Welcome to this week’s edition of BC Disease News.

In the last week it has been reported that the NHS Litigation Authority (NHSLA), has set up its own in-house litigation team in an attempt to reduce its £120.1m external legal costs. Elsewhere, a claimant has been refused the protection of QOCS after his solicitors wrongly informed the defendants that a CFA was in place three years earlier.

This week we present the second in a series of features looking at the judgment in Wignall v Secretary of State for Transport. In edition 153 of BC Disease News we considered the implications this had for common law dates of knowledge and implementation periods in NIHL claims. This week we look again at the judgment in relation to the court’s findings on causation.

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

As always, warmest regards to all.

SUBJECTS

**NHSLA Attempt To Reduce Defence Costs**

It has been reported that the NHS Litigation Authority (NHSLA), has set up its own in-house litigation team in an attempt to reduce its £120.1m external legal costs.¹ Notwithstanding, defence costs comprising only 8% of the total costs run up by the NHSLA in 2015/16, this was a 17% increase compared to the 2014/15 period.

The new team has not long been established and will have to pass a 12-month pilot with an analysis of the costs saving effect of the service before a longer term commitment can be made. The NHSLA have said:

‘The litigation team has been established to enable some of the NHS Litigation Authority’s legally qualified staff to act in cases where court proceedings are served. Currently, these cases need to be outsourced to our legal panel’.

This outsourced legal panel consists of 11 law firms and this will not be reduced during the pilot period.

These cost saving measures come at a time when the Government’s proposals on fixed costs in clinical negligence claims are still awaited and claims received by the NHSLA decreased by 5% compared to the period in 2014/15.

**Costs Sanctions and CFAs**

In the recent judgment of Price v Egbert H Taylor & Company Limited (Birmingham County Court 6 July 2016), the County Court refused to apply the costs protection of QOCS to a claimant after his solicitors wrongly informed the defendants that a CFA was in place three years earlier.²

The letter sent by the claimant to the defendant stated:

‘Please be advised that our Client’s claim is being funded by way of a conditional fee agreement which provides for a success fee’.

The claimant, bringing an action against his employer, lost, and contended that QOCS should apply as the reference to the CFA was made in error in a letter to the defendants. However, the defendants submitted that the claimant should not be allowed to walk away unscathed from this mistake with costs protection as this was a ‘clear and unequivocal representation’ which the defendants had relied upon.

In doing so the defendant outlined the definition of estoppel by representation at Halsbury’s Laws at 47[307] which states:

‘Where a person has by words or conduct made a clear and unequivocal representation of fact to another, either knowing of its falsehood or with the intention that it should be acted upon, or having conducted himself so that another would, as a reasonable person, understand that a certain representation of fact was intended to be acted upon, and the other person has acted upon such representation and thereby altered his position, an estoppel arises against the party who made the representation, and he is not allowed to state that the fact is otherwise than he represented it to be’.

It was submitted that this is precisely what had happened in this case. The claimant asserted that there was a pre-commencement funding arrangement in place and the defendant, as a reasonable person, understood that to be a representation to be acted upon and, inevitably, altered its position based on the representation. As such, the defendant contended that the claimant should not be allowed to subsequently assert that QOCS applied.

His Honour Judge Lopez accepted this argument and found that:

‘I accept the submissions made by Mr White in respect of the issue of estoppel. It is, I find, clear that by the letter of the 30th October 2012 the Claimant’s solicitor made a clear and unequivocal representation to the Defendant and it is clear that the Claimant had the benefit of a conditional fee agreement, even giving the additional detail in the letter that the agreement provided for a success fee. Further, it is clear that the Defendant and his solicitors relied upon that representation. Therefore, I find that the Claimant is now estopped from asserting that Qualified One-Way Costs Shifting does not apply’.

The claimant was ordered to pay £5,533 costs of the first hearing and the £8,806 costs of the appeal.

The full judgment can be accessed here.

**Claimants Entitled To Default Judgment Where Defence Is Filed Late**

In the recent decision of Billington v Davies [2016] EWHC 1919 (Ch), Deputy Master Pickering illustrated two important principles in relation to the late filing of defences.³

Firstly, where a claimant has applied for default judgment in default of the defence they are still entitled to default judgment even if the defence is filed between the date of the application and the date of the hearing. Secondly, an application for an extension of time for filing a defence is dealt with on the basis of CPR 3.9 and Denton principles.

The facts of Billington, were that the First Defendant filed an acknowledgment of service. The defence was due on the 4th January 2016. No defence was served...
and, on the 11th April 2016, the claimant issued an application for judgment in default of filing a defence. The defendant then served a defence the day before the hearing was due to be heard and at the same time made an application for an extension of time to file the defence.

The defendant submitted that the claimant was not entitled to default judgment once the defence had been filed by virtue of the wording of CPR 12.3(2) which states that:

**Judgment in default of defence may be obtained only** –

(a) where an acknowledgement of service has been filed but a defence has not been filed;

(b) in a counterclaim made under rule 20.4, where a defence has not been filed, and, in either case, the relevant time limit for doing so has expired.

The Deputy Master rejected this argument on the grounds that to accept it would mean that an application for judgment in default of a defence will automatically be defeated whenever a defendant files a defence – however late. It was also said that:

‘...the reference to ‘a defence’ in CPR 12.3(2)(a) must be a reference to a defence which has either been served within the time permitted by the Rules or in respect of which an extension of time has been granted. Where a defence is served late, unless and until an extension has been granted, a document purporting to be a defence is not in fact a defence for the purposes of CPR 12.3(2)(a). To this extent, the note at 15.4.2 of the 2016 edition of the White Book is, in my judgment, wrong’.

The note at para 15.4.2 of the White Book states:

‘Filing a defence late will prevent the claimant obtaining a default judgment (see r.12.3). However, the claimant may instead apply for an order striking out the defence under r.3.4(2)(c)’.

The Deputy Master also rejected the defendant’s application for an extension of time.

**Expert Shopping and Specific Disclosure**

In the judgment of Allen Tod Architecture Ltd v Capita Property & Infrastructure Ltd [2016] EWHC 2171 (TCC), the court ordered a claimant to disclose its original expert’s notes, preliminary report and other documents setting out his opinion on the issues, as a condition for granting permission to the claimant to rely on a new expert.

The parties had been given permission to call an expert structural engineer. The claimant instructed an expert but lost confidence in him after delays in the production of his report. The claimant instructed a new expert. The defendant sought disclosure of the claimant’s letters of instruction to the original expert and to the new expert, and any report, document and/or correspondence setting out the substance of the original expert’s opinion, whether in draft or final form. The claimant had disclosed the letters of instruction and the original expert’s report, which was supportive of the claimant’s claim.

The claimant submitted that the documents sought by the defendant were privileged and should therefore not be the subject of an order for disclosure. It also argued that it had already disclosed sufficient material, and it had not been guilty of ‘expert shopping’.

In considering this argument His Honour Judge David Grant outlined the following principles he felt were relevant:

(a) the court had a wide and general power to exercise its discretion whether to impose terms when granting permission to a party to adduce expert opinion evidence;

(b) the court could give permission for a party to rely on a replacement expert, but such discretion was usually exercised on condition that the report of the original expert was disclosed. The party seeking permission would therefore have to waive privilege in the first expert’s report;

(c) once the parties had engaged in a relevant pre-action protocol process, and an expert had prepared a report in the context of such process, that expert owed a duty to the court irrespective of his instruction by one of the parties. Accordingly, there was no justification for not disclosing such a report;

(d) the court’s power to impose a condition for the disclosure of the first expert’s report arose irrespective of the occurrence of any “expert shopping”. It was a power to be exercised reasonably on a case-by-case basis, having regard to all the circumstances; (e) the court would require strong evidence of expert shopping before imposing a term that a party disclose documents other than the report of the first expert (such as attendance notes and memoranda made by a party’s solicitor of discussions with the expert) as a condition of giving permission to rely on a second expert.

He did however state that whilst this was only a mild case of ‘expert shopping’ the court could still direct disclosure of material produced by the original expert, in which he expressed his opinion, as a condition of permitting the party to rely on a new expert. Accordingly, the court’s power was reasonably exercised by ordering disclosure of those documents, along
with any document in which the expert provided his opinion on the case prior to April 2016, as a condition for the claimant calling the second expert as its witness. To the extent that other material was contained within such documents, it was to be redacted.

Feature
Revisiting Wignall v Secretary of State for Transport: Issues of Causation

Introduction

In edition 153 of BC Disease News we considered the recent NIHL judgment of Wignall and discussed the implications this had for common law dates of knowledge and implementation periods in NIHL claims. This week we look again at the judgment in relation to the court’s findings on causation.

Background

NIHL has a characteristic audiometric pattern consisting of bilateral ‘notches’ or ‘bulges’ in hearing thresholds at 4 kHz – or 3 or 6 kHz (or any combination of these frequencies). If the noise exposure continues the notches/bulges deepen and spreads to affect the adjoining frequencies. It is generally accepted that NIHL usually begins around 4 kHz. At first it may be asymptomatic but if it spreads into the lower frequencies of 3 and 2 kHz, individuals begin to complain of hearing disability. In Scott-Brown’s Otolaryngology, Dr Alberti states that the loss at 4kHz usually begins to progress at a steady rate for about 10 years and then slows greatly. However, the loss eventually spreads into other frequencies and it may take up to 30 years to involve frequencies of 1kHz and below to any great extent. This will lead to a notched sensorineural hearing loss centred about 4kHz, gradually becoming a steeply sloping loss starting at about 0.5 kHz. This is illustrated in the following audiogram:

The effect of noise and the differing noise induced threshold shift by frequency is neatly demonstrated in the figure below reproduced from Noise and Man by W. Burns, 1968.

ISO 1999: Acoustics-Determination of occupational noise exposure and estimation of noise-induced hearing impairment, also demonstrates the maximal damaging effects of noise at 4 kHz. The table below shows the estimated (median) noise damage at differing frequencies as a function of exposure time (in years) and a daily noise exposure dose of 95 dB(A), LEP,d.
This condition is relatively rare and is thought to have a genetic cause rather than indicative of NIHL. It is very rare for cookie bite hearing loss to be caused by damage to hearing. Those suffering from this condition will experience difficulty hearing the mid frequencies but not the low and high frequencies.

As such, it is established medical convention that where hearing loss has been caused by exposure to excessive noise there will be maximal damage at the frequencies of 3, 4 and 6 kHz. Where an audiogram is showing maximal loss at 1 or 2 kHz, this kind of loss is very rarely caused by damage and is more likely a genetic condition idiopathic to the individual.

However, in the recent decision of Wignall, the contrary was found. Wignall v Secretary of State for Transport

We outlined, in detail, the facts of the case in Wignall in edition 153 of BC Disease News and as such for the sake of brevity we will not repeat those in any great detail, except to remind readers that the parties in this case were in dispute as to limitation, breach of duty, causation, quantum and apportionment of damages. The exposure in this case was said to be between 1957-1968.

The court posed two questions, firstly was the deceased’s hearing loss, revealed in 2 audiograms taken in October 2012 and February 2014, noise induced? Secondly, if it was, was the loss attributable to the defendant’s breach of duty?

The claimant relied upon the medical opinion of Mr Zeitoun, Consultant Otolaryngologist, Head & Neck Surgeon and the defendant relied upon that of Mr Jones, Consultant Surgeon formerly of the Department of Otolaryngology, Head & Neck Surgery. For the purposes of Mr Zeitoun’s medical report a pure tone audiogram was obtained on 18th October 2012 and for the purposes of Mr Jones’ report a further pure tone audiogram was obtained on 18th October 2012 and for the purposes of Mr

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<th>Frequency (Hz)</th>
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The 2012 Guidance Statement on the principle characteristics of occupational NIHL authored by the American College of Occupational and Environmental Medicine provides a useful outline of what NIHL typically looks like. In relation to the frequencies affected, it states:

- It is always sensorineural, primarily affecting the cochlear hair cells in the inner ear;
- Its first sign is a ‘notching’ of the audiogram at the high frequencies of 3, 4 or 6 kHz with recovery at 8kHz;
- In early NIHL, the average hearing thresholds at the lower frequencies of 0.5kHz, 1 and 2 kHz are better than the average thresholds at 3, 4 and 6kHz, and the hearing level at 8 kHz is usually better than the deepest part of the notch.

This approach is also propounded in the Report of the Expert Hearing Group, entitled ‘Hearing Disability Assessment’, in which it states NIHL has a recognisable audiometric pattern with the maximum damage usually occurring at 4,000Hz, but occasionally it may occur at 3,000Hz or 6,000Hz.

Moreover, the CLB Guidelines, for the diagnosis of NIHL, have, as one of the requirements that must be met for a diagnosis of NIHL, that there be evidence of a high frequency sensorineural hearing impairment i.e. that the HTL at 3, 4 or 6kHz is at least 10 dB greater than the HTL at 1 kHz or 2 kHz.

Conversely, when an individual is showing maximal losses at 1 kHz and 2 kHz, this may indicate that the individual is suffering from what is known as ‘cookie bite’ hearing loss. The condition affects the mid-frequency sounds but in most cases does not affect high and low frequencies. The condition derives its name from the specific form of the hearing curve in the audiogram of a person suffering from this particular kind of sensorineural hearing loss. An audiogram carried out on a person thought to have cookie bite hearing loss can be seen below:
Jones’ report a further pure tone audiogram was obtained on 18th February 2014. The appearance of these audiograms were similar and both demonstrated a hearing loss at the 2 kHz frequency which was greater than that at the 3 kHz and 4 kHz frequencies—particularly in the right ear.

Both experts agreed that this was an unusual appearance for NIHL, however, Mr Zeitoun claimed that he would expect to see and had seen such a presentation in 5 to 15% of NIHL cases. In order to show that NIHL can affect the 2 kHz frequency Mr Zeitoun relied on the text book, Scott-Brown’s Otolaryngology, as mentioned above, which states:

‘Noise-induced permanent threshold shift usually commences between 3 and 6 kHz, often around 4 kHz, and gradually worsens at that frequency and spreads into neighbouring frequencies. At first it may be asymptomatic but if it spreads into the lower frequencies of 3 and 2 kHz complaints begin’.

He also pointed out that the CLB Guidelines also refer to involvement at 2 kHz in some cases.

Mr Jones disagreed and expressed the opinion that the audiograms did not show evidence of NIHL at all because, as a point of principle, hearing losses most marked at 2 kHz are not evidence of NIHL. In doing so, he relied upon the position paper, also mentioned above, of the American College of Occupational Medicine, which summarises the typical features of NIHL and emphasised the sentence ‘there is always far more loss at 3, 4 and 6 kHz than at 0.5, 1 and 2 kHz’ and ‘the greatest loss usually occurs at 4 kHz’.

Mr Jones also relied upon the publication called ‘Advances in Noise Research ’(1998), written by Dr Luxon, which he claimed endorsed the American criteria to the same general effect. However, His Honour Judge Butler pointed out that Dr Luxon also accepts that NIHL ‘can begin in frequencies other than the 3-6 kHz region’ albeit ‘this is rare’.

Additionally, Mr Jones claimed that if one was to use the CLB Guidelines on such an atypical loss it would result in a ‘false diagnosis’.

Mr Zeitoun did not agree with Mr Jones and insisted that whilst the audiogram was atypical it was still within the methodology of the Guidelines. However, he did accept that if the atypicality had included the 1 kHz frequency he would then not have diagnosed NIHL.

His Honour Judge Butler did recognise that the Guidelines indicated that the normal or typical presentation is of a measurement of hearing threshold level at 3, 4 or 6 kHz which is at least 10 decibels greater than that at 1 or 2 kHz. However, he emphasised at para 64 that:

‘It is in my judgment important to bear in mind that guidelines are just that. They are guidelines not a straitjacket. The express purpose of the guidelines is said (page 281) to be:

“…to assist in the diagnosis of noise-induced hearing loss (NIHL) in medico-legal settings. The task is to distinguish between possibility and probability, the legal criterion being more probable than not. It is argued that the amount of NIHL needed to qualify for that diagnosis is that which is reliably measurable and identifiable on the audiogram. The three main requirements for the diagnosis of NIHL are defined: R1, high frequency hearing impairment; R2, potentially hazardous amount of noise exposure; R3 identifiable high frequency audiometric notch or bulge”’.

HHJ Butler also acknowledged that the guidelines mainly referred to ‘uncomplicated cases of NIHL’, or ‘typical’ NIHL alongside ‘normal’ age-associated hearing loss (AAHL). However, he concluded that:

‘In my judgment, this plainly does not mean that the guidelines cannot be applied to complicated cases where the NIHL is atypical or the AAHL is abnormal, merely that the expert using the guidelines should recognise the atypicality or abnormality’.

He went on to say:

‘No doubt in some cases the atypicality and the degree of abnormality would be such as to prevent an expert using the guidelines but I am satisfied on the balance of probabilities that Mr Zeitoun did not find himself in that position. In my judgment he has interpreted the guidelines as a guide not a rigid rule’.

In conclusion, HHJ Butler pointed out that Mr Jones’ position that NIHL could never be diagnosed where there was maximal loss at 2 kHz in any circumstances, did not accord with the publications. He noted that in the CLB Guidelines, Dr Luxon’s publication and Scott-Brown’s Otolaryngology text book, it had been said that maximal loss at 2 kHz in NIHL claims was rare.

Additionally he stated that if the CLB Guidelines were to be accepted as the definitive approach in the medico-legal context of NIHL claims then it had to be accepted that whilst atypical, maximal loss at 2 kHz can sometimes, in a small proportion of cases, lead to a finding of NIHL.

As such, HHJ Butler found that Mr Zeitoun’s evidence was preferred stating at para 70 that:

‘For all the foregoing reasons, I found the opinion of Mr Zeitoun to be logically consistent and his use of the guidelines and his approach to the audiogram results to accord with the orthodox medico-legal approach. Each case depends on its own facts and the quality of the evidence adduced. In the context of this present case, on the evidence presented to me, I reject Mr Jones’ opinion that where the greatest loss is at 2 kHz, NIHL cannot ever properly be diagnosed. I accept the opinion of Mr Zeitoun that although the deceased was atypical and his, NIHL in his case could properly be diagnosed, albeit as a rare or
minority cases, subject to proof of hazardous noise exposure has been proved. The position is that, on the facts of this case, such exposure has been found proved.’

HHJ Butler, also rejected Mr Jones’ alternative argument that the cause of the hearing loss in both audiograms was idiopathic or had a genetic cause which was currently beyond scientific explanation. As such it was found that on the balance of probabilities the deceased’s employment was causative or materially contributory of part of his NIHL.

Conclusion and Comment

Most, if not all, of the medical and scientific literature on NIHL concurs that where typical occupational noise exposure gives rise to NIHL, then such losses are maximal at 4 or 3 or 6 kHz. However some of the literature also acknowledges a possibility, in exceptional circumstances, of maximal loss at 2 kHz. Although generally for the hearing at 2kHz to be affected by NIHL it would take over twenty year’s exposure, high noise levels and a sensitive ear for this to happen. As this was not the case in Wignall, it would seem more logical that the loss at 2 kHz was therefore not due to noise exposure but instead idiopathic i.e. of unknown origin.

As was recognised in Wignall, such a dispute as this is often determined on the evidence before the court. As such it is important that when faced with such a dispute, there is a focus on providing evidence to show that the individual does not fall into the ‘rare’ category and a specific alternative causative explanation for the hearing loss is put forward.
References


4 Arguably isolated losses at 6 kHz i.e. in the absence of any losses at 3 and/or 4 kHz are not NIHL see edition 3 of BCDN.


6 Chapter 18, Dr Alberti, ‘Scott-Brown Otolaryngology, ‘Adult Audiology’ (Vol 2, page 608).

7 Ibid


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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