5 The Basis of Liability

The issue of hearing loss is considered here not in its familiar context as an audiological science but as one of the grounds for compensation. For a claimant to succeed in Court — cases not founded on Common Law are rarely the subject of litigation — he must not only show that his hearing loss results from his occupation but also that his employer is negligent.

The principle upon which the fault system is based is that an employer who causes injury or loss to his worker should pay for the harm so caused. The main objection to this principle is that compensation is made to depend not solely on the worker's loss, his need or the merits of his conduct, but on the largely fortuitous circumstance of whether he can blame anyone (Ison, 1967). In an action in law, justice looks to the interest of both sides. Although it may seem harsh that workers should have no ampler remedy, it will be unjust to the employers to hold them liable for more than the proven consequences of their default.

An employer has a duty to provide and maintain proper plant and machinery, a safe place of work and a proper system or method of working [1]. In *Berry v Stone Manganese and Marine Ltd* [1972], where the noise level from pneumatic hammers was so high as to hurt and endanger hearing, ear muffs should be provided and warning given of the danger of not wearing the muffs. In *McCafferty v Metropolitan Police District Receiver* [1977], a police officer was employed in gun testing. The room should have been sound-proofed and ear muffs provided [2]. There is a Common Law duty to protect an employee from foreseeable risk of danger to health. There is also a need to take competent advice on precautions.

There are two alternative ways for holding an employer liable for negligence. A worker can show that his employer is either in

(a) Breach of duty at Common Law, or in
(b) Breach of a Statutory Duty imposed by a relevant statute such as section 29 of the Factories Act 1961. In one sense, this is a derivative action: the employer being negligent in the observance of a statute which requires him to take a stipulated standard of care.

Breach of duty at Common Law is the basis of specific allegations such as:

(a) Failing to recognise the existence of high levels of noise and that such noise created a risk of irreversible damage to hearing.
(b) Failing to provide sufficient ear protection devices or to give the necessary advice and encouragement for the wearing of hearing protectors.
(c) Failing to investigate and take advice on the noise created.
(d) Failing to reduce the noise created.
(e) Failing to organise the layout and timing of the work so as to minimise the effect of noise [3]

When faced with such allegations, the widely accepted test is that set out by Mr

[1] *Wilsons and Clyde Coal Co v English* [1938] AC 57, *Qualcast (Wolverhampton) Ltd v Haynes* [1959] AC 743.

[2] The firearms were tested at Theobalds Road Police Station, near Great Ormond Street and the Royal Courts of Justice. Lord Justice Lawton said, "It came as a surprise to me, indeed a startling surprise, that between 1965 and 1973 the plaintiff's work was done in a room measuring 22 ft by 6 ft in a modern office block in the very centre of London."

[3] These points were pleaded in *Thompson v Smiths Shiprepairers.*

Justice Swanwick in *Stokes v GKN (Nuts and Bolts)* [1968] 1 WLR 1776:

"The overall test is still the conduct of the reasonable and prudent employer, taking positive thought for the safety of his workers in the light of what he knows or ought to know, ... and if he is found to have fallen below the standard to be properly expected of a reasonable employer in these respects, he is negligent.

An employer is obliged to exercise initiative in seeking out knowledge of facts which are not in themselves obvious. The employer must keep up to date but the courts must be slow to blame him for not ploughing a lone furrow."

The risk of noise to hearing has long been known and it could not have escaped attention that workers in noisy industries have suffered from deafness. It is important to distinguish between general recognition and the knowledge of particular employers conducting notoriously noisy trades.

A key issue in establishing negligence on the part of employers is the date at which he is deemed to have knowledge of noise as an industrial hazard. An employer is not liable for any injury caused before the deemed date of knowledge and liable for any injury caused subsequent to that date. The apportionment of damages between liable and non-liable periods becomes an important exercise. The watershed date was held to be in 1963 by Mr Justice Mustill in *Thompson v Smiths Shiprepairers* and in 1960 by Mr Justice Popplewell in the later case of *Kellett v British Rail Engineering Ltd,* 1984.

Breach of duty at Common Law and Breach of Statutory Duty are strange bedfellows. The relationship started when the Common Law was once willing to adopt the simple principle that the breach of duty created by statute was a tort in itself. The creation of civil liability as a result of a breach of a statutory duty is not automatic or conclusive. The situation is not clarified by judicial dicta attempting to expand on the principle.

There are two reconciling approaches to these divergent ramifications of breach of duty:

(a) A breach of statutory duty, in failing to satisfy the threshold of care stipulated by the statute itself, is a breach of duty at common law (i.e. the derivative theory), or

(b) They are differing torts, but the nature of an action for breach of statutory duty resembles an action in common law by coincidence of the same facts.

In practice, an action based on a breach of statutory duty raises much the same questions as those raised in actions in negligence at common law. Contravention of a statute automatically establishes a liability, but not necessarily a civil one to the injured party. Liability under statute is not generally dependent on the issue of negligence under the Common Law. The nexus is provided by the identity of factual issues raised. In the case of noise as a hazard, statute law is not specific and the same facts can be used under either head.