11 The Presbyacusis Factor

If it has been difficult to find out the exact role of medical evidence in the recent test cases, it is even more difficult to find out the weight of presbyacusis [1] on the final award. The issue of presbyacusis is lost somewhere between the medical evidence and the award of damages.

The loss of hearing due to presbyacusis is not so small as to become a de minimis exception to be disregarded. The courts do give it ample consideration, but any importance placed on it is subsumed within the Broad Jury Approach.

The interrelationship between presbyacusis and noise-induced hearing loss is not properly understood. It is not known whether the effects of age and noise are additive or synergistic. Legally paraphrased, the issue is whether the effects of nature and a culpable act are separate intervening causes or indivisible proximate causes, i.e. jointly concurrent causes.

If age and noise are independent causal factors, the "last opportunity rule" in law operates. Deterioration of hearing due to age cannot be avoided. No one is at fault since it is a natural phenomenon: an insidious Act of God. A noisy occupational environment is the last avoidable opportunity — the last straw. The employer thereby becomes liable for the noisy environment and all the consequences flowing from it.

Once the negligent act and causation are proved, a second legal rule operates. The employer takes his workers as he finds them: *Smith v Leech Brain* [1961] 3 All ER, 1159. If they already have significant hearing impairment due to age, to cause more harm so as to result in disability or handicap will render the employer liable for the whole disability or handicap. If it were not for the employer's negligence, the worker might have been able to cope with unperceived hearing impairment which causes no disability in spite of the decibel loss detected on the audiogram.

This second rule is also known as the "egg-shell skull rule". If a person had a skull as thin as an egg-shell and if it were to be broken as the result of a proven negligent act, the defence could not claim that the skull was unusually susceptible to damage. Thus if a motorist were to knock down an old lady and she were to break her femur, the motorist would be liable in full for the fracture of the femur and all other foreseeable consequences. The frailty of the bones due to, say, osteoporosis is in fact a predisposing factor to fracture and a young man's bones might have withstood the trauma with impunity.

There is no 'osteoporosis factor' in the case of such an accident and by analogy, there should be no 'presbyacusis correction factor' to mitigate the liability of the employer. Similarly, there is no allowance for the additive effect of smoking or chronic bronchitis to

[1] Zwaardemaker (1893) coined the term 'presbyacusia' to denote poorer hearing of older people. Some would restrict the term presbyacusis to ordinary physiological changes with age. The component due to overt disease should not be included. It is difficult to define which disease processes are due to age and which are not. The writer prefers to use the term to mean any impairment of hearing not due to pathology—Ageing starts at birth. Presbus = old, not poor, although there is some truth that Presbyterians = poor Scotsmen! Actually, church run by Elders, implying maturity and vintage, not degeneration and decay as in presbyacusis. The spelling presbycusis without the 'a' accords with common medical usage but presbyacusis is etymologically more correct: akoustikos (Greek). Presbyacusis is the spelling in the law reports and favoured by judges. The term deaf = wholly or partly without hearing (Concise Oxford) but will here be used synonymously with disability as legally defined.

asbestosis contracted in the course of employment.

The corollary to the disregarding of presbyacusis preceding the claim is that presbyacusis which sets in after the claim has been adjudicated is also disregarded. No account is taken of the worsening effect of presbyacusis which will inevitably aggravate the deafness later. This seems to be the practical effect of the recent cases in spite of the rule in *Moeliker v Reyrolle* [1976] which allows prospective losses to be brought into account.

The situation is crystallised at the moment of judgment. This might be viewed as a rough trade-off where the employer absorbs the consequences of presbyacusis before the claim but is absolved from the later disproportionately sharp deterioration of hearing disability in the distant future.

One earlier approach by employers to get damages reduced is to attribute as much of the disability as possible to the period which is statute-barred or a non-liable period.

Conversely, claimants will try to attribute as much disability as possible to the later non-statute-barred or liable period. It is tactically advantageous for claimants to have the disability from presbyacusis to be rated as Nil during the earlier non-liable period and for disability to be assessable during the liable period. One may view this cynically as 'No fault without liability' [2].

The legal result of the test-cases is that the allocation exercise for presbyacusis loses most of its significance if not all. The presbyacusis in the presence of noise-induced hearing loss seems to be symmetrically disregarded on both sides of the date of claim. One possible justification for ignoring the later effects of presbyacusis in the presence of occupational hearing loss is that the expectation of life is likely to be short when such increased handicap manifests [3]. As one gets older, other disabilities develop. Deafness is no longer the limiting factor and becomes a "smaller feature" in the overall picture. Also, the deafness may be more acceptable when others in the same age group also suffer from it.

The position of presbyacusis needs clarification. Although there has been ample judicial consideration, it is submitted that there is no clear nexus between the obligatory judicial review of the medical evidence presented and the quantum of damages. It is of major concern that there are many out-of-court settlement schemes in which a very definite allowance has been made for presbyacusis. What is decided in the court must ultimately be reflected in these settlement schemes. The relative bargaining strengths of the parties in these schemes will be affected.

A detailed scrutiny of the computational aspects of presbyacusis was made in *Kellett v BRE* where in the event, Mr Kellett was treated as Mr Average in relation to presbyacusis. After considering the evidence which was expressed in odd numbers and decimals, the final damages were declared to be £4000 exactly and apportioned £800 and £3200 between non-liable and liable periods. From the evidence presented, the judge had gone as far as to deem 25 dB to noise and 3 dB to presbyacusis. This final award of damages in round numbers did not lend weight to the possibility that presbyacusis was taken seriously [4].

In *Berry v Stone Managanese Marine* [1972], a possible reference to the issue was made by Mr Justice Ashworth, "... to make a man already deaf still deafer is to increase his handicap very considerably: as Dr Coles said, he has fewer decibels to spare."

In *Tripp v Ministry of Defence,* 1982, Mr Justice Sheldon noted that "Disability would increase and in 10 years' time it was doubtful if he would hear very much at all."

[2] Transposing the received wisdom "No liability without fault". The situation is analogous to the anecdotal last man who befriended a promiscuous lass and was held responsible for the baby because earlier culprits (strictly, culprit in the singular) were not traceable.

[3] Mr Justice Popplewell in *Kellett v British Rail Engineering Ltd,* 3rd May, 1984 at the High Court at Chester, Queen's Bench Division. O.B.Popplewell QC appeared for the Metropolitan Police Receiver in *McCafferty* [1977].

[4] The six claimants in *Thompson* were awarded £1350, £1250 plus £295 hearing aid, £850, £850, £600 and £250 plus £650 against two employers. These were lowish awards compared to the £5,000 average for significant cases.

In *Faulkner v BRE*, 1983, Mr Justice Cantley at first instance accepted Dr Coles' view that although it would not be right to add the effect of noise damage and the effect of the natural deterioration in age arithmetically together, the claimant's hearing would at all times be worse than if he had not suffered the noise damage. A nuisance had been inflicted upon the claimant which had bothered him and will bother him in his ordinary life. In the Court of Appeal, Lord Justice Robert Goff said that the judge could take into account the comparatively early age at which hearing had been affected.

The Court came close to laying down a principle for presbyacusis in *Thompson v Smiths Shiprepairers* [1984]. Mr Justice Mustill compared presbyacusis to osteoarthritis which would probably appear within the next five years as the result of damage to the knee, although the joint was for the time being free from symptoms. A proper award of damages would recognise the existence of both current and potential symptoms.

Mr Justice Mustill observed that "It is senseless to demand the utmost accuracy at one stage of a calculation, which involves the broadest assumptions at another stage ..." He did however say that the ages of the subjects must be "borne in mind" together with other factors such as NPL tables and especially "the manifold uncertainties affecting the process of quantification." The older men would tend to have suffered a more prolonged handicap, but it should not be forgotten that their current impairment was likely to contain a greater element attributable solely to ageing. In people who were already going to be hard of hearing in later life, an employer's breach of duty merely served to accelerate and enhance the progress. "A monetary value should then be directly assigned to this additional detriment." He did not go on to explain how. He noted the difficulty of translating impairment in terms of a potential disability.

The inference from the judgment is that some consideration may be given to the effect of presbyacusis although this is discretionary and very approximate only. It is not possible to find out what weight if any is put on it, although it is assuring that the ages of the subjects 'must be borne in mind'. It is not possible to identify a severable item of damages set aside for presbyacusis.

"The whole exercise of assessing damages is shot through with imprecision. Even measurements of the plaintiff's hearing loss contain a substantial margin of error," Mr Justice Mustill.

In spite of the many judicial disclaimers, there is an important opinion given to the writer by Dr Ross Coles. For practical purposes, "Certainly in court hearings the expectation of hearing disability is often argued and although it has not been specified in judgments I suspect that the point has gone home and influenced quantum. The usual argument presented is that of a man, say 40 years of age with a disability now, will experience a steadily increasing disability with each year but he would not normally have any disability at all from ageing factors on their own until aged about 65. I think there has certainly been a judicial tendency, and Counsels in conference have made this point, for a younger man with a given degree of hearing loss to get more money. So I think in fact that there has been some look ahead at the added effects of ageing in most of the cases that have been judged or settled at the court door."

On principle, in jurisprudence, it is an issue whether presbyacusis should be an exculpatory or inculpatory factor. Under the Austrian state compensation system, the projected effect of presbyacusis was added to occupational hearing loss rather than subtracted from it (Raber, 1970). The principle rather than quantum is illustrated since the average payment in 1969 was equivalent to £11.[5] By analogy, alcohol is often considered an exculpatory factor for criminal acts but it can

[5] As in Germany, speech audiometry is also used. Austrian compensation philosophy is based on loss of earning capacity, but in practice this roughly equates with disability. The German attempt of correlate discrimination loss with $(3\times H500 + 2\times H1000 + H2000)\div 6$ had to be modified across the border to account for variations in accent (Röser, 1963; König, 1966; Surböck, 1971).

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just as easily be an inculpatory factor enhancing punishment meted out, especially for drunken driving.

The injustice of presbyacusis adjustment has been pointed out by the National Acoustic Laboratories in Australia. As in Britain, there is no clear judicial statement in France, Italy and West Germany. In the USA and Canada, presbyacusis is exculpatory as in most systems. The issue is predicated upon scientific data rather than legal considerations, minor changes being made in the light of new scientific evidence. In the USA, the balance of argument for and against a presbyacusis subtraction is equal but the legal issue is unresolved. British courts have given detailed and careful consideration but have all chosen to side-step the issue with enviable finesse. No case has been litigated solely on presbyacusis; no precedent has been set.

In claims against the State through the DHSS under the Social Security Act (Industrial Injuries Provisions), the presbyacusis correction of 0.5% for each year after the age of 65 has been abolished. This did not result from charitable motives. So few claimants satisfied the stringent 50 dB averaged threshold for compensation that the operation of the correction was not administratively worthwhile [6].

[6] Presbyacusis Correction is more accurately called "Presbyacusis Subtraction".

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