Welcome

Welcome to this week’s edition of BC Disease News. In the last week, Raleys Solicitors, best known for running thousands of miners’ compensation claims, has gone into administration. Elsewhere, two defendants have failed to persuade courts to interpret the Part 36 costs rules in a way that benefitted them.

This week we present, a feature article revisiting the topic of de minimis in NIHL claims. Since our last feature on this subject in edition 108 of BC Disease News we have seen more setbacks for defendants in 3 recent decisions. In this feature we explore the reasons for these setbacks, how they impact on defence strategies and what selection criteria apply to running de minimis cases.

Any comments or feedback can be sent to Boris Cetnik or Charlotte Owen.

As always, warmest regards to all.

SUBJECTS

Miners’ Compensation Solicitors Goes Into Administration

The firm of solicitors best known for running thousands of miners’ compensation claims, Raleys Solicitors, has gone into administration. The firm announced on their website that insolvency practitioner Begbies Traynor was appointed as administrator earlier this month. Raleys was formed more than 130 years ago and specialises in work-related disease cases, in particular miner’s claims, as well as personal injury, employment, conveyancing, and wills, trust and probate.¹

A spokesman for Begbies Traynor said: ‘To ensure that their clients’ matters and interests are protected with the minimum of disruption and to maximise returns to creditors, the partners of Raleys have made arrangements for all ongoing clients’ files to be transferred to Ison Harrison, solicitors in Leeds’.

The firm has suffered high-profile court defeats in recent years relating to the way it has handled some miners’ claims.

In 2013, in Leeds County Court, HH Judge Gosnell found negligence on the part of Raleys, and awarded its former client damages of £5,925 on the basis he had a 75% chance of securing extra compensation. Raleys had secured former miner Andrew Procter damages in 2003 after settling his vibration white finger claim including 75% of £11,141. Procter subsequently made a claim for either loss of earnings or for ‘services’ – the help needed with domestic tasks as a result of a stroke. The County Court Judgment was appealed by Raleys but the Court of Appeal upheld the decision.

Gill, the managing partner, said the case was one of 186 similar claims made against Raleys, the vast majority of which had been brought by the law firm Mellor Hargreaves, of Oldham. Raleys had successfully defended 141 of them, and had conceded and settled a further 35.

The Association of Costs Lawyers Call for More Specialist Costs Judges

In response to a recent report from Briggs LJ the Association of Costs Lawyers (ACL) has called for a new breed of case officers consisting of specialist cost judges and cost lawyers in county courts. The ACL has said that it supports the program for reform by Briggs LJ, however they identified some areas in which they have concerns.²

The ACL said in their response to the report that ‘legal costs is a learned skill and needs to be recognised as such’. Currently most solicitors and barristers do not see costs as a specialised area of law meaning that as deputy or district judges they do not possess the knowledge they need.

A large number of deputy or district judges have no interest in dealing with issues of cost, and as a result allow their dislike of the issue to influence their judgment when making decisions. This causes inconsistencies in costs rulings. Briggs LJ identified that if there were judges that were specialised in specific areas within civil work these inconsistencies would be reduced significantly.

The ACL have recommended, off the back of Briggs LJ’s idea that some of the judges’ more routine and non-contentious work be transferred to supervised case officers, that ‘given the challenge of some district judges’ attitude towards costs work, “we recommend that costs lawyers be considered for appointment as case officers in costs-related matters”’.

As for the current online system, the ACL have urged that further scrutiny is needed. The ACL have stated that ‘experience tells us that using Money Claim Online, for example, is not straightforward, even to someone with a legal background. To use a system which is not operating adequately as a benchmark for what is to come is, in our opinion, flawed’.

In an attempt to identify the issues it has been suggested that a full survey of the users of the process be undertaken. In addition to this it was suggested that ‘the move toward a less adversarial approach to litigation has to be the way forward. This means that the emphasis on ADR is a positive step in the right direction and one to be encouraged; however, experience of using the small claims mediation process has not been positive. Once again we would suggest a full survey of users should be undertaken’.

A more general issue to arise with the report by Briggs LJ is whether the changes that have been outlined are actually feasible and whether there are sufficient resources available to plan, deliver and monitor the changes.

In the response of the ACL, they called for a rewrite of the civil procedure rules, to make them more understandable and easy to read. It was also said that the introduction of the proposed online court would require staging, starting only with cases worth up to £10,000 (£15,000 less than proposed by Briggs LJ).

ACL chairman Sue Nash said: ‘Costs are an integral element of the court process and in looking at the overall structure of the civil courts, Lord Justice Briggs has identified positive solutions that should improve the resolution of costs disputes. Putting the right people in the right roles is a feature of modern legal practice, and we believe that as case officers, costs lawyers could make a significant contribution to the justice system’.

Strict Application of Part 36 Not Good News For Defendants

In two recent decisions, defendants have failed to persuade courts to interpret the Part 36 costs rules in a way that benefitted them. We will take each case in turn.³

Firstly, the case of ABC v Barts Health NHS Trust [2016] EWHC (QB), before HHJ McKenna, sitting in the High Court. The claimant, acting with the aid of his wife and litigation friend, sought damages of over £1million, plus an annual payment of £230,000, for delay in surgery, resulting in a stroke. A part 36 offer of £50,000 was made in June 2015 but only accepted in February 2016. The offer was expressed to be a settlement of the whole of the claimant’s claim.
The claimant argued that there was no reason to depart from the ‘usual order’ under CPR Rule 36.13(5), so that its costs up to expiry of the offer in June should be awarded and then they would pay the remaining defendant’s costs.

The defendant submitted, however, that such an order would be unjust because it failed to reflect that the claimant had ‘failed in relation to the vast majority of his pleaded claim’ and argued that the claimant’s costs until June 2015 should exclude costs relating to causation, which gave rise to the ‘overwhelming’ issue in the claim.

HHJ McKenna, acknowledged (as it has been before) that Part 36 was a ‘separate, self-contained code’ which must be applied as such. He went on to say that:

‘Moreover, the court’s discretion to depart from the usual order is constrained by the precondition that its full enforcement would be unjust. The difficulty with the broad thrust of the defendant’s submissions as it seems to me is that the defendant had the means and opportunity to protect itself in respect of the costs that it was going to have to incur in respect of the causation issue but chose for whatever reason when making its part 36 offer to frame the offer as a settlement of the whole claim and then subsequently when that offer was not accepted did not make any revised offer excluding causation. True it is that in rejecting the offer and pursuing the action up to or close to trial the claimant acted unreasonably, but Part 36 expressly provides an effective remedy to cater for that very situation in that the claimant will have to pay all the defendant’s costs incurred post expiry of the Part 36 offer and in the circumstances of this case it seems to me that the assessment of those costs should be on the indemnity basis. To my mind, there is nothing unjust about making the usual order in the circumstances of this case, accepting as I do, the thrust of the claimant’s submissions on this issue’.

As a result, HHJ McKenna ordered that the defendant pay the claimant’s costs up to June 2015 on the standard basis and the claimant pay the defendant’s costs from expiry of the Part 36 offer until acceptance in February 2016.

Elsewhere, in Littlestone and others v Macleish [2016] EWCA Civ, Briggs LJ, sitting in the Court of Appeal, ruled that the defendant’s desire to add together the amount of a Part 36 offer and a payment on account in order to produce a larger sum than the claim and the amount awarded, was an ‘absurdity’. The claim involved a dispute between a landlord and an unnamed law firm over repairing obligations in the firm’s lease.

Briggs LJ, said the ‘admissions payment’ on account should be regarded as ‘part payment in advance of the £35,000 that would have been due and payable to the claimant if, thereafter, he accepted the Part 36 offer’. This he said ‘would do no violence’ to CPR Rule 36.11(6) which was not intended to deprive defendants of the benefit of a party payment made on account, after admissions, between the making of a Part 36 offer and its acceptance.

Delivering the leading judgment, Briggs LJ went on:

‘There is nothing inconsistent in a defendant both wishing to encourage settlement by making an offer to settle the whole claim, then making one or more smaller payments outright pursuant to admissions, while leaving the part 36 offer open for acceptance throughout. The continuing offer encourages settlement while the admissions payment narrows the issues. There is no reason why the admissions payment should be intended to improve the value of the offer to settle the whole claim. It is made for a different purpose’.

Briggs LJ dismissed the defendant’s appeal, and allowed the claimant’s cross-appeal that costs should have been awarded on the indemnity basis because this was provided for under the lease.

Negligence and Damages Bill Update

The Negligence and Damages Bill is a private member’s bill presented to the House of Commons by Labour M.P Andy McDonald. The Bill is separated into 3 parts, with Part 1 seeking to amend the law which relates to people who suffer psychiatric harm after witnessing the death or injury of others. Parts 2 and 3 of the Bill would repeal the Fatal Accident Act 1976 and make provision for a new way of providing damages to terminally ill or fatally injured claimants and/or bereaved families in England and Wales. The Bill had its first reading in the House of Commons on 13th October 2015 and was scheduled for its second reading on 22nd January 2016. However, this has now been pushed back until 22nd April 2016.

Please see edition 122 of BC Disease News for our feature on the impact of this Bill should it be enacted as legislation (here).

CPR Update: New Rules on Costs Budgeting

The 83rd Update of the CPR brings many changes which come into force from 6th April 2016. The most significant changes relate to the budgeting process and its implication on assessment. Amendments will be made to the following provisions of the CPR:

Practice Direction 3 E

This part deals with the budgeting process and the following changes will be implemented:

- A new document entitled ‘Guidance Notes on Precedent H’ which states that:
  - Where monetary value of the case is less than £50,000 then the parties must only use the 1st page of Precedent H (this restriction currently only applies where costs claimed are less than £25,000).
Deciding whether a full Precedent H is required depends not only on the costs claimed but also on the monetary value of the claim.

It is made plain that the “contingent cost” sections should only be used for costs which are more likely than not to be incurred. If that test is not met, then the present route of seeking to amend the budget should be followed.

The time spent in preparing the budget and associated material must not be claimed in the draft budget under any phase. The permitted figure is to be inserted once the final budget figure has been approved by the Court. This is to facilitate the cap on the recoverable costs of preparing the budget (a maximum of £1000 or 1% of the budget as approved, whichever is the greater) which was somewhat difficult to calculate if the cost of preparation of the budget was included within the budget in the 1st place.

- In all other cases, a full Precedent H has to be filed and exchanged ‘not later than’ 21 days before the 1st CMC.
- The Practice Direction also introduces a new form, Precedent R.
  - This is to be filed 7 days before the 1st CMC and is called an ‘Agreed Budget Discussion Report’.
  - It is an Excel spreadsheet which is in 5 columns that identify the phase, the sum claimed, the sum offered, whether figures are agreed and if not why not and provides space for the judge’s comments.

Practice Direction 47
- Introduction of 2 new requirements;
  - In proceedings commenced after 1 April 2013, it is necessary to divide the bill for work done before and after that date.
  - Where there has been a Costs Management Order, the bill must be divided into separate parts showing the costs claimed for each phase and providing details from the last approved or agreed budget of the incurred costs and those which were estimated.
  - A further part is required in order to show the costs incurred in the initial preparation of the Precedent H and other costs incurred in the budgeting process.

It has been suggested that these amendments are an attempt to simplify the budget process for smaller claims and that they provide a mechanism for demonstrating the issues between the parties on their respective budgets (Precedent R) and for the separation out of the costs of preparing the budget. The requirement for a completely different format of bill which will now be in multiple parts with a superfluity of information required will be a major change.

A Paperless Supreme Court?

The Supreme Court justice, Lord Kerr, is leading an initiative to improve the use of technology at the court and cut down on paper, it has emerged.

The president of the Supreme Court, Lord Neuberger has said that ‘Lord Kerr is also helping to make sure that we do not sit on our laurels. He is chairing a committee of three justices to try and see whether we can cut down the amount of paper in most cases and do more on screen. We are also examining the possibility of greater use of video links, which would save parties time and money’.

In a speech given last week for the Northern Ireland Assembly Committee for Justice, Lord Neuberger said, ‘courts should not balk at the idea of changing their procedures to enable maximum efficiency for new IT systems’. He recommended that off-the-shelf systems be purchased in preference to more bespoke systems because: ‘Off-the-shelf systems have been rigorously stress-tested, whereas the same cannot be true of bespoke systems. Secondly, and connected with the first point, as we discovered from our successive experiences, even courts should not balk at the idea of changing their procedures to enable maximum efficiency for new IT systems. Of course this does not mean that courts should be prepared to sacrifice any practice which supports or facilitates the rule of law. But the notion that IT always has to be designed to fit working procedures to enable maximum efficiency for new IT systems is wrong.’

He then went on to consider the ‘vexed question of access to justice in an age of austerity’, on which Lord Neuberger said lawyers had to ‘face the fact that we are in something of a perfect storm’. Echoing the words of the Lord Chief Justice, Lord Thomas, he said: ‘Legal Services are
increasingly very expensive and increasingly unaffordable to ordinary people. At the same time, government money to support the courts and legal aid is in very short supply'.

He said the government was ‘proposing to make available a large sum of money to overhaul both the physical and the electronic infrastructure of the courts’, which would result in ‘fewer, but larger and more modern’ court buildings across the UK.5

‘Fit and Proper Test’ for CMCs

In a joint response to an independent review of the sector, the Ministry of Justice and Treasury agreed that claims management companies will be forced to pass a ‘fit and proper test’ and record all client calls if they want to continue practising.6

Chancellor George Osborne said the government wants to clamp down on the rogue CMCs that provide bad service and ‘bombard’ customers with nuisance calls. He added: ‘The new regime will be tougher and will ensure CMC managers can be held personally accountable for the actions of their businesses.’

He also confirmed the government will transfer responsibility for regulating CMCs to the Financial Conduct Authority. The review, published after this week’s budget, says despite improvements to the system there remains a ‘widely held perception’ of ‘widespread misconduct’ by CMCs.

Common conduct issues identified by the review included CMCs offering poor value for money, misrepresentation of service, nuisance calls and texts and speculative or fraudulent claims.

As well as recommending that all people working in CMCs be required to pass a fit and proper persons test and be held personally accountable for rule breaches for which they are responsible, CMCs will also be mandated to record all calls with clients, and retain the recordings for at least 12 months after the conclusion of a contract with that client.

Other recommendations include:

- Appointing an independent chair of the claims management regulation unit;
- That the unit’s website publish all information on enforcement activity;
- Smaller fines or mandatory training to penalise for more minor conduct breaches; and
- A proportion of receipts from enforcement activity to subsidise regulation.

Turnover from personal injury claims in the sector was £309.7m in 2015, compared with £238.2m in 2014 and £354.1m in 2013. Around 900 CMCs were operating in the personal injury market by the end of December, the smallest the sector has been since regulation began in 2007.

Director General of the Association of British Insurers, Huw Evans, backed Osborne’s plan for the CMC sector, suggesting the public had previously been ‘at the mercy of unscrupulous firms’.

To our knowledge there have now been 7 County Court decisions which address de minimis arguments in NIHL claims (there are no doubt other decisions out there). Defendants have succeeded in 2 and claimants in 5 (although in 1 the case was defended on diagnosis and comments on de minimis were obiter). When and if the new LCB Guidelines on quantification of NIHL come to be commonly applied then de minimis will become an increasing feature of NIHL claims. We recently saw from our analysis of some 10,000 audiograms and the impact of the LCB Guidelines that around 50% of claims will broadly fall within a de minimis categorisation—see link here.

In this feature, we explore the reasons for the recent defendant setbacks, how they impact on defence strategies and what selection criteria apply to running de minimis cases.

Background

The same issues have arisen in all these cases: does the claimant suffer any NIHL and if so is the claimant ‘appreciably worse off’ as a result?

In edition 97 we considered two defendant favourable decisions of Hughes and Holloway in which it was found that NIHL at 4 kHz of up to 15 dB in conjunction with average NIHL of over the key speech frequencies 1, 2 and 3 kHz of up to 1-2dB did not give rise to any disability so that the claimant could not be considered to be ‘appreciably worse off’. It is noteworthy that in both of these claims medical evidence was heard from both the claimant and the defendant.

We then considered the further decisions of Hinchliffe and Briggs in edition 108, whereby the test of the claimant being ‘appreciably worse off’ was again endorsed and described as meaning that there must be ‘real damage as distinct from damage which is purely minimal’.

The loss in Hinchliffe was 1.7dB of NIHL between 1-3 kHz plus a loss of about 10-15dB at 4 kHz. Notwithstanding the fact that causation had not been established and so the claim failed on that basis, HHJ Gosnell went on to consider obiter the issue of de...
minimis. It was said that the need for hearing aids had been accelerated by between 2-5 years and on the Worgan-Coles scale of disability the claimant reached stage 1 (see paragraph 121 of the Nottinghamshire & Derbyshire Deafness judgment of HHJ Inglis for a more detailed discussion of the scale). The judge considered that the claimant was reporting symptoms caused by hearing loss which were ‘appreciable and more than minimal’. It was agreed that an award of £2,800 would have been made had the claimant succeeded in proving NIHL.

This was followed shortly by Briggs v RHM Frozen Food Limited in which the claimant’s hearing was essentially normal between 1-3 kHz and typical for her age but with a 10-15 dB NIHL at 4 kHz. Professor Homer for the claimant argued that 4 kHz is a critical frequency for hearing whilst Mr Jones for the defendant argued the NIHL would make very little difference and would not be noticeable to the claimant. HHJ Coe preferred Professor Homer’s evidence that loss at 4 kHz was significant. This together with an accelerated need for hearing aids made the claimant appreciably worse off. Damages were valued at £4,000 but £2,000 awarded as the defendant was responsible for only half of the NIHL.

We now go on to consider three further de minimis judgments in which the defendant did not challenge the claimant’s evidence.


We turn firstly to the decision of Lomas, in which the claimant, claiming damages from the defendants in respect of his developing 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 so small that it was not compensable on the ground that it was de minimis.

The claimant’s expert, Mr Lloyd, initially calculated the claimant’s average binaural NIHL over 1-3 kHz at 11.5 dB. However, in his oral evidence Mr Lloyd, conceded that this was not a proper calculation and changed his assessment over 1, 2 and 3 kHz bilaterally to 3 decibels. In the words of Recorder Hindcliffe QC, ‘that, of course, is a substantial alteration to the overall hearing loss’.

The defendants, perhaps following this concession by Mr Lloyd, decided not to call their expert, Professor Lutman, to give evidence and so the claimant’s NIHL was accepted as 3dB over 1, 2 and 3 kHz. There was no loss at any higher frequency of 4 or 6 kHz as can typically arise a de minimis cases.

The defendant argued that this loss was de minimis and referred the judge to the authorities of Rothwell and Holloway. As well as not calling their expert to give evidence, the defendant did not provide the judge with a transcript of the latter judgment, however, although some criticisms were levied at the defendants for this, this did not prove to be fatal as Mr Lloyd conceded that the claimant would ‘have no appreciation of any harm or diminution in his hearing whatsoever’. (para 26).

The judge then considered whether, on the balance of probabilities, the tinnitus was likewise caused or materially contributed to as a result of the claimant’s exposure to the same noise. It is this issue where the defendant’s decision to not call Professor Lutman to give oral evidence proved fatal to the defence.

The joint medical report considered the causation of the tinnitus. Indeed, attention was drawn to the passage of the medical report entitled ‘Area of disagreement’ in which Mr Lloyd outlined his opinion in the following terms: ‘With regards to whether the claimant’s tinnitus is caused by his excessive noise exposure there is a range of opinion on this point. Some experts argue that the tinnitus cannot be attributed to excessive noise exposure unless it came on during or within a year of cessation of the claimant’s excessive noise exposure. Other experts argue that there is cochlear damage which by definition is when there is noise induced hearing loss present. Then the claimant has been predisposed to developing tinnitus even if it is some years after cessation of noise exposure. I am of the latter opinion; there is no evidence in the literature to support either argument.’

Hincliffe Q.C. points out significantly at para 24 that Mr Lloyd was not challenged on this aspect of his evidence. He then went on to consider whether he should accept this unchallenged evidence. He stated:

‘It has to be said that he impressed me as a witness and I have no reason to doubt his expertise and it is his opinion, which I accept, that in this case the claimant has suffered noise induced hearing loss to the extent of 3 decibels bilaterally. Moreover that the damage to the cochlear has, in this case, played a material part in the development of the tinnitus.’

Therefore, whilst the NIHL was found to be de minimis, based upon the unchallenged oral evidence of Mr Lloyd in relation to the claimant’s tinnitus, Hindcliffe QC was satisfied that as ‘it has not been seriously argued that the tinnitus should not sound in damages’ it was found to be in part or in whole, as a result of his exposure to harmful levels of noise.(para 30). The claimant was awarded £3,000 for the tinnitus.

Roberts v Prysmian Cables and Systems Limited, 30 October 2015.

In this case the medical evidence was based on 8 audiograms, 7 of which were carried out during the claimant’s employment with the defendant using Bekesy audiometry between 1986 and 2004 and one in 2012 when the claim was issued which used pure tone audiometry (PTA). The claimant also complained of tinnitus.

The claimant’s expert Mr Tomkinson provided an initial report based on the 2012 PTA only and finding NIHL (average of 10-11 dB NIHL over 1-3 kHz). Mr Tomkinson did not know of and was not provided with the workplace audiograms when producing this initial report. When Mr Tomkinson was later provided with the workplace audiograms—which showed far better hearing than the later 2012 audiogram—and asked to report on them he concluded that the NIHL over 1-3 kHz was nil or minimal though with some damage at the higher frequencies of 4 and 6 kHz, 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 3rd report however his conclusion was markedly different. He now sought to disregard the workplace audiograms as being unreliable and found a NIHL over 1-3 kHz of between 3-5 dB (having been specifically directed in instructions by the claimant solicitors that 3 dB of NIHL represented a level which would result in compensation).

HHJ Keyser found the change in Mr Tomkinson’s opinion in the 3rd report to be unexplained and felt that it was given due to the nature of the questions put by the claimant’s solicitors.

HHJ Keyser identified that Mr Tomkinson had ‘altered his position considerably’ and that ‘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’.

He therefore did not allow the claimant to rely upon the evidence within the 3rd report.

Despite this the defendant’s arguments on de minimis were doomed. They argued this without obtaining their own medical evidence or calling the claimant’s expert for cross examination. The defendant relied on the findings in Holloway to challenge the claimant’s expert evidence. His Honour Judge Keyser Q.C. was unappreciative of this approach and stated:

‘A court should exercise very considerable caution before rejecting contradicting expert evidence on technical matters’.

HHJ Keyser found that the evidence adduced for the claimant does not establish that the level of hearing loss at 1.2 and 3 kHz would have been ‘either perceptible or functionally significant’ (para 36). He noted, however, that whilst the loss at 4 and 6 kHz is not included in the calculation of average binaural haring loss there had been no evidence adduced to ‘undermine’ the proposition that the presence of noise induced hearing loss at 4 and 6 kHz is sufficient to establish material, though very minor damage.

HHJ Keyser even went on to say that: ‘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’.

An award of £1,500 was made on the basis that the contribution of noise damage to the overall disability was very slight. In relation to tinnitus, HHJ Keyser found that as the onset of the claimant’s tinnitus was more than 1 year after the last exposure, it could not be due to noise exposure and so no award was made for this.

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

This is another NIHL claim whereby a de minimis defence was being run where the defendant did not have their own expert and neither did they 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. He went on to say that:

‘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 noise-induced hearing loss of moderate severity. This will have a moderate effect on his ability to enjoy social, domestic and recreational activities’.

DJ Kelly went on to consider the proposition of the defendant that the NIHL of 2.02 dB was de minimis. In doing so she identified the test as set out in Johnston & NEI International Combustion Limited,1 namely, whether or not the claimant is ‘appreciably worse off’.

DJ Kelly indicated that she had read the decisions which were referred to by the defendant, of Holloway, Hincliffe and Briggs. In doing so she noted that in Holloway;

‘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’.

Again, when referring to Hincliffe, she noted that HHJ Gosnell had the benefit of hearing live medical evidence. HHJ Kelly then went on to say:

‘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. A paragraph 16 of his report he confirms that the claimant has:

“…noise-induced hearing loss of moderate severity. This will have a moderate effect on his ability to enjoy social, domestic and recreational activities”’

In relation to the comment of Mr Manjaly regarding hearing aids, HHJ Kelly said that the proposition that there has been a five-year acceleration period remained unchallenged by the defendant. This resulted in her making the following conclusion:

‘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.’

Therefore, the approach as to hearing aids in Briggs was followed.

In the table below we summarise the key findings in the 7 de minimis judgements.
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<td>THE NIHL</td>
<td>No disability within 1-3 kHz frequency range 5dB NIHL at 4kHz.</td>
<td>NIHL of up to 1.6 dB averaged between 1-3 kHz. 11dB NIHL at 4kHz in the right ear and 16 dB NIHL in the left ear.</td>
<td>3dB NIHL averaged over 1-3 kHz. 10-15 dB loss at 4kHz.</td>
<td>3 dB NIHL averaged over 1-3 kHz bilaterally. No losses at 4 or 6kHz.</td>
<td>Little or no NIHL at 1-3kHz. Loss of up to 15dB at 4kHz.</td>
<td>Average of between 3-5dB NIHL over 1-3 kHz and ‘some damage’ at 4 and 6 kHz.</td>
<td>2.02dB NIHL averaged over 1-3 kHz.</td>
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<td>TINNITUS</td>
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<td>SLIGHT and noise induced</td>
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<td>HEARING AIDS</td>
<td>No Hearing Aids</td>
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<td>Need accelerated by 2-5 years.</td>
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<td>Accelerated need for Hearing Aids</td>
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<td>CL SOL / COUNSEL</td>
<td>? / David Harris</td>
<td>Roberts Jackson Limited / Timothy Grace</td>
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<td>Michael Lewin Solicitors / Joe Wynn</td>
<td>Roberts Jackson Limited / Mr Vanderpump</td>
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<tr>
<td>DE MINIMIS?</td>
<td>YES</td>
<td>YES</td>
<td>NO</td>
<td>YES NIHL BUT DAMAGES AWARDED FOR TINNITUS</td>
<td>NO</td>
<td>NO</td>
<td>NO</td>
</tr>
</tbody>
</table>

**Comment**

What lessons can be learnt from these recent defendant setbacks?

Whilst it could be suggested that the most recent *de minimis* judgments are all claimant favourable, they are of no precedent value for the proposition that either small amounts of NIHL over 1-3 kHz alone or combined with loss at 4 kHz means that the claimant is ‘appreciably worse off’. The poor outcome of these claims was largely down to failures in the defendant obtaining its own medical evidence and allowing the claimant’s medical evidence to remain unchallenged. None of these county court decisions are binding. Further each decision is based on the particular evidence (or lack of it!) of each case. Findings on the evidence in one case is not a proper basis for the same finding in another case where the evidence is different.

Defendants cannot simply reply on previous favourable decisions to run *de minimis* cases without evidence (and equally the same applies for claimants). Where there is a genuine *de minimis* defence then defendants should *always* instruct their own medical experts and challenge those areas of the claimant’s evidence in dispute.
Conclusion: Success in Running a De Minimis Defence

Therefore, despite this recent claimant success and with the major caveat that all cases are individual and fact specific we believe the appropriate selection criteria for running a de minimis defence are as follows:

- The main speech frequencies between 1-3 kHz unaffected by any NIHL, or are only affected in a very limited way—say a maximum of 3-5 dB;
- NIHL of not more than 10-15 dB at 4 kHz or 6 kHz. It is preferable that the NIHL is only at 6 kHz since there are studies to support the role of hearing at 4 kHz for speech recognition and it is possible to argue that any loss at 6 kHz is transient or spurious or, if the loss is permanent, does not arise as a result of NIHL;
- No tinnitus;
- No advanced need for hearing aids in the future;
- An elderly claimant with already significant non-noise related losses such that it can be argued that any disability from NIHL is completely subsumed by other losses/disability. Whilst the effects of NIHL and age related losses are initially additive the effect of the noise component progressively diminishes over time. By the age of 80 it is arguable that it makes virtually no difference to an individual’s hearing ability what noise exposure has arisen, though be aware of the onset of any disability being ‘brought forward’ as a result of the NIHL.

Also, as is clear from these recent decisions, if you are going to run a de minimis defence to trial you must ensure that:

- You do not leave any key areas of the claimant’s medical evidence unchallenged.
- You call your expert to give oral evidence at trial.

- You put Part 35 questions to the claimant’s expert.
- Apply for and obtain your own medical evidence.
- You develop proper medical evidence supported by authorities.
References


7. (Manchester County Court, 22 June 2015).

8. (Wrexham County Court, 30 October 2015).

9. (Birmingham County Court, 21 December 2015).


Disclaimer

This newsletter does not present a complete or comprehensive statement of the law, nor does it constitute legal advice. It is intended only to provide an update on issues that may be of interest to those handling occupational disease claims. Specialist legal advice should always be sought in any particular case.

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