reject the expert's evidence altogether. Indeed, he found against the defendant on *de minimis* for pretty standard evidential reasons. Urged by the defendant to "follow" the case of Holloway he declined, saying (and in particular note the fourth reason here):

35. … 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 of the evidence 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 compensable, 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 that 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. I do not quite see why one should not be compensated, even if only modestly, for physical changes that result in a noticeable diminution of the faculty of hearing.

67. Again, the defendant sought here to make its case without obtaining its own medical evidence or challenging the claimant's expert in cross-examination, but rather by relying on the "authority" of *Holloway*. In effect the defendant sought to use the findings in *Holloway* (on the evidence in that case of course) to challenge in submission the claimant's expert evidence. This was, of course, forensically misconceived.

68. The judge concluded:

36. … The fact that loss at 4 and 6 kHz is not included in the calculation of average binaural hearing loss would militate against this conclusion only if it were shown on the evidence that the reason for its non-inclusion was that it had no impact on function or perception. In fact, the evidence before me is, to the contrary, that it can and in the present case does have some functional significance.

69. An award of £1,500 was made on the basis that the contribution of noise damage to

the overall disability was real and significant but slight:

37. In the light of my findings, the award of damages for hearing loss must be very small. The evidence establishes the bare minimum for a finding of actionable damage; the contribution of noise damage to the overall disability is very slight.

70. In relation to the claimant's tinnitus, HHJ Keyser found that it arose after the claimant's retirement, well over a year after the last tortious noise exposure, and that he was not persuaded on the evidence before him that it was due to noise exposure. Accordingly, no award was made for this or in relation to any claimed financial losses.

71. It is my view that in this factually complex case the judgment provides the best review in this series of the applicable principles and most conventional judicial approach to what the claimant must do to prove loss, and how varying expert evidence should be considered, in particular when it is not directly opposed evidentially.

Child

72. At the end of 2015 DJ Kelly in Birmingham was asked to join the happy judicial throng, now in the fast track and with oral evidence only from the claimant himself. It is worth considering because this is the forum in which we can now expect many of these cases to be tried. *Child v Brass & Alloy Pressings (Deritend) Ltd* (2015)[25] was another NIHL claim in which the *de minimis* defence was run without a defence audiological expert, and neither did the defendant put written questions to the claimant's expert. Mr Manjaly was instructed by the claimant and produced a report finding average NIHL of 2.02 dB over 1-2-3 kHz and adding:

Mr Childs does not require hearing aids at present. However, he will benefit from the fitting of bilateral hearing aids in the future. In my opinion, the client's need for hearing aids has been accelerated by five years as a result of the exposure to loud noise...I can confirm that Mr Childs has NIHL of moderate severity. This will have a moderate effect on his ability to enjoy social, domestic and recreational activities.

73. The impossibility of the defendant's position might have been obvious. However, DJ Kelly was cited and considered *Rothwell*, *Holloway, Hinchliffe* and *Briggs*. She noted that in *Holloway*:

28. … Judge Freedman had the benefit of hearing medical evidence from two doctors, one on behalf of the claimant and one on behalf of the defendant. The evidence before me today is limited to the medical report from Mr Manjaly in its written form, without Mr Manjaly being here to be subject to cross-examination.

74. Likewise, when referring to *Hinchliffe*, she noted that HHJ Gosnell had the benefit of hearing live medical evidence. The District Judge concluded:

25 Unreported, 21 December

31. It is apparent from those three cases that the conclusion as to whether or not the loss is de minimis is very fact specific to an individual case. Mr Manjaly's evidence is the only medical evidence I have before me. At paragraph 16 of his report he confirms that the claimant has: "...NIHL of moderate severity. This will have a moderate effect on his ability to enjoy social, domestic and recreational activities. …

32. … The defendant chose not to ask questions of Mr Manjaly, nor, as I understand it, to seek permission to rely on its own medical evidence. On the evidence that I have before me, I have unchallenged evidence as to Mr Manjaly's conclusion that there is a five-year acceleration as to the need for hearing aids. Doing the best I can on the evidence before me, it seems to me that there is no evidence on which I can properly reject the conclusion of Mr Manjaly as to the five-year acceleration period. Accepting as I do, that the claimant's need for hearing aids has been accelerated by five years, it does seem to me that the claimant is appreciably worse off...

75. The District Judge awarded damages for pain and suffering and loss of amenity based on a full valuation of £4,000, with an allowance for one set of hearing aids and related costs.

Matthews

76. There have been (at least) two further decisions of note in 2016. In *Matthews v Gardwell Coatings Limited (2016)* [26] Recorder Lowe QC, sitting in Cambridge, accepted the defence medical evidence and hence found against the claimant on causation generally. However, he also considered the *de minimis* issue on the facts of that case and said:

54. … has the claimant demonstrated that that he is appreciably worse off as a result of suffering NIHL per Lord Hoffman in Rothwell v. Chemical & Insulating Co Ltd [2008} 1 AC 281 at 289? Is the damage sufficiently serious to found a claim for negligence or is it too trivial to justify a remedy?

55. The claimant's case at its highest was that the loss related to NIHL was in the order of the threshold of perception by the human ear i.e. just in excess of 3 dB. On my findings above it gave rise to no perceived adverse symptoms and he appears to have been unaware of it. However, in this hypothesis i would have to proceed from the basis that the 2009 audiogram showed notching which was likely evidence of the NIHL. In that context 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, as described by Mr Webber. Although Mr Matthews 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. I should record that my award of general damages for such a degree of loss as that identified by Mr Webber of just in excess of 3 dB - accepted by him to be at the threshold of perception by the human ear - would have been at the lower end of the spectrum at about £3,500 together with his special damages relating to the provision of a single hearing aid.

Ross

77. Finally, in the test case of *Ross v Lyjon Ltd & Ors. (2016)*[27] in Liverpool, the claimant alleged that he was exposed to excessive noise throughout his employment with the three defendants between 1979 and 1992. The defendants made unqualified admissions of breach of duty and, consequently, no engineering evidence was

26 Unreported, 11 March

27 Unreported, 23 September

required. Private BUPA audiometry in 1993, a year after the claimant ceased in the noisy work, appeared to reveal no evidence of NIHL. A further audiogram in 2011, prepared for the purposes of Mr Zeitoun's medico-legal report, showed features of NIHL and was also diagnostically complaint with the CLB.

78. The main arguments in the case concerned the claimant's case that the noise damage to his hearing remained "latent" for some time, and hence not demonstrated in the 1993 audiogram but properly revealed in the later 2011 test. Two heavyweight academic scientists appeared to give expert evidence. Prof. Moore, Emeritus Prof. of Auditory Perception at Cambridge, cited a number of animal studies that demonstrated noise exposure caused damage to the outer hair cells in the cochlea or damage to the synaptic nerve which would not be evident on an audiogram immediately after noise exposure but which led either to an acceleration of the ageing loss or a super-additive effect upon the progression of ageing after exposure has ceased. He was opposed by Prof. Lutman (Emeritus Prof. of Audiology at the Southampton ISVR) on behalf of the defendant, who considered there was no reason to doubt the efficacy of the 1993 audiogram and that the weight of research *on humans* supported the consensus opinion amongst experts that there was no latent effect from noise exposure. Therefore, as there had been no noise exposure after 1993, the 2011 audiogram must represent "idiopathic sensorineural hearing loss" which was a common feature of data obtained from the general population.

79. HHJ Wood said that he was not persuaded on the balance of probabilities either that the 1993 audiogram was inaccurate or that the claimant has sustained latent damage to his hearing, although he was at pains to stress that his decision was fact sensitive to this case. He did not consider himself bound to determine the wider issue of latency stating that the epidemiology was conflicting and that until further research was undertaken a full determinative finding on the issue was unlikely. The claim therefore failed on the evidence adduced.

80. This is a perhaps unsurprising stance for the court to take approaching the matter upon the balance of probabilities and with the claimant to prove his case, given Prof. Lutman's evidence about current "consensus" in the audiological community and therefore the novelty of the latency analysis, though the claimant seeks to appeal and we await that outcome.

81. However, the judge also addressed the *de minimis* issue:

116. … As I remarked in court, the issue as to whether or not the 4 kHz threshold should be taken into account remains a controversial one, because in some respects it has an effect on the disability. It remains to be seen whether or not those involved in medico-legal work adopt the potentially less generous interpretation without applying the exceptions which appear to emanate from the more recent guidelines.

117. However, in this particular case, I would have had some sympathy with they approach of Mr Zeitoun if it had been necessary to assess the disability, and to have compensated the claimant on the basis of an approx 10 dB threshold hearing loss over 1, 2 and 3 kHz which was indeed the preferred approach of Mr

Welch.

82. It is obvious that the judge did not make any proper finding here, but indicated that he would have been disinclined to find for the defendant on *de minimis* argument on the evidence before him, principally from the ENT experts Mr Zeitoun and Mr Welch, who seemed in agreement that the small losses assessed at 1-2-3 kHz and at 4 kHz did produce a material worsening of the claimant's hearing position attributable to noise. Professor Lutman's apparent skepticism about the effects of losses confined to 4 kHz did not therefore come to bear.

Harbison

83. Finally, we come to a recent resurgence for the insurers. On 13 October HHJ Wall gave judgment for the defendant at Birmingham in *Harbison v The Rover Company Ltd (2016)*[28]. Even though the defendant called no medical/audiological evidence, the judge accepted that the claimant's NIHL was *de minimis* and not compensatable, including that the claimant failed to prove that his established loss at frequencies above 1-2-3 kHz made him appreciably worse off in *Rothwell* terms.

84. The claimant was a former welder during 1975-2006. Breach was admitted and the issues were limited to whether he had suffered compensatable loss at all. The case was allocated to fast track and the only expert medical evidence in the case came from the claimant's expert, Mr Sharma. He calculated the claimant's hearing loss averaged over 1-2-3 kHz as 1dB. He used an averaging method using the two audiograms, even thought it appeared that the hearing threshold level at 4kHz had improved from 40dB in the first audiogram to 20dB in the second audiogram. Not surprisingly, the defendant sought to challenge this approach, but the judge found that she could not reject it when it was not challenged by countering expert evidence:

I should be slow to reject the claimant's medical expert's approach where there is no expert evidence to suggest that he was wrong to take that approach in this case.

85. However, in any event, Mr Sharma's evidence to the judge was that the claimant's NIHL across 1-2-3 kHz *would not generally give rise to any noticeable subjective effect or material disability*. He also told the court that hearing loss above (or below) these frequencies *could* have an impact on the claimant's hearing but, crucially, did not elaborate upon that and gave no opinion that this was in fact the case in Mr Harbison's case. The judge correctly identified the *Rothwell* test as requiring the claimant to prove he was, had been or would be "appreciably worse off" and although she found that the claimant established he had sustained some NIHL, the judge unsurprisingly found that it was not sufficient to discharge the claimant's burden of proof of compensatable loss because, as a mater of fact on the

28 Unreported, 13 October

evidence before her, the claimant was not appreciably worse off by reason of NIHL, and the claim therefore failed.

86. The judge stressed that establishing a diagnosis of NIHL does not of itself amount to proof of compensable damage. This is no different from the position in *Rothwell*, where the causing of pleural plaques did not automatically mean that the claimant sustained compensatable injury. The burden of proof is on the claimant to show that he meets the threshold for compensable damage; it is not for the defendant to disprove it. This should be considered to be legally entirely uncontroversial.

Evidential considerations

87. Thus, as ever, the true analysis of these issues turns not upon differences in interpretation of the legal principles applicable, but upon the evidence put before the court in the individual case.

88. It should be noted, however, that the quality of expert evidence in these cases can often be poor. There are some experts who advise on claimant cases in large numbers, and the number of defence experts used seems extraordinarily small, generally running to 3 or 4 well-known individuals. Moreover, on both sides experts commonly do not often record the range of expert opinion of which they – certainly those who appear regularly in these cases – are aware, in direct contravention of CPR35.10(1) and PD35para3.2:

> **3.2 An expert's report must:**
> **…**
> **(6) where there is a range of opinion on the matters dealt with in the report –**
> **(a) summarise the range of opinions; and**
> **(b) give reasons for the expert's own opinion**

89. Judges rarely criticise experts for such failure and they should. It is in no-one's interests for poor experts reports to be relied upon giving rise to fully fought cases in circumstances where there is in fact a general consensus in the expert community on certain points. If a party is to rely on an outlier view in such instances, that should be clear to all including the poor recorder asked for the first time to try a NIHL case, and that is what PD35para3.2 requires. Run your outlier case by all means, but do not do it upon a pretence that it is in some way "mainstream".

Defence tactics

90. Because of the individual facts and basis of resolution in these cases, it is easy to advise defence solicitors as to selection criteria to be applied to give the *de minimis* defence the best chance of success, such as to choose cases:

    (1) where the main speech frequencies between 1-3 kHz are unaffected by NIHL, or only affected in a very limited way, to a maximum of 3-5 dB;

(2) where there is NIHL of not more than 10-15 dB at 4 kHz or 6 kHz and preferably only at 6 kHz since there are studies to support the role of hearing at 4 kHz for speech recognition and it is usually arguable that any loss at 6 kHz is transient or spurious or, if the loss is permanent, does not arise as a result of NIHL;

(3) where there is no tinnitus;

(4) where there is no advanced need for hearing aids in the future;

(5) where the claimant is elderly and already has significant non-noise related losses such that it can be argued that any disability from NIHL is completely subsumed by other losses/disability.

91. Likewise to run a *de minimis* defence to trial Defendants are well advised to make sure that they do not leave any key areas of the claimant's medical evidence unchallenged. "Experienced" claimant experts who have not been subjected to recent cross-examination can be poor in their understanding of the CLB and LCB computations and what underlies the statistical comparisons made to diagnose and quantify loss, and of the arguments about the impact of specific and limited losses, especially outside the 1-2-3 kHz range. This presents an obvious opportunity to "catch them out", so the defence solicitor will need to:

(1) put Part 35 questions to the claimant's expert;

(2) apply for and obtain their own medical evidence, and then call it; and

(3) develop proper medical evidence supported by modern research and techniques.

The well prepared claimant

92. The answer to these tactics, and to the complexities these arguments raise is not to abandon what may well be good claims, but in response the claimant solicitor *must*:

(1) work with otolaryngologist(ENT)/audiological experts who really know what they are doing in this field; I'm afraid this is not to be assumed from the fact that a person is a practising ENT surgeon, since the audiological/statistical analyses undertaken have nothing to do with clinical practice in that field. Anyone worthy of instruction will be happy to consider new points, and to read these cases and others (which should be provided to them) to see how the arguments are framed and what data and research needs to be cited;

(2) ensure those experts meet their CPR35 duties by reflecting ranges of opinion in the literature and on the part of colleagues (anyone who works in this field well knows the arguments repeatedly put by the defence experts mentioned in the cases) and <u>then</u> explaining why they take the view they do in support of the claim;

(3) ensure those experts do not just focus on the effect of losses over 1-2-3 kHz and the rather artificial Black Book assessment of "disability" (which despite its

conventional acceptance is not really based on much), but instead consider carefully the effects of losses at higher frequencies, including upon ability to discriminate speech and other mixed sounds, ability to hear the nuances of musical instruments' outputs (harmonics and timbre), higher register voices of females and children, limited frequency broadcasts by telephone/Facetime/TV, and ability to hear sounds in the range 4-12 kHz generally. The focus should be not on somewhat limited numerical estimates (for that is all they are) of the NIHL element of measured hearing loss at particular frequencies, but upon a much broader assessment of affect related where possible to described symptoms;

(4) ensure that the experts consider not just the marginal effect of the addition of NIHL to the Claimant's overall hearing levels, but also approach the matter by asking whether the noise portion is making a *material contribution* to the overall levels and resulting affect from all contributing causes;

(5) ensure that as part of this approach the experts deal with the issue of *loudness recruitment* canvassed in *Holloway* and its implications where impairment is concentrated in the 4-6 kHz range;

(6) ensure also that *tinnitus* is properly considered and attributed; this is particularly important where NIHL is established, but the reduced levels of hearing may themselves not be sufficient to be compensated, as in *Lomas*;

(7) ensure those experts get the CLB and LCB computations *right*; I'm afraid they so often do not, as illustrated repeatedly in this small sample of cases, some even being treated as "test" cases; these days there is no need to rely on the doctors for the CLB and CLB computations, which are not matters of clinical judgment at all, but rather of relatively straightforward mathematical/statistical analysis, though of course it is convenient to have one's expert present them; it is important even before service of the medical report relied upon that the computations have been either *given* to the doctor in instruction (if the audiogram is obtained beforehand) or *checked* by solicitor or counsel. Once the report is served, it is very difficult to avoid the expert looking incompetent when a correction has to be made later;

(8) this includes ensuring that the correct age associated loss (AAHL) comparators are used; it is standard now from CLB and LCB to use the nearest of the age bandings in 5 year intervals, at one of 75th (upper quartile), 50th (median) or 25th (lower quartile) centiles; the tables of adjusted data from ISO7029 are set out in the CLB;

(9) ensure that those computations and analyses are presented in readily understandable format, preferably graphically; it is extremely rash to assume that the court asked to consider the case will have any prior familiarity with, or understanding of, the technicalities of NIHL;

(10) ensure that the experts retain control of the drafting of joint statements; this is correct in principle: the Claimant retains conduct of the case, and no aspect should be ceded to the defence side.

Conclusion

93. The law as to what is required to establish a person injury is now well established in the House of Lords's decision in *Rothwell*, even if somewhat differently expressed by their Lordships, and by their predecessors in *Cartledge v Jopling*. The test is whether the claimant is "appreciably" or "more than minimally" or "more than negligibly" worse off by reason of the physical and or sensory and or mental[29] loss caused by the breach.

94. However, in particular situations, and that of sensory loss by way of NIHL is the currently topical one, this apparently straightforward test gives rise to particular difficulty, and further guidance from the senior courts is required to enable these cases, which are litigated in the many 000s each year, to be resolved sensibly without the need for frequent trials at great cost.

95. Defendants have had mixed results in their attempts to characterise low level but identifiable/estimable NIHL as *de minimis* and not worthy of compensation. This is a highly fact sensitive issue, and the cases usually turn on who was better prepared evidentially.

THEO HUCKLE QC
Doughty Street Chambers
Armistice Day, 2016

29 Subject to the control conditions for claims for psychiatric affect as to the nature of the injury and status of the claimant: McLoughlin v O'Brian [1983] 1 A.C. 410; Alcock v Chief Constable of South Yorkshire [1992] 1 A.C. 310; Page v Smith [1996] A.C. 155; White & Frost v CC of S Yorks [1999] 2 A.C. 455; Donachie v Chief Constable of Greater Manchester [2004] EWCA Civ 405 etc.