Beale v Tomlinson (t/a Multi-Fab Construction Ltd)


No Substantial Judicial Treatment

Court
County Court (Worcester)

2021 WL 09593411

IN THE COUNTY COURT IN WORCESTER

Case No: F34YM283

Worcester Combined Court Centre

The Shirehall

Foregate Street

Worcester

WR1 1EQ

Friday, 10th December 2021

Before:

HIS HONOUR JUDGE TINDAL

B E T W E E N:

MR PAUL BEALE

and

MR SP TOMLINSON T/A MULTI-FAB CONSTRUCTION LIMITED AND MULTI-FAB CONSTRUCTION LIMITED

MR R GREGORY appeared on behalf of the Claimant

MR H **VANDERPUMP** appeared on behalf of the Defendants

JUDGMENT

(Approved)

HHJ TINDAL:

a) Introduction

1. This is a claim for personal injury, namely noise-induced hearing loss. It is brought by the Claimant, Mr Paul Beale, against the remaining Defendants, Mr Tomlinson, trading as Multi-Fab Construction and the Multi-Fab Construction Limited (the alter ego of Mr Tomlinson reflecting his decision in 1999 to set up a company and trade through it). The claim started life against four Defendants, the two that remain and one earlier and one later employer against whom the claims have now been settled.

2. Many things are disputed in this case, but it entirely clear that the Claimant has sustained noise-induced hearing loss. That is confirmed by a medical report by Mr Tapponi, a consultant otolaryngologist ENT surgeon. Moreover, that noise#induced hearing loss is significant. Mr Tapponi's conclusion in his report in November 2017 was that the Claimant, then 46, had suffered total hearing loss of some 40 dB of which the noise#induced hearing loss represented 24.4 dB. On the different LCB basis that loss is 17.63 decibels without tinnitus. That is a significant figure for noise-induced hearing loss. However, the Defendant contends there were various causes of it.

3. The Claimant was a keen motorcyclist between 1987 to 2000, and again from 2010 (as seen in a photo in 2020). Nevertheless, the Claimant's position in relation to motorcycling is that he has always from the start worn ear plugs to protect him, partly from the noise of the bike, but also from the impact and the noise of the wind at relatively high speeds.

4. Moreover, since about the early 2000s, the Claimant has been a keen user of a shotgun. The consultant engineer, Mr Chanelis, agreed that a shotgun might produce a significant sound impact, but would not pose a significant risk of hearing loss if ear protection were worn. The Claimant says that he always has worn ear protection and as a consequence he considers shooting is not 'a noisy activity'.

5. The third and most relevant factor is the noise to which the Claimant certainly says he has been exposed at work over a number of years by a number of different employers, which is the reason why this case was originally issued against four of them.

a. Between 1988 and 1995 or so, the Claimant was employed by Phillips Structures Limited as a steel welder and fabricator in a very noisy environment with no hearing protection, and they have settled his claim against them. It is notable that in 1993 he asked for a hearing test on the basis that he thought that there was a piece of steel lodged in his ear. It turned out that there was not. A letter at that point said that he was worried about his poor hearing in the right ear. It was noted that the hearing was in the normal range, although there was some neurosensory impact in relation to his hearing at that stage. The Claimant says he was never told the result of that test and just assumed his hearing was fine – it was 'something and nothing'.

b. Between 1995 and 2000 in various capacities he worked for the second and third Defendants. I will come back to that period.

c. Between 2000 and 2002, he worked for Frank Dell Limited, again in a noisy environment. He had ear plugs, but they were not properly enforced. The claim against Frank Dell has also been settled.

d. From about 2005 onwards for over the succeeding few years, he worked for himself under his own companies in similar noisy roles, although he maintains he always wore hearing protection.

6. Both Counsels' Skeleton Arguments addressed Limitation. The Defendant's argument was that the Claimant's hearing loss had been established by the early 2000s and, therefore, that it was far too late to extend time to a claim which had only been issued in early 2020.

7. The Claimant's riposte was that he only noticed significant hearing loss in 2016 and having sought advice, he was referred to Mr Tapponi in 2017. Noise-induced hearing loss was confirmed then and the claim was then issued just within three years of that confirmation. Alternatively, it was said there were ample grounds to extend time because there was no significant prejudice to the Defendant, partly because the Defendant had been on notice of the claim in 2018, which was before the Third Defendant company was wound up in 2019. In any event, there had never been noise surveys kept at any stage, so none were destroyed.

8. Having heard the evidence of both witnesses in this case, the Claimant and Mr Tomlinson, it was obvious that Mr Tomlinson had been able to recall in some detail what the system was, had never kept noise surveys and had not kept documents when notified of the claim. He was clearly not prejudiced by the delay and limitation as an issue falls away.

b) The Witnesses

9. I turn to that evidence given by the witnesses. At the start of this trial today, myself, Mr Gregory for the Claimant and Mr **Vanderpump** for the Defendant, all agreed that this was, on the face of it, a relatively straightforward case where the factual issue between the Claimant on one hand and Mr Tomlinson on behalf of himself and his company on the other, was whether the Claimant had access to any hearing protection at all. The Claimant says he did not. Mr Tomlinson said he did. Therefore, the factual issue of hearing protection was prior to trial apparently fundamental to the Claimant's own case succeeding.

10. As I have noted, whilst we are talking here about events between 20 and 25 years ago, Mr Tomlinson's recollection was relatively clear. However, under excellent cross-examination by Mr Gregory, Mr Tomlinson made a number of concessions. He said even in the early 90s when the Noise at Work Regulations 1989 were already in force, he considered there was no obligation to undertake any specific 'noise survey' in the context of a small business with only six people working at the time within one relatively small tennis court sized area in a shed. That is now accepted on his behalf to be wrong.

11. In addition, Mr Tomlinson had to accept that at times there was loud noise. The system he described was essentially that where there was going to be noisy activities undertaken that the person should let his colleagues know and that they would insert hearing protection, which would depend would either be ear muffs (or ear bins, as they were called at the time) or ear plugs if the people were using welding equipment which would not fit over the welding mask, or even occasionally just putting their fingers in their ears. Mr Tomlinson estimated that ear protection was only required only about a third of the time. Therefore, he conceded that ear protection was not worn all of the time.

12. Whilst Mr Gregory submitted this undermined the reliability of Mr Tomlinson, in my judgment such a substantial concession goes to demonstrating his basic honesty and candour. Indeed, Mr **Vanderpump** accepted that Mr Tomlinson had effectively conceded breach of duty. I found Mr Tomlinson was clearly giving evidence in order to honestly and in order to assist me, even if it must have been clear to him that he was not always assisting his own case. For those reasons, and others I come to, I accept Mr Tomlinson's evidence.

13. By contrast, I do not accept the Claimant's evidence. Given that the case the Claimant was meeting has rather changed (through the effectiveness of Mr Gregory's cross#examination of Mr Tomlinson which followed the Claimant's evidence), it is important to explain precisely why I do not accept the Claimant's evidence. There are five serious difficulties with it (I come back to the implications of this below).

14. Firstly, I have already mentioned that in 1993 the Claimant had a hearing test because he was worried about his hearing. He told the GP at the time that he thought there was a piece of steel in his ear and did not consider that there was any ongoing issue thereafter. However, even when the Claimant was discussing working conditions between 1988 and 1995 at Phillips Structures with Mr Tapponi his own medical expert, he failed to mention he had a hearing test within that period in which he was told was fine. The Claimant was clearly able to remember this test because that was his response after it emerged in a CPR 18 request for information by the Defendants who had spotted it in his medical records.

15. Secondly, the Claimant also failed to mention to Mr Tapponi his noisy hobby of shooting. The original report in 2017 states *"There is no history of noise exposure due to noisy hobbies such as shooting or listening to loud music or playing noisy musical instruments"* Likewise, in his statement, the Claimant said he had not been engaged in any noisy hobbies. He did not say, as Mr

Chanelis later opined, *'I go shooting but always wear ear defenders, so it has no impact on my hearing'*. The Claimant simply said in his statement what he had said to Mr Tapponi: that he had no noisy hobbies. I find that was a deliberate omission.

16. Thirdly, it is true the Claimant did tell Mr Tapponi and said in his witness statement that he owned a motorbike but did not use it between 2000 and 2010. However, what was not so clear before the Claimant's oral evidence was he used ear plugs (for noise and protection) when biking in his first five years of employment with the Second or the Third Defendants in 1995-2000. So, the Claimant had his own ear protection available at the time he worked for the Second and Third Defendants, but was not forthcoming about this.

17. Fourthly, even though the Claimant now accepts having and using ear plugs between 1995 and 2000 when using his bike, he maintains that he had not access to and so did not wear any hearing protection at work in the same period despite the fact it was very noisy. I do not believe him. I also accept Mr Tomlinson's evidence that hearing protection was always available at work, even if it was only used a third of the time.

18. Finally, whilst I accept that the Claimant was being asked about events over 20 years ago, he took pains to give a detailed description of his working conditions. He did not suggest he was under any difficulty in remembering. Yet contrary to Mr Tomlinson, who made clear and candid concessions, the Claimant was entirely unconvincing in addressing these issues.

19. For those reasons I reject the Claimant's evidence insofar as it conflicts with Mr Tomlinson's evidence. Indeed, as I shall explain later, I consider the Claimant has at times conducted this litigation dishonestly and I come back to the significance of this later. Against that background, I turn to my findings of fact on the balance of probabilities.

c) Findings of Fact

20. The Claimant started work with Phillips Structures in 1988 and was employed as a welder and fabricator in doubtless a very noisy environment. I have no reason to doubt that he was not given hearing protection at that time. The Claimant then moved on, according to his HMRC working schedule, to a different job which was not a noisy environment and appeared to be some form of maintenance or cleaning job.

21. In 1995 to 1996 and 1996 to 1997 that HMRC schedule records no employer because the Claimant was self-employed or working on the lump for Mr Tomlinson. In 1997 to 1998 and 1998 to 1999 and 1999 to 2000, his employer was simply described as Multi-Fab, not Multi#Fab Limited. The conclusion I draw from that is that the Claimant was self-employed until working for Mr Tomlinson from 1995 until about 1997 when there was a change in HMRC's stance in relation to construction and self-employment at which point he started employing directly. However, Mr Tomlinson plainly did employ the Claimant at that point himself because his company did not exist and was not incorporated until 1999. Mr Gregory suggested there may well have been a TUPE transfer when it was incorporated in 1999. However, HMRC documents suggest differently: that the Claimant's employer remained Multi-Fab: the business Mr Tomlinson owned as a sole trader, not his company.

22. A company is a separate legal person than the human who owns and runs it: *Salomon v Salomon & Co Ltd [1897] AC 22*. Here, Mr Tomlinson employed the Claimant, but there is no evidence this employment was transferred to the Third Defendant. So, while I gave permission at the start of trial for the claim to proceed against the Third Defendant which had been dissolved, it must fail: although no one suggests that makes much difference. It just means Mr Tomlinson himself is the true remaining Defendant in this case.

23. As to the Claimant's working conditions, there is photo at page 149 of the bundle, which is accepted to be the site, as it was much later when another building had been constructed. However, it does show two rather older sheds, one of which was the shed in which the Claimant along with the five other individuals worked for Mr Tomlinson at that point. They made steel-frame buildings in that relatively small workshop, which was about 40ft wide by about 60ft long. It has been described as roughly the dimensions of a tennis court. It was a very small company with what the Claimant described as two bays on one side of the workshop, two of them the other side of the workshop separated by a welding screen.

24. The Claimant made steel frames for buildings. He used a punch to put large holes in a steel plate as well as welders and electric grinders. There is some suggestion of the use of needle guns, although Mr Tomlinson does not remember them being used and I accept his evidence. However, I also accept the equipment was noisy and there was also the noise of forklifts moving the steel around as they did not have the crane to move the steel bars. They had trestles to work on and shape the steel into the structure they needed. They made buildings from a 30ft span up to about an 80ft span, so they were dealing with steel beams

from about 15ft upwards. In addition to the tools that were used that screeched and ground loudly against the steel was the constant clatter from steel being banged against steel benches and trestles and the punch and grinder being used. A punching machine could punch 100 tonnes of pressure and that when operating this was noisy. I accept that the men – including the Claimant - worked in pairs and sometimes had to shout at each other in order to converse. The Claimant worked Monday to Friday 8am until 6pm, although he frequently started at 6am doing overtime. He worked on Saturday from 6am until noon with a 30-minute lunch break and a 10-minute break in the morning. Other than the needle guns, none of that account was significantly disputed by Mr Tomlinson.

25. However, the Claimant also said in his witness statement: *"The overall workshop was just full of noise. The constant noise of metal banging, hammering, thudding, pounding, banging and screeching noises of metal, cutting through steel which echoed around the workshop"*. Tellingly he also said, *"There was no hearing protection, decibel checks or warning signs regarding noise levels"* but he admits he never complained to Mr Tomlinson. The Claimant made no real concessions under cross-examination about this. He maintained he did not have access to ear protection at work even though it was always noisy.

26. Mr Tomlinson does take issue with this evidence and three points of real importance:

a. Firstly and most importantly, Mr Tomlinson maintains there was a system in place for ear protection to be provided, namely ear plugs and, if appropriate, ear muffs.

b. Secondly, whilst when welding ear-muffs could not be used because of the facial mask, ear plugs could be and were used. So for any activity at work it was always possible to wear ear plugs. It is not suggested there was anything special about the ear plugs at work - I find they were the same as the Claimant's ones for his bike.

c. Thirdly, he disagreed with the Claimant's assessment that there was 'always' loud noise. He said there was only a significant amount of noise about a third of the time. When anyone was going to undertake a significantly noisy activity that they would let their colleagues know who would then put on ear protection. However, he also accepted there was no ear protection zone, nor noise surveys undertaken.

27. I accept the evidence of Mr Tomlinson who made significant concessions in his evidence. His evidence was clear and candid, although it emerged only during cross-examination, of the system. As I say, and I shall go on to explain, that system did not necessarily assist his case in some ways, although honesty and candour in a witness always assists their case before a Court. By contrast, as I have already explained, I do not accept the Claimant's contested evidence, especially in relation to hearing protection. The Claimant himself says that he wore ear plugs that he had himself for his motorbike at the time we are concerned with. Yet, he says despite this constant continual noise he did not put in his own ear plugs that he had already for his bike. That seems to me to beggar belief as to his own credibility.

28. Moreover, Mr Tomlinson's evidence has the ring of truth. This was a small group of young men, including the Claimant and Mr Tomlinson at the time, working in this small-scale operation where health and safety was perhaps not the main concern. This explains why there were no formal Noise at Work surveys, 'protection zones', or formal instruction regime. However, even young men who are cavalier about health and safety compliance know when there working conditions are noisy and they need to protect their ears from it. I find they did so by wearing ear protection or taking other steps about a third of the time. In other words, I reject the Claimant's evidence that he was never able to wear ear protection whilst working for Mr Tomlinson. I find as a fact that, like the others, he would wear ear protection about a third of the time, when especially noisy – and had access to ear protection not only that Mr Tomlinson would provide, but his own ear plugs for his bike.

29. It is striking the Claimant can remember so many details of the operation, the machinery, the hours of work and so on with no records from that period, yet states that there was no hearing protection when I find there clearly was – not least his own ear plugs for his bike. By contrast Mr Tomlinson's evidence that there was a rather ramshackle system was clearly credible, not least because it did not show him in an entirely good light as an employer. For those reasons, I accept Mr Tomlinson's evidence as to the system that was employed, namely that the Claimant was afforded the opportunity of having hearing protection; that there was plentiful supply of ear plugs, but he would be instructed to wear them only about a third of the time when it was

particularly noisy. I find that was the position essentially throughout his work with Mr Tomlinson, irrespective of his formal employment status.

d) Liabilty and Causation

30. Until January 1990 when the Noise at Work Regulations came into force, the position at common law and indeed under s.29 Factories Act was governed by essentially the standard of care was set by the code of practice, which set the decibel level of 90 as discussed by the Supreme Court in *Baker v Quantum Clothing Group Ltd [2011] UKSC 17*. However, unlike there, this case against these two Defendants entirely falls in the period following which the Noise at Work Regulations 1989 ('the Regulations') were in force.

31. Those regulations under Regulation 2 applied to employers, but said at Regulation 2(2):

"Any reference to–(a) an employer includes a reference to a self-employed person and any duty imposed by these Regulations on an employer in respect of his employees shall extend to a self-employed person in respect of himself; (b) an employee includes a reference to a self-employed person; and where any duty is placed by these Regulations on an employer in respect of his employees, that employer shall, so far as is reasonably practicable, be under a like duty in respect of any other person at work who may be affected by the work carried on by him".

I agree with Mr Gregory that this placed the same duties on Mr Tomlinson in relation to noise at work whether he was employing the Claimant or his company (although I have found it was Mr Tomlinson throughout) and whether the Claimant was at the time strictly speaking self-employed 'on the lump' on one hand or formerly employed on the other. In my judgment, it simply makes no difference and that is the plain meaning and statutory purpose of Regulation 2(2). Indeed, it accords with the looser approach to 'employment' in the context of statutory duties taken in *Lane v Shire Roofing [1995] EWCA Civ 37*. So, I turn to those statutory duties (for breach of which there was civil liability at the time).

32. Regulation 4 required a noise survey when any of the employees where likely to be exposed to noise at the first action level: defined as a daily personal noise exposure of at least 85 dB. Regulation 5 required that records be kept in that respect. Regulation 6 provided, *"Every employer shall reduce the risk of damage to the hearing of his employees from exposure to noise to the lowest level reasonably practicable"*. That was a general duty that also applied at 'the first action level' of 85dB. However, Regulation 7 provided that with daily personal noise exposure of 90 dB ('the second action level'): *"Every employer shall, when any of his employees is likely to be exposed to the second action level or above… reduce, so far as is reasonably practicable (other than by the provision of personal ear protectors), the exposure to noise of that employee"*.

33. The practical effect of these provisions is if the daily exposure were between 85 and 90 dB, hearing protection would discharge the duty under Reg. 6, whereas if once noise reached the second action level in excess 90 dB, then other steps would need to be taken. As Mr Gregory pointed out, this might be simply a case of moving the lads around so that there was more distance between three of them and the other three, bearing in mind at the time there appeared to be two sheds that were available (or another could have been built).

34. More specifically, Regulation 8 required *"Every employer shall ensure, so far as is practicable, that when any of his employees is likely to be exposed to the first action level or above then the employee is provided, at his request, with suitable and efficient personal ear protectors"*. Regulation 8 (2) says, *"Every employer shall ensure, so far as is practicable, that when any of his employees is likely to be exposed to the second action level or above… that employee is provided with suitable personal ear protectors which, when properly worn, can reasonably be expected to keep the risk of damage to that employee's hearing to below that arising from exposure to the second action level ..."*. In addition, any personal ear protection provided had to comply with BSI specifications at the time.

35. However, the main argument is in relation to breach is Regulation 9, which provided:

"Every employer shall, in respect of any premises under his control, ensure, so far as is reasonably practicable, that–(a) each ear protection zone is demarcated and identified by means of the sign...(b) none of his employees enters any such zone unless

that employee is wearing personal ear protectors. (2) In this regulation, "ear protection zone" means any part of the premises ... where any employee is likely to be exposed to the second action level or above..."

36. In effect, the practical meaning of Reg.9 in this small space, as Mr Gregory says, is to declare the whole area an 'ear protection zone' and instruct the workers to wear ear protection the whole time when in the shed. It has not been suggested that that would have been not reasonably practicable. It would have been perfectly simple to tell employees to wear ear plugs the whole time and to go outside if they wanted a break or a conversation.

37. Whilst Mr Tomlinson says that it was only noisy enough to justify ear protection a third of the time, that is a subjective assessment and he accepts that he did not keep noise surveys, nor enforce ear protection zones, nor take any other measures other than provide ear protection (as I accept). It follows there would be a breach of statutory duty if the daily noise level reached 85dB and even more if it reached 90dB. Mr Chanelis, relying on the Claimant's evidence estimated that the likely noise levels would have exceeded 85 dB and indeed normally reached at least 90dB. Indeed, his average that he worked on would have been an average daily exposure of 96dB. However, that depends on the Claimant's evidence and I prefer Mr Tomlinson's evidence (although that does not specify noise levels).

38. However, I have Mr Chanelis' evidence and he was not asked whether Mr Tomlinson's account would mean noise levels would reduce things below 85dB (he answered it would if ear protection were worn the whole time, but that is not now what Mr Tomlinson says). It seems to me that given Mr Tomlinson's failure to take noise surveys and on all the other evidence in the case, it is legitimate to draw the inference (as discussed by the Court of Appeal in *Mackenzie v Alcoa [2019] EWCA Civ 2110*), that in the absence of noise surveys, I am satisfied on the balance of probabilities that the daily level of exposure to noise was at least 85 dB and probably 90dB. It follows that I am satisfied that Mr Tomlinson was in breach of Regulations 4 and 5 in not undertaking and keeping noise surveys and that Mr **Vanderpump** was right to concede there was a breach of Regulation 9 in this case by Mr Tomlinson in failing to enforce ear protection zones (and of Reg.7 in relation to other steps)

39. However, I accept workers always had access to Reg.8-compliant ear protection. However, I find Mr Tomlinson did not always ensure that they wore it at all times when they needed to – I do not accept the noise level was below 85dB 2/3 of the time, nor did Mr Tomlinson say that it was – he did not measure the noise level so did not know what it was. His subjective impression of ear protection only being 'needed' 1/3 the time is insufficient. Therefore, I also accept a breach of Reg.8, not because he did not provide ear protection but rathe because he did not require it to be worn as often as he should have done.

40. Given this breach of duty and the Claimant's admitted noise-related hearing loss, I also accept that despite his credibility issues, on the balance of probabilities at least some of his noise-related hearing damage was caused by the Defendant's breach of duty. Ultimately this was a case where the Claimant has suffered, on any view, substantial noise-induced hearing loss, as Mr Gregory describes in his skeleton argument over 17 dB that effect, which is a high figure. My uncertainty about the extent of the attribution of that to the Second and Third Defendants goes not so much to the question of whether the Claimant can prove his claim against them, but the extent of apportionment of that injury to the Claimant's time working with Mr Tomlinson that it is just to undertake in all the circumstances. However, as said in *Holtby v Brigham [2000] EWCA Civ 111*, once a Claimant proves injury, apportionment is for the Defendants to prove. I return to that later.

e) Fundamental Dishonesty

41. However, my findings so far do not necessarily mean the Claimant succeeds. In his skeleton argument, Mr **Vanderpump** raised fairly and squarely the question of fundamental dishonesty. Whilst the Defence could have been clearer, it has always been apparent it was the Defendant's case and it was fairly raised: *Howlett v Davies [2018] 1 WLR 948 (CA)*.

42. As Mr Gregory agreed at the start of trial, it was the Defendant's case that hearing protection had been provided. It was what we thought the trial was going to be about before Mr Tomlinson took us on a detour. In those circumstances, if I found that the Claimant was not telling the truth about not being provided with hearing protection then that is something which can, not necessarily will, but can amount to fundamental dishonesty.

43. The way it was articulated in Mr **Vanderpump**'s Skeleton Argument was that the Claimant in those circumstances would lose on liability, but also would lose his costs protection under CPR 44.16. Therefore, Mr **Vanderpump**'s approach would have been to raise this issue after the judgment where I had found that the Claimant had lost. However, because of Mr Tomlinson's evidence, which effectively amounted to a concession of breach of duty and where I have found causation established, the argument had to be made at an anterior stage. For those reasons, I invited submissions on this issue before I gave judgment.

44. The reason it makes a difference is because, as Mr Gregory rightly indicates, if I were to make a finding of fundamental dishonesty in relation to a claim that would otherwise succeed, s.57 of the Criminal and Justice and Courts Act 2013 ('CJCA') bites, namely:

"This section applies where, in proceedings on a claim for damages in respect of personal injury ("the primary claim")—(a) the court finds that the Claimant is entitled to damages in respect of the claim, but (b) on an application by the Defendant for the dismissal of the claim under this section [which effectively I have treated the Defendant as having made for the reasons I have given]*, the court is satisfied on the balance of probabilities* [the burden of proof being on the Defendant now not the Claimant] *that the Claimant has been fundamentally dishonest in relation to the primary claim or a related claim".* [In those circumstances]:

(2) The court must dismiss the primary claim, unless it is satisfied that the Claimant would suffer substantial injustice if the claim were dismissed.

(3) The duty under subsection (2) includes the dismissal of any element of the primary claim in respect of which the Claimant has not been dishonest.

(4) The court's order dismissing the claim must record the amount of damages that the court would have awarded... but for the dismissal of the claim".

45. Mr **Vanderpump** submitted that the Defendant must prove on the balance of probabilities that the Claimant has acted fundamentally dishonesty in relation to the primary claim, which has substantially affected the presentation of his case and indeed potentially adversely affected the Defendant in a significant way. That is essentially the test as articulated in the case of *Sinfield v LOCOG [2018] EWHC 51*- albeit on very different facts.

46. It is essentially a question, as Mr Gregory rightly says, of looking at whether, (a) there has been 'dishonesty', and (b) whether that dishonesty is 'fundamental' in the sense that it goes to the root of the claim as opposed to being collateral (see *Howlett*), and thirdly the application of the question of substantial injustice; whether it is just to visit the Claimant in the circumstances with the consequences of any fundamental dishonesty.

47. I am fully conscious that, as Mr Gregory rightly says, it is unusual to make a finding of fundamental dishonesty in connection with a noise-induced hearing loss claim. Unusual but not necessarily unprecedented. Certainly, HHJ Gregory in the unreported case of *Dimanttek Ltd v James (2016)* found that there had been fundamental dishonesty on an appeal from a district judge's decision that a claimant in a noise-induced hearing loss claim had not told the truth in evidence. Of course it does not bind me in any way, but does illustrate that the same fundamental dishonesty principles apply even in this type of claim.

48. For the five reasons that I have touched on earlier in my judgment and which I now elaborate, I find on the balance of probabilities (indeed I go so far as to say that I am sure) that the Claimant has conducted the litigation at times and given evidence dishonestly. This was a Claimant who purported to give a very detailed description of his working conditions even years after the event, down to the machines that were being worked on, his working hours, how many people were working, even the fact that he recalled being covered in mud. That is not a separate strand of dishonesty, but rather as an illustration of the detail and recollection the Claimant was seeking to paint in his evidence.

49. Firstly, there was the Claimant's evidence about the hearing test in 1993. Whilst I accept there were no further medical tests between 1993 and 2016, I do not accept the Claimant's evidence was that this hearing test was simply 'something and nothing'. He was described in the contemporaneous medical notes as having a belief that it related to a piece of steel in his ear, and that is confirmed in the GP note dated 14 January 1993, but it is also confirmed in the letter from Dr Singh the SHO at the time:

"The patient was referred to the ENT department with suspicion of a foreign body in his right ear. He was also worried about his poor hearing in his right ear for the past two days".

It is true that there was no reference to his working conditions. However, it is also clear this was somebody who at the time he was working for his (first) employer, who has since accepted responsibility for breach of duty that he was working in very noisy conditions. For the Claimant not to mention that he had a hearing test at a time, which was clearly related to work as it related to a piece of steel in his ear, either to his own medical expert or in his witness statement, at a time when he was suing the employer in question was plainly not straightforward. I find it was not an oversight for someone who has purported to give detailed descriptions not only of his working conditions at these Defendants but also his working conditions in the 1980s-90s who will have known and will have remembered he had a hearing test but deliberately did not mention it. I find that the Claimant chose not to mention a hearing test he plainly remembered because it might complicate his case, especially against the First Defendant, but perhaps all of them. It only emerged when the Defendant's solicitors spotted it in his medical records. It was not something he volunteered. Whether or not it would have made any difference to the doctor's assessment is not the point. This was a deliberate and dishonest omission.

50. Secondly and related to that, the Claimant did similarly and perhaps even more egregiously fail to mention to either the doctor or in his statement that he had a very noisy hobby: shooting. I do not accept his weasel words it was not a noisy hobby because he wore hearing protection. Shooting a shotgun is an obviously noisy hobby: that's why ear protection is needed. This is also not a question of memory. He knew full well he shot a shotgun for several years from 2000 and before his hearing test in 2017. It was obvious, in my judgment, from having heard his evidence and being cross-examined, that he deliberately failed to mention that in either his statement or to the doctor. It is true, as Mr Gregory says, that this activity did emerge because the Claimant mentioned it in an audiogram. However, it is striking that he thought it relevant to mention to someone giving him a hearing test in 2020 yet did not think to mention to a doctor assessing his noise-related hearing loss three years earlier, even though he had been shooting since the early 2000s. The fact that he does not shoot all the time, the fact that he considers it a minor hobby, is neither nor there. Moreover, even if in fact shooting has made no difference to the Claimant's hearing because he has always worn ear protection, that is not the point. The point is that the Claimant deliberately failed to mention a noisy hobby which *might* have contributed to his hearing loss to his expert who was investigating this. Indeed, worse than that, he said he had no noisy hobbies. That was a straightforward and bare-faced lie.

51. Thirdly, as I have said earlier, the Claimant's evidence about the motorbike was not straightforward about wearing ear plugs. His equivocation in evidence - initially that it was for protection and then more about comfort more than protection, although he later clarified it was relation to both – was on its own perhaps not critical. However, it takes on a different hue when once recalls his evidence about not having access to ear plugs back in 1995-2000 at work when at the same time he admits using them when biking. I find again the Claimant was dishonestly not telling the whole truth in his evidence to bolster his own case.

52. Fourthly, the Claimant was unequivocally clear, as he said in his statement, there was no hearing protection. That was due to be the key issue in this trial, as Counsel agreed at the start, until Mr Tomlinson's evidence. In his own evidence, the Claimant was unequivocal, not that 'there was hearing protection, but no one wore it', but there was no hearing protection *at all*. That, I conclude, was a clear lie, not least given his access to his own ear plugs from the bike which he wore at the time to protect his ears in part from the noise of riding. I find the Claimant, like the others, wore ear protection at work a third of the time.

53. Finally, even though Mr Tomlinson has candidly accepted a poor system, it is striking that this was not the Claimant's evidence. He did not say, as he could have, that there was a system, but it was not very good and it did not amount to proper protection. Instead, the Claimant went much further than the truth as I have found it to be and said there was no hearing protection at all. In other words, the Claimant has dishonestly exaggerated – not his injury itself as some Claimants do – but the Defendant's breach of duty – i.e. how bad the system was. As I have explained, this is not simply a question of distorted perspective or poor recollection. I find that, unlike Mr Tomlinson, the Claimant was not interested in telling the Court the truth about his access to hearing protection back in 1995-2000.

54. For those reasons individually and cumulatively, I find the Defendant has proved on the balance of probabilities (indeed so that I am sure) that Claimant has at times conducted the litigation dishonestly. The question then arises whether, in the words of s.57 CJCA: "....*The Claimant has been fundamentally dishonest in relation to the primary claim or a related claim"*and if so, "*The Court must dismiss the primary claim, unless it is satisfied that the Claimant would suffer substantial injustice if the claim were dismissed."*

55. If my finding was *only* that the Claimant had deliberately not mentioned his hearing test in 1993 to the medical expert or *only* deliberately failed to mention the shooting hobby to him, each of those alone would have been dishonesty, but not necessarily 'fundamental'. By contrast, this is a case where all advocates and myself agreed at the beginning of the trial that the case really turned on whether or not there had been hearing protection and I have now found that the Claimant was dishonest about not being provided with ear protection.

56. Therefore, it is difficult to see how the Claimant's dishonest evidence about ear protection could be anything other than 'fundamental' to the current primary claim. Until Mr Tomlinson made the concessions that he did, such dishonesty was the only way that the Claimant could have won his case. It significantly affected the presentation of his case and impacted on the Defendant as discussed in *Sinfield*. The Claimant's dishonesty in this claim about not having access to ear protection is by itself 'fundamental dishonesty'. However, it is made that much worse – and more 'fundamental' – by the Claimant's related dishonest omissions to mention his hearing test or his shooting hobby to the ex-pert and his use of ear plugs when riding his bike back at the material time. Therefore, I find the Defendant has proved on the balance of probabilities (at the least) the Claimant has been fundamentally dishonest in relation to the primary claim on the *Howlett / Sinfield* approach.

57. It is true that the Claimant has settled his claims with the other employers. However, that does not mean he has not been fundamentally dishonest in his 'primary claim' against the Second and Third Defendants. Even if one says that the Claimant's dishonest omission to mention the hearing test was 'in relation to' the claim against the First Defendant, that is a 'related claim'. In any event the other instances of dishonesty related to this 'primary claim'

58. Therefore, I must dismiss the primary claim unless I am satisfied the Claimant would suffer substantial injustice if the claim were dismissed. In my judgment, it involves an assessment of all the circumstances of the case – it does not follow inexorably from my finding of fundamental dishonesty otherwise it would not be a separate requirement in s.57(2) CJCA. However, likewise, s.57 only bites if I find the Claimant would otherwise succeed, so that situation is the precondition to s.57(2) applying, not a barrier to it doing so. In my judgment, all the circumstances of the case include that the Claimant has been dishonest not only in relation to one issue – ear protection; but other issues too – exposure to noise and his hearing test. Moreover, he has also received compensation from other employers in respect of the same injury already (albeit liable to 'apportionment'). This money will assist him to meet the inevitable costs liability to the Second Defendant.

59. Mr **Vanderpump** recognises that it is difficult in this case to assess the 'counterfactual damages' I would have awarded under s.57(4) CJCA. Because I have found the Claimant did have ear protection (and indeed I find given his biking experience, that he wore it), it is difficult to determine the extent of noise-related hearing loss caused by breach (as the expert evidence assumed he did not wear hearing protection). However, doing the best I can in adjusting that premise on the basis he wore ear protection a third of the time and given the 'time exposure' was five years with the Second Defendant (not the Third, but that makes no difference), the fair approach under the Judicial College Guidelines is to place this award at the bottom of the lower bracket of a mild noise-induced hearing loss, namely £11,820. To comply with s.57(4) in this case, I must adopt that rough and ready approach.

60. In reality, the Claimant's dishonesty about his wearing of ear protection and other exposure to noise is such that it is very difficult to value his claim because the factual premises the experts have opined upon are false. This is another reason along with those set out about why when assessing the issue in the round, I consider there would be no 'substantial injustice' in denying him an award, which he has made so complex by his dishonesty. So, I dismiss the Claimant's claim under s.57 CJCA.

End of Judgment

Transcript from a recording by Ubiqus

291-299 Borough High Street, London SE1 1JG

Tel: 020 7269 0370

legal@ubiqus.com

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This transcript has been approved by the judge.

