



Case No: C74YJ155

IN THE COUNTY COURT AT SHEFFIELD

50 West Bar
Sheffield
S3 8PH

Date: 21/12/2018

Before :

DISTRICT JUDGE BADDELEY

Between :

Paul Dudhill	<u>Claimant</u>
- and -	
The Secretary of State for Business, Energy and Industrial Strategy	<u>1st Defendant</u>
-and- Stayed	<u>2nd Defendant</u>

Mr Johnson (instructed by Nigel Askew Solicitor) for the Claimant
**Mr Jaspal (instructed by CMS Cameron McKenna Nabarro Olswang LLP) for the 1st
Defendant**

Hearing dates: 22nd November 2018 and 21st December 2018

Approved Judgment

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

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DISTRICT JUDGE BADDELEY

DJ Baddeley :

1. This is a noise induced hearing loss claim that proceeded to trial against the First Defendant (hereafter “the Defendant”) only.
2. The Claimant was employed by the British Coal Corporation from 29th July 1974 to 22nd December 1985, save for a period between August 1978 and September 1980. The Defendant is responsible for the liabilities of the British Coal Corporation.
3. Breach of Duty is admitted and the Defendant does not pursue a limitation defence.
4. The issues are causation, de-minimis and loss.
5. The Defendant did not challenge the Claimant’s evidence that *“I haven’t particularly noticed my hearing getting worse but then it came on so very gradually and slowly and it tends to be others who notice this and not me. I notice I now sometimes don’t hear the doorbell or telephone ring. Now when I get the tinnitus it lasts for longer than it used to and is in both ears but worse in the left ear... I think it’s there all the time now but I don’t notice it all the time it just depends what I am doing to distract me from it or if there’s another noise to block it out. It’s more noticeable when I am going to sleep but it isn’t bad enough to make getting to sleep difficult at all.”*
6. The Claimant was examined by his medical expert, Mr Lancer who noted that the Claimant *“has been aware of a gradual reduction in his hearing. He usually manages in normal conversation in a quiet room but finds it fairly difficult to hear in noisy surroundings and at public meetings. He still enjoys ordinary conversation as much as he used to. He requires his television volume turned louder. His wife comments on this. Half the time he fails to hear the door bell and sometimes fails to hear the telephone ring...”*
7. It was not necessary for me to hear from the Claimant.
8. I heard oral evidence from the experts in the case, Mr Lancer for the Claimant and Mr Hughes, who was instructed by the Defendant.
9. The Claimant has only undergone one audiogram, on 20th November 2015, when he was 57. This shows losses of between 10 and 20 dB at 0.5 and 1 kHz, with an improved reading of 10 dB in both ears at 2 kHz and then a notch at 4 kHz. As Mr Lancer puts it, *“in both ears the hearing is close to normality in the lower tones and there is a fall off towards the higher frequencies. There are significant notched effects bilaterally at 4 kHz with recovery at 6 and 8 kHz which are Coles’ compliant.”*
10. The parties have obtained a single joint expert engineering report from James Gillam, which confirms that the Claimant’s overall noise dose (NIL) is between 100 dB(A) and 102 dB(A) and that the Claimant’s NIL from the Defendant alone was over 100 dB(A).
11. The experts agree that, on the basis of this evidence, requirements R1, R2(a) and R3(a) of the 2000 Coles, Lutman & Buffin Guidelines on the Diagnosis of Noise-induced Hearing Loss for Medicolegal Purposes are met and that on the balance of probabilities, the Claimant has some noise induced hearing loss (“NIHL”).
12. The experts disagree however as to: -

- i) The extent of the Claimant's NIHL over 1, 2 and 3 kHz (and the appropriate method to be used to determine that);
 - ii) Whether the Claimant's NIHL at 4 kHz (where the experts agree that the Claimant's NIHL is between 22 dB and 27 dB) is, in itself, a material injury;
 - iii) Whether the NIHL is de-minimis; and
 - iv) Whether the Claimant's tinnitus, which did not manifest itself until over 25 years after his last exposure to noise, was in part caused by noise.
13. Mr Lancer does not believe that there is evidence of idiopathic hearing loss. He used the median ratio allocation method as described by Dobie as the appropriate method of apportioning the cause of the Claimant's hearing loss between age and by noise. These calculations produce figures over 1, 2 and 3 kHz of 13 dB caused by ageing and 4.5 dB caused by noise. Mr Lancer described this as "*a clear and compelling case of noise deafness.*"
14. Mr Lancer considered the DSS guidelines. His application of the DSS test produced NIHL of between 3 and 4.5 dB across 1, 2 and 3 kHz, depending on whether you use the table for a 55-year-old man or extrapolate to 57 using the age 55 and age 60 figures and on whether you take the better ear or the average. He believes however that these guidelines offer an unfair positive bias towards ageing because they work from the premise that you take the age-related figure as read and when you deduct that from the total hearing loss figure you use what is left as the noise induced element.
15. Mr Lancer also considers the methodology advanced in the 2016 Lutman, Coles & Buffin guidelines ("LCB 2016") but dismisses this as inappropriate. He accepts however that if that methodology is used, the resulting NIHL figure is small – only 1.4 dB.
16. Mr Lancer further considers the effect of the Claimant's hearing loss at 4 kHz, where the experts agree that the Claimant's NIHL is between 22 dB and 27 dB. Mr Lancer refers to the work of Smoorenberg, who uses the average of the readings at 2 kHz and 4kHz and concludes that someone in the position of the Claimant, with an average loss of 12 dB across these frequencies, would be expected to suffer a decrease in the number of correctly identified sentences by about 20%. Mr Lancer believes that this explains the Claimant's difficulties in noisy surroundings and with the telephone and door bell, which ring across 4 kHz.
17. As to the issue of tinnitus, Mr Lancer considers that delayed onset tinnitus can be attributed to noise, although he acknowledges that there is a range of opinion between experts. He considers that the Claimant's tinnitus, which he classifies as moderate, is partly caused by noise.
18. Mr Hughes considers that the fact that the audiogram reading at 2 kHz is better than at 1kHz is evidence of idiopathic hearing loss. He discounts the median ratio allocation method because this is not commonly used and also because a finding of idiopathic hearing loss would render it wholly inappropriate. He considers the LCB 2016 method and the DSS method. On his calculations, these produce NIHL figures of 1.4 dB and 2.8 dB respectively, which he considers to be de-minimis.

19. Mr Hughes' view is that the Claimant's better than average hearing at 2 kHz masks his difficulties at 4 kHz and that he does not have a material disability.
20. Mr Hughes agrees with Mr Lancer that there is a range of opinion on the issue of delayed onset tinnitus but is in the opposite camp.
21. His view is that tinnitus that becomes apparent many years after exposure to noise cannot be caused by it.
22. The first issue for me to consider is that of whether the audiogram evidences a third contribution to the Claimant's hearing loss over and above that caused by age and noise – a so called third pathology or an idiopathic loss. On this, I prefer the evidence of Mr Lancer. Mr Hughes said that his interpretation of the audiometry was that it demonstrated a low frequency idiopathic impairment, slightly worse on the left. He described this as "*slight*" at paragraph 22 of his report. However, he fairly accepted in evidence that this was a question of interpretation rather than fact and that the difference between the readings that lead him to this view is within testing error. Mr Lancer's evidence was that audiometry is not a precise science and you cannot conclude from the fact that this audiogram shows better hearing at 2 kHz than at 1 kHz that there is idiopathic hearing loss. Firstly, the difference is within the margin of error (+/- 10 dB) and secondly, hearing at 1 kHz can be damaged by noise (and effected by age). He said that, in a clinical setting, if thresholds are no greater than 20 dB, the hearing would be considered to be within acceptable range and would not be investigated further.
23. In my judgment, because the readings used by Mr Hughes are within testing error, I cannot conclude on the balance of probabilities that they demonstrate a third pathology. I prefer Mr Lancer's evidence on this point.
24. My next task is to make a finding as to the Claimant's hearing loss over 1, 2 and 3 kHz. Here, the experts are not so far apart. Mr Hughes' evidence was that the loss is "*less than 2 kHz*", this being based upon the DSS and LCB 2016 calculations (2.8 kHz and 1.4 kHz respectively on his calculations).
25. Mr Lancer's DSS calculation produced a slightly higher figure than Mr Hughes'. He explained the difference by saying that it depended upon whether you use the actual age (by extrapolation) or the nearest 5-year point on the Coles tables and whether you use the better ear or the average.
26. I accept Mr Hughes' DSS calculations here. I can see the sense in using the best estimations, even in an imprecise area such as this. By rounding a Claimant's age to the nearest 5 years, a further layer of imprecision is introduced. Further, the DSS guidelines provide a mechanism for apportioning between the ears – ((4 x best ear + 1 x worse ear) /5). Mr Lancer has not persuaded me that Mr Hughes' figure is incorrect.
27. The experts agree that the LCB 2016 guidelines are not always satisfactory. As Mr Lancer put it – "*here we have a clear and compelling case of noise deafness. R1, R2 and R3 are clearly fulfilled. Therefore, to come back under LCB 2016 to say that the loss is zero is ridiculous. I have no belief in it at all.*" He gave another example (although he said he could give over 20 reasons) of the negative readings that the calculations can produce – "*are you saying that noise makes you hear better?*".

28. Mr Hughes also accepted the limitations of LCB 2016 – *“I have been using it for about sixteen months and agree that there can be some difficulties. I consider however that it is a useful addition but one has to remember the caveat expressed in both the CLB paper of 2000 and the LCB paper of 2015.”* As is said in LCB 2016, *“Quantification of noise-induced hearing loss is at best an indirect estimate. The estimation procedures recommended here should be considered in that context to be an approximation.”*
29. In my judgment, Mr Lancer’s preferred median ratio allocation method of apportionment does not provide a definitive answer either. This is not a widely used method. Mr Hughes is not aware of any experts apart from Mr Lancer who use it. The Dobie paper upon which Mr Lancer relies in support of this method suggests that it is prudent to present the estimates *“as only one of several lines of evidence upon which one’s causation evidence is based”*. Further, Dobie includes consideration in his paper of the 0.5 kHz frequency (PTA5123), which Mr Lancer has not done.
30. In the round, and bearing in mind that we are dealing with losses of only a few dB in a field where there is a wide margin (+/- 10 dB) on audiometry, my finding on this evidence is that the Claimant’s NIHL over 1, 2 and 3kHz is in the order of 3kHz. I am not able to be more precise than that. The NIHL across these frequencies is, on any view, small.
31. The next issue is whether the Claimant’s accepted NIHL at 4kHz makes any material difference. I shall take this loss to be 24 dB, which is the rough average of the expert’s figures – there being no significant issue between them about this.
32. Mr Lancer’s view is that it is this higher frequency loss that is causing the Claimant’s difficulties with hearing speech in crowded places and with the phone and doorbell. He cites Smoorenburg’s 1992 research discussed by Moore. The theory is that the percentage of correctly identified sentences decreases by 1.7% for every dB of hearing loss averaged across the 2 kHz and 4 kHz frequencies. So, applying that equation to the numbers in this case would produce a percentage of at least 20%. Moore’s paper summarised Smoorenburg’s research by saying that it indicates that *“even relatively small noise induced elevations in audiometric threshold at 4 kHz are associated with a markedly reduced ability to understand speech in noise.”*
33. Mr Hughes summarises the research in this area in some detail in his report at paragraphs 41 – 67. His view is that losses at 4 kHz do have an impact but the effect is small and depends upon the magnitude of the loss. He cites research by Bell Telephone Laboratories demonstrating that subjects could identify over 95% of speech sounds using only frequencies between 1 and 3 kHz. He concludes that *“although Mr Dudhill might miss some sounds in certain circumstances, in the majority of situations he will not be appreciably worse off.”* He notes that the Claimant’s hearing at 2 kHz is better than average, which he concludes will compensate for his deficits at 4 kHz.
34. This issue has been considered in a number of cases.
 - i) In Holloway v Tyne Thames Technology Limited in 2015, HHJ Freedman heard expert evidence from Prof Homer and Prof Lutman. He preferred Prof Lutman’s evidence and found that a hearing loss at 4 kHz of 11 dB in the left ear and 16 dB in the right ear on top of 30 dB age related hearing loss *“would make some...*

theoretical difference [to the Claimant's] hearing” but that he could not “be satisfied that she would be appreciably worse off.” The claim failed.

- ii) In Briggs v RHM Frozen Food Limited in Sheffield in 2015, HHJ Coe QC heard from Prof Homer and from Mr Jones. She accepted Prof Homer's evidence and made a finding that a NIHL of 10 - 15 dB at 4 kHz did make the Claimant appreciably worse off and awarded damages. She referred to another case decided in that year by HHJ Gosnell in Leeds, where a similar view was taken (Hinchcliffe v Six Continents Ltd).
 - iii) In Evans v Secretary of State for The Department of Energy and Climate Change and JJ Maintenance Limited in 2017, HHJ Bidder QC heard from the experts, Mr Singh and Prof Lutman and preferred Mr Singh's evidence that the Moore survey of 2016 does establish the real significance of 4 kHz and above to those suffering from an established NIHL at that frequency. In that case, there was NIHL of 11.2 dB averaged binaurally at 3 and 4 kHz but only 2.3 dB averaged across 1, 2 and 3 dB. The claim succeeded.
35. Since those cases were decided, the Supreme Court has clarified the law around the de minimis issue in Dryden v Johnson Matthey [2018] UKSC 18. Lady Black concluded that “*to be actionable, the damage had to be more than negligible.*” She noted that the test has been described as “*more than trivial*”, “*real damage*” and “*material.*”
36. In my judgment, it is not necessary for me to make a finding in isolation about whether the 3 dB hearing loss averaged over 1, 2 and 3 kHz is “more than negligible”. As to this, Mr Lancer's view was that 3 dB was on the borderline. Mr Hughes would have drawn the line at 5 dB. The reason for this is that I agree with Mr Lancer that the NIHL at 4 kHz must be factored in as well. Here, the Claimant has a significant noise induced deficit at 4 kHz, namely 24 dB.
37. The Defendant has not challenged the Claimant's evidence as to his hearing difficulties. Whilst Mr Hughes mentioned papers questioning the Moore research, he did not produce them. Mr Hughes himself accepts that the NIHL at 4 kHz will make some difference.
38. The bar to overcome a de minimis defence is not a high one, the test being “*more than negligible*”. The courts regularly make awards for minor personal injuries of a few hundred pounds. The Judicial College Guidelines for the Assessment of General Damages in Personal Injury cases includes a bracket of up to £600 for injuries where there is a complete recovery within seven days.
39. In my judgment, Mr Lancer's evidence about the 4 kHz issue makes sense. It explains why the Claimant has difficulties with speech in crowded places and with the telephone and the doorbell. Whilst 4 kHz is not the most important frequency for picking up speech, some sounds are identified with the frequency – the speech banana identifies “F”, “S” and “Th”. Mr Jaspal cross examined Mr Lancer about this, criticising him for not having asked the Claimant about these particular sounds to establish whether the hearing loss at 4 kHz is responsible for his difficulties. Mr Lancer stood his ground, referring to the frequencies of the telephone and doorbell – I was impressed with his evidence on this and do not criticise his history taking and methodology.

40. Mr Hughes accepted in the joint experts' statement that the Claimant's "*high frequency losses at the 4 kHz frequency might make some sounds seem softer*" and he conceded in cross examination that "*the loss at 4 kHz may explain some of the Claimant's symptoms – he will hear speech but it might sound softer. This would particularly be the case in a noisy background*" but he went on to cite Lacroix and Harris to support his view that the losses at 4 kHz are only associated with small changes in performance. Mr Hughes noted that 2 kHz is the most important frequency for picking up speech and that the Claimant's hearing is better than average at that frequency – "*this lessens the effect at 4 kHz.*"
41. In my judgment, the noise induced hearing losses suffered by this Claimant are great enough to be considered to be more than negligible and so sound in damages. They are more serious, for example, than a soft tissue injury healing within a week. The Claimant will have modestly reduced hearing in certain situations for many years, until the effects of aging over-take the noise damage.
42. It follows that the claimant has established on the balance of probabilities that he has suffered a NIHL of 3 dB averaged over 1, 2 and 3 dB and of 24 dB at 4 kHz and that this has caused him a disease or an impairment of his physical condition (Dryden paragraph 24) which is more than negligible (paragraph 25).
43. The next issue for me to consider is that of the Claimant's tinnitus. Mr Lancer and Mr Hughes sit on the opposite sides of the range of professional opinion as to whether so called delayed onset tinnitus can manifest itself many years after the exposure to noise. Mr Lancer's view is that delayed onset tinnitus is well recognised (he described this as "*the mainstream view*") and it depends upon when there has been enough damage to the hair cells in the inner ear such that a tipping point is reached, beyond which symptoms develop. He cites research from a number of experts, concluding that the more accepted view amongst his peers is that, except in exceptional circumstances, whatever the causes are for hearing loss will also be the causes for the tinnitus.
44. Mr Hughes cites research from Hazell in which it was found that the traditional concept that tinnitus is due to hair cells "*lying down*" in the cochlea is unhelpful and misleading and that there are many possible reasons for the onset of tinnitus other than noise. Reference was made to over 80% of patients in one study having triggers that could be classified as reflecting changes in mood state. Mr Hughes' view is that tinnitus is a central feature rather than being due to damage to the hairs in the cochlea – he cites research showing that 62% of patients who have sustained a severing of the acoustic nerve still get tinnitus. He doesn't accept Mr Lancer's contention that his is the conventional view. Mr Hughes accepts that it is a view espoused by many people but a lot of other experts agree with him. Mr Hughes' view is that, given the gap of over twenty-five years from the Claimant's last exposure to noise in 1985 and the onset of his tinnitus in about 2011 and the fact that the tinnitus started initially only in the Claimant's left ear, the tinnitus could not have been caused by noise.
45. The extracts from the Hazell paper included by Mr Hughes in his report however, note that noise exposure is associated with a two-fold increase in the risk of developing tinnitus over the population not exposed to noise.
46. I have found it difficult to resolve this difference of professional opinion between two impressive experts. On the balance of probabilities, I prefer Mr Lancer's analysis. He

explained in some detail the methodology that he used in coming to his conclusions. He described how he takes a history, performs an examination, considers the medical records and comes to a conclusion based upon his 30 years of experience. Here there was no ear disease evident on examination and no mention in the Claimant's medical records of any condition linked to hearing loss. Mr Lancer was able to conclude on the balance of probabilities that there was no idiopathic hearing loss (which I have accepted) and no likely explanation for the tinnitus other than age and noise.

47. On balance, I accept that evidence. Mr Hughes was asking me to consider all of the other theoretical possible causes of the tinnitus, against the backdrop of the tinnitus starting in only one ear and the long gap between the last exposure to noise and the onset of symptoms. I prefer Mr Lancer's view that we can consider the known probabilities i.e. age and noise rather than the unknown possibilities.
48. On balance, I find that the Claimant's tinnitus to have been caused by the same pathologies as his hearing loss.
49. However, I prefer Mr Hughes' categorisation of the severity of the symptoms as mild to Mr Lancer's categorisation as moderate. Mr Hughes uses the conventional categories as per McCombe, whilst Mr Lancer adopts his own system. There has to be consistency and the Claimant's own description of his symptoms is consistent with Mr Hughes' categorisation – "*my tinnitus has always been slight to me; I don't see it as a serious affliction.*" He described his symptoms in 2015 as "*trivial*".
50. The next step is to quantify the Claimant's damages. The appropriate Judicial College Guidelines bracket is 5(B)(d)(iv) for slight or occasional tinnitus with slight NIHL - £6,450 to £11,040. Whilst the Claimant is only 60, my award is nevertheless at the very bottom of this bracket. The Claimant does not see his tinnitus as a serious affliction and his NIHL is approaching the levels which might be considered de-minimis – in other words towards the very lower end of actionable NIHL. I award £6,450.
51. The Claimant also seeks special damages, namely the cost of hearing aids during the period of acceleration of his need for them caused by noise and for a tinnitus masker and desensitisation therapy for his tinnitus.
52. The difficulty with the special damages claim is that it is based upon Mr Lancer's view back in November 2015 that the Claimant would benefit from hearing aids. Mr Lancer accepted in evidence that any acceleration due to noise would be less than 3 years and so, on the Claimant's own evidence, the need for hearing aids cannot now be due to his noise exposure. Having chosen not to purchase hearing aids before now, the window has passed. As Mr Lancer put it, "*the Claimant made a choice not to seek assistance. He has made the decision. It is his loss, if you like.*"
53. My reasoning is the same in relation to the tinnitus related special damages claimed. Further, I am not satisfied that the claimant has proved a need for such equipment, given his description of the severity of his tinnitus and that he does not consider it to be a serious affliction.
54. This sum must be apportioned to reflect the periods of exposure. On the basis of the evidence of Mr Gillam, the single joint engineer, depending on whether all of the

Claimant's employment was noisy, the Defendant is responsible for either 65 – 79% of the Claimant's NIHL or 57 – 73%.

55. The Defendant refused to engage with Mr Gillam in this regard on the mistaken belief that engineering evidence would not assist – *“we therefore have and will not be disclosing any further documentation or joining in with any engineer instruction”*. In these circumstances, it would be unfair for the Defendant to shelter behind the burden of proof. I accept the Claimant's evidence that virtually the entire period of employment was noisy and therefore find the 65 – 79% bracket is appropriate. Given that the Defendant could have produced the evidence needed to enable the engineer to produce more accurate figures, but chose not to do so, I take the 79% figure as appropriate.
56. My award is therefore 79% of £6,450, which is £5,095.50.
57. I end by thanking both Counsel for their helpful skeleton arguments and well-structured submissions. This enabled the case to be concluded in a day and has assisted me in the preparation of this judgment.

District Judge Guy Baddeley.