



## Personal Injury and Medical Law Teams Case Note

### **Parkes v Meridian Ltd & Ors (Nottinghamshire and Derbyshire Deafness Litigation)** [2007] EWHC B1 QB) , HH Judge Inglis (BAILLI 14<sup>th</sup> February 2007)

The case related to seven out of more than 700 claims that have been issued claiming damages for personal injuries and consequential loss sustained by exposure to excessive noise during the employment of the Cs in the textile industry in Nottinghamshire and Derbyshire. The common features is that exposure was at a noise level less than 90dB with the Cs arguing that liability should attached to cases of exposure from the 1960s in the whole bracket 80-90 decibels. The Claimants' case was that from at least 1963 employers in the position of the employers in these cases, in discharge of their general employer's duty of care, should have made available to the workforce hearing protection and appropriate information, training and instruction, where there was any real risk of damage to hearing by long exposure to noise. It was not their case that in the context of the industry with which these cases are concerned, it was reasonably practicable generally to reduce the levels of noise at source below the levels that actually existed. They submitted that the effect of the documents and publications referred to in the course of the case was that no reasonable and prudent employer could be unaware of a risk to a significant, though small, population exposed to levels below 90dB(A)lepd and take steps to afford their employees protection [paragraph 69 to 71]. Reliance was placed upon Stokes v Guest Keen and Nettlefolds [1968] 1 WLR 1776 at 1783, about general industrial practice and developing knowledge: keeping reasonably abreast of developing knowledge and not being too slow to apply it would have caused an employer to identify the risk to the hearing of employees under 90dB(A), and to take steps to provide protection. The risk that they would have to identify need not be a high risk: Bolton v Stone [1951] AC 850, HL and the two Armstrong v British Coal Corporation cases in the Court of Appeal [1997] 8 Med LR 259, CA and (1998) 31<sup>st</sup> July, CA. per Judge LJ

The Defendants denied that the Claimants had suffered noise induced hearing loss at all and in any event contended there was no liability at common or under section 29 of the Factories Act 1961 for exposure at such levels of noise.

The judge reviewed the nature of noise and its measurement, and how this affected the human ear before considering the risk to employees of damage to hearing at exposures below 90dB(A) lepd. He recorded that the susceptibility of any individual to such loss is very variable and cannot be predicted which includes an inability to predict the susceptibility of the individual to damage, and the rate at which that individual's hearing thresholds would in any event decline with age. He also reviewed the research into hearing loss from the 1960's including that of Professor Burns and Dr Robinson and noted that this led to the publication in 1973 of NPL Tables by Robinson which were produced in

a more conveniently useable form in 1977 coinciding with the publication in 1996 of BS 5330 based on the Burns and Robinson formula as a method by which a relationship can be specified between noise exposure and the expected incidence of hearing disability. ISO1999 (substantially revised in 1982 and 1990) did not purport to suggest limits to tolerable exposure

Further tables akin to the NPL tables, were produced in 1988 (expanded in 1991) which went down to 83dB(A). The noise levels in the 1991 tables for exposed populations start at 85dB(A).

Evidence was given by Professor Lutman for the Claimants and Professor Robinson for the Defendants. Both experts are highly respected in the field of noise-induced hearing loss and who have researched and published widely on this subject. In 2000 Professor Lutman published a paper in Occupational Medicine: "What is the risk of noise-induced hearing loss at 80,85, 90dB(A) and above" and concluded that from a preventive point of view, as long as daily noise exposures do not exceed 85dB(A), the risk of hearing loss is minimal

The judge dealt with 85 to 80dB(A) separately because of the evidence in individual cases and because 85dB(A) is an important feature in the material about risk, and statutory regulation. He noted that the risk from exposure moves in a continuum, though not in a straight line, and does not stop at any particular sound level and that there was agreement that there is effectively no risk below 80dB(A), despite the fact that the NPL tables would suggest there is. He also noted that 90db(A) is an arbitrary level, and approaching it from 85dB(A) the risk of noise induced hearing loss in some people is significant and increasing as 90dB(A) is approached [paragraph 27].

In a detailed and clear exposition of developments since the 1960's including the interaction with European law and Directives, the judge reviewed the 'moves towards regulation' [paragraphs 29 to 45] as well as the general approach in industry [paragraphs 45 to 48]. At paragraphs 40 to 68 he considered the approach of the individual Defendants: Meridian, Courtaulds, Taymill Ltd., Pretty Polly and Guy Warwick Ltd.

Held: Claims dismissed.

- 1) The principles that emerge from the cited authorities are that the overall test is the conduct of the reasonable and prudent employer, taking positive thought for the safety of his workers in the light of what he knows or ought to know; where there is a recognised and general practice which has been followed for a substantial period in similar circumstances without mishap, he is entitled to follow it, unless in the light of common sense or newer knowledge it is clearly bad; but, where there is developing knowledge, he must keep reasonably abreast of it and not be too slow to apply it; and where he has in fact greater than average knowledge of the risks, he may be thereby obliged to take more than the average or standard precautions. He must weigh up the risk in terms of the likelihood of injury occurring and the potential consequences if it does; and he must balance against this the probable effectiveness of the precautions that can be taken to meet it and the expense and inconvenience they involve. If he is found to have fallen below the standard to be properly expected of a reasonable and prudent employer in these respects, he is negligent [paragraph 71]
- 2) In terms of whether it was reasonably practicable for the employers to do something about the noise exposure, the evidence did not show that the cost of

implementing a policy of voluntary hearing protection at levels below 90dB(A) was such that a reasonable employer could use cost or difficulty as a valid reason for not having such a policy. The Judge reviewed reported decisions including the judgment of Neuberger LJ in Harris v BRB (Residuary) Limited [2005] ICR 1680, CA. There is no doubt that research into the question of what risks to the hearing of employees exposure below 90dB(A) posed would have yielded the answer that 90dB(A) was not a natural cut off point, and that there were risks to susceptible individuals below that level. Further, it was a level of risk that came by the end of the 1980's to be seen as unacceptable if not accompanied by at least voluntary protection, though the 90dB(A) limit had remained, both in 1975 and in 1981, the proposed regulatory standard in England. However, complying with 90dB(A)lepd as the highest acceptable level met the standards of the reasonable and prudent employer during the 1970's and 1980's, certainly until the time when the terms of the 1986 directive became generally known in the consultative document of 1987: see Swanwick J in Stokes v Guest Keen and Nettlefolds

"I am not persuaded that employers in industry who conformed to the maximum acceptable level of exposure in the 1972 Guidelines were in breach of their duty of care to their employees who were exposed over 80dB(A)lepd. In rejecting the primary case for the Claimants I acknowledge that I do not see the issue as only one of foreseeability. It would in my judgment be futile to hide behind the 1972 Guidelines for that purpose, or behind the third edition of Noise and the Worker, when the documents themselves proclaim that the level proposed will not be safe for all workers. But good practice as informed by official guidance has in my view to be taken into account as well. The guidance as to the maximum acceptable level was official and clear. It would in my view be setting too high a standard to say that it was incumbent on employers to ignore it, and to reach and act, even as early as the 1960's, on a view that the standard set was inadequate to discharge their duty to their employees." [paragraph 87]

- 3) There is room, however, for "greater than average knowledge" as Swanwick J put it in Stokes, to inform the steps that individual employers should have taken at an earlier time than the late 1980's. Whilst it is not attractive that those who have a safety department and medical officers and take the matter of noise seriously should be worse off than those who wallow in relative ignorance, it is an inevitable consequence of a test that depends on what an individual employer understood. On that basis, by the beginning of 1983 management both at Courtaulds and at Pretty Polly had sufficient understanding of the risks to hearing below 90dB(A)lepd to require them to take action. Although putting a conservation programme into action, accompanied by information and instruction takes time, because of the particular state of knowledge of these two employers, they were in breach of their duty to employees who suffered damage through exposure at 85dB(A)lepd and over, without having the opportunity of using hearing protection, from the beginning of 1985 [paragraph 88]:

"it is not a case of not knowing of susceptibility, so that protective measures need only be directed at the average. It is known that there are some people in a workforce who will in fact be particularly susceptible. All that is unknown is who they are. Even at 90dB(A) the protective measures are directed at a minority susceptible population." [paragraph 89]

- 4) As to what constitutes "safe" in respect of a safe system or work under section 29 Factories Act 1961, this section did not add materially to the position at common law:

"the standard of safety in the section is governed by the general standard which ought reasonably to have been adopted by employers at the relevant time. That would be not to expose employees to a noise level exceeding 90dB(A)lepd." [paragraph 99]

- 5) Noise induced hearing loss is a difficult diagnosis, not only because of the variability of audiograms but because of the numerous potential causes of deafness including aging, middle ear disease, sensorineural hearing loss, ototoxic drugs, smoking and other lifestyle habits as well as 50% to 70% of cases being idiopathic in origin. NIHL also tails off after long exposure and varies from person to person. The judge was anxious not to include possible cases such that some persons might be compensated whose hearing loss was no in fact attributable to noise exposure

"[T]he criteria for diagnosis of noise induced hearing loss on the balance of probability have to be robust, and cannot depend upon opinion without adequate reasons, or on a history of noise exposure alone, certainly not at levels from which little if any noise induced loss may be expected to result in any event. ... There should be a history of noise exposure such that it may give rise to identifiable noise damage, and a clear picture on the audiogram that exhibits a notch or dip typically at about 4khz at least 10 dB deep, and bilateral unless some other condition in one of the ears has obscured the picture, even though a certain degree of asymmetry may be acceptable. The history of noise exposure considered by the doctor will usually have to result in a provisional diagnosis, because the noise levels described by the patient may not be borne out when the engineering evidence is in. I do not accept that a history of exposure between 80 and 85dB(A) absolutely prevents a finding of noise induced loss because such loss in some degree is possible in the most sensitive percentiles of the population, but the more the exposure falls below 85 the less likely that a diagnosis can be made, and in the low 80's diagnosis will not be likely without the clearest evidence; the more it rises above 85 the greater the possibility of such a finding. A history of noise exposure in these areas alone without clear confirmation from the audiogram in my judgment is not enough." [paragraph 118]

- 6) Quantification of the individual claims is set out from paragraph 122 onwards and involves a detailed debate as to what level of impairment is likely to have an impact on hearing as to amount to a disability. The test is whether a real degree of noise induced impairment can be confidently diagnosed on the balance of probability. Where there are low noise exposures in particular a robust approach must be taken in which real impairment is evidenced in order to pass the standard of proof [paragraphs 125 and 126]. Where the threshold of diagnosis is passed, the minimum award is likely to be in the region of £3000 without tinnitus, and if associated with slight tinnitus which is at least a nuisance to the Claimant at least £2000 more. For the case to be able to move into higher awards, the subjective assessment of disability and its social effect may be helped by a cross check to the

percentage disability towards which the Black Book<sup>1</sup> points, namely to try and equip the court with information about what proportion of the overall disability is caused by noise. What would have been the Claimant's position but for the tort has always to be considered.

- 7) In relation to tinnitus, the severity of the effect of a tinnitus signal on the patient depends in considerable part on the patient's psychological reaction to it. There was conflicting medical opinion with supporting literature, including the view that most tinnitus is not associated with noise induced hearing loss, and it is often found in the absence of any hearing loss at all. The judge was not called upon to resolve the conflicting views as to the incidence of tinnitus in high tone and low tone hearing loss but adopted the conventional view that where there is high tone hearing loss with tinnitus, it is appropriate to assume that the causes of the hearing loss are the causes of the tinnitus.
- 8) On apportionment, the court accepted the consensus view of the experts in the case that apportionment should be on a time basis. This was despite there being studies to show that the early years of noise exposure caused the greatest damage to hearing with maximum effect before 15 years of exposure and the approach of Mustill J in Thompson v Smiths Shiprepairers (North Shields) Limited (1984) 1 QB 405 who made substantial and weighted allowance for noise exposure before the period of culpable exposure began. The expert evidence was that it was difficult to weight the effect of each exposure. In the absence of more satisfactorily developed evidence (the issue only being raised by Courtaulds in supplementary written submissions at the end of the case), the court adopted a time based approach. The judge did indicate that had the oral evidence in the case been more satisfactorily developed, weighting to the first 10 to 15 years of exposure may have been appropriate.
- 9) Evidence of noise levels was provided by expert engineering evidence based on noise surveys in the factories concerned or analogous situations. The expert evidence when viewed alongside a survey by Lutman & Coles (who had tried to relate noise levels to workers' perception of how difficult it was to communicate in a place of work in the 1980s) suggested that the levels of noise exposure identified by engineering evidence were lower than suggested by the accounts of lay witnesses of the noise they had experienced at the time. The judge concluded that given the scientific evidence available and that such anecdotal evidence was by its nature subjective, it was not appropriate to add to the noise levels identified by the experts because of the descriptions given by lay witnesses.
- 10) The judge then applied the principles set out above to the individual claims. Each claim was decided on the evidence heard by the court in respect of each individual Claimant and Defendant. Essentially the court found that in the majority of cases, exposure to noise was below 85dB(A)Lepd and that there was no breach of duty by the employer. Where it found noise exposures above 85 it found that either the employer did not breach its duty because it did not and could not be

<sup>1</sup> Developed in 1992 by a working party of 5 experts including Professor Lutman and Professor Robinson, this Black Book adopted a different system of estimating the effect of noise induced hearing loss, separating it from the loss caused by age. It is quite widely used for forensic purposes

expected to know that noise levels below 90 could be harmful (e.g. Taymil) or in taking a robust approach to causation, the medical evidence did not prove noise induced hearing loss particularly in cases where there was noise exposure below 85dB(A)Lepd. There was also a limitation point in respect of one particular Claimant where the court found that the claim was issued within section 11 and 14 and if not section 33 would have been applied.

Comment:

At first blush this looks like a triumph for the employers, all claims having been dismissed. However, when the court's findings are examined it is not quite as clear cut.

Claimants can take heart from the fact that it would now appear to be accepted that noise levels in excess of 85db(A)Lepd can give rise to a duty of care where the employer knew or ought to have known of a risk of damage to hearing at such levels. This is particularly likely to affect Claimants working for large manufacturers who are likely to have had access to materials identifying such a risk.

On the negative side for Claimants and to the benefit of Defendants are the findings that there is no duty of care for noise levels below 80dB(A)Lepd and the robust approach that the court took in respect of causation. These findings are particularly negative for Claimants who are likely to have to incur significant costs before issue in order to ascertain whether they have a case or not or issuing without having a real understanding of the strengths or weaknesses of their case with the shadow of costs consequences hanging over them should their case turn out to be weak. In addition, they face a situation where unless there is a definite notch on the audiogram, the court is likely to reject their claim on causation.

What is clear from this judgment is that making a claim for noise induced deafness is anything but straightforward. Claimants and Defendants will have to have an eye to every aspect of the cause of action, from duty to breach to causation. In my view the upshot will be increased costs in litigating such claims rather than a reduction which is unlikely to be good news for Claimants or Defendants.

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Please note that this Case Note is intended to provide a summary and comment of the subject matter covered. It is not intended to be comprehensive or to provide legal or other professional advice.