9 The Legal Attitude in Assessing Damages

The seminal case against which all subsequent monetary awards are compared against appears to be *Berry v Stone Manganese and Marine Ltd* [1971], 12 KIR 13 and [1972] 1 Lloyds Law Reports 182. Eleven years of disability was worth £2500 at the time. [1].

More significantly, Mr Justice Ashworth laid down a principle which was cited with approval in later cases, including *Kellett v BRE:* "Although hearing is measured by reference to decibels I know of no tariff for measuring compensation by reference to a loss of decibels.

The Court's task is to assess in terms of money what is reasonable compensation for the handicap to which the injured party is subjected. In that connection the Plaintiff's own evidence is clearly of importance."

In *Kellett v BRE,* Mr Justice Popplewell oberved that "the more evidence that was given and the more differences which arose, the less certain I became that it was possible to approach a proper assessment on a genuinely scientific basis, the more convinced I became and have become that the only possible method of approach is to take a broad jury approach.

I propose to adopt the views of the Privy Council in the case of *Paul v Rendel,* April 1981, reported in K14008/81 where Lord Diplock said that the assessment of damages is not a science, a judgment can only be intuitive and the observations of the Board in that case have a particular relevance in the Plaintiff's case."

"Before I set out the conclusions at which I have arrived it is necessary in fairness to the protagonists briefly at any rate to set out the rival contentions upon which their calculations are based." This was a nice judicial way of saying that all the scientific evidence presented was going to be disregarded, at least to a large extent.

The medical evidence set out by the experts is complicated. The matters forwarded for consideration of the courts in the test-cases include:

(a) National Physical Laboratory tables for the prediction of noise-induced hearing loss,
(b) Equal energy hypothesis, Damage Risk Criteria and proposals in the Wilson Report. Some of this work is based on studies of jute workers in Dundee and on chinchillas,
(c) Noise immission levels and calculation of L eq figures,
(d) Types of hearing protectors and their protective efficiency, and
(e) Corrections for presbyacusis which is natural deterioration of hearing caused by ageing, the average for a sample population being expressed as Presbyacusis Correction Curves.

None of the above considerations has singularly impressed the Courts. In all the decided cases, the courts have considered factors taken from the chequered backdrop of human life.

[1] Total loss of hearing (young girl of 12): £32,000 was the suggested figure by the Criminal Injuries Compensation Board (19 June 1984) but this is in a different category altogether. The Board also suggested £450 for an undisplaced nasal fracture and £700 if displaced, £2,750 for rape and £12,000 for loss of one eye. The quantum of damages in Berry was based on an earlier case *Ashcroft v Curtin* [1971], 1 WLR 1731, Court of Appeal, a motor accident case. Hearing loss was less than in Berry, but the awards are similar. Circumstances were different. Compensation tends to be higher in accident cases.

In *Kellett v BRE,* the damage to injury sustained from noise was assessed from four separate sources:

Firstly the audiometric results:
secondly the Plaintiff's own evidence,
thirdly the evidence of his wife, and
fourthly the medical reports.

It is proposed that the classification be reduced to two categories:
I. Medical Assessment, and
II. Social Assessment.

The audiometric results are an indispensable part of the medical reports. They are invariably incorporated into reports and in practice, form the starting point of medical assessment.

The Plaintiff's own evidence and that of his wife are important as found in the case of Kellett. Invariably, the claimant would be cross-examined by Counsel on both sides. However, the evidence of the Plaintiff and his wife is not strictly necessary, nor are they the only source of evidence to which the courts are restricted when they consider the effect of the disability in the social context. Evidence from colleagues and from the claimant's social circles has so far not been necessary. Many of the cases have been 'test cases' and the claimants have been found to be straightforward, reliable and honest. [2].

It is not surprising that the courts have been inclined to place a lot of weight on the social side of the assessment. Medical evidence is used for the purpose of cross-checking social findings, especially where the disability may not be so apparent. The medical assessment will invariably have included a clinical history which will be tested again in court by cross-examination, the legal equivalent of clinical history taking. There is a considerable amount of overlap between medical and social assessment. Medical reports may indicate to Counsel the areas which may require particular attention.

The courts have shown a distinct preference for the type of evidence which they can experience for themselves. An honest witness will tip the balance when expert evidence is confusing and in apparent conflict. Medical evidence has the merit of being collected at a time when the claimant is trying to determine for himself whether his loss of hearing is noise-induced or not: at an early stage, the patient is likely to tell the truth and give all the relevant information asked for by his doctor. However, medical assessment at that time is also likely to miss out factual items which are of legal significance. The object and emphasis are different.

For example, initial medical case-notes may not include the exact date, so far as possible, when the patient first noticed his hearing loss. Yet, it is probably the most important single piece of evidence in the award of damages. *Kellett v BRE* underscores the point. "It is possible fairly accurately to pin-point when the decibel loss did as a matter of fact in this Plaintiff adversely affect the quality of his life. That was in 1976. And that is important because until he appreciates that it is in fact affecting him he is not in fact suffering from a disability, thus even though the Plaintiff was exposed to further excessive noise, nevertheless he was free of disability for over 20 years after 1955."

It is submitted that while the courts devote a great part of their judgments to the scientific evidence, such evidence tends to be compartmentalised after the obligatory judicial perusal. The rationes decidendi tend to be drawn from the evidence which the courts can be in sympathy with. Analysis of the recent 'test-cases' shows that much of the scientific evidence has been disregarded and there is no clear nexus between the scientific evidence and the legal reasoning leading to the final

[2] W.G.Noble studied the men in detail: "The men don't give very much away, although on the other hand, there may not be all that much to give away. They seem to be a fairly balanced lot, within a rather narrow range of interests. Aware of the monotony of their job they do, however, get some satisfaction out of earning their livelihood and doing a day's work. They live quiet lives ... Perhaps hearing loss does not matter all that much since they do not seem to make any great demands on life. A quiet life is the aim ... not Living Theatre. One question is whether this quietness' would be a natural feature of people like these or whether they have become so because of hearing loss."

award of damages. A simple factual finding that a claimant experienced disability from 1976 was sufficient to put aside the tables used to predict when deafness might or should have occurred.

Scientific evidence has decisively been relegated to a corroborative role. It acts as a rough check to ensure that the figures arrived at by the judges are broadly fair. Its potential is possibly underestimated.

It is submitted that the scientific evidence is far from discredited. The conflict between medical experts lies not so much in principle as in detail. At present, medical and legal reasoning both lead to the same awards. So far as the medical principles do not conflict with legal principles, they lend moral support to judicial conclusions.

The present attitude is to compensate actual disability rather than unnoticed impairment. An employer might thus get away with causing sub-disabling impairment en masse.

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