

4 Causation

Unlike the case with other occupational diseases, it is relatively easy to discover the cause of the deafness as the signature on the audiogram left by noise is quite distinct. Whether the damage is work related or from some other sources, such as noisy pastimes like rifle shooting, is in the province of other medical evidence such as clinical history taking and its legal equivalent which is cross-examination under oath.

In *McCafferty v Metropolitan Police District Receiver* [1977], Lord Justice Megaw referred to an audiogram report which “shows a perceptible deafness in each ear with a very marked loss, particularly at the 4000 frequency, which is in keeping with a nerve deafness resulting from acoustic trauma”[1]. This was a factual issue before the Judge, who found for the claimant at first instance. On the balance of probability, it was found to be caused by exposure to firearms explosions rather than to the effects of presbycusis or to cervical spondylosis also suffered by the claimant.

The Courts will assist the claimant to some extent, for in *Gardiner v Motherwell Machinery and Scrap Co Ltd* [1961], where the claimant contracted dermatitis, the House of Lords considered that the circumstances of the case created a presumption that the illness was work related, even though expert witnesses suggested that the claimant suffered from a kind of dermatitis which could not have been caused by his work [2]. The generous attitude in this aspect of causation may be of little assistance to the worker who has also to establish that his illness is actually induced by the employer’s negligence (Barrett, 1981).

For the purpose of medical evidence, there is a normal request for the claimant to undergo examination by a doctor nominated by the employer. Where the claimant refuses examination, the employer may obtain a stay of the action because the refusal prevents the just determination of the cause. The claimant can only refuse to be examined if he can satisfy the court that the request for the examination is unreasonable [3].

Prescott v Bulldog Tools Ltd [1981] 3AER 869 is a complex ‘borderline’ case. The employee claimed that he developed noise-induced deafness with maximal loss in the high tone frequencies and that he had tinnitus and episodes of vertigo. Three initial reports by the employee’s own doctors (his GP, Mr Devine and Prof Coles) revealed that the disorders in the right ear were probably not noise-induced. Prof Coles raised the possibility of an acoustic neuroma.

The employer’s solicitors then arranged four more examinations, two by ENT consultants (Mr Farrington and Mr Clarke), one by Prof Atherley, consultant physician in occupational medicine and one by Dr Evans, a neurologist.

The employers then wanted the employee to be examined for a fifth time by Prof Hinchcliffe. They said that the same factors affecting the right ear might similarly be the cause in the disputed left side. At the Queen’s Bench Division of the High Court, Mr Justice Webster held:

- (1) It was necessary for the court to balance a plaintiff’s right to personal liberty against a defendant’s right to defend

[1] [1977] 2 AER 756, Court of Appeal.

[2] [1961] 3 AER, 831.

[3] *Edmeades v Thames Board Mills Ltd* [1969] 2 AER 127.

himself in litigation as he thought fit, and there was no reason in principle why one party should be regarded as more important than the other.

- (2) A distinction had to be made between examinations involving (a) only an invasion of privacy (b) some technical assault such as palpation (c) a substantial assault without discomfort or risk (d) discomfort and risk and (e) risk of injury or risk to health.
- (3) In the circumstances, the employer's request for (i) electrocochleography involving piercing the eardrum with a probe, (ii) polytomography involving serial X-rays and radiation hazard and (iii) caloric tests involving irrigating the ears with hot and cold water to induce dizziness, were all reasonable. However, the reasonableness of the claimant's objections to (i) electrocochleography and (ii) polytomography outweighed the employer's requests for the two tests. The caloric test was allowed.

Prescott v Bulldog Tools laid down principles on the reasonableness of medical examinations. The particular facts were very

unusual but it underscored the difficulty where a decision on complex facts is forced on the judge. The number of expert witnesses is now limited to two for each party. In practice, it is not difficult to find medical opinion to support conclusions of noise-induced hearing loss since virtually all types of hearing pathology are made worse by noise. However, the medical referees for Mr James Prescott had quite reasonably concluded otherwise for one ear on various grounds.

In the more conventional circumstances of *Bird v Cadbury Schweppes Overseas Ltd*, 1981, Mr Justice Mais ordered an action to be stayed unless the claimant submitted to caloric testing and polytomography. Liberty to apply for electrocochleography was provided for.

The contribution of hearing impairment due to the natural ageing process merits separate legal consideration but a line must be drawn to dissociate pure disease entities like Menière's disease, chronic otitis media and otosclerosis [4]. Unmeritorious cases are rarely an issue before the courts. With thousands of cases pending settlement to draw from, unreliable claimants with weak cases tend to be rejected or deferred for litigation by medical experts or legal advisors [5].

[4] In *Slater v Ministry of Defence*, 25th November 1970, Stafford Assizes, Mr Justice Bridge attributed hearing loss to chronic otitis media on the medical evidence. In *Harbach v Garringtons Ltd*, 16th June, 1971, Birmingham Assizes, Sir Roger Ormrod found that otosclerosis which responded to stapedectomy on one side was also the cause on the disputed side.

[5] On the detection of malingerers, see R.R.A. Coles on "Non-organic hearing loss", in *Otology*, (Gibb, A. and Smith M. eds.) Butterworths international medical reviews 1982. The use of private detectives is legitimate. The Medical Defence Union reduced damages when a Singapore man claiming radial nerve palsy after an injection was seen lifting vegetables into his van (Annual Report, 1985). Dr Coles has related the case of a Southampton man claiming severe dizziness after head injury. The defence produced a photograph of him riding a bicycle whilst carrying a 20-foot ladder on his shoulder. The judge was not very impressed by the man's complaint of disabling dizziness.