

IN THE COUNTY COURT AT LEEDS

Date: 30 June 2023

Before :

HHJ MALEK

Between :

Mr David Holmes

Claimant

- and -

1. Alfred Clarksons & Sons Ltd

Defendants

2. Peter Swinson

Mr Robert Timewell, solicitor (instructed by Gavin Edmondson Solicitors Ltd) for the
Claimant

Lady Ruth Trippier (instructed by BLM Law) for the First Defendant

Mr Nicholas Grimshaw (instructed by Weightmans LLP) for the Second Defendant

Hearing dates: 19 & 20 April 2023

APPROVED JUDGMENT

I direct that pursuant to CPR PD39A 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.

HHJ Malek :

Introduction

1. In this case Mr. Holmes, born on 25 January 1961 and, therefore, now aged 62, seeks damages for injury and loss as a consequence of alleged exposure to excessive noise whilst in the employment of the Defendants. It is common ground that between 1977 and 1982 he worked for the First Defendant as a plumber and heating engineer and that between 1983 and 1988 he worked for the Second Defendant in a similar capacity. He then worked as a Firearms Officer for the West Yorkshire Police Authority between 2004-2013. There is no claim made against the latter force and it is not alleged that he was exposed to excessive noise whilst in its employee.

Limitation

2. As will no doubt be apparent from the brief summary of the Claimant's work history set out above, the Claimant's actions against the Defendants arise out of alleged exposure to noise prior to 1988 (some 35 years ago). It might, therefore, be anticipated that both Defendants would evoke the Limitation Act 1980 as a defence. However, whilst both Defendants pleaded a limitation defence it was not pursued by either with any vigour before me. I do not, therefore, dwell on the point to any significant degree. Suffice it to say that I found it proven to the necessary standard (the balance of probabilities) that the Claimant's "date of knowledge" for the purposes of section 14 of the Limitation Act 1980 was November 2018. Given that (a) the Claimant brought his claim on 10 November 2020, and (b) the relevant limitation period was 3 years (per section 11 of

Limitation Act 1980) it follows that the Claimant has brought his claim within the statutory limitation period.

Breach of duty

3. It is common ground that each of the Defendants were under a duty to make the premises from which the Claimant worked at the relevant time safe pursuant to section 29(1) of the Factories Act 1961.
4. It is further common ground that the 1972 Code of Practice was in use at the time of the Claimant's employment and that the Code gave rise to "an appropriate standard upon which the reasonable and prudent employer could legitimately rely...until the late 1980's" (para. 36 of Lord Mance's judgment in *Baker v Quantum Clothing Group Limited [2011] UKSC 17*).
5. Section 3 of the Code, in summary, provides:
 - i) That there should be a general reduction of noise exposure. Where noise exposure less than the limits in section 4 [i.e. that continuous exposure should not exceed 90 dB(A) for 8 hours a day] are not achieved, ear protectors should be provided and their use ensured.
 - ii) There should be adequate training in noise measurement and control.
 - iii) Suitable records should be maintained.
 - iv) When not practical to reduce the noise, management should identify and mark places for use of ear protectors; control entry into such areas; ensure that ear protection is supplied and used; ensure instruction in the use of ear protection.

6. The parties jointly instructed Mr. Nigel Humphreys to give his expert opinion on the likely noise imission levels that the Claimant was exposed to during his employment with the Defendants. Mr. Humphreys is an experienced acoustics expert and holds a Bachelor of Engineering Degree in Mechanical Engineering. He interviewed the Claimant and then produced a written report setting out his findings. He was asked part 35 questions by the Claimant to which he duly furnished answers; however, he was not called by any of the parties to give oral evidence.

7. In his report Mr. Humphreys correctly identifies the actionable level of noise as 90dB(A) and properly prefaces his conclusions with the fact that he has not, for obvious reasons, measured the relevant noise emissions for himself and he has not reviewed any historic noise surveys (none being available). He is, therefore, left to draw any conclusions solely from the Claimant's account of working with, and/or in close proximity to, noisy tools (such as grinders and hammers) whilst employed by the Defendants. Given the passage of time and the absence of any corroborating evidence Mr. Humphreys treats the Claimant's account with some caution, but is nevertheless able to come to some conclusions.

8. Mr Humphreys concludes that:

"...I consider that, on the basis of the evidence disclosed by the Claimant, the content of his work with the Defendants was such that his daily overall noise exposure could have attained, and exceeded, at least on some days, if not most days, 90dB(A)LEP.d, the recognised 'action level'.....

Ultimately, in my opinion, the Claimant's daily overall noise exposures are likely have been variable, depending the what he was undertaking, and whether

he used, for example, such as angel [sic] grinders and hammer drills, and for how long. Therefore, in my view, the Claimant ought to have been provided with, by the Defendants, instructions and training as to when to wear hearing protection, and suitable hearing protection ought to have been readily available.”

9. The first Defendant argues that unless the Claimant belatedly recalls reliable details of exposure beyond the details contained in his statement, the Court cannot conclude, on the balance of probabilities, that his exposure reached the recognised action level in the 1972 Code of Practice which obliged the First Defendant to provide hearing protection.
10. The Second Defendant makes a similar argument saying that in relation to it (i) the Claimant’s evidence of exposure to noise lacks detail and was inconsistent, (ii) that it was not possible for Mr. Humphrey to make a more objective analysis of the noise levels, and (iii) it was inherently implausible that he would use the tools that he described given his job.
11. The difficulty that both Defendants face is that whilst the Claimant’s evidence, based upon his recollection, may not be the best or the most cogent it is, absent any noise surveys, the only evidence that is available. None of the perceived inconsistencies, lack of detail or inherent implausibility in the Claimant’s evidence mean that it should be disregarded in its entirety and, as I have said, there is no evidence contrary to that given by the Claimant. At best I can place less weight upon it than I would have otherwise done.
12. Secondly, I do not accept when Mr. Humphrey says that the Claimant’s daily noise exposure “could” have attained, and exceeded, 90db(A)LEP.d he means

to suggest that it did not or was not likely to. Nor should anything be read into the fact that he was unable to conclude that it was probable or more likely than not that noise exposure exceeded 90db. Mr. Humphrey accepts, rightly in my view, finding as to the level of noise exposure is a matter of fact for this court to determine.

13. Mr. Humphreys expert opinion is that, as a rule of thumb, if you have to shout to be heard by a colleague at a distance of 1m the noise level is likely to be around 90db(A) and if you have to shout at a distance of 2ms then the noise level is likely to about 85dB(A). The Claimant's evidence is that he had to shout to communicate with colleagues if they were 4ft (1.2m) -6ft (1.8m) away. The lack of precision notwithstanding, this does on the face of it, tend to suggest that the Claimant was exposed to noise levels of 90db(A) or more at premises operated by both Defendants.

Medical causation

14. The Claimant instructed Mr. Murty, a Consultant Otorhinolaryngologist, who produced a desktop report dated 1 August 2019. The Defendants were, subsequently, given permission to rely upon their own expert in relation to medical causation. The Defendants instructed Mr. Carpentier, a Consultant Otorhinolaryngologist and Head and Neck Surgeon whose report is dated 13 October 2021. Both experts then produced a joint statement dated 9 May 2022 which set out areas of agreement and disagree.
15. There are large areas of agreement between the two experts and, in particular, they are agreed that, firstly, the pure tone audiogram carried out on the Claimant on 3 November 2018 shows a significant deterioration in hearing which cannot

be attributed to age alone and is, prime facie, sufficient to make a diagnosis of Noise Induced Hearing Loss (“NIHL”). Secondly, they are agreed that:

“noise induced hearing loss does not develop or progress and that new diagnostic indicators consistent with noise exposure do not emerge on sequential audiometry once exposure ceases or the individual becomes appropriately protected from it.”

16. This is important because, during the Claimant’s subsequent employment with the West Yorkshire Police Authority, he was subject to regular occupational health (“Bekesy”) hearing tests in 2004, 2005 (x2), 2008, 2010, 2011 (x2), 2012 and 2013. In short, if these occupational health hearing tests do not show a sufficient deterioration in hearing (when adjusted for age) then it is unlikely that any subsequent deterioration picked up, for example, in the pure tone audiogram carried out on 3 November 2018 is attributable to noise at the Defendants premises.

17. Mr. Murty is of the opinion that there is no universal acceptance of the hearing frequencies to be used when estimating hearing handicap. He says that whilst the use of 1 kHz and 2 kHz is universally accepted the use of higher frequencies is not agreed. He regards measurement of hearing at 1,2 and 3 kHz alone (and thus excluding the mid to higher frequencies, particularly 4 kHz) can result in an underestimation of the degree of impairment and he cites in support a paper by Professor Moore, *A Review of the Perceptual Effects of Hearing Loss for Frequencies above 3 kHz*, *International Journal of Audiology (2016)* and a study by Smoorenburg (*Smoorenburg GF, Speech Reception in Quiet and in Noisy Conditions by Individuals with Noise-induced Hearing Loss in Relation*

to their Tone Audiogram. Journal of the Acoustical Society of America 1992: 91: 421037).

18. He regards hearing loss at 4 kHz and above to be particularly important because it may compromise the ability to hear certain speech sounds (such as “s”) produced by women and children and the ability to hear certain sounds such as bird song.
19. He points out that in practice in the “Blue Book” (“Method of Assessment of Hearing Disability”, British Journal of Audiology 17:203-12, by the British Association of Otolaryngologists/British Society of Audiology (1983)), the frequencies used are 1, 2 and 4 kHz. However, he accepts that in the “Black Book” (Assessment of Hearing Disability) by King, Coles, Lutman and Robinson [1992], the frequencies used are 1, 2 and 3 kHz.
20. He also refers to the several grading systems used to assess hearing disability and points out that (a) The World Health Organisation uses 0.5, 1, 2 and 4 kHz, (b) The Coles, Worgan System uses 0.5, 1, 2 and 4 kHz, (c) the DSS Guidelines uses 0.5, 1, 1.5, 2, 3 and 4 kHz and (d) the American Medical Association does not use 4 kHz, employing 0.5, 1, 2 and 3 kHz only.
21. In contrast, Mr. Carpentier regards the assessment of NIHL over 4 kHz as being unconventional. I tend to agree. It seems to me that, for better or worse, the use of the Black Book for assessing NIHL for medico-legal purposes is now well established. Whilst I accept that the Black Book and both the “Guidelines on the Diagnosis of Noise Induced Hearing Loss for Medico Legal Purposes” paper by Coles, Lutman and Buffin, Clinical Otolaryngology, 2000, 25, 264 – 273 (the “CLB Paper”) and the “Guidelines for the quantification of NIHL in a

medico-legal context” paper by Lutman, Coles, and Buffin (Clinical Otolaryngology, 2016,14, 347-357) (the “LCB Paper”) are guidelines and can, therefore, be departed from in certain circumstances there would need to be good reason for doing so. That reason cannot, in the case of a medico-legal expert, simply be because measuring at 4 kHz produces a disability or greater disability. There would, in my judgment, need to be something more. It is right to say that this might lead to an “under assessment” of the “true” disability in some cases at the margins. However, this is the price that is to be paid for standardisation and the ability to make proper comparison. Given that the role of this court is, ultimately (but only if liability is established), to quantify the loss suffered by a claimant and award appropriate compensation the ability to compare with others, on a like basis, the disability (if any) suffered by a claimant assumes a much greater importance than might otherwise be the case.

22. Whilst Mr. Carpentier further criticises Professor Moore and the Smoorenburg study I do not need to delve into the detail. This is so not only because of what I have said above, but also because given Mr Murty failure to consider, using his preferred methodology of measuring hearing loss at 4 kHz (instead of 3), the Bekesy audiograms, this argument is barren. Mr. Carpentier accepts that looking in isolation at the pure tone audiogram of 3 November 2018 using the LCB methodology and criteria he is able to come to a diagnosis of NIHL showing a material loss. That is the same position adopted by Mr. Murty.
23. The more important area of disagreement between the two medico-legal experts arises out the way in which the Bekesy audiograms ought to be viewed and/or treated. Mr. Murty’s position is that these should be disregarded entirely. He says that this is the case because they are ‘rarely available in audiology clinics’

and pure tone audiometry is the ‘gold standard for quantification of NIHL’. That seems to me to miss the point. Evidence, whether it is to be evaluated by this court or by experts appointed by this court to offer opinion, should only be excluded (or disregarded) in exceptional cases. It shouldn’t be disregarded because it is rarely available or does not represent the gold standard. The weight to be given to evidence (in this case the Bekesy audiograms) is a different matter.

24. When pressed Mr. Murty volunteered that the Bekesy audiology might not be as good as puretone audiology because the former relied upon self-recording, were highly automated using computer programmes, were often only conducted by a nurse, and might not take place in a sound-proof booth. In this case not only were the Bekesy audiograms conducted in a sound-proof booth, but I can see no disadvantage in these tests having been conducted by a nurse – particularly when using highly automated, and by all accounts, reliable technology which reduced the incidence of human error using a “self-recording” methodology¹. That coupled with the remarkable consistency between the Bekesy audiograms from year to year leads me to the conclusion that these particular Bekesy audiograms are reliable.
25. Mr. Murty was also of the view that, as a general rule, Bekesy audiograms have not been proven to be equivalent to puretone audiometry for quantification. He relied upon the conclusions reached by Faheema Mahomed et al in *Validity of Automated Threshold Audiometry: A Systematic Review and Meta-Analysis* by Faheema Mahomed, De Wet Swanepoel, Robert H. Eikelboom, and Maggi Soer. 0196/0202/2013/0000-0000/0 • Ear & Hearing • Copyright © 2013 by Lippincott Williams & Wilkins (the “Mahomed Paper”). In that paper the authors concluded that: “*Automated audiometry provides an accurate measure of hearing threshold, but validation data are still limited for (a) automated bone conduction audiometry; (b) automated audiometry in children and difficult-to-test populations; and (c) different types and degrees of hearing loss*”. Mr. Murty

¹ The “self-recording” referred to involves the subject pressing a button when an automatically generated sound is heard through headphones. It is inherently difficult for a subject to “over” record his /her hearing loss because s/he will only be able to indicate a response on hearing an actual sound.

reads this to mean automated audiometry provided an accurate measure of hearing threshold and, therefore, it was useful as a screening tool, but could not (or should not) be used to measure the degree of hearing loss. In oral evidence he used the analogy of a sprinter with a stone in his shoe. Even without a stopwatch one can tell if the sprinter is running in a different manner (a Bekesy audiogram), but it is only when you have stopwatch (a pure tone audiogram) can you measure the degree to which he is affected.

26. With respect to Mr. Murty and his undoubted clinical experience and expertise, I am afraid that I cannot agree with his analysis. The starting point is that in order to disregard the Bekesy audiograms completely I (and the experts for that matter) would need to be satisfied (absent any other rule relating to the admissibility of evidence) that they offered no evidential value at all or in this context were completely unreliable. The very highest that can be said to support Mr. Murty is that the conclusions drawn by Mahomed et al was that there was insufficient data for them to conclude Bekesy audiometry was equivalent to pure tone audiometry in measuring degrees of hearing loss. That is not the same as saying that the conclusion reached was that there was sufficient data to conclude that Bekesy audiometry was not equivalent to pure tone audiometry- which is, in my judgment, the conclusion that would need to be reached before Mr. Murty could cite the paper in support of any argument that I ought not to consider, at all, the Bekesy audiograms. The conclusion reached by Mahomed et al in respect of the measurement of degrees of hearing loss is that they are unable to reach any conclusion at all (positive or negative) because there was insufficient data. As I indicated to counsel for the Claimant during his closing it seems to me the error here is to assume that the absence of evidence for something is evidence of its absence. It cannot be.

27. Even if I am wrong and the Mahomed Paper shows that Bekesy audiometry is inferior to pure tone audiometry for measuring degrees of hearing loss or, for that matter, just generally it doesn't take the Claimant much further. This is because it is not a question of choosing which is better- Bekesy or pure tone. It is a question of deciding whether Bekesy audiometry is so poor that it ought to be ignored – either generally as a matter of principle or in this particular case. The Mahomed paper clearly does not go this far.
28. For the sake of completeness, I do not accept Mr. Murty's analogy as accurate. It seems to me that both Bekesy and pure tone audiometry are concerned with the same thing: the measurement of hearing loss. So, a more apt analogy might have been to compare, for example, a person using an old fashioned pocket watch without a second hand (inferior) and a modern stop watch accurate to 1/10 of a second (superior) timing a sprinter.
29. All said, there is, in actual fact, no evidence to suggest that Bekesy audiometry is anymore unreliable than pure tone and, accordingly, there is no reason for me (or the experts for that matter) to disregard the Bekesy audiometry.
30. Mr. Carpentier is the only expert who conducted an analysis of the Bekesy audiograms. He used the LCB criteria and diagnosed NIHL in all but one of these cases. However, in each of the remaining cases he concluded that given the NIHL was less than 4 dB this loss was immaterial. The Claimant did not seek to argue otherwise; but, in any event, I agree with Mr. Carpentier that NIHL of less than 4 dB is unlikely to present a material disability. I further agree that the pure tone audiogram from 2018 has a very different configuration from any of the Bekesy audiograms which allowed for the diagnosis of NIHL of an exponentially larger quantum of NIHL of 9 dB (using the LCB criteria). It is, therefore, likely that there was a supervening idiopathic cause of hearing loss

which occurred after 2013 to which the Claimant's deterioration in hearing may be attributed.

31. In summary, this means that the hearing loss (and resultant disability) that the Claimant suffers from cannot be shown by him to be caused by NIHL resulting from exposure to actionable noise levels whilst in the employee of the Defendants (or either of them).

Conclusion

32. For the reasons given I dismiss the Claimant's case.
33. Counsel are all invited to agree a draft order for my approval dealing with any consequential orders and to file it in advance of the handing down of this judgment. In the event that such an order is agreed and filed in advance all parties and their representatives may be excused from attendance at the handing down of judgment.