

Hearing problems



Philip de Berry and Philip Jackson assess the difficulty in establishing medical causation in noise induced hearing loss

For some time now, defendants have focused on medical causation in noise induced hearing loss (NIHL) cases. Breach of duty is often difficult for defendants to run, given the lapse of time and, one suspects, due to the failure of industry to adequately get to grips with the risk of noise exposure at work. Meanwhile, limitation has not proved the saviour that defendants had hoped it might be.

Medical causation is perhaps the most fertile ground for defendants. The problem that both sides face with this, however, is that medical causation has become, to a significant extent, rather formulaic. The clinical judgment of the expert takes a back seat to the Coles, Lutman and Buffin Guidelines of 2000 ('the guidelines').

The guidelines are aimed at a medico-legal diagnosis on the balance of probabilities. The paper is peer reviewed, and widely used by almost all experts. It requires three main things:

1. A high frequency hearing impairment, such that the hearing threshold level (HTL) is at least 10dB greater at 3-6kHz than at 1-2kHz. A 7dB difference is adequate if an average is taken across two or more tests;
2. A noise imission level (NIL) of at least 100dB(A);
3. A notch or bulge of at least 10dB. The size of the notch or bulge may

be as little as 7dB where an average is taken. A 20dB notch or bulge is required where the NIL is less than a 100 but at least 90dB(A).

The guidelines are grounded in statistical data. The first and third requirements involve relatively straightforward formulaic interpretations of the audiometric data. The second requirement is engineering evidence. Whilst they leave room for clinical judgment and are not intended to be applied too rigidly, the reality is that the guidelines provide a forceful steer in most cases.

The court's approach

This article examines the use of the guidelines in the unreported case of *Aldred v Cortaulds Northern Textiles Limited*, Liverpool County Court, 2012. The claimant sought damages for NIHL arising from her employment as a ring spinner in the textiles industry. The engineering evidence suggested an NIL of about 100dB(A). HHJ Wood was faced with a choice between two experts; Mr Zeitoun, who applied the guidelines, and Mr Parker who rejected the guidelines in several respects.

The evidence lasted for four days, took in areas of dispute too numerous to mention, and involved a trawl through historical and current research papers. Numerous audiograms had been obtained over a 15-year period, with wildly differing results. The defendant's focus was on a work-related audiogram shortly after the exposure period, which showed very significant losses in one ear, but arguably normal HTLs in the better ear.

Mr Zeitoun identified the need for Cortical Evoked Response

Audiometry (CERA) to try and resolve the inconsistencies between the audiometric data. This proved to be a significant step, as the further testing revealed that the use of headphones was causing the claimant's narrow ear canals to collapse, creating an artificial conductive hearing loss. Insert ear phones revealed the claimant's true hearing thresholds, which were confirmed by CERA and standard audiometry conducted by Mr O'Driscoll.

Ultimately, the judge accepted Mr Zeitoun's approach, which was to disregard all previous audiograms as unreliable. However, the confirmed true HTLs only allowed for a diagnosis of NIHL if a bulge of 7dB was accepted in one ear, and/or the guidelines approach to asymmetrical cases was strictly applied.

Averaging

The guidelines state: 'In borderline cases, an average of all the audiograms available and acceptable for averaging should be used in assessing the evidence.'

The further testing by Mr O'Driscoll involved two pure tone audiograms, separated by about three months. The results were consistent within the margin of audiometric error. In the circumstances, Mr Zeitoun concluded that it was appropriate to average the results, and apply the lower threshold of 7dB. Mr Parker disagreed, on the grounds that he felt all audiograms should stand or fall on their own. He claimed that the guidelines only supported averaging where several sets of audiometric data were obtained at the same sitting on the same day. HHJ Wood concluded:

It is both logical and sensible that the guidelines should be interpreted to allow, within reason, the use of audiograms taken at different times, and not within the same test sitting.

Asymmetry

Supplementing the general principles are specific examples of how to approach unusual cases, particularly asymmetrical cases. Note 11 of the guidelines provides the following four different scenarios:

1. If one ear meets the 10dB notch/bulge requirement and the other ear also shows a notch or bulge but it is smaller than the 10dB required, then the probability of NIHL is still high
2. If one ear is markedly better at high frequencies and shows a significant notch or bulge, but the worse ear shows little or no trace of such, then there is still a more likely than not probability of NIHL
3. If there is not much difference between two ears at high frequencies but - without apparent explanation - only one ear shows a significant notch or bulge and the other shows little or no trace of one, then such cases should be regarded as very

borderline and be decided on the strength of the other evidence

4. Finally, if only the worse ear shows a significant notch or bulge at high frequencies, and there is little or no trace of NIHL in the better ear, then there is only a possibility of NIHL, not a probability

Mr Zeitoun applied Note 11. Mr Parker stated he would not be prepared to diagnose NIHL on scenarios 1 or 3. The problem with that approach was that it was not rationalised adequately, if at all. In the circumstances, the judge arguably had little option but to accept the approach of Mr Zeitoun, and apply the guidelines.

The claimant, who had modest hearing losses, suffered a 9.2dB hearing loss averaged across 1-3kHz, attributable to noise. In the absence of any significant tinnitus, the Court awarded £4,250 general damages before apportionment. Reference was made to the up-to-date JSB Guidelines.

Departing from guidelines

The use of CERA to resolve inconsistent audiometric data

is worthy of note. However, it is suggested the main conclusions are these:

- Audiograms can be averaged where the results are broadly consistent, and the gap in time is not so great that age may have played a significant part in deteriorating HTLs. The more consistent the results and the testing circumstances, the more suitable the results are for averaging;
- Any attempt to deviate significantly from the guidelines needs to be carefully planned, fully explained and justified.

The guidelines have once again proved to be difficult to challenge. This fact is potentially a cause for complaint for both sides, depending on the case. There are areas in which the guidelines are ripe for reform, but the size of that challenge should not be underestimated.

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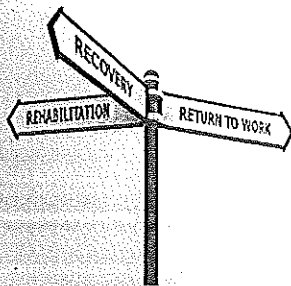


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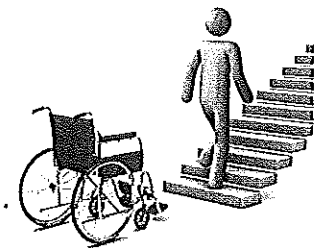
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