6 Negligence and the Employer's Knowledge

The problem of deafness due to exposure to high-level noise at work has been present since the industrial revolution. Many countries have provided protection for workers at risk and make the employer liable for those deafened but developments in Britain are slower. In the only case for damages before 1970, the claimant lost the case. There was insufficient evidence to establish that there was a general knowledge of risk to hearing by exposure to a cartridge rivet gun. The state of knowledge at the material time (April 1966) was not sufficient to impose liability [1].

Where there is a developing knowledge, the employer must keep reasonably abreast of it and not be slow to apply it. [2] After reviewing evidence on the protective measures available, Mr Justice Mustill applying *Stokes v GKN*, formulated the following test:"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, found a possible solution, weighed up the potential advantages and disadvantages of that solution, decided to adopt it, acquired a supply of the 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 into full effect?" This question is not capable of an accurate answer: and indeed none is needed, as will appear when the scientific aspects of the case are considered. [3]

Not every foreman, shop steward or company director reads the Lancet or Proceedings of the Royal Society of Medicine, so this is not the standard. The general literature is clearly rich with references to noise-induced hearing loss. The point to be argued is when an employer has run out of legally acceptable excuses. It is difficult for anyone reviewing the popular literature at the present time to imagine that the connection can have eluded anyone involved in noisy industries. (Bryan and Tempest, 1971).

There are references which pre-date Ramazini's treatise on occupational medicine in 1713. The Bible has been quoted as referring to noisy occupations [4] though this is a matter for personal interpretation. The value of hearing protection was recognised where in Homer's works, Odysseus moulded wax to stop up his oarsmen's ears to prevent his ship from being wrecked on the rocks. The sailors could not hear the seductive songs of the Sirens. Odysseus lashed himself to the mast so

[1] *Down v Dudley, Coles, Long Ltd,* 27th January 1969, Devon Assizes, case on percussive noise. Mr Justice Brown: "Ought the defendants to have foreseen that the use of this gun might have caused injury...?" No. But by late 1969, Dr Coles and others had shown the dangers of percussive noise.

[2] *Stokes v Guest, Keen and Nettlefold (Bolts and Nuts) Ltd* [1968], 1 WLR 1776.

[3] *Thompson v Smiths Shiprepairers* [1984]

[4] D.L.Chadwick, quoted in Occupational Hearing Loss (1971), D.W.Robinson ed, Academic Press, at p. 167. On the contrary, *Ecclesiastes Ch 1 v 8* is considered in Cruden's "Complete" Concordance to be the biblical definition of the ear as an organ of hearing. There were 14 references to deafness in the Bible (Concordance), mostly derogatory in the Old Testament but optimistic in the New Testament: deafness was shown to be curable in 3 large series (reported in Matthew, Mark, Luke). In fact, there are 18 references altogether in modern biblical indices. Isaiah 41:7 is more to the point: So the carpenter encouraged the goldsmith, and he that smootheth with the hammer him that smote the anvil ... Also 44:12. Chapters 40-44 describes a military-industrial complex: graven images, swords etc.

when he heard the enchanting songs, he shouted to his sailors to untie him, but because their ears were plugged up with wax, they paid no attention to him and they rowed safely past.

A general knowledge of the problem is not sufficient to hold a particular employer liable since liability is judged according to his own knowledge. A date for constructive knowledge was found to be 1963. The year 1963 was an important one in the history of employer liability for noise-induced deafness. In that year, the Wilson Committee report was published. It recommended that the Ministry of Labour should:

(a) Disseminate knowledge of the hazard of noise to hearing,
(b) Urge industry to reduce the hazard, and
(c) Advise industry on practical measures to reduce the hazard.

As a result, the Ministry of Labour published a four page leaflet called "Noise and the Worker" and a 24 page HMSO pamphlet of the same name.

Thus, in *Thompson v Smiths Shiprepairers* [1984], Mr Justice Mustill concluded that the year 1963 marked the dividing line between a reasonable policy of joining other inactive employers in the trade, and a failure to measure up to standards. After the publication of "Noise and the Worker" there was no excuse for ignorance. There was no lack of a remedy in the provision of hearing protectors.

"Mr Justice Mustill said in Thompson that he did not regard the facts as establishing a breach of duty under section 29(1)" per Mr Justice Popplewell in the later case of *Kellett v BRE,* 1984, where he approved of Lord Maxwell's ruling in the Scottish case *Carragher v Singer,* Scottish Law Times 1974 p 28, that a breach of section 29 of the Factories Act could apply to dangers created by noise.

The same facts giving rise to the employer's breach of their common law duty will result in the same finding against the employer's breach of their Statutory Duty. Employers will be liable under the Act itself which imposes a duty on employers to keep the place of work safe so far as it is reasonably practicable. Since the Act came into operation in 1960, the date 1963 was not followed.

It is submitted that in cases based on negligence in cases of industrial hearing loss, it does not make any difference whether it is based on a breach of common law duty or a breach of statutory duty. The legal nexus is provided by the Scottish case. The factual matters to be proven are the same in both cases and the liability is imposed in any event. Considerations around Statute Law have a flavour of strict liability, that liability being fixed as from the date the statute comes into operation.

The date 1960 was determined from the construction of section 29 of the Factories Act: since "safe" was not defined with respect to noise, it was a mixed issue of law and fact. Taking judicial notice of facts, the law was stretched to encompass hearing loss. The date 1963 however was determined solely on extrinsic evidence, not on legal interpretation of the statute.

From an evidential point of view, 1963 is the preferred watershed date. The operation of the Act in 1960 in general terms of providing a safe place of work did not specifically mention noise — the enactment itself did not result per se in more awareness of the noise problem. Unlike a Ministry publication, the statutory provision had to wait 14 years till *Carragher v Singer* for authoritative interpretation and gave rise to the view that the existing statute law could be relevant to noise. In fact, the contrary view was expressed in *Berry v Stone Manganese and Marine* [1972], earlier and breach of statutory duty was decisively rejected.

From the point of legal theory, a Statute always imposes a duty when the Statute comes into operation, even if the scope is later held to be wider than apparent at the time of passing of the Act. If the breach not specifically mentioned in the Act were found to be within the ambit through a fortuitous exposition of the words of the Act in a case decided after its operative date, a pre-existing breach starts to be blameworthy contemporaneously with the passing of the statute. When a statute is not interpreted strictly, it creates the unpleasant

paradox that one is supposed to 'discover' law pre-existing in a statute: a proposition more familiar in the context of Common Law.

This is the uncertain position occupied by noise at present. Both courts of equal binding authority disagree on the date of commencement of liability. 1963 in *Thompson v Smiths Shiprepairers* based on the publication of "Noise and the Worker" and 1960 in *Kellett v BRE* based on the operation of the Factories Act.

In the particular case of *Kellett v British Rail Engineering,* the employers kept all the correspondence since 1953 which showed that they had actual knowledge of the risks of noise since 1955. The date of the employer's liability in this case started from 1955. One can sympathise with British Rail Engineering being punished for keeping meticulous records all the way back to the 1950s. Had the records been lost and no other evidence forthcoming, the date of liability would have been 1960 as for all other employers without actual knowledge.

1963 was the year fault at common law began. The employers, in the light of their knowledge in 1960 could not have anticipated that section 29 of the Factories Act was intended to apply to noise. Kellett was decided on the Common Law and perhaps the dicta on Statutory Duty could be considered obiter. Kellett appeared to be a curious retrospective application of the maxim: Ignorance of the Law is no excuse. A cynical view by Glorig in 1971 was that the whole issue of compensation for hearing loss was based on ignorance of the law, and he had always heard that ignorance of the law was no excuse. In effect, the whole issue of negligence is based on ignorance of Facts. Noise in the sixties was in the same position as radiation hazard from the nuclear industry is today.

Mr Justice Mustill's view was that in any event, the difference of three years was slight. There were no facts in his case to warrant detailed consideration. It was submitted that the principle was important and needed to be settled by higher authority: as stated in Thompson, there were over 20,000 cases pending processing. [5]

There is a difference in the standard of knowledge required from large enterprises which employ specialists to look after the health of employees and small firms who have to rely on general knowledge. It appears that the diligence of the larger firms in seeking out technical knowledge is being held against them while less diligent firms who are judged on a lower standard are exonerated. There is a scientific opinion expressed in 1971 that a large firm employing medical specialists should have been aware of the hazard from noise no later than the early fifties (Bryan and Tempest, 1971).

Whatever reasons there are in legal theory for the differences in approach, there is no practical effect on cases involving periods after 1963 since all employers are deemed to have constructive knowledge in any case. The differences between smaller and larger business concerns surface in the different arena of "reasonably practicable measures". The question of knowledge of employers would come up paraphrased as "Did they have knowledge of reasonably practicable measures to prevent injury?"

With the implementation of EEC directives on noise being envisaged, it is anticipated that all the issues of knowledge, size of enterprises, reasonably practicable measures and construction of statutes and its relation to common law will be re-examined when UK regulations are passed to comply with the directives.

[5] 25 years has passed since 1960, or 22 after 1963. Some employers deny liability after 1978 or any date after providing adequate protection. A difference of 3 years makes a difference of 12-15% to the damages awarded.