THE COUNTY COURT AT BIRMINGHAM

Claim No. A54YP868

Civil Justice Centre
The Priory Courts
33 Bull Street
Birmingham

Monday, 21st December 2015

Before:

DISTRICT JUDGE EMMA KELLY

Between:

MR CHRISTOPHER CHILDS

Claimant

-v-

BRASS & ALLOY PRESSINGS (DERITEND) LTD

First Defendant

Counsel for the Claimant: MR. VANDERPUMP

Counsel for the Defendant: MR. GREGORY

APPROVED JUDGMENT

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APPROVED JUDGMENT

1. THE DISTRICT JUDGE: This is a claim brought by the claimant Mr Childs, seeking damages for noise-induced hearing loss, alleged to be attributable to his employment with the first defendant, Brass and Alloy Pressings (Deritend) Ltd, during the period between 1969 and 1979.

BACKGROUND

2. The background to this matter is as follows: The claimant was born on 6th June 1953 and is now 62 years of age. In 1969, shortly after leaving school at the age of 15, he went to work for the first defendant as an apprentice electrician. He qualified as an electrician in around 1973 and continued to work for the first defendant as an electrician until 1979. His case is that, in breach of the duty owed by the first defendant at that time, he was exposed to noise throughout the ten-year period of his employment.

3. This claim was issued on 21st October 2014. The claim was issued against both the first defendant and a second defendant, Jones Brothers Pressings Limited. The claim against the second defendant related to a period of employment from 1979 to 1991. The claim against the second defendant has now settled.

4. The first defendant disputes liability. The defence asserts that the claim is statute-barred pursuant to the Limitation Act 1980. The first defendant puts the claimant to proof as to the working conditions and, whilst admitting that a common law duty applied throughout the applicable period of employment, denies any breach of duty. No admission is made in the defence to medical causation.

THE ISSUES

5. There are four live issues which I need to determine today:

   (i) limitation;

   (ii) Breach of duty, in particular the noise emission level and how that interacts with causation;

   (iii) Whether or not any injury caused to the claimant is *de minimis;*

   (iv) Quantum.

EVIDENCE

6. The only live evidence that I have heard has been that of the claimant. He relies on a witness statement dated 3 October 2015, which appears at page 52 of the bundle. In the course of that witness statement the claimant describes the nature of his employment with the first defendant throughout the relevant ten-year period. He describes how the first defendant was engaged in the manufacture of brass and alloy pressings; how he initially worked as an apprentice electrician from 1969 to 1973 and thereafter as a full electrician. He describes his working hours as being from 8 am until 4.30 pm, with a thirty minute lunch break, and two ten minute breaks taken in whichever area he was then working. He also says that he undertook four hours' overtime every Saturday morning and approximately five hours' further overtime during the week.

7. In his witness statement the claimant describes the nature of his role. Firstly as an apprentice electrician, during which time he was shadowing an electrician throughout the day to learn the trade to repair and maintain the machinery. Secondly as a qualified electrician when it was he who was actually carrying out the repairs and conducting general maintenance. He describes the first defendant's factory layout as including a main press shop, a smaller press shop and a tool room. The claimant describes spending 60 to 70% of his working week in the main press shop, that being the biggest area in the factory, housing all the big presses and being slightly smaller than a football pitch in length. He describes the main press shop as having twenty large heavy duty power presses along two aisles of ten presses. He says the presses would have all been operating in tandem, making constant banging noises. He reports that he worked no more than three to four feet away from a press machine with the noise being such that he had to use hand signals or shout in order to communicate with colleagues no more than two or three feet away. He also describes an area within the main press shop where the grinders were situated and another section where saws were located.

8. He then describes the tool room. He estimates in his witness statement that he spent about 25% of his working week in the tool room repairing drills or lathes. He describes the machinery in the tool room as also generating excessive noise. He then goes on to deal with the smaller press shop where he said there were four power press machines, the machines being no more than three to four feet apart, and where he would spend approximately 5 to 10% of the week.

9. Towards the end of the claimant's statement, he deals with the issue of limitation. He states that he started to notice a gradual problem with his hearing, which has become more prominent over the last two to three years. He states that he had a hearing test in October 2011 when he was advised that he was suffering from some hearing loss.

10. The claimant was cross-examined. He states that his role whilst an apprentice was exactly the same, in terms of exposure to noise, as it was when he was a qualified electrician. He further explains that, contrary to the description given in his witness statement of working with other electricians, he was the only apprentice to one qualified electrician. When he became qualified, he was the only electrician working in the premises at the time. He was asked about whether or not the electricians had their own small workshop, away from the three other main areas of the factory premises described in his witness statement. He accepts that there was a small workshop for electricians and he describes using it very occasionally. When asked to comment on the frequency with which he would use the workshop he says:

> "Two to three to four times a month, probably going to the workshop for half an hour at most."

Otherwise, he says, his time was spent between the main press room, the smaller press room and the tool rooms.

11. He was asked questions about why his witness statement made no reference to having had to shout, when an apprentice, to communicate with the qualified electrician who was teaching him his trade throughout the initial four-year period. He maintains that he did have to shout during that period of time, as well as when he was a qualified electrician. The claimant accepts that he undertook some other back office work, such as changing light bulbs in the office. He was asked questions about his estimates as to the percentage of time he had spent in the various different sections of the factory. The

claimant accepts his figures were his best guess and that there had been a significant period of time between his employment and today.

12. The claimant states that he does not wear hearing aids at the moment and that he had no difficulty in understanding the questioning that was being put to him in court. He did, however, describe that he now finds that he has to have the television on a slightly higher volume than previously. He says that he had noticed a problem before October 2012, but only in the context of the odd word being difficult to understand, which he initially put down to age.

13. The claimant accepts that his witness statement incorrectly referred to "ear plugs" being provided rather than ear defenders. The claimant explains that he had overlooked the error in his witness statement, despite having picked up another factual error which he corrected at the start of his evidence. He accepts that he does not know when in the future he will require hearing aids, but at the moment he did not.

14. I also have before me comprises the written medical evidence from Mr Manjaly. Mr Manjaly was instructed by the claimant. He is a consultant ENT surgeon and has produced a report dated 9th November 2014. There has been no oral medical evidence and the defendant does not have its own expert. Mr Manjaly's report states that audiometry was carried out on 9th November 2014, which revealed bilateral high frequency deafness, with a bulge at high frequencies, characteristic of noise-induced hearing loss. He concludes that the average hearing loss over 1, 2 and 3 kilohertz is 15.32 decibels. Of that, he concludes that age-associated loss amounts to 13.3 decibels and noise-induced hearing loss is 2.02 decibels. At paragraph 15 of his report, under the heading "Treatment", Mr Manjaly concludes:

> "Mr Childs does not require hearing aids at present. However, he will benefit from the fitting of bilateral hearing aids in the future. In my opinion, the client's need for hearing aids has been accelerated by five years as a result of the exposure to loud noise. The cost of private hearing aids would be in the region of £5,000 and they would require replacement every five years."

At paragraph 16 of his report Mr Manjaly records under the heading "Conclusion":

> "I can confirm that Mr Childs has noise-induced hearing loss of moderate severity. This will have a moderate effect on his ability to enjoy social, domestic and recreational activities."

Neither party has put written questions to Mr Manjaly.

15. I also have before me the single joint expert engineering report of Mr Watts, dated 4th November 2015. At paragraph 4.2.1 of the report, Mr Watts refers to documents mentioned in the pleadings in this case. Firstly, a booklet published in 1963 by the Ministry of Labour, entitled "Noise and the Worker." Secondly a revised version of the same, published in 1971, which specified 90 decibels as the level for action when averaged over a shift of eight hours. Mr Watts also refers to the Department of Employment's 1972 "Code of Practice for Reducing Exposure of Employed Persons to Noise". The code generally recommended that sound should be controlled, but if the precautions are insufficient, then exposure to noise on a time-related basis was permitted. The code stated that "for a continuous eight-hour working day, a reasonably steady sound pressure level of 90 dBA should not be exceeded."

16. Mr Watts, at paragraph 4.3.4, gives information as to typical minimum noise levels when no steps have been taken to reduce noise from a variety of different types of machinery. Some of the machines are relevant to those described by the claimant on the facts of this case. Mr Watts concludes, at paragraph 4.6.1, that he considers it likely that, during the period that the claimant was employed by the first defendant, the claimant's typical daily noise exposure whilst working in the press shops would have exceeded the action levels set by the two publications I referred to earlier. He does not however conclude that the action level would have been exceeded by the work in the tool room. At paragraph 4.7.1 of his report, Mr. Watts comments on the Noise Immission Level, being a measure of an individual's lifetime exposure to noise, and relevant in the context of the Coles guidelines. Mr Watts' concludes that, subject to the evidence given by the claimant and if it is assumed that the claimant was exposed to noise of 90 dBA for 65% of his working time with the two defendants, the claimant will have been exposed to a Noise Immission Level of 101.6 dBA.

17. The claimant put various Part 35 questions to Mr Watts. The questions were designed to challenge the assertion made by Mr Watts that the claimant had only spent 65% of his time exposed to noise levels in breach of duty, as opposed to a slightly higher percentage of time.

18. I have heard no factual lay evidence from the first defendant. The first defendant company is no longer trading and, given the passage of time, the first defendant finds itself in a position whereby it has no factual evidence to call.

Issue 1: Limitation

19. The claimant's case is that this case has been issued within time from the relevant date of knowledge. By Section 11(4)(b) of the Limitation Act 1980 the claimant has a period of three years from the date of knowledge of the injury. The claim was issued on 21st October 2014. Therefore, a three-year period dates back to 21st October 2011.

20. Section 14(1) of the Limitation Act 1980 deals with references to a person's date of knowledge. It states that

> "…references to a person's date of knowledge are references to the date on which he first had knowledge of the following facts:
>
> (a) that the injury in question was significant;
>
> (b) that the injury was attributable, in whole or in part, to the act or omission which is alleged to constitute negligence, nuisance or breach of duty;
>
> (c) the identity of the defendant; and
>
> (d) if it is alleged that the act or omission was that of a person other than the defendant, the identity of that person…"

21. The claimant's evidence, in his witness statement dated 3rd October 2015, is that he noticed the problem gradually over the last two to three years. He accepted in cross-examination that he had noticed his hearing loss before October 2012 - ie, three years before the signing of the statement. At that time he said it was only an odd word and he thought it was age-related. In re-examination the claimant was taken to two letters from

the claimant's medical records. At page 172 of the bundle is a letter dated 15th September 2011 i.e. dated a month prior to the start of a three-year period leading up to the issue date of this claim. It is a letter from a consultant neurologist to the claimant's GP concerning problems the claimant had been having at that time in relation to balance disturbances. In that letter the consultant neurologist records that the claimant denied hearing loss, tinnitus or neck or back pain.

22. There is a letter at page 252 of the bundle, dated 28th October 2011, from a Dr. Blourness, Staff Grade in ENT, to the claimant's GP. It appears that the claimant attended a clinic on 26th October 2011. The letter records that there were no associated ear symptoms, there was no hearing loss but audiometry revealed bilateral high frequency hearing loss, slightly worse on the left. Based on those contemporaneous letters, in my judgment, the claimant was not complaining of hearing loss throughout September 2011 or prior to the audiometry being carried out in October 2011. I accept that he did not appreciate in September 2011 that he was suffering from hearing loss, let alone that it was attributable to his employment with the first defendant. In my judgment, at its worst for the claimant, his date of knowledge would stem from the results of audiometry and subsequent advice following his assessment in October 2011. His clinic attendance was not until 26th October 2011 and the letter is dated 28th October 2011. On any view, even if his date of knowledge were the date of his clinic attendance, the claim was issued within three years of that date. I am satisfied that this is a claim which is brought within time and, therefore, I do not propose to go on to consider the application of Section 33.

Issue 2: Breach of duty

23. I turn to the issue of breach of duty. The onus is on the claimant to prove his case and to do that he firstly has to establish the level of noise exposure. Thereafter, Mr Watts's conclusion is referable to exposure at or above 90 dBA.

24. The first defendant quite properly makes the point that Mr Watts's conclusion is wholly dependent on the factual account the claimant gave to Mr Watts. Mr Watts's report, at paragraph 4.7.1, concludes that the Noise Immission Level, on the assumption that the claimant was exposed to noise at 90 dBA for 65% of his working time, is 101.6 dBA. The first defendant points out that the figure of 101.6 dBA is only slightly in excess of the level of 100 dBA. It is submitted this is significant in the context of the guidelines on the diagnosis of noise-induced hearing loss for medico-legal purposes by Coles and others. Those are the guidelines that Mr Manjaly uses when he assesses measurable causation. If, therefore, the percentage of time alters even slightly, one can easily foresee that the exposure figure of 101.6 dBA drops below the 100 dBA Coles' threshold.

25. I have to make factual findings as to precisely what exposure the claimant was subjected to during the course of his employment with the first defendant. What do I make of the claimant's factual evidence? Generally, I found the claimant to be a credible witness, a down to earth gentleman who was trying his best to assist the court and not overstate his position. However, I have to consider the effect of the passage of many years on his ability to remember accurately precisely what he was doing on a day in, day out basis many decades ago. The first defendant points to the additional time that the claimant would have spent working outside the three noisy areas identified in the claimant's

witness statement. In particular, the first defendant has established that the claimant spent some time in an electricians' workshop and also in other back office areas. However, the evidence of the claimant was that he was only very occasionally in the electricians' workshop. He described his use of the workshop as "two, three, four times a month and only half an hour at a time". Even taking the most frequent figure cited by the claimant of once per week, that would be a tiny percentage of around 2.5% of each working week. Taking an average use of three occasions per month, the percentage would be slightly less. In relation to the work in the other back office areas, whilst I accept that that would account for some percentage of his time, on the evidence I have heard I am satisfied that it would have been a tiny percentage. Certainly no more than the time spent in the electrical workshop. By contrast, I accept that there is force in the claimant's submission that Mr. Watts' adoption of an average figure of 65% of the claimant's time being spend in areas where the noise level exceeded 90 dBA is, if anything, an under-estimate. The evidence I have before me from the claimant is that he spent 60 to 70% of his time in the main press shop. I am satisfied on the evidence of Mr Watts that the main press shop would have resulted in him being exposed to a level of 90 dBA. In addition to that I have evidence from the claimant that he spent 5 to 10% of his time in the small press shop area, again an area with a similar level of noise. Taking those two figures together gives a range of 65 to 80% or, as the claimant's counsel puts it, an average of 72.5% of the time spent in those noisy environments. The figure of 65% adopted by Mr Watts in his report is significantly below the average figure of 72.5%. Even taking account of the evidence the claimant has given today as to the small percentage of amount of time he spent in the electricians' workshop and back office, in my judgment, Mr Watts, if anything, under-estimates the amount of time exposed to 90 dBA. Therefore I am satisfied, on the evidence that the claimant gives, that Mr Watts' conclusion as to exposure at a level of 101.6 dBA is, on the balance of probabilities, the correct level of exposure. In turn this means that the claimant establishes both breach of duty and the necessary medical causation.

ISSUE 3: De Minimus

26. I move on to the issue as to *de minimis*. The first defendant says that the noise-induced hearing loss of 2.02 decibels in this case is *de minimis*. The parties are agreed that the test I have to apply is that identified in *Johnston & NEI International Combustion Limited [2007] UKHL 39* as to whether or not the claimant is appreciably worse off.

27. I have been taken to a number of decisions dealing with the issue of *de minimis*. All those decisions are by Circuit Judges at County Court level and not binding on me today. I have however taken the time to read the judgments in each of the three cases referred to and to understand the approach taken by the Circuit Judges in each of those cases.

28. The first defendant refers to *Holloway v Tyne Thames Technology Limited*, an unreported decision of His Honour Judge Freedman on 7th May 2015. In that case, Judge Freedman had the benefit of hearing medical evidence from two doctors, one on behalf of the claimant and one on behalf of the defendant. The evidence before me today is limited to the medical report from Mr Manjaly in its written form, without Mr Manjaly being here to be subject to cross-examination. In paragraph 32 of the judgment in *Holloway*, Judge Freedman stated that:

> "even if I were to find that over one, two and three kHz decibel loss was 3 …whilst I would find it would give rise to noticeable loss, I would not be satisfied there was appreciable loss. In coming to that view I accept what Professor Lutman said to me that a 2 decibel loss would not produce a noticeable loss, whilst a 3 decibel loss might, subject to individual susceptibility but it would not have any real impact."

29. The claimant also refers to two unreported decisions. Firstly, the decision of His Honour Judge Gosnell in *Hinchliffe v Six Continents Limited & Cadbury UK Limited* dated 12th May 2015. In that case what is said as to *de minimis* is *obiter*. The Judge identified the legal test I have referred to in *Johnston & NEI International Combustion Limited*. At paragraph 22 of the judgment he noted that both experts (again in a case in which the Judge had the benefit of hearing live medical evidence) appeared to agree that the claimant's hearing loss over one to three kHz frequencies on the right side alone could be measured at 1.7 decibels. Both agreed that if this were the only loss caused by noise it would not be noticeable to the claimant, so it could not be said that the claimant was appreciably worse off.

30. I have also considered the unreported decision of His Honour Judge Coe QC in *Briggs v RHM Frozen Foods Limited*, dated 30th July 2015. The issue of *de minimis* was addressed. There was medical evidence before the Judge that the difficulties faced by the claimant included the future need for hearing aids sooner than she otherwise would have required. On the facts of that case, the Judge concluded that the damage was more than *de minimis*.

31. It is apparent from those three cases that the conclusion as to whether or not the loss is *de minimis* is very fact specific to an individual case. Mr Manjaly's evidence is the only medical evidence I have before me. At paragraph 16 of his report he confirms that the claimant has

> "…noise-induced hearing loss of moderate severity. This will have a moderate effect on his ability to enjoy social, domestic and recreational activities."

The first defendant submits that the above conclusion of Mr Manjaly cannot be accepted. The first defendant refers to the Judicial College Guidelines for Noise Induced Hearing Loss. The categorisation starts with slight noise-induced hearing loss, increasing to mild and then raising to moderate. The claimant's own assessment, as referred to in the submissions on quantum, make it evident that the claimant accepts that this is not a case of moderate noise-induced hearing loss. Whilst Mr Manjaly may not be familiar with the Judicial College Guidelines, I accept the submission made by the first defendant that, on any understanding of the word "moderate" in the English language, this is not a case of moderate, let alone moderately severe noise-induced hearing loss. However, the test I have to apply is whether or not the claimant is appreciably worse off.

32. Mr Manjaly's view, at paragraph 15 of his report, is that the claimant does not require hearing aids at present, but that he will require hearing aids five years earlier than he otherwise would have done, as a result of the exposure to loud noise. The conclusion as to a five-year acceleration period remains unchallenged by the defendant. The defendant chose not to ask questions of Mr Manjaly, nor, as I understand it, to seek permission to rely on its own medical evidence. On the evidence that I have before me, I have unchallenged evidence as to Mr Manjaly's conclusion that there is a five-year

acceleration as to the need for hearing aids. Doing the best I can on the evidence before me, it seems to me that there is no evidence on which I can properly reject the conclusion of Mr Manjaly as to the five-year acceleration period. Accepting, as I do, that the claimant's need for hearing aids has been accelerated by five years, it does seem to me that that the claimant is appreciably worse off. If one needs a hearing aid for a period as long as five years prior to that at which one otherwise would have done, I take the view that that amounts to him being appreciably worse off. As seen in *Briggs v RHM Frozen Foods Limited* , where there was also a need for hearing aids sooner than otherwise would have been the case, whilst the attributable hearing loss in the claimant's case is small, I do not accept the argument that it is *de minimis*.

ISSUE 4: Quantum

33. I turn to the issue of quantum. The parties do not agree the quantum of general damages appropriate on a finding of liability. Both parties agree that it is a case that fall within Chapter 5(B)(d)(v) of the Judicial College Guidelines being slight noise-induced hearing loss without tinnitus. The bracket is for awards up to £5,860. The claimant submits that the gross quantification should be in the region of £5,000; the first defendant submits the appropriate figure is in the region of £3,000. I have to deal with a case in which the noise-induced hearing loss is very slight. There is, however, acceleration by five years in relation to the need to use hearing aids. There will be a loss of amenity impact throughout that five-year period, associated with the inconvenience of having to use those hearing aids. It seems to me that £3,000 under-values the case slightly, but I do not accept that a quantification of £5,000 is appropriate. This is a very low level case which falls towards the very bottom end of the guidelines. In my judgment, a figure of £4,000 on a gross basis is the appropriate award for general damages. That needs to be subject to the 45% apportionment, to reflect the period of time for which the first defendant is not liable.

34. I turn to the issue of special damages. There is a schedule of special damages which seeks damages in relation to hearing aids. The claimant accepts that the schedule, in the form in which it appears in the bundle, does not accurately reflect the position. There is a claim for the cost of hearing aids and a claim for two sets of replacement hearing aids. It however accepted today that, when one considers the average life span of a hearing aid and a causation period limited to five years' acceleration, only one set of bilateral hearing aids would be required. The cost of one set is put at £1,500. In addition to that, there is a claim for the cost of replacement batteries at £50 per annum over the five-year period. The difficulty I have in quantifying this head of the claim is that the medical evidence of Mr Manjaly does not state at what point in the future the claimant will require hearing aids. As such, it is impossible to quantify with accuracy the discount which needs to be applied to reflect the accelerated receipt of the damages. The first defendant quite properly points out that the burden is on the claimant to prove his claim. I do not know precisely at what point in time the hearing aids will be required. The claimant suggests I adopt a conservative approach to ensure that the claimant is not over-compensated and assess the sum at £1,000. In my judgment, given that the burden is on the claimant to evidence this side, I propose to err very strongly on the side of caution. I do not want the claimant to be over-compensated in this respect and, in so far as my approach under-quantifies the claimant, the burden was on the claimant to go back to Mr Manjaly to identify the date at which aids would be required. I propose to apply a 50% discount to the cost of a pair of bilateral hearing aids. That may well under-compensate the claimant, but I cannot be confident, on the balance of

probabilities, that any higher figure would be appropriate in the absence of a precise date. I propose to discount the £1,500 by 50% and likewise with the cost of the batteries. Those figures need to be apportioned as to 45% to the first defendant. I invite counsel to carry out the necessary arithmetic.

(Pause for calculations.)

MR. VANDER PUMP: Madam, I have a figure, including interest on general damages, of £2,219.87, to which Mr Gregory nodded when I said it.

THE DISTRICT JUDGE: Mr Gregory, do you agree with that?

MR. GREGORY: Yes, I do - £2,219.87.
