2 The Recent Test Cases

In 1975, industrial deafness became a prescribed disease for the purposes of the National Insurance (Industrial Injuries) Act, 1965. The conditions for state benefit were very stringent and those who were not very deaf did not qualify for payment. Accordingly, the idea was conceived of suing the employer under the Common Law.

It is notable that most of the litigated cases are less than 10 years old and significant judgments have only been made in the last few years. "Cases have come before the Courts during the last two decades in a trickle, but there are indications that they may soon become a flood," Lord Justice Lawton in 1980 [1]

Counsel in *Robinson v British Rail Engineering Ltd,* 1982, submitted that there were thousands of cases which have arisen since the first reported case in 1971, and that insurers and trade unions are interested in any guidance which the courts can give on the conventional figure which should be awarded. In *Smith v British Rail Engineering Ltd,* 1980, Counsel informed the court that there were no less than 2,000 writs outstanding against British Railways for negligence causing damage to hearing.

In fact, by 1984 "the legal processes were in danger of being swamped by the flood of claims — more than 20,000 of them." [2] Accordingly, a number of cases have been selected with the intention of establishing a set of criteria which would be applicable to the broad majority of claims, without the need to bring every single claim to trial.

The Court of Appeal's approach in *Smith v BRE* was to deal with the case on its own facts regardless of the number of claims awaiting the decision of the case. However, they were conscious that their decision may to some extent provide guidance for Judges having to deal with this kind of claim.

In *Thompson v Smiths Shiprepairers* [1984], Mr Justice Mustill noted that although these were not test cases in the sense of anyone having agreed to be bound by the outcome, it was certainly the hope of all concerned that they would at least provide some pointers towards the resolution of similar disputes by agreement.

"That there are strong differences of opinion outside the courtroom as to some of the scientific issues, it is quite plain, and there were clear echoes of these differences in the course of the trial."

"The evidence given at the trial is plainly the reflection of a wider controversy, which is currently unresolved. For practical reasons, proceedings in court cannot possibly yield a clear and complete solution."[2]

The differences are difficult to reconcile. Many of the test cases can be given a sub-title *Coles v Hinchcliffe*, after the two eminent experts dominating the field of forensic audiology. A great deal of their distinguished scientific work had been done even before the

[1] *Smith v British Rail Engineering Ltd,* Court of Appeal, reported in Kemp and Kemp, The Quantum of Damages (in personal injury and fatal accident claims) Volume 2 1975 as updated.

[2] *Thompson v Smiths Shiprepairers* [1984], which is the leading case on Industrial Hearing Loss. It is a leading case in its own right in industrial compensation, health and safety at work and employer's liability. The full name is *Thompson, Gray and Nicholson v Smiths Shiprepairers (North Shields) Ltd; Blacklock and Waggott v Swan.Hunter Shipbuilders Ltd; Mitchell v Vickers Armstrong Ltd and Swan Hunter Shipbuilders Ltd,* The High Court, Queen's Bench Division (Mr Justice Mustill) in a judgment delivered at Newcastle Crown Court on 14.11.83. Reported [1984] IRLR 93 March. [1984] 2 WLR 522 in Kemp and Kemp, and [1984] 1 All ER 881.

first cases were litigated. There was no doubt that strong convictions had developed before the forensic significance of their research results were foreseeable. In the wider context, the experts were part of the proxy battle in court, the larger issue being the continuing conflict between the Corporations and the Unions.

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