

Reasonably practicable, not reasonable

Theo Huckle considers the Nottingham and Derbyshire deafness litigation appeal and its implications for noise-induced hearing loss cases and the law of industrial disease claims



Theo Huckle is head of personal injury at Civitas

'In *Baker v Quantum Clothing Group* the Court of Appeal held that from January 1978 all factory employers had a statutory duty to protect their workforces against noise exposure.'

Baker v Quantum Clothing Group [2009] concerned the liability of employers in the knitting industry of Derbyshire and Nottinghamshire for their employees' hearing loss. The case dealt with exposure to noise at a lower level than that which has generally been recognised as giving rise to liability prior to 1990, namely 90dB(A)L8.

I do not deal here with the issues of diagnosis and causation that were raised by this litigation but not re-argued in the appeal. Suffice it to say that this area is something of a minefield which requires very careful assessment and a questioning and technically proficient approach to medical evidence.

Although there was technically a single appeal, Meridian (Courtaulds) and Pretty Polly, the successful defendants in the original trials, were permitted to be respondents to the appeal in order to argue that some of the findings of the judge did not go far enough in their favour. Meridian contended that it should be held liable not from 1985 but from 1990; Pretty Polly contended for 1986, the date from which it provided ear protectors for those working amid noise at and above 85dB(A)L8.

In summary, the Court of Appeal held that from January 1978 all factory employers had a statutory duty to protect their workforces against noise exposure at 85-90dB(A)L8.

Some employers, having greater than average knowledge of the risks, owed the common law duty before

that date, depending on findings as to their particular knowledge: *Harris v BRB* [2005]. In this case the 'actual knowledge' date of common law liability for the major knitting industry employers was held to be January 1984.

All employers had a common law duty in negligence to protect from January 1988 at the latest, although arguably this should be January 1984.

The long-standing practice of lawyers and judges to treat common law and statutory duties in noise injury cases as co-extensive was expressly disapproved of by the Court of Appeal. In a real sense the claimants in these cases and their legal advisers must be taken to have changed that practice. It remains to be seen whether this will have professional indemnity implications for advisers in previous cases.

Result of the appeal

The appeal was allowed. Quantum was liable under s29 of the Factories Act (FA) 1961 from 1 January 1978, and Miss Baker was thus entitled to a time-apportioned damages award.

Knowledge of risk of noise exposure

The principal judgment contains an excellent summary of the historical background. Taken with the first-instance judgment, *Parkes v Meridian Ltd* [2007] and the earlier judgment of Mustill J in *Thompson v Smiths Shiprepairers* [1984] provide the essential history of the development of knowledge of noise risks in the UK.

The judge's findings considered and reviewed by the Court of Appeal

At first instance HHJ Inglis made findings as to the risk of injury at levels of exposure below 90dB(A). Based in part on the claimants' concession, he considered the risk below 85dB(A) essentially 'minimal', but said that:

Above 85dB(A) the risk accelerates up to 90dB(A). In the high 80s, given long enough exposure, significant hearing loss may be expected in at least a substantial minority of individuals.

Smith LJ noted that this important finding was not challenged on appeal. She added:

It is important to note that the judge's conclusion above was based on scientific work first published in 1970 and fully explained by 1973. That is not to say that, in 1973, a lay person would have understood the extent to which noise in the 85 to 89dB(A)L8 range was likely to cause harm. However, it does mean that a suitably qualified expert would have that understanding by 1973.

The judge had then essentially limited his liability findings to the state of actual knowledge of the employers, and did not make findings about what they ought to have known.

Common law liability

HHJ Inglis found:

... complying with 90dB(A) LEP,d as the highest acceptable level was, I think, meeting the standards of the reasonable and prudent employer during the 1970s and 1980s certainly until the time when the terms of the 1986 directive became generally known in the consultative document of 1987. I accept that this means that employers were not bound in the discharge of their duty to ask the question 'Who are those at risk in my factory and how big is the risk?' It is a question that none of them in this case asked. But the effect of the maximum acceptable level in the Guidelines means, in my judgment, that they were not in breach of their duty for not asking it.

He then applied *Harris v BRB* and held that two of the major employers before him had greater than average knowledge by the beginning of 1983.

Allowing for time to put in place hearing conservation measures he held that those two employers were in breach of their duty at common law in respect of exposure at 85dB(A)L8 and above from the beginning of 1985.

Statutory liability

Section 29 of FA 1961 applied in these cases, and provided:

There shall, so far as is reasonably practicable, be provided and maintained

The safety of a place of work is to be judged objectively without reference to reasonable foresight of injury, and without reference to what society might at material times have thought was an 'acceptable' degree of danger.

a safe means of access to every place at which any person has at any time to work, and every such place shall, so far as reasonably practicable, be made and kept safe for any person working there.

The judge held that the claimants' places of work had not been unsafe by reason of the noise to which they were exposed because at the material times 'the standard of safety' was exposure to 90dB(A)L8.

Arguments on appeal

The appellant's primary argument was as to liability under s29 FA 1961. The first question was whether the workplace was 'safe'. She argued that the judge had accepted that the risk was recognised from 1972, so the judge should have held that the place of work was not safe: *Kellett v British Rail Engineering Ltd* [1984]. Quantum argued that the judge's approach had been correct: whether or not a place of work was safe depended on what a reasonable employer ought to have considered acceptable at the time.

At the trial, a major area of dispute had been the Court of Appeal's authority on the proper interpretation of s29. The claimants relied on *Larner v British Steel* [1993] to the effect that foreseeability of risk was irrelevant to the question of whether the workplace was safe. The defendants contended that the case was wrong and that the

different approach of the Court of Appeal in *Allen v Avon Rubber* [1986] should be followed. Smith LJ carefully analysed the judgments in *Larner* and the authorities cited. She noted that, two years after *Larner*, in *Mains v Uniroyal Englebert Tyres Ltd* [1995], the Inner House reached the same conclusion on principle and expressed their agreement with *Larner*.

The Court of Appeal held that the decision in *Larner* was binding and that the judge had been wrong to rely

instead on the decision in *Taylor v Fazakerley* [1989].

Thus, the safety of a place of work was to be judged objectively without reference to reasonable foresight of injury, and without reference to what society might at material times have thought was an 'acceptable' degree of danger for employees to have to face:

... what is objectively safe cannot change with time. If 85dB(A) LEP,d causes deafness to a particular claimant, that claimant's place of work was not safe for him or her. It might have been safe for another person working alongside. But for the susceptible worker who has in fact been damaged, it can be demonstrated, without more, that his or her place of work was not safe. Looking at matters from the point of view of the workforce generally, it is known that a minority of people will suffer appreciable harm as the result of prolonged exposure to 85dB(A) LEP,d. Therefore, it can be said that the place of work is not safe for the workforce because there is a risk of injury to all of them. Some of them will be injured but not all; no one knows which of them will not be injured. They all face some risk, save for those workers who are already known to be of average susceptibility. For those reasons, I would hold that, on the evidence before the judge, which was not controversial, the places of work where the ambient noise levels were 85dB(A) LEP,d or above were not safe.

Smith LJ added that if she were wrong about the irrelevance of reasonable foresight to the question of safety, she would accept the appellant's alternative submission that, by the early 1970s, the reasonable employer who kept abreast of developing knowledge would have known that prolonged exposure to 85dB(A)L8 was harmful to some people, and thus would have known that the place of work was unsafe for an undefined section of its workforce and that it must do what was reasonably practicable to make and keep it safe.

The Court then considered the question of the employer's reasonable

Three points arose:

- First, Asquith LJ was considering risks of which the employer was actually aware and was able to quantify. If an employer ought to have known of the risk but did not, it would have to show that it would not have been reasonably practicable to avoid or reduce the risk even if it had thought about it.
- Second, the balancing exercise is not done with a view to seeing whether the scales just tip. There must be a gross disproportion: *Coltress Iron Co Ltd v Sharp* [1938] at 94 (Lord Atkin).

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practicability defence, which the judge had not considered, although he had found that:

The evidence does not show that at any time the cost of implementing a policy of voluntary hearing protection at levels below 90dB(A) was such that a reasonable employer could use cost or difficulty as a valid reason for not having such a policy.

The burden of proving the defence was on the employer: *Nimmo v Alexander Cowan & Sons Ltd* [1968]. The classic exposition of reasonable practicability was to be found in Asquith LJ's judgment in *Edwards v National Coal Board* [1949] at 712:

'Reasonably practicable' is a narrower term than 'physically possible' and seems to me to imply that a computation must be made by the owner in which the quantum of risk is placed on one scale and the sacrifice involved in the measures necessary for averting the risk (whether in money, time or trouble) is placed in the other, and that, if it be shown that there is a gross disproportion between them – the risk being insignificant in relation to the sacrifice – the defendants discharge the onus on them.

- Third, the 'quantum of risk' referred to the gravity of the harm which might occur if the risk eventuated, as well as the likelihood of it happening.

According to Smith LJ's findings in *Baker*, 'Noise and the Worker' told employers from 1963 that there was something that could and should be done to protect the worker against noise injury. However, even that would not necessarily have put on notice employers in an industry which had no general knowledge of deafness in its workforce.

However, all employers who had any noisy processes, including employers in the knitting industry, should, within a few months of its publication, have been aware of the 1972 code of practice. Any area where the ambient noise was 85dB(A) was obviously noisy to anyone entering it. By mid-1973, employers such as Quantum Clothing Group should have been turning their minds to the problem of noise, using the code as a guide. Anyone considering the matter properly would immediately have realised that they ought to measure the noise in their workshops. If they had done so, they would have discovered that they had some workshops in which the noise exceeded 90dB(A), and so

were required to take steps as the code advised.

The code also told all employers that in workshops where the noise levels were in the range 85-89dB(A) there was risk to some particularly susceptible employees. Thus, by the time that they had the time and opportunity to measure their noise levels, by about mid-1974, employers in the knitting industry ought to have known that they had some workshops where the noise would harm some (unidentified) employees, and that the whole workforce in those departments was therefore at risk of harm.

Once the employer appreciated some risk, it would have to consider the quantum of risk. At first instance HHJ Inglis was able to estimate the quantum of risk in a general way, judging that prolonged exposure to noise above 85dB(A) could cause significant hearing loss.

While a lay person may not have had that understanding by 1974, a suitably qualified expert would. With expert advice, and given that the provision of ear protectors was neither difficult nor expensive, the employer could not hope to establish that the burden of providing ear protectors was substantially disproportionate to the quantum of risk to their employees.

The code of practice was relevant to the employer's assessment of the quantum of risk but was plainly inadequate as an assessment tool. It advised only that there was some risk to susceptible individuals from exposure below 90dB(A). It did not discuss the size of the minority that would be affected or the extent to which they would be affected. Expert advice was required for a proper assessment and the employer was bound to obtain it. Looked at another way, it was reasonably practicable for the employer to obtain such advice, and the employer who failed to obtain it could not establish the defence.

From the issue of British Standard 5330 (the test for estimating the risks of hearing damage) in July 1976, there was a risk quantification method available to anyone with a modest degree of mathematical skill, and certainly any consultant acoustic engineer. Thus, by early 1977, the average-sized employer in the knitting industry could and should have been able to make an informed assessment of the quantum

of risk arising from the below 90dB(A) noise in its workshops.

Accordingly, the Court found that from early 1977 the respondent, and indeed any other employer of average size in the knitting industry who exposed employees to 85dB(A)L8 or more without acting to provide protection, was in breach of duty under s29 FA 1961. Six to nine months would be allowed for the provision of hearing protection. For the sake of simplicity, the date by which action should have been taken was January 1978.

In his brief judgment concurring, Sedley LJ summarised at paragraph 114 why the respondent was liable under s29:

[The risk] can and should be ascertained and, once ascertained, can be readily guarded against. In such a case the onus on the employer has not been discharged. This was precisely the policy of s29.

of all issues in the appeal: all the respondents were or would be liable from January 1978. Thus the issues arising under common law and the issues of the respondents' actual knowledge had become academic. However, she made certain limited but important findings on those issues.

The implication of the Code that exposure to noise below 90dB(A)L8 was 'acceptable' was a factor to be taken into account by an employer considering what it was reasonable

body of opinion regarded it as 'acceptable' to expose employees to noise in the 85-89dB(A)L8 range.

The judge at first instance allowed a further two years, 1987-89, for the implementation of the hearing protection policy. The Court of Appeal considered this too generous, and no more than a further six to nine months could be justified. Thus, the revised date for breach of common law duty for the employer in the knitting industry without special knowledge was January 1988, on the

All employers who had any noisy processes, including employers in the knitting industry, should, within a few months of its publication, have been aware of the 1972 code of practice.

Common law liability: the cross appeals

Smith LJ considered that the decision on s29 effectively disposed

for it to do. Thus the Court did not interfere with the judge's view that there was no breach of the duty at common law as long as a responsible

basis that the Court of Appeal was not interfering with the judge's conclusion that triggering knowledge arose in 1987, following publication

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of the 1986 Directive. However, 'left to herself', Smith LJ would have said that the publication of the 1982 draft Directive put all employers on notice that it was unacceptable to leave this group of employees exposed.

As the judge had found, by early 1983, the major employers in the case

cost or other difficulties grossly disproportionate to the risk of harm under consideration.

Successor statutory duties

That FA 1961 was fully repealed with effect from 1996 raises the question of what legislation protection of employees follows. It is so far

The fact of injury (proof of causation) will demonstrate that the workplace was unsafe, leaving the employer to plead and prove that it was not reasonably practicable to make it safe.

(Courtaulds and Pretty Polly) could no longer have thought that a responsible body of opinion took the view that it was acceptable to ignore the risks of harm below 90dB(A)L8. They should by that time have known which of their workers required protection, and so only a further six to nine months would be allowed. They were therefore liable at common law from January 1984. Contrary to the judge's view, this also applied to Quantum, which was not in a materially different position.

Implications

The case was hard fought by the defendants' insurers on the specific basis that success by the claimants would have broad implications for employer's liability across all industries.

Unsafe factories

Baker's conclusions on s29 are particularly wide in their scope. The fact of injury (proof of causation) will demonstrate that the workplace was unsafe, leaving the employer to plead and prove that it was not reasonably practicable to make it safe. This affects not only noise-induced hearing loss cases, but any employer's liability cases concerning factories while the statute was in force. The Court of Appeal stresses that it is not the reasonableness of the employer that matters for the defence to s29, but the reasonableness of practicability, to be tested by whether steps to avert a risk of which the employer was or could have been aware cause inconvenience,

a generally applied principle that successor legislation in the field of occupational health and safety can be assumed and interpreted to provide at least equal if not better protection to the employee than the predecessor provisions. In the case of noise, do the Noise at Work Regulations 1989 provide equal protection to the employee, post-1990, as held here to have been provided by s29? This consideration, following *Baker*, may lead courts to a broad and purposive interpretation of the general regulation 6 duty for the employer to:

... reduce the risk of damage to the hearing of his employees from exposure to noise to the lowest level reasonably practicable.

Common law: date of knowledge

HHJ Behrens' view of the 'average' knowledge of employers must be confined to the facts of these cases and does not bind other judges hearing other cases. Thus, it would seem that 1982 is the appropriate trigger date, with a period for introduction of protective measures allowed after that. This was the trigger actually applied by the judge to the larger employers before him. However, if the 1982 draft Directive does inform general knowledge of employers, then the judge's findings of specific knowledge become irrelevant, with January 1984 the generally applicable date for a common law duty to protect against noise injury caused by exposure to 85-90dB(A)L8.

Acceptability of common law

Save in respect of regulatory coverage of general application, the common law remains of importance, for example in cases of employees exposed to hazards outside factories before 1990. The concept of 'acceptable risk', in the sense of risk of injury acceptable to society, industry or employers (on economic grounds), as opposed to risks acceptable to the injured employee never warned of any risk, is introduced. This seems novel, and is noticeably absent from the straightforward risks v steps-to-avoid balancing exercise contemplated in the line of House of Lords authority, including *Wagon Mound (no 1)* [1961] and *(no 2)* [1967], and *Jolley v Sutton* [2000].

In *Baker* it is held that an employer may recognise a risk (or be deemed to have done so, on the basis that it ought to have kept itself properly informed) and know that steps to protect the employees are not difficult or costly, yet deliberately subject employees to the risk, on the basis of non-statutory official guidance (even where, as here, that guidance points out the risk itself). ■

Allen v Avon Rubber
[1986] ICR 675

Baker v Quantum Clothing Group
[2009] EWCA Civ 499

Coltress Iron Co Ltd v Sharp
[1938] AC 90

Edwards v National Coal Board
[1949] 1 KB 704 CA

Harris v BRB
[2005] EWCA Civ 900

Jolley v Sutton
[2000] 1 WLR 1082

Kellett v British Rail Engineering Ltd
(Unreported, 3 May 1984)

Larner v British Steel
[1993] ICR 551

Mains v Uniroyal Englebert Tyres Ltd
[1995] IRLR 544

Nimmo v Alexander Cowan & Sons Ltd
[1968] AC 107

Parke v Meridian Ltd
[2007] EWHC B1 (QB)

Taylor v Fazakerley
(Unreported, 29 May 1989)

Thompson v Smiths Shiprepairers
[1984] QB 405

Wagon Mound
(no 1) [1961] AC 388;
(no 2) [1967] 1 AC 617