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NIHL and success fees

Andrew Hogan Barrister at law[1]

On 13th March 2015 at 4pm, Mr Justice Phillips handed down judgment in conjoined cases, **Dalton and others.v.British Telecommunications plc**[2] on the preliminary issue as to whether NIHL/tinnitus, is to be treated as an injury or a disease, for the purposes of calculating fixed success fees under the former part 45 of the Civil Procedure Rules.

He decided that NIHL/tinnitus is a disease rather than an injury, and the higher success fees applicable to diseases should apply.

However, in doing so he recognised that his approach to construction of the rules, differed from that of Mr Justice Males in the case of **Patterson.v.Ministry of Defence**[3].

The judgment

A full copy of the judgment can be found at www.costsbarrister.co.uk. What follows is a consideration of the reasoning in the judgment.

The reasoning

The Defendant submitted that taking a "purposive-and-literal" approach to construction of the former part 45, the court had to consider the "natural and ordinary" meaning of the word "disease". As disease was given no extended definition in the rules, the word simply had to be applied in the context of a claim for NIHL/tinnitus.

The Claimant did not contend for a "purposive-and-strained" construction, but countered with the submission that a considerable body of extraneous

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[2] [2015] EWHC 616 (QB)
[3] [2012] EWHC 2767

material, could and should be admitted as evidence to construe "disease" more widely to include the condition of NIHL/tinnitus.

The court accordingly considered a lot of extraneous material, including the provisions of the social security legislation which, did contain an extended definition of disease:

24. Regulations made under the 1975 Act, the Social Security (Industrial Injuries) (Prescribed Diseases) Regulations 1985, which remain in force, define prescribed diseases as "a disease or injury described under ... these regulations, and references to a prescribed disease being contracted shall be deemed to include references to a prescribed injury being received". Schedule1 lists prescribed diseases, including: "A10 Substantial sensoineural hearing loss (occupational deafness)". Occupational deafness is defined in the Regulations as "the disease numbered A10 in part one of schedule 1 to these regulations".

25. It follows that NIHL has been expressly defined as a 'disease' in subordinate legislation governing statutory compensation for industrial injuries for about 30 years and had been so defined about 20 years prior to the introduction of section V of CPR Part 45 in 2005.

The reader will note, that the only reason that occupational deafness is a disease, is because it is given that label under the regulations: a provision which is strikingly absent from the former part 45.

26. The distinction between 'injury by accident' and 'disease' further survives in the Pre-Action Protocols made under the Practice Direction on pre-action conduct. A Protocol in relation to personal injury claims was introduced with the CPR in April 1999. On 8 December 2003 a further Protocol for Disease and Illness Claims came into force. Section 2 contains the following:

> "*2.1 This protocol is intended to apply to all personal injury claims where the injury is not as the result of an accident but takes the form of an illness or disease.*
>
> *2.2 …. Disease for the purposes of this protocol primarily covers any illness physical or psychological, any disorder, ailment, affliction, complaint, malady,*

or derangement other than a physical or physiological injury solely caused by an accident or other similar single event."

27. It is quite clear that NIHL would constitute a disease under this definition and, indeed, the template for a letter of claim makes express reference to providing details of "exposure to noise or substances".

For the purposes of the Protocol, disease would plainly include NIHL, but that is only for the purposes of the Protocol, and there is a long line of authority emphasising the dangers of trying to construe rules by reference to practice directions made under them. The protocol is not even a practice direction.

The judgment also throws up two further issues; to what extent should admissible material outweigh the clear words of the statute and to what extent should the views of doctors and a minority of lawyers who practise in the field of industrial deafness litigation be used to construe a "natural and ordinary" English word?

The core of the judge's reasoning lies in these paragraphs:

49. However, reference to the legislative history is particularly relevant in interpreting these provisions, not only because the terms 'injury' and 'disease' are otherwise relatively ambiguous, but also because the longstanding usage of those terms in antecedent legislation is reflected in the definition of disease in the Pre-Action Protocol, which can be regarded as 'internal' to the CPR, the very legislative scheme under consideration.

50. In my judgment consideration of the legislative history in this case strongly indicates that Parliament intended the term 'disease' in sections IV and V of CPR 45 to include any illness (whether physical or physiological), disorder, ailment, affliction, complaint, malady or derangement other than a physical or physiological injury solely caused by an accident or other similar single event. The provisions of section IV are therefore restricted to injuries caused by accidents (or other single events), preserving the long-established distinction.

51. The above conclusion is reinforced both by certain wording of the sections

and by their substantive effect:

(i) Section IV provides that it does not apply to injuries sustained before a specified date (rule 45.20(20(a)(ii)), consistent with its application to injuries caused by a single incident, when the precise date the injury was suffered will be known. In contrast, that provision would be inapposite in relation to injuries resulting from process (such as NIHL). It would rarely be possible to identify a date on which such a condition was 'sustained' and the need to do so would give rise to uncertainty and argument (as indeed has incurred in relation to the four test cases). That issue does not arise if conditions and injuries not caused by a single incident or accident are diseases within section V, which does not provide a cut-off date.

(ii) The broad effect of sections IV and V is that success fees in injury claims are limited to 25% whereas higher percentages are provided for in disease claims. The rationale for higher success fees in disease claims must be that it is harder to prove how and when a disease was contracted than to prove how and when an injury was sustained. But that greater difficulty can only be to do with the difference between a (possibly) lengthy and unobservable process on the one hand and a single observable occurrence on the other, namely the difference between injury by process and injury by accident. No other distinction has been suggested to explain the assumed difference in failure rates which must underlie the provisions.

In a most important paragraph, the decision in **Patterson** was distinguished:

52. I recognise that the above conclusion differs from that reached by Males J in Patterson, but it does not appear that the lengthy legislative history, nor its relationship with the current Pre-Action Protocol, was drawn to his attention.

The judge went on to state what he thought the position was in relation to VWF/HAVS cases, even though no such case was before him:

53. Applying the above meaning of 'disease', there is no doubt that NIHL falls within section V of the former CPR Part 45. Whilst not forming part of the issue I am deciding, I should add (in the hope of clarifying a further area where disputes may arise) that the same conclusion would apply in relation to VWF.

54. Mr Hogan referred throughout to "NIHL/tinnitus", no doubt in order to ensure that claims for tinnitus (a perception of ringing in the ears) were covered by my ruling on the preliminary issue. To the extent that tinnitus is a symptom of NIHL or otherwise is caused by exposure to excessive noise, it also clearly falls within section V.

55. If I am wrong about the meaning of 'disease' in sections IV and IV, it is nevertheless entirely clear, in my judgment, that the term (however it is defined) must be taken to include NIHL.

56. First, the categorisation of NIHL has its own legislative history, pointing in only one direction. It has been a 'prescribed disease' for the purpose of national insurance and social security legislation since 1975, following detailed consideration and recommendation by an advisory council mandated to undertake that task by statute. Occupational deafness has been expressly defined a disease since 1985. In using the term 'disease' in section IV and V without any list or definition, Parliament must be taken to have intended to include conditions such as NIHL which had been and were currently defined as diseases for the purposes of closely-related legislation.

57. Second, in the context of claims for occupational diseases, NIHL claims are not only recognised as that type of claim, but account for a substantial majority of all such claims. NIHL is not merely an occupational disease, but is the paradigm case of such a disease. That accounts for the fact that, when considering issues arising in occupational disease claims, courts give as examples claims relating to NIHL (see paragraph 37 above). Further, given that section V makes specific provision for asbestos, RSI and stress claims, the category of other diseases which comprises type C would be denuded of content if it did not include the two other main types of widely recognised occupational disease, NIHL and VWF. It is inconceivable, when looked at in its proper litigation context and considering the mischief being addressed, that Parliament did not intend to include NIHL (and VWF) in type C in section V.

58. Third, the Civil Justice Council's press release puts the matter beyond any sensible argument, expressly recording that an 'industry' agreement was to be embodied in rules and would prove for the success fee in claims for NIHL and VWF to be 62.5%. Mr Hogan does not dispute that the press release is an admissible document and that it demonstrates that the intention of the parties to the industry negotiation, the Civil Justice Council and the Rules Committee was (at least at the date of publication) that NIHL and VWF should be included as diseases in section V. His submission is that such private intentions must be

ignored in favour of the literal meaning, which must prevail in public legislation, even if that means that (as in this case) the intended effect of the legislation miscarries.

59. However, sections IV and V were designed to regulate an aspect of claims between two clearly identifiable groups following negotiations and agreement between those groups under the auspices of the official bodies responsible for the legislation. The report of one of those bodies on the result of that process is a powerful factor in interpreting the legislation which is intended to enact the agreed outcome. In R (Public and Commercial Services Union) v. Minister for the Civil Service [2010] ICR 1198, Sales J considered the 1972 report of the Joint Superannuation Committee of the national Whitely Council in interpreting the effect of s2(3) of the Superannuation Act 1972. After stating his initial impression of the effect of the provision, Sales J stated at paragraph 38:

> *"That impression is reinforced by the terms of paragraph 12 of the joint committee report, which records the understanding of the staff and management sides at the time regarding the protections which would apply with the introduction of the Superannuation Bill. Such contemporaneous understanding of the effect of an act, particularly by an official body like the joint committee, constitutes a powerful form of contemporanea expositio and is a legitimate aid to the construction of that Act: see Bennion on Statutory Interpretation, 5th ed (2008) pp 702-706, 711-712. That is especially the case where, as here, an Act is being introduced specifically to regulate relations between certain persons and it is those persons who have the understanding in question and the."*

60. I accept that there might be cases where the language of legislation is so clear that the court would be compelled to find that an intended scheme, even one as clearly evidenced as that reported in the Civil Justice Council's press release, had totally miscarried, the words actually used failing to give effect to what was intended by those who devised the scheme. But this is not such a case. I have set out above examples of NIHL being categorised as an occupational disease in medical literature, legislation, House of Lords and Supreme Court decisions, legal texts and the Pre-action Protocol for Disease and Illness claims, all

of which goes to demonstrate that, consistently with the 'industry' agreement and the Civil Justice Council report of that agreement, NIHL may properly be categorised as a disease.

Permission to appeal

An application has been made for permission to appeal to the Court of Appeal.

The judgment is concerned with a point of law, with no elements of fact or issues of discretion, namely a point of statutory construction. The decision of the court expressly recognizes, that its decision differs from that of Males J (paragraph 52) of the judgment. Where there are conflicting approaches by differing High Court judges, there must be a real (defined as more than fanciful prospect) that the Court of Appeal might prefer the approach of Males J. Moreover, the issue at the heart of this case, was the extent to which extraneous material could be admitted to construe the former part 45 and what weight should be attached to it. The court's decision places emphasis on the role of subordinate legislation which does provide an extended definition of disease, and the Pre-Action Protocol, which applies to disease claims, but which is not part of the Civil Procedure Rules, nor a Practice Direction made under them and which contains a definition, which the draftsmen declined to include in part 45, a further point which is expressly in conflict with the approach taken by Males J in Patterson. A similar point would apply in relation to the Civil Justice Council press release.

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