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# Mackenzie -v- Alcoa Manufacturing (GB) Ltd: Guidance from the Court of Appeal

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## Introduction

1. Today sees the handing down of the judgments of Lord Justices Dingemans, Bean and Baker, in the case of *Mackenzie -v- Alcoa Manufacturing (GB) Limited* [2019] EWCA Civ 2110 in which the Court of Appeal unanimously overturned the decision of Mr Justice Garnham[1] which was handed down on 31st January 2019. In overturning the decision of Garnham J., the Court of Appeal has restored, in full, the original trial decision of HHJ Vosper QC and has accordingly dismissed the Claimant's claim.

2. *Mackenzie* was, following the decision of Garnham J., heralded by Claimant representatives as a landmark decision with huge ramifications for the NIHL market. Essentially, the decision allowed Claimants to establish breach of duty on an inference from a lack of noise surveys even in a claim which went back many decades. Given the prevalence of such situations to Defendant representatives, who are dealing with historic claims of such antiquity that there are rarely documents, witnesses, or even sites, available to make enquiries of, it is easy to see why the decision was promoted on behalf of Claimants in this way. Indeed, taken at its highest, if Garnham J. was correct, the inference could be used not just to defeat a defence of breach of duty, but would bear on the issue of limitation - section 33 discretion being more likely to be exercised if Claimants could establish breach of duty on the basis of inferred default from missing documents. Indeed, that would have posed a 'double-hit' for Defendants since, in most cases, a lack of documents would usually be relied upon by them as being the biggest indicator of prejudice mitigating against the exercise of section 33 discretion.

3. Patrick Limb QC and Gareth McAloon appeared for the 2nd Defendant in this successful appeal against the decision of Garnham J. In this bulletin they outline the key points arising from the decision and discuss the consequences of the decision and its wider impact in the context of industrial disease claims.

## The Facts

4. Mr Mackenzie worked for the 1st Defendant, Holiday Hall Limited, initially joining their employment as an Apprentice Electrician and Maintenance Fitter in 1963. As part of his duties, he was sent by his employer to work on the premises of Alcoa at their factory in Waurnarlwydd, Swansea. Alcoa's factory was an aluminum smelting works, which housed both furnaces and an extrusion mill. The Claimant worked on the site until he left the 1st Defendant's employment in 1976. He alleged that during the period in question he was

[1] [2019] EWHC 149 (QB)

exposed to excessive levels of noise whilst on Alcoa's premises without any hearing protection. He gave a subjective account of having to shout to communicate with co-workers in close proximity.

5. The parties obtained single joint engineering evidence from an agreed expert, Mr Worthington. He reported in a detailed report and further answered Part 35 questions. There were no documents or witness evidence to consider from either the 1st or 2nd Defendant. As such, he relied upon the Claimant's account of working conditions, and to make a more detailed assessment of noise levels, a noise survey undertaken by Sound Research Laboratories Limited in 1989 at an Aluminum producing factory of British Alcan, in Newport, South Wales. Having considered that survey together with the Claimant's evidence, Mr Worthington had concluded:

> *"…whilst it is accepted that the premises referred to are not those in which the Claimant actually worked, the indication is that whilst there are some areas of such a mill where noise levels could exceed 90 dB(A), the average level for a maintenance/installation employee would be unlikely to regularly exceed such a level. Hence, without observation of contemporaneous noise surveys/measurements from the premises at which the Claimant worked, it is not possible to demonstrate, on the balance of probability, that his daily average noise exposure would have reached or exceeded 90 dB(A) during these periods of employment…Hence, substantiation of this claim, on engineering grounds, would be very difficult."*

## The Trial

6. The matter proceeded to trial against the 1st and 2nd Defendants before HHJ Vosper QC at the Swansea County Court on 15th & 16th August 2017. The Claimant's arguments on breach were as follows:

   a. The Claimant invited the Court to draw an adverse inference against the Defendants amounting to a finding of breach of duty for them not having undertaken noise surveys during the Claimant's period of employment at Alcoa's premises. The Claimant cited the decisions in *British Railways Board -v- Herrington* [1972] AC 877 and *Keefe -v- Isle of Man Steam Packet Company Limited* [2010] EWCA Civ 683 in support and pointed to the absence of noise surveys from either Defendant as the evidential basis from which that breach could and should be inferred;

   b. The effect of that inference was that the Claimant's evidence ought to be treated benevolently and that as a consequence of the operation of *Keefe*, the engineering evidence of Mr Worthington, ignored; and

c. That having undertaken steps (a) and (b), the same should be a basis for further finding a breach of duty that the Defendants exposed the Claimant to excessive levels of noise in excess of 90 dB(A) Lep'd.

7. At first instance, HHJ Vosper QC refused to draw any such inference under either *Keefe* or *Herrington* and distinguished both. Rather, he considered that the significant passage of time made it 'unsurprising' that no noise surveys were available and that there was no evidence to say, one way or the other, that they had existed or had never been undertaken. He thereby refused to make any finding of breach of duty against the Defendants for those reasons and in light of the engineering evidence of Mr Worthington. Accordingly, the claim failed.

## The decision of Garnham J.

8. The Claimant sought, and obtained, permission to appeal the decision of HHJ Vosper Q.C. to the High Court. Permission was only sought against the 2nd Defendant, Alcoa. Garnham J. allowed that appeal.

9. As a preliminary matter, Garnham J. considered that the duty to undertaken noise surveys arose shortly after the circulation of the 2nd edition of Noise and the Worker in 1968 (though mistakenly he was actually looking at the 3rd edition from 1971). At that point, it was noted that the guidance changed within the section 'Have you a noise problem?'. That section required an employer to consider several questions about noise and work conditions. Though in the 1st edition, published in 1963, action was advised only if an employer considered that several of those questions could be answered 'yes', that appeared to change in the 3rd edition whereby action was to be taken if only one of the questions was answered 'yes'. Accepting Mr Mackenzie's evidence that he had to shout to communicate at Alcoa's premises (that being one of the questions within the guidance), Garnham J. considered that such triggered a duty on Alcoa to conduct noise surveys from when that guidance changed from 'several' to 'one'. Garnham J. pinpointed that date as 1968 and allowed a period of two years for this to be done.

10. Having reached that conclusion, Garnham J then dealt with the arguments regarding *Herrington* and *Keefe* and adverse inferences. Garnham J. held that whilst passage of time might well provide reason not to draw an inference under *Herrington*, it did not provide a basis for rejecting an application of *Keefe*. Applying *Keefe*, Garnham J. disregarded the engineering evidence of Mr Worthington, treated the Claimant's evidence benevolently and found a breach of duty from 1970 onwards during which time (as he went on to find)

Alcoa failed to undertake noise surveys and that the Claimant had been exposed to levels in excess of the common law limit.

## The Court of Appeal's decision

11. Alcoa sought, and obtained, permission to appeal to the Court of Appeal on 3rd June 2019. The Appeal was heard on 6th November 2019. The 2nd Defendant/Appellant advanced the following principal arguments:

    a. That this was not a case suitable for any adverse inference to be drawn against the Defendant either under *Herrington* or *Keefe* since no positive breach of duty could be established against Alcoa;

    b. Even if the Claimant was right that *Keefe* ought to apply, it cannot be right to ignore expert engineering evidence as a matter of course in such circumstances; and

    c. Further to (a) and (b), no positive finding of breach of duty had been made by the trial judge and that Garnham J. had been wrong to reverse that position.

12. Giving the lead judgment of the Court of Appeal, Lord Justice Dingemans held that to determine the issues, it first had to be determined whether there was a duty to conduct noise surveys which was capable of being breached - either by way of an adverse inference or otherwise. Dingemans LJ. held:

    *"There was no statutory duty to carry out surveys until the coming into force of the Noise at Work Regulations 1989 on 1 January 1990, but there was guidance which pre-dated that statutory duty which, it is common ground, gave rise to a common law duty to carry out a noise survey in certain circumstances."*[2]

13. To that extent there was some agreement with Garnham J. in that their Lordships agreed that the guidance which gave rise to this obligation 'in certain circumstances' was the 3rd edition of Noise and the Worker (1971) and the 1972 Code of Practice for Reducing the Exposure of Employed Persons to Noise. It was determined that both suggested (after a grace period allowing consideration of the said guidance):

[2] Para 37

*"…that a common law duty to carry out and act upon a noise survey arose around 1973 or 1974…"*[3]

14. Moving then to the next issue, concerning inferences and the circumstances in which they could be drawn, the Court grappled with a plethora of cases[4] on this point. Drawing on that case law, Dingemans LJ. held:

> *"It seems therefore that it is possible to state the following propositions: First, whether it is appropriate to draw an adverse inference, and if it is appropriate to draw an inference, the nature and extent of the inference, will depend on the facts of the particular case, see Shawe-Lincoln at paragraphs 81-81. Secondly, silence or a failure to adduce relevant documents may convert evidence on the other side into proof, but that may depend on the explanation given for the absence of the witness or document, see Herrington at page 970G, Keefe at paragraph 19 and Petrodel at paragraph 44."*[5]

15. Finally, Dingemans LJ. considered that even in cases where inferences are capable of being drawn, that did not justify complete marginalization of the expert engineering evidence in this case. HHJ Vosper QC had been right to place reliance upon that evidence in his findings. To do to the contrary, as Garnham J. had done:

> *"…risked elevating the decision in Keefe to a rule of law, rather than an example of a proper approach to finding facts in a particular case."*[6]

16. In a short concurring judgment, Bean LJ. concurred that both the passage of time, and the engineering evidence of Mr Worthington were relevant considerations which pointed away from drawing any adverse inference on the facts of this case.

17. As such, the Court unanimously held that HHJ Vosper QC was right not to make a positive finding of beach because it was a proper and relevant factor that noise surveys may have been lost to the passage of time, and that Garnham J had been wrong to draw the inference which he did and thereby interfere with that finding.

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[3] Para 40
[4] Particularly: *Armory -v- Delamarie (1721) 1 Strange 505; Herrington; Keefe; Gibbs -v- Rea [1998] AC 786; Wiszniewski -v- Central Manchester Health Authority [1998] PIQR P324; Shawe-Lincoln -v- Dr Arul Chezhayan Neelakandan [2012] EWHC 1150; Garner -v- Salford City Council [2013] EWHC 1573 (QB); Petrodel Resources Limited -v- Prest [2013] UKSC 34.*
[5] Para 50
[6] Para 55

## Conclusions and practical points

18. The decision of Garnham J. aroused much discussion in the early part of this year. On the one hand, there was some scepticism as to its correctness, on the other, there was fear over the ramifications for Defendants facing historic claims with little by way of documentation. As was outlined at the commencement of this Bulletin, Claimant's lauded the decision as a significant victory which would inevitably lower the hurdles which Claimant's presently faced in proving their claims for NIHL.

19. Due consideration of the judgment conveys the following practical points for practitioners in this area:

    a. Adverse inferences are capable of being drawn in NIHL cases notwithstanding this decision. Ultimately, whether or not they ought to be drawn will depend on the particular facts of a particular case - see the guidance in paragraph 50;

    b. *Keefe* is still good law. Indeed, it could be said to be an obvious (and correct) application of the principle that a Defendant cannot make a defence out of his own proven default which has deprived a Claimant of evidence on which he could prove his claim. To that end, it builds upon the decision in *Herrington* and applies similarly;

    c. However, the application of *Keefe* is not without qualifications. The parameters of *Keefe* are established on cases where: (i) there is a proven breach of duty by the Defendant (that is a positive finding to that effect), and; (ii) there exists no other evidence which can prevent a further finding of breach capable of being established on a benevolent treatment of the Claimant's evidence accordingly;

    d. Following on from limb (ii), engineering evidence is capable of preventing a finding of breach even where *Keefe* is deemed to apply, and a Claimant's evidence is treated benevolently. That evidence does not become automatically marginalised or excluded but rather remains part of the evidential balance which the Court must weigh when considering if an inference is to be drawn at all, and if so, to what extent;

    e. Wherever possible, when acting for a Defendant facing an historic claim, there should be a statement from someone - even a solicitor - outlining the corporate history of the Defendant and the extent to which investigations and searches have been undertaken to look for documents. That

can at least provide a basis for an explanation for the absence of surveys being the sheer passage of time. It may not be possible in all cases for such a witness to be available - as indeed it was not for Alcoa - and in such circumstances the chronology must speak for itself, but it is good practice to try and evidence the corporate history and investigations undertaken nonetheless; and

f. Finally, there is a common law duty to undertake noise surveys, prior to the 1989 Regulations, where proper scrutiny of the guidance would indicate that that would have been a reasonable step for an employer to take.

20. It is hoped that this Bulletin has been of some assistance. Should there be any queries arising, please do not hesitate to contact ether of us by email at patricklimbqc@ropewalk.co.uk or garethmcaloon@ropewalk.co.k

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