COMMON LAW COMPENSATION FOR INDUSTRIAL DEAFNESS

J Burrows, Lancashire Polytechnic, Department of Legal Studies, Preston.

1. INTRODUCTION

The Noise at Work Regulations, 1989 came into force on 1st January, 1990 as the result of a European Community Directive dated 12th May, 1986. The object of these regulations is to reduce the risk of workplace hearing damage by means of providing ear protectors to employees at risk and for the employer to keep records of noise levels where employees are exposed to noise in excess of the prescribed limits[1]. Some writers have suggested that the noise levels prescribed in the regulations are too high and it is necessary for more action to be taken concerning levels below 90 dB(A)[2].

The Noise at Work Regulations have yet to be tested in the courts and as they do not apply retrospectively, it may be some time before an action is brought[3]. Employees who have been diagnosed as suffering from an element of industrial deafness would therefore be unlikely to seek and obtain a remedy in Health and Safety at Work legislation[4]

Until 1975, there was no statutory provision for employees diagnosed as suffering from industrial deafness, but in that year, industrial deafness became a prescribed disease for the purposes of the National Insurance (Industrial Injuries) Act, and therefore, in principle, industrial injury benefit would be available to such victims. The qualifying conditions for benefit

---

1 Currently 85 dB(A) or 200 pascals

2 Geoff Holgate : Business Law Review, May 1990, p121

3 This is because deafness caused by excessive workplace noise can take years to develop.

4 It has been suggested that some duty may be owed as the result of Sec. 29(1) Factories Act, 1961 which imposes on the employer a duty to make the workplace safe, so far as reasonable practicable, for every person working there.

were, and still are very stringent leaving many people with only a slight degree of deafness unable to obtain monetary benefit. For these people, the only way to seek compensation was by means of an action against the employer in negligence at common law.

In order for the plaintiff to bring an action against his employer in negligence, he must show that the loss of hearing was caused by exposure to excessive workplace noise and the onus is on the employee to show that the employer was negligent rather than being on the employer to show that he did not act negligently. To succeed in an action for negligence, the plaintiff has to show that the defendant owed him a duty of care, one of the most important aspects of which is the standard of care.

2. EMPLOYERS' DUTY OF CARE

The issue of the employers' duty of care was discussed in the leading case of Wilsons and Clyde Coal v English[5]. Here, the court determined that the employers' duty of care is comprised of four elements:

1. plant and machinery
2. safety of the workplace
3. safe system of work
4. provision of a competent staff

although as was pointed out by Lord Wright[6], the duty extends beyond these areas:

> "The whole course of authority consistently recognises a duty which rests on the employer, and which is personal to the employer, to take reasonable care for the safety of his workmen, whether the employer be an individual, a firm or company, and whether or not the employer takes any share in the conduct of the operations."

Of the four points made in Wilsons and Clyde Coal v English, the one which is most relevant to the prevention of industrial

---

[5] [1938] AC 57

[6] at page 84

deafness is that of a safe system of work.

3. SAFE SYSTEM OF WORK

A safe system of work encompasses the organisation of the work, the procedure to be followed, any appropriate safety precautions, an adequate number of employees to carry out the work and adequate supervision.

In devising the system of work, the employer must exercise due care and skill for all aspects of the safety of his workforce. The case of General Cleaning Contractors v Christmas[7] suggested that a safe system of work included not only an adequate form of instruction, but also a supply of protective equipment where appropriate. If this is so, it can be deduced that where the system of work is excessively noisy the employer should provide protective ear covering.

In Stokes v Guest, Keen and Nettlefold (Bolts and Nuts) Ltd[8] the court held that it was a question of fact whether a system of work should be prescribed and in deciding this question, regard should be given to the nature of the operation, whether it is one which requires proper organisation and supervision in the interests of safety or whether it is such that a reasonably prudent employer would properly think could be safely left to the employee doing the particular job.

Where the employer has devised a safe system of work, there is a duty on the employer to ensure that this system is followed. This can be illustrated by the case of Nolan v Dental Manufacturing Co. Ltd.[9] where a workman was blinded when he was sharpening a tool on a grinder and a chip flew off and entered his eye. The court held that the common law duty of the employer was not only to provide goggles but also to issue strict instructions as to their use. This point can be further emphasised by the case of Thompson v Smiths Shiprepairers (North Shields) Ltd.[10] where the court stated that there had long been a general practice of inaction with regard to the possibility of deafness resulting from the noise of repair work.

---

7 [1953] AC 180

8 [1968] 1 WLR 1776

9 [1958] 1 WLR 936

10 [1984] QB 405 ; [1984] 1 All ER 881

The defendants were held to be liable once there was an awareness of the damage from noise and once protective equipment became available[11].

Given that an employer owes a duty of care to his employees in providing, amongst other things, a safe system of work, consideration will now be given to the standard of care owed by the employer and to what extent an employer would have to fall below that standard to be negligent.

4. THE STANDARD OF CARE OWED BY THE EMPLOYER

The accepted definition of negligence is that from the judgement of Alderson B, in Blyth v Birmingham Waterworks Co.[12] where he said:

> "Negligence is the omission to do something which a reasonable man, guided upon those considerations which ordinarily regulate the conduct of human affairs, would do, or doing something which a prudent and reasonable man would not do."

It can be seen from this that the standard of care is determined by the hypothetical 'reasonable man' or in this case, the reasonable employer. It would be feasible to suggest that a reasonable employer is one who is aware of developments within both Health and Safety Legislation and working practices, and also, any developments in the availability of protective equipment. An employer who does not keep himself aware of these matters could be deemed to have exercised a lower standard of care towards his employees than that which is expected.

This was one of the issued raised in Thompson v Smiths Shiprepairers (North Shields) Ltd[13] where the employers were aware of the possible damage to hearing caused by excessive noise but found that there was no easy solution to the problem. The court had to consider the question at what stage suitable ear protectors became available and although it accepted that

---

11 This was following the production of the pamphlet "Noise and the Worker" in 1963, which explained the problem and suggested ways to overcome it.

12 [1856] 11 Exch 781 at 784

13 op. cit.

employers could not be expected to read every pamphlet they received, it suggested that employers should have been aware of the time protective devices became common and where their own knowledge was insufficient, should have contacted one of the organisations which offer advice in this area. Mustill, J[14] posed the question:

> "From what date would a reasonable employer, with proper but not extraordinary solicitude for the welfare of his workers, have identified the problem of excessive noise in his yard, recognised that it was capable of solution, weighed up the potential advantages and disadvantages of that solution, decided to adopt it, acquired a supply of protectors, set in train the programme of education necessary to persuade the men and their representatives that the system was useful and not potentially deleterious, experimented with the system, and finally put it into full effect?"

He went on to say that the actual date does not matter, it is the question of degree which is important. For example, the case of Cartwright v GKN Sankey Ltd [15] concluded that the courts expect warning pamphlets issued by the Health and Safety Executive to be read carefully by a person with authority as opposed to being given a cursory glance before being thrown in the dustbin.

The standard of liability for negligence is an objective one, dependant on the foreseeable element of risk, therefore, it is no defence for an employer to undertake responsibilities without the appropriate knowledge or experience. Consequently, where he is in a position requiring specialised knowledge and skill, a failure to avail himself of this or to exercise it appropriately, will amount to negligence. Where the risk of damage was either unknown or unforeseeable at the time it occurred the employer may not be held liable[16].

One of the main elements of the tort of negligence whether concerned with industrial claims or any other branch of law is that the plaintiff will have to prove causation, namely, that the damage was caused by the defendant's breach of duty and following from this, that the damage is of such a nature that the law will

---

14 op. cit. at page 539

15 [1973] 14 KIR 349

16 Roe v Minister of Health [1954] 2 QB 66

provide compensation.

5. CAUSATION

The element of causation is well illustrated by the case of Barnett v Chelsea and Kensington Hospital Management[17] where a night-watchman went to the casualty department complaining of vomiting after drinking tea. The duty doctor told him to go home, call his doctor and go to bed. Five hours later, he was dead from arsenic poisoning. His widow brought an action claiming that her husband's death was caused by the doctor's failure to treat him, but her action failed because even if he had been admitted to hospital he would have died. Negligence can be the result of omission as in McWilliams v Sir William Arrol & Co Ltd[18] where a workman, who was not wearing a safety belt, fell to his death. Although the employers were in breach of their statutory duty in failing to provide belts, they were held not to be liable because the evidence showed that the plaintiff had rarely worn a belt in the past. The defendant's breach did not cause the damage as the plaintiff would not have worn a belt even if it had been supplied. In McGhee v National Coal Board[19] a plaintiff employee was able to recover for the whole of his injury where the defendants failed to provide him with washing facilities which resulted in an increased risk of the plaintiff developing dermatitis as the result of prolonged contact with brick dust. McGhee can be compared with the case of Wilsher v Essex Area Health Authority[20] which concerned a premature baby who was allegedly blinded as the result of the hospital's negligence. The difficulty in this case was that excess of oxygen was only one of five possible factors which could cause blindness. Here, the House of Lords held that the plaintiff failed to establish causation because of the five other possible causes and it could not justify attaching blame to the defendant. The case distinguished McGhee on the grounds that there were no other factors which could have aggravated the plaintiff's skin condition apart from the brick dust. The importance of McGhee to cases involving industrial deafness is that where there are no other factors which could have caused the plaintiff's hearing loss other than workplace noise, the employer will be liable.

---

17 [1969] 1 QB 428

18 [1962] 1 WLR 295

19 [1973] 1 WLR HL

20 [1957] 2 WLR 557

To apply these principles to industrial deafness cases immediately produces the problem faced by the courts in assessing damages which is that many people develop a degree of deafness through ageing, to a greater or lesser extent and given this fact, it is very difficult for the court apportion the exact degree of deafness which was caused by workplace noise and thus award damages accordingly[21]. In Thompson v Smiths Shiprepairers[22], this point was considered by Mustill, J:

> "If we know... and we do know for by the end of the case it was no longer in dispute that a substantial part of the impairment took place before the defendants were in breach, why in fairness, should they be made to pay for it? The fact that precise quantification is impossible should not alter the position. The whole exercise of assessing damages is shot through with imprecision...I see no reason why the present impossibility of making a precise apportionment of impairment and disability in terms of time, should in justice lead to the result that the defendants are adjudged liable to pay in full, when it is known that only part of the damage was their fault. What justice does demand, to my mind, is that the court should make the best estimate which it can, in the light of the evidence, making the fullest allowances in favour of the plaintiffs, for the uncertainties known to be involved in any apportionment."

The question of damage caused before the right of action arose was discussed in Crookhall v Vickers Armstrong[23] where the plaintiff brought an action against his employers for their negligence in failing to protect the employee against silicosis. It was held that this type of negligence would have been actionable from 1942 when silicosis and the risks of contracting it were appreciated and recognised therefore, any damage caused prior to this was not compensatable. The plaintiff in this case started to develop silicosis in 1939.

---

21 Hearing loss in one ear only will be assessed lower than hearing loss in the "good" ear where the plaintiff is already wholly or partially deaf in the other ear.

22 op. cit.

23 [1955] 1 WLR 659

The case of Clarkson v Modern Foundries[24] considered statutory limitation periods and held that where it is impossible to determine which part of damage occurred within the limitation period and which part outside, the plaintiff is entitled to recover for the total injury.

6. CONCLUSION

It can be seen that the employer owes a duty of care to his employees and it is necessary for a plaintiff employee to show that an employer has been negligent where there is a breach of the duty. In cases of industrial deafness, the difficult issues are deciding how much of the deafness was caused by the noise at work and to what extent the employer should be held responsible. The most logical way of arguing this point is to say that employers should be responsible for a particular health and safety matter when they first become aware of the dangers. If this is so, employers who operate in noisy environments have very little with which to defend their inaction in terms of the provision of safety precautions. It would seem that ear protection was recommended for those workers who hammered copper for a living as long ago as 1713, and blacksmith's deafness has also long been recognised[25].

In 1886, the Proceedings of the Glasgow Philosophical Society contained a paper by Barr on an "Inquiry into the Effects of Loud Sound upon the Hearing of Boilermakers and Others working in Noisy Surroundings". In it, Barr identified the essentials of the problem and the fact that noisy work led to deafness. He also stated the need to use protective devices such as cotton wool or rubber plugs, particularly in the early stages of employment. Instead of this paper being the beginning of a study into the effects of noise at work and the prevention of industrial deafness, it was largely forgotten. Applying the principle that employers are responsible from the time they become aware of the dangers, the actual knowledge of the employers in Thompson v Smiths Shiprepairers[26] could be proved to have been from 1963 when the Ministry of Labour published the pamphlet "Noise and the Worker" although it could be argued that actual knowledge extended further than this because of the

---

24 [1957] 1 WLR 1210 The plaintiff brought the action five years outside the start of the limitation period.

25 Deafness: the facts - Andrew P. Freeland

26 op.cit.

historical background of industrial deafness.

One of the defendants in Thompson's case made cotton wool available to the employees but if they wished to make use of it, it was on their own initiative. There was also an experiment with the use of ear plugs, but apparently this ended in October 1973 on the advice of the factory doctor who considered them a possible source of damage and infection. There was no evidence offered to the court that any of the plaintiffs were offered or asked for Billesholm wool even though it was shown that one of the defendants received a pamphlet advertising the advantages of Billesholm wool sometime during 1962. Ear muffs were introduced and widely used by the middle of 1973.

It would seem from this that very little was done by the employers early enough to prevent industrial deafness and whilst the Thompson case applies to the shiprepairing industry, other cases have shown that it is not unique. In the case of Robinson v British Gas[27] the plaintiff suffered loss of hearing and tinnitus[28] as the result of operating pneumatic drills and other noisy equipment in the digging up and repairing of roads.

This paper would be incomplete without some mention of the amounts of monetary compensation awarded and the levels of hearing loss for which compensation is made.

On 9th March, 1992 the House of Lords briefly discussed the issue of damages for personal injury. In his comments, Lord Irvine suggested:

> "However, are not damages in personal injury cases regarded as generally far too low, and are they not fixed in accordance with tariffs that are laid down exclusively by Judges who say that the loss of an eye is worth only £20,000, that almost total deafness due to industrial causes is worth £10,000 or less;"

It is unfortunate that generally, hearing loss is very poorly compensated by the courts, despite the misery suffered by the victims. For example, in the case of Tripp[29], the plaintiff

---

27 30.11.89 (unreported)

28 Tinnitus is a constant ringing or noise in the ears which is often associated with working in a noisy environment.

29 [1983] CLY 1017

was a man aged 65 years who suffered from a high degree of deafness with tinnitus. He was unable to carry on a normal conversation and could not attend meetings or use the telephone. In order to watch the television, he had the volume so loud that it was unbearable to others. Despite this suffering, the court awarded him £7,500.

An indication of the levels of hearing loss suffered by industrial deafness victims was given in Abramowicz v The Carborundum Co. Ltd[30] where the plaintiff worked for the defendants for between 23 and 28 years and at the time of the claim was aged 65 years. He suffered deafness in both ears at 3 kHz and above and almost total deafness at lower frequencies along with constant tinnitus. He claimed that his early retirement was due to the noise of the machine next to that which he operated. The court accepted this claim and awarded him £15,000[31].

The attitude of the courts in awarding damages for industrial deafness can be summed up by the words of Mustill, J[32]:

> "All in all, the consequence of a noise-induced hearing loss goes no further than a real but not total, diminution in the opportunity to enjoy life to the full."

7. BIBLIOGRAPHY

Tort: Cases and Materials - Hepple and Matthews - Fourth edition
Winfield and Jolowicz on Tort - Thirteenth edition
Street on Torts - Eighth edition
Clerk and Lindsell on Torts - Sixteenth edition
Munkman: Employer's Liability at Common Law - Eleventh edition
McGregor on Damages - Fifteenth edition
Munkman: Damages for Personal Injury and Death - Eighth edition
Kemp and Kemp : Quantum of Damages
Deafness: the facts - Andrew P. Freeland
Hearing and Noise in Industry - W. Burns and D.W. Robinson
Occupational Hearing Loss - D.W. Robinson
Hansard (Lords) - 9th March, 1992

---

30 22.7.81

31 This award of damages was for non-pecuniary loss, that is, pain and suffering and loss of amenity. It does not include loss of earning capacity and medical costs.

32 Thompson v Smiths Shiprepairers, op. cit. at page 537