High-Value NIHL Claims: Application of the Ogden Tables

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On 3 March 2023, Johnson J gave judgment in *Barry v Ministry of Defence* [2023] EWHC 459 (KB).

A former Royal Marine was medically discharged at the age of 29 years with noise-induced hearing loss ("NIHL") and tinnitus sustained after training exercises. Primary liability was admitted.

The Ministry of Defence contended for contributory negligence (in failing to wear hearing protection), which was not found against the claimant.

There was a conflict in principle as to the claim for future loss of earnings, namely whether the claimant was disabled within the meaning of the Ogden Tables, and if so on what basis should future losses be calculated. It was found that he was disabled, and that a standard approach, using a multiplier and multiplicand, with only modest adjustment of the contingency discount, was appropriate.

Broader issues as to diagnosis and quantification of hearing losses, particularly in a military context, along with whether synaptopathy (the loss of synapses which connect the inner hair cells of the cochlear to the auditory nerve) arises without detectable anomaly on audiograms (so that a normal audiogram in fact masks a difficulty hearing conversation in a noisy environment), and whether exposure to noise during military service affects the subsequent progression of hearing loss after exposure ceases, were raised but no findings made, not least because forthcoming group litigation of similar cases raises some of those generic issues.

The Facts

The claimant, aged 34 years at trial, enlisted in the Royal Marines at the age of 24 years for a 20-year engagement. He had shown commitment in doing so, further both to the treatment necessary to remove a tattoo, and to meet the physical demands of entry and service.

His hearing was tested in January 2014 and found to be good.

He was issued with ear defenders and ear plugs during training. He wore protection when firing weapons at a static range, but did not do so during a training exercise when he came under mock attack, with around 4000 rounds discharged. More generally as to protection during exercises, it was not worn in the left ear when a radio was being used, and ear plugs had a tendency to fall out during vigorous exercise, so that there were occasions when weapons were fired without protection. One particular exercise, in late 2014, was likely to have caused the majority of his hearing loss, with a

variety of very loud military noises without protection when his ear plugs had fallen out, and when he was using his radio.

Tinnitus in the left ear manifested shortly after this exercise, and hearing loss was identified on serial audiograms, and by late 2016 a decision was made to discharge the claimant from service on medical grounds due to bilateral sensorineural hearing loss with left sided intrusive tinnitus.

It was common ground that his hearing loss meant he could not continue to serve in the military, nor as a police officer or in the fire and rescue service.

Contributory Negligence

The Ministry of Defence contended that the claimant had a practice of not wearing protection in his left ear when using his radio. It sought a discount of 30%. The claimant resisted, saying that this was not realistic or reasonable.

This is plainly a matter of considerable impact in high value NIHL claims. If found against the claimant, and assessed as the defendant sought, it would have reduced his damages by over £200,000. All such cases will be fact-sensitive.

It was found that the claimant was not contributorily negligent: he wore protection during planned exercises involving firing, and only did not do so during surprise attacks (for which there was no suggestion that he should have used protection), and while the ear plugs fell out on occasion there was no evidence about training on inserting plugs, or whether they could or should remain in place during vigorous physical movement, and failure to replace them during lulls was not negligent. As to non-use in the left ear during radio operation, there was evidence that it was often not possible to hear transmissions with a left ear plug worn.

Had there been any such finding against the claimant, Johnson J expressly observed that apportionment would have been small.

Disability and Future Loss of Income

The claimant contended for an Ogden disability, which when applied to a further 14 years of Royal Marine service, and thereafter lucrative civilian employment opportunities, resulted in a significant claim.

The defendant argued there was no material difference between the claimant’s present income and that he would have received absent any hearing loss, so that only an award for handicap on the open labour market was appropriate.

After a finding that the claimant would have probably continued to serve in the Marines for his full 20 year engagement,

and findings as to average income absent discharge and in light of discharge (which indicated that a conventional multiplier/multiplicand approach should be used) Johnson J addressed the issues of disability and calculation of future loss of income.

In this regard, the contingency discount – which affected the multiplier – made a significant difference.

The claimant fulfilled the definition of "*disability*": this was a physical impairment which had a substantial and long-term effect on his ability to carry out normal day-to-day activities, which expressly included hearing, and the ameliorating effects of a hearing aid must be disregarded (further to statutory guidance to do so). The two examples within the statutory guidance were "*difficulty hearing someone talking at a sound level which is normal for everyday conversations, and in a moderately noisy environment*" and "*difficulty hearing and understanding another person speaking clearly over a voice telephone with good reception*", both of which examples were met.

Thereafter there was consideration of any adjustment to the contingency discount multiplier.

Level 2 was accepted on a purely educational basis (rather than his own contended Level 1 basis). Without a disability, the discount to his multiplier (at the age of 34, to retirement at 68 years) would be only 0.89. With a disability, at Level 2 education, it was as great as 0.45.

The issues were whether there should be adjustment to that discounting figure of 0.45, and if so, to what extent.

Any temptation to assess a discount at somewhere in the middle between 0.45 and 0.89 was resisted: the claimant was not at the outer fringes of disability but lay squarely within the definition; he was no longer pursuing his chosen career; his disability affected career choices available to him; his hearing will deteriorate further in the future (through ageing); communication by voice was necessary in any career open to him.

That said, there would be some amelioration through aiding (even if that was not relevant to the binary issue of whether he was disabled or not), and his disability was in the mild to moderate end of the range set out in paragraph 89 of the explanatory notes to the Ogden Tables. Moreover, he had actually been in employment for six years since discharge.

As such, some adjustment was appropriate.

However it was to be modest. Paragraphs 84 and 91 of the explanatory notes to the Ogden Tables were particularly considered, including the discouragement of selecting a mid-point between disabled and non-disabled, as being too great a departure from the disabled discount.

The adjustment made was to the neighbouring Level 3 educational discount (namely 0.56), so that of the range between 0.45 and 0.89, a figure 25% of the way through that range was selected.

When applied to the multiplicands, a future loss of income of as great as £452,247 resulted.

Issues Which Were Not Determined

A number of issues were ventilated but not determined (on the narrow basis that determination was not necessary to assess damages in this particular case), and so the forthcoming group litigation of similar claims will be watched for consideration of at least some of these generic issues.

They include the competing models between Professor Lutman and Professor Moore for diagnosing and quantifying *military* noise-induced hearing loss, and the extent to which those with military NIHL will suffer a greater deterioration in future than to be expected from age alone. For more on this point, see Kate Longson's recent blog.

Conclusion

Hearing loss, if it meets the threshold of being substantial, will amount to a disability. This will allow at least an argument for an award for loss of future income, so that Schedules of Loss which seek merely hearing aids and tinnitus retraining therapy may become enlarged.

A qualifying consideration for any such claim, however, is likely to be a past termination of employment by reason of the hearing loss.