# 10 The Broad Jury Approach

The Broad Jury Approach advocated in *Kellett v BRE* attempts to find out what the claimant has lost from life and to determine what is the fair compensation to be awarded [1]. The measure of social handicap is not an exact science and the Court will look at all the circumstances of the claimant.

The philosophical question is what ought to be compensated:

(a) Any hearing Impairment,
(b) Social Handicap and Disability, or
(c) Loss of earning capacity.

The emphasis in the Broad Jury Approach is firmly placed on the disability and handicap actually suffered by the claimant. Little consideration is given to mere 'impairment of hearing' which shows up only on the audiogram. It is theoretically possible for hearing to be severely impaired without social handicap if the frequencies affected are outside the useful speech range.

The type of social factors which are taken into account in this approach is illustrated by the judgment of Mr Justice Popplewell:

"The Plantiff's description of his loss of hearing is this. It was not until 1976 he first noticed something wrong. He described his present state as follows. His wife kept telling him to keep his voice down and he kept asking people to repeat themselves. He said he has to ask his wife what had gone on on television. His wife complained that he has it on too loudly and the same applies to his stereo. He said that he likes music of most kinds. So far as the telephone was concerned there are two problems. Sometimes his wife can hear it ringing when he cannot and sometimes when talking on the telephone he has to ask people to speak up. He says it is a lot easier talking one to one but if someone else is talking that is when he has the most difficulty. He hears the doorbell most of the time and if he is listening to somebody he tends to follow their lips. He plays Crown Bowls and when the score is shouted out sometimes he does not hear. He prefers to go somewhere quiet rather than anywhere noisy and he said he did not go out to dances like he used to. He said that the general conditions in his house did not trouble him. He had a car and he drove for pleasure but he had stopped going to Bingo about four years ago. One of the reasons was that he would sooner go somewhere quiet. So far as dancing was concerned he could not talk while the music was on.

Mrs Kellett gave evidence. She said that they had been married for 30 years. They go out in the car which is good but she had to shout to make herself heard. He misses the telephone and does not answer it if she is there to do so; occasionally he does not hear the door bell; so far as the television is concerned he has to sit close, it is ridiculously loud and she sits as far away as she can. She said that if he is in a group he gets withdrawn and gives up trying; they have had to give up dancing because he cannot cope with the music and the noise. She found it very irritating not being able to go dancing. She said he had been an easy going fairly cheerful sort of person but is not as cheerful as he used to be. He makes light of his disability. She thought

[1] *James Kellett v British Rail Engineering Ltd,* 3 May 1984, Queen's Bench Division, the High Court at Chester, transcript.

he made rather too light of it and she noticed it rather more than he did. She also said that he did not go and buy clothes by himself. His confidence had diminished and he gets flustered and nervous when shopping. I observed both the Plaintiff and his wife in the witness box, and I am quite satisfied that neither were given to exaggeration. Indeed I accept what Mrs Kellett said that the Plaintiff in fact makes light of his disability. While he was giving evidence and being examined-in-chief by Mr Rose [Queen's Counsel] he did not appear to have any difficulty hearing Mr Rose, but that was because he pitched his voice somewhat louder than he normally would, that is Mr Rose. When he was cross-examined by Mr Lawton [QC] and in answer to me there were occasions when it was necessary for the questions to be repeated.

There are medical reports from a number of distinguished practitioners in this field which not only substantially agree but also confirm both the audiometric findings and the picture which the Plaintiff and his wife painted in Court."

The factors which appeal to a court where a judge is acting in the capacity of a notional jury are fairly consistent. In *Faulkner v British Rail Engineering Ltd,* 1983, at first instance, Mr Justice Cantley observed:

"His wife is employed in a public house and he goes there three nights a week and spends the evening there with persons whom he knows. He often has difficulty in hearing what they say to him. He told me that on one occasion he was with four friends who were conversing together and he had not properly picked up a word the whole evening. There may be some exaggeration in that but picking up the odd word of course is not really taking part in or enjoying a conversation.

His defect does occasion him some embarrassment. He has to ask people to repeat what they have said. Sometimes when he thinks he has understood what they said it turns out that he had misunderstood what they had said and he makes a reply which is nonsense.

He told me he attended dancing classes with his wife but found he could not make out the instructions of the instructor while the class was dancing to music. I understood him to agree that if there is no competing background noise then his hearing is practically normal for speaking or listening to speech. Certainly the medical evidence which I have heard would confirm that. Mr Goodman found when he examined the Plaintiff that he could hear a whispered voice at 16 feet in either ear. There was of course during the test no competing noise. The Plaintiff says that his hearing disability does not interfere with his work and there is no suggestion in this case that his hearing disability puts his future employment in jeopardy."

In *Robinson v British Rail Engineering Ltd,* 1982, the Court of Appeal noted that the claimant "liked to hear birdsong and now he misses that on his walks. He also suffers from the usual sorts of embarrassment ... He found it impossible to hear a friend of one of his daughters from the University of Stirling, speaking no doubt with a soft Scottish accent, and that embarrassed him; and his wife described how he had become much quieter than he used to be; he had come to terms with his deafness, but occasionally ... you feel like saying 'Well I'm deaf, not daft'."

There are special circumstances of the claimant the court would consider. In *Abramowicz v The Carborundum Co Ltd,* 1981, *Manchester*, the claimant was of Polish origin. He was a man who had difficulty in speaking and understanding English. Mr Justice Forbes held that the severity of disability was compounded by his lack of command of the English language.

In *Edwards v Ministry of Defence,* 1982, Mr Justice Bristow suggested that there was a view that "A recluse might suffer not at all", a rather extreme view. "How much each suffers in damage to the quality of life depends on his personality and circumstances."

The legal profession has noticed the emphasis on the social assessment. The evidence which would be significant in court has been collated and there is a fairly comprehensive Questionnaire of 18 main ques-

https://doi.org/10.1017/S0022215100600130 Published online by Cambridge University Press

tions in "Personal Injury Litigation Practice and Precedents" by I.S. Goldrein, Butterworths, 1985 at page 91 [2].

It is submitted that the Broad Jury Approach has certain possible implications:

1. The issue of what frequencies should be used to calculate awards for compensation purposes becomes largely academic.
2. The question of whether loss not yet noticed is to be compensated or actual demonstrable handicap or disability has been resolved in favour of disability which can be noticed by a jury.
3. A detailed history of the social circumstances must be ascertained and the degree of loss of amenity in each situation must be itemised. Counsel should highlight particular handicaps and disabilities which have impressed the Courts in earlier cases.
4. If the special facts of each individual case are agreed by both sides before the trial, medical evidence merely directs the awards to very wide brackets. This contrasts with out-of-court settlement practice of having many brackets, indeed a sliding scale. Which works more equitably: a percentage sliding scale, a simple classification of 3 (mild-average-bad), 5, 7 (some psychologists argue that subjective discrimination cannot be accurate beyond seven gradings, no more than 3 grades above and below the median grade), an 8 point classification or a 10 level classification?[3]

[2] Questionnaire for Loss of Hearing, from I.S. Goldrein, Personal Injury Litigation Practice and Precedents, Butterworths, 1985.

1. Is there tinnitus? (the word denotes a continuous unusually high pitched noise appearing to originate from the inside of the head. It is notorious that this can be amongst the most distressing of ailments. It can have very serious psychological effects leading to nervous disorders). If yes, when did it start, to what degree, what does it sound like and how does it affect him? Is it bearable? Does it interfere with sleep?
2. Is the deafness total or partial? If partial, is there a frequency above and/or below which he had total deafness? If yes, what are the material frequency or frequencies?
3. In respect of each ear, what is the decibel hearing loss?
4. Does he wear a hearing aid? If yes — when did he commence using it and what difference does it make? If not, why not?
5. Can he hear radio and/or television and/or a film track at the cinema? If yes—with what degree of ease?
6. With and without a hearing aid, can he distinguish what is being said when two or three people are talking at the same time?
7. Is there buzzing in his ears when concentrating on listening, eg to music?
8. Does he have difficulty conversing against background noise—especially at meetings or on the telephone?
9. Has he learnt to lip read? If yes—when and how well? If not—why not?
10. Can he hear the doorbell, telephone bell, bird song, etc?
11. How often did he go out socially before the accident, and how often after?
12. Can he appreciate stereo music?
13. How does he manage in an ordinary two way conversation—and—ordinary three way conversation?
14. What is the effect on his personality?
15. Does he have any difficulty in particular in hearing a female as opposed to a male voice, or a child's voice as opposed to that of an adult?
16. Prognosis?
17. Prior to the injury did he associate with numbers of people, as for example in clubs or public houses? If yes—does he still (and if not, why not?)
18. When did he start to be aware of his deafness? What put him on notice? How gradual was the deterioration? At what stage does he consider it became significant—and, why? (i.e. over what period has he suffered interference with the quality of his life?)

[3] "A determination of the relationship between the magnitude of a subjective sensation and the magnitude of the objective stimulus has, of course, been the basis for the science of Psychophysics since Gustav Fechner's Elemente der Psychophysik, which was published over 125 years ago. From then until the 1950s it was considered that the magnitude of the subjective sensation bore a logarithmic relationship to the physical magnitude (Weber-Fechner Law).

Stevens (1955) showed that the Weber-Fechner logarithmic function was invalid and that a power function gave a better fit to the available data:

$$\text{i.e } \psi = k\phi^n \qquad (1)$$

where $\psi$ = psychological magnitude of stimulus, $\phi$ = physical magnitude of stimulus, k = a constant, and n = a constant.

Subsequently, Scharf and Stevens (1959) showed that a more appropriate psychophysical relationship was obtained by subtracting the physical magnitude of the physiological zero from the physical magnitude of the relevant stimulus,

$$\text{i.e. } \psi = k(\phi-\phi_0)^n \qquad (2)$$

where $\psi$ = a psychological magnitude of stimulus, $\phi$ = physical magnitude of stimulus, $\phi_0$ = physical magnitude of threshold stimulus, k = a constant, and n = a constant."

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5. As with other personal injury litigation, legal practitioners would soon reach a consensus what aspects of the injury would carry more weight than others. If the Broad Jury Approach were the policy, there would be a quick end to the "series of test cases" so far as quantum is concerned; no specific guidance is forthcoming.

After the full weight of expert evidence is expressed for both sides, the judges disregard much of it and make their own observations. They can override expert evidence by their own observations from the bench. As the claimant is being cross-examined by Counsel, the judge is witnessing a hearing test from the distance of his bench. The judge may subconsciously be executing a speech test used by medical assessors when he observes the response of the claimant to his questions.

In *Heslop v Metalock (Britain) Ltd,* 1981, Mr Justice Mustill said, "I have had the opportunity to judge his condition by observation. In a court which has a good acoustic the Plantiff seemed to experience very little difficulty in understanding what was being said to him by Counsel. Of course the atmosphere is quiet, and he is concentrating. Counsel would speak not with raised voices but with conspicuous clarity so as to make sure he heard. I did observe, however, that on a few occasions when Counsel turned aside for a moment whilst speaking he was able to follow the gist of what was being said."

The courtroom may be a representative microcosm of human life but may not be an ideal place to assess a person's hearing. The judge may not be the best person to assess hearing directly. A substantial amount of impairment can be present before a person notices his own disability — as yet no decision has been challenged on the ground that the judge, acting as a notional jury, has not checked his own hearing with an audiogram [4].

As the emphasis appears to be on the loss of amenity and the quality of life in general, the Social Assessment remains an area which the Courts are eminently suited to carry out. Medical assessors have not laboured in vain in taking a detailed clinical history, particularly on the social aspects, as this history is drawn upon and put to good effect by Counsel and forms the basis of good courtroom technique. The law remains concerned with people in their circumstances.

[4] Menière, an obstetrician turned hygienist turned otologist reported the case of a judge whose hearing was a great handicap at the bench. Menière, using a long golden needle, applied pressure to the centre of the tympanic membrane. Dr Yves Tarlé of France considered this the first stapes mobilisation (Torok, 1983) At the Old Bailey in the 1830s, some of the judges might be thought eccentric. The Commissioner, Mr Serjeant Arabin, was both short-sighted and deaf. "I assure you, gentlemen' he said one day to a jury, speaking of the inhabitants of Uxbridge, "they will steal the very teeth out of your mouth as you walk through the streets. I know it from experience.' (Tumim, 1985).

https://doi.org/10.1017/S0022215100600130 Published online by Cambridge University Press