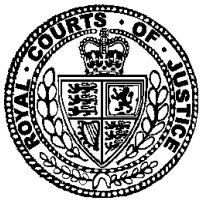

Neutral Citation Number: [2019] EWHC 149 (QB)

Case No: B90YJ215

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
On Appeal from the County Court at Swansea

Cardiff Civil and Family Justice Centre
Cardiff CF10 1ET

Date: 31/01/2019

Before:

MR JUSTICE GARNHAM

- -

Between:

Mr Brian MacKenzie	**Appellant**
- and -	
Alcoa Manufacturing (GB) Limited	**Respondent**

- -

- -

Christopher Johnson (instructed by **SSB Law**) for the **Appellant**
Patrick Limb QC & Gareth McAloon (instructed by **Simpson Sissons & Brooke LLP**) for the **Respondent**

Hearing dates: 28th November 2018

- -

Approved Judgment

Mr Justice Garnham:

Introduction

1. On 15 November 2017, His Honour Judge Vosper QC handed down judgment in this claim for damages for noise induced deafness. The Judge dismissed the claim against both defendants.

2. The claimant now appeals against the dismissal of his claim against the second defendant, Alcoa Manufacturing (GB) Limited. (Accordingly, the claimant is the Appellant before me and the second defendant is the Respondent. For convenience, however, I will continue to refer to them as "claimant" and "second defendant" respectively). The claimant appeals with permission of the trial judge, as regards Grounds 1-3, and with the permission of Rose J, as regards Grounds 4-5. The five grounds of appeal set out in the notice of Appeal are as follows:

> "The decision of the Learned Judge that "*it is not possible to make a finding that [the Respondent] is in breach of duty in failing to carry out noise surveys*" ([33] of the judgment) was wrong because:
>
> 1. The Learned Judge failed to give sufficient weight to the following factors: (1) that the Respondent was under a duty to conduct noise surveys at the Site between 1963 and 2007 (44 years), but the Respondent has failed to provide any noise surveys; (2) the Respondent could have produced evidence to explain this failure, but has not.
>
> The decision of the Learned Judge that the claimant was not tortuously exposed to noise by the Respondent ([66] of the judgment) was wrong, in relation to the period prior to 1972, because:
>
> 2. The Learned Judge was wrong to distinguish the decision in Keefe v Isle of Man Steam Packet Company [2010] EWVA Civ 683 on the basis that there was no expert evidence in that case and there is expert evidence in the present case. Rather, in accordance with paragraph [19] of the judgment in Keefe, the Learned Judge should have judged the "*claimant's evidence benevolently and the defendant's evidence critically*".
>
> 3. Had the Learned Judge judged the "*claimant's evidence benevolently and the defendant's evidence critically*" he would have found the Respondent to have tortuously exposed the Appellant to noise in the tax years 1963/64 – 1975/76.
>
> The decision of the Learned Judge that the claimant was not tortuously exposed to noise by the Respondent (paragraph [66] of the Judgement) was wrong, in relation to the period after 1972, because:

4. The Learned Judge wrongly did not *consider* the claimant's submission that for peripatetic workers (such as the claimant), the duty from 1972 onwards was to avoid *any* exposure at or exceeding 90 dB(A).

5. Further or alternatively, the Learned Judge wrongly did not *accept* the claimant's submission that for peripatetic workers (such as the claimant), the duty from 1972 onwards was to avoid *any* noise exposure at or exceeding 90 dB(A)."

3. I accept the opening submission of Mr Patrick Limb QC for the second defendant, that Grounds 1 to 3, and 4 to 5, are better considered and analysed together. The first set of grounds relates to the Judge's conclusion as to the claimant's exposure to noise before 1972, the second set to his exposure to noise as a peripatetic worker from 1972 onwards.

The Factual Background

4. The factual background is well summarised by the trial judge:

"4. From about 1963 to about 1968 (between the ages of 16 and 22) the Claimant was employed initially as an apprentice electrician by the First Defendant but he worked at the factory of the Second Defendant at Waunarlwydd, Swansea. For the first 10 or 12 months of his employment he was engaged in the installation of the hot and cold rolling mills. At that time, he was not exposed to excessive noise.

5. Thereafter he worked in those parts of the factory which he describes in his Particulars of Claim as the foundry and extruding mill and in his replies to Part 18 questions and his witness statement as the strip mill and the extrusion mill.

6. In the foundry or strip mill, he says, aluminium was smelted and rolled. There were 2 smelting furnaces and 4 holding furnaces. They produced ingots of aluminium which were about 3 feet in length and 6 or 9 inches in diameter. Some of these were rolled in the strip mill by hot and cold rolling mills. There were 10 Brightside rolling mills in the strip mill. Some were then cut by cutting machines. The entire process was noisy.

7. In the extrusion mill, which was noisier than the strip mill, ingots were heated in ovens and then pressed in 5 presses ranging in size from 500 to 5000 tonnes. These presses forced the ingots through shaping dyes. The presses were powered by compressors which were noisy and in constant operation. The presses were also noisy. The extruded items were cooled by blowers as they passed down the production line and then cut by cutting machines. All these processes were noisy.

8. The Claimant's job involved installation of plant and maintenance and repair of the machines. He was required to work on a machine, such

> as a blower or a cutting machine, while the line continued and other blowers and cutting machines were still working. He might have to work on a machine which was itself still working in order to find a fault. A job might be a simple one, taking only minutes to complete, or it might take days. In consequence, he says, he was exposed to noise throughout his working day. He was never more than a few feet from operating machinery. In order to communicate he had to shout or use hand signals. He was provided with no hearing protection and he was given no warning of the dangers of exposure to excessive noise.
>
> 9. His pleaded case is that he worked 6 days each week though when he was an apprentice he attended college on one day a week. The machines shut down from 6 am on Saturday until Sunday morning. During his working day there were short breaks but no relief from exposure to noise when the machines were running. He also worked overtime so that his working days were 10 hours long.
>
> 10. In about 1968 the Claimant worked for a few months at Port Talbot. During that time, he was not exposed to noise. He then returned to the Second Defendant's factory where he worked from about 1968 to about 1976. He was not then employed by the First Defendant but by Industrial Needs Limited. However, his work did not change. The Claimant was therefore aged about 30 when he ceased work at the Second Defendant's factory…
>
> In 2002 he returned for a short time to work for the Second Defendant. By then the Second Defendant provided hearing protection and tested the Claimant's hearing."

4. The Judge held that the claimant first had knowledge of his hearing loss in the summer of 2012 and that accordingly, the claim was issued within the relevant limitation period.

The Pleaded Cases

5. The claimant's particulars of claim include an allegation, at paragraph 22, that his injuries were "caused by the negligence and/or breach of statutory duty of the defendants' their servants or agents". The particulars of negligence include the following:

> "a) Failed to make a noise assessment contrary to the Noise at Work Regulations 1989…, regulation 4, or at all …
>
> i) Failed to investigate and take advice on the noise levels in the said premise…
>
> q) Failed to monitor the noise levels at the said premise properly, sufficiently, frequently or at all to ensure the Claimant was not exposed to unsafe levels of noise."

6. The response of the second defendant in their defence was to make no admission of negligence

> "12.2 The Second Defendant makes no admission as to the particulars of breach of statutory duty or negligence set out at paragraph 22(a) to (y) and the Claimant is put to strict proof thereof."

The Evidence at Trial

7. The Judge received evidence from the claimant and from a consulting engineer, Mr Kevin Worthington, who had been jointly instructed by the parties. The claimant's witness statement, the contents of which he confirmed at the start of his oral evidence, included the following at paragraph 11:

> "Throughout my working time working on the Waunarlwydd site, most of it was spent in environments where it was necessary to shout to communicate with my colleagues at very close distances or even resort to having to tap them on the shoulder in order to get their attention or lip read what it is they were trying to relay to me".

8. The Judge described the evidence of Mr Worthington this way:

> "18. …He had knowledge of measurements of noise levels at the premises of British Alcan, also an aluminium producer, at Newport carried out in 1989 by Sound Research Laboratories Limited, which he describes as a reputable noise and vibration consultancy. British Alcan produced sheet aluminium, but, like the Second Defendant, its premises also contained furnace areas, hot and cold rolling mills and finishing areas.
>
> 19. Noise levels at Newport varied widely. In the vicinity of the furnaces levels were 84 – 90dB(A)$_{Leq.}$ Along the hot and cold rolling mills levels were measured at 80 – 90dB(A)$_{Leq,}$ though at one point they were at 97 – 106dB(A)$_{Leq.}$ Noise levels exceeding 90dB(A)$_{Leq}$ were measured in areas described as the mill motor room, the roll tables, the hydraulic system area and the hot mill scrap conveyor.
>
> 20. The decrease in decibel levels when machinery was shut down was measured with respect to a tension levelling machine and a slitting machine. The drop in noise was from 85 to 79dB(A)$_{Leq}$ in the former and from 88 to 75dB(A)$_{Leq}$ in the latter. Those machines are, I assume, used for sheet aluminium and so would not have been used at the Second Defendant's premises. Nevertheless, the readings give some indication of the level of reduction of noise which the Claimant might

have experienced when working on a stopped machine in the vicinity of others which continued to work.

21. Based upon this information Mr Worthington concludes that there are some areas of an aluminium processing plant where the noise levels exceed 90dB(A), but that the average level for someone carrying out the Claimant's work would be unlikely regularly to exceed such a level. He then says:

> "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 average daily noise exposure level would have reached or exceeded 90dB(A) during these period of employment. Hence substantiation of this claim on engineering grounds would be very difficult."

22. He points out that calculation of the Claimant's Noise Immission Level ("NIL") cannot be carried out without knowledge of all relevant employment and exposure periods and the average daily noise exposure level during those periods. However, as guidance only, and relying upon assumptions, he suggests that the Claimant's NIL in the period 1963 to 1968 did not exceed 97dB and in the period 1968 to 1976 did not exceed 99dB.

23. In reply to questions by the Claimant's solicitor Mr Worthington accepts that his use of the data emanating from the Newport factory is of limited assistance. But he points out that it is the only information currently available and without it, his conclusion would have been that there is no evidence to show the levels of noise to which the Claimant was exposed."

9. The second defendant adduced no evidence at trial that any noise surveys had been conducted at the premises during the period of the claimant's employment there.

The Argument before the Judge

10. The claimant was represented at the trial by Mr Christopher Johnson who also appeared for him before me. The Judge summarised the argument he heard as follows:

> "24. Mr Johnson, counsel for the Claimant, submits that the First Defendant owed to the Claimant the duty of an employer to an employee at common law. The Second Defendant owed to him the duty of an occupier of a factory to a person working within the factory at common law and under the Factories Act. At the time of the Claimant's employment those duties included a duty to monitor the level of noise at the factory in order to determine whether and if so, what steps needed to be taken to protect the Claimant from exposure to noise which might damage his hearing.

25. The Second Defendant has not produced any noise surveys. In their absence it is to be inferred that none was carried out. In that respect the Second Defendant was in breach of duty.

26. Had Mr Worthington had access to such surveys he would have been able to determine the level of noise to which the Claimant was exposed during his employment at the Second Defendant's factory. Counsel submits that it is likely that Mr Worthington would have concluded that the Claimant had been exposed to excessive noise but a finding to that effect is not a necessary step in his argument.

27. Mr Worthington has been unable to provide important evidence because of the Second Defendant's breach of duty. In such circumstances it should be inferred that the Claimant was exposed to excessive noise. Alternatively, Mr Worthington's evidence should be set aside and the court should make its own assessment of the noise to which the Claimant was exposed based upon other evidence in the case.

28. Mr Johnson relies upon the decision of the Court of Appeal in *Keefe v The Isle of Mann Steam Packet Company Limited [2010] EWCA Civ 683*. Mr Keefe claimed damages for hearing loss caused he said by the noise to which he had been exposed when working in the galley of the defendant's ships. The issue which arose is set out as follows at paragraph 6 in the judgment of Longmore LJ:

> "This case is (as the judge said) somewhat unusual because there is no engineering evidence of noise level in the ships in which Mr Keefe served during his 20year period of employment with the defendants. There is no evidence that the defendants took any measurements of noise levels in their ships and the judge's finding is that they did not. They were, however, aware of noise problems in that they provided ear protectors for employees working in the engine room and also, for a short time, to employees working with the cars coming on board and leaving the ships. But it does not appear that that occurred as a result of any noise measurement being taken. The relevant ships were all disposed of before the claim was brought."

11. The second defendant was represented before HHJ Vosper QC by Mr McAloon, who appeared with Mr Limb before me. Mr McAloon argued before the Judge as follows:

> "32. Mr MacAloon further submits that in *Keefe* there was a finding that no noise surveys had been carried out. The present case is however concerned with events 50 years ago. The fact that the Second Defendant has produced no noise surveys should not be taken as evidence that none was carried out. It is not

> surprising that documents created over 50 years ago are not available. Noise surveys might have been undertaken. It would be wrong to make a finding that no noise surveys had been carried out in the present case and that thereby the Second Defendant is in breach of duty…"

12. The judge continued at paragraph 42:

> 42. Mr Worthington was informed that the Claimant worked 7 days a week (save that he attended college for one day each week when he was an apprentice); that he worked 26 hours overtime each week (or that he worked 7 days of 10 hours each day and 6 hours overtime each week) and that the noise was such that he would have to shout to communicate and would often resort to the use of hand signals. Breaks were taken in the noisy environment. He was not provided with hearing protection.
>
> 43. The noise came from furnaces which were noisy because of the air feed, the hot mill, cutting machines, 10 Brightside mills, presses which were noisy because of steam leaks, and blowers. He was told that the machines operated 7 days a week. The Claimant's job involved installation, maintenance and repair. He did not operate the machines.
>
> 44. As I have said, the Claimant's evidence did not fully accord with this information. It is likely that the information given to Mr Worthington exaggerates the Claimant's noise exposure.
>
> 45. Mr Worthington says that he has previously addressed noise levels for mill operators at the Newport factory. It was in that context that he had access to the noise survey. The exposure to noise of a mill operator is likely to be greater than that of the Claimant.
>
> 46. The noise survey at Newport was carried out in July 1989. By that time it was understood that protection was necessary at levels of noise exposure below 90dB(A) (see for example Directive 86/188/EEC issued in about May 1986). The Noise at Work Regulations 1989 were about to come into force. The Introduction to the report states that the survey is required in order to get an idea of the overall noise levels. British Alcan were attempting to limit operator noise exposure to 85dBA for an 8 hour shift. It appears therefore that British Alcan were preparing for the 1989 Regulations.
>
> 47. Up to the 1989 Regulations, 90dBA had been regarded as the relevant level of exposure. It might be inferred therefore that the noise levels in the Newport factory had not changed since the 1960s and early 1970s and were therefore comparable with the levels to which the Claimant had been exposed at the Second Defendant's factory.
>
> 48. However, British Alcan had undoubtedly carried out some noise reduction work on its machines: the survey records that the tension

levelling machine and the "Nobs" slitting machine had been fitted with an acoustic enclosure because of complaints about noise.

49. There is reference to a survey in 1981 but no comparison with that survey is made in the report and the 1981 survey is not available. There are suggestions in the report that noise levels were in places higher and in other places lower than they might have been during everyday production. For example, it is suggested that operators were deliberately increasing the noise at the No. 48 Remelt Furnace by dragging a skip across the floor. On the other hand, measurements at that furnace may have been lower than in general production because the No. 51 Furnace alongside it was shut down. No measurements were made when the furnaces were being charged or during casting or pouring. In general light gauge material was being used in the mills. Heavier gauge material is likely to have generated more noise.

50. The LEQ in the vicinity of the ingot scalping machine was 98dBA. The high level of noise was generated by the ducted air transport system for removing swarf. It is noted that this machine was old and soon to be replaced. On the one hand that might mean that it is the sort of machine which would have been in use in the 1960s. On the other, the high level of noise was generated by a specific function which may not have been present at the Second Defendant's factory.

51. Part of the Claimant's complaint is of noise generated by blowers, motors and compressors. These were present at the Newport factory and, I assume, were similar to those at the Second Defendant's factory. In the pit furnace area the noise, which was generated by recirculation fans and electric motors, was 90dBA LEQ. In the mill motor room the LEQ was 91dBA. In the mill hydraulic systems area the LEQ was 90dBA. The noise was produced by hydraulic pumps and electric motors.

52. There were some processes at the Newport factory which generated high levels of noise but which are related to the particular process at that factory. For example, at the roller tables the LEQ was 92dBA but this was attributed to a feature of the production of sheet aluminium. At the hot mill scrap conveyor the LEQ was 93dBA but this was caused by scrap falling into bins.

53. The area where the noise level was highest was at the outfeed side of the Tandem Mill. The LEQ at the operator position was between 97 and 106dBA. That reduced at other operator positions to 86dBA and 84dBA. However this machine is used for processing coils of sheet aluminium and again may not be representative of the work carried out at the Second Defendant's factory.

54. Mr Worthington was asked in questions by the Claimant about the extent to which reliance might be placed on this survey at Newport. He said:

> "I have pointed out that the data referred to is of limited assistance, although if the processes and/or operations were similar to those at the relevant premises, then such information would assist. Essentially, this information is what is currently available. Without this, the conclusion would have been that there is no evidence available to show what levels of noise would have existed."

55. Mr Worthington's opinion is set out at paragraphs 5.1.15 to 5.1.17 of his report where he says:

> "It is considered unlikely that electrical maintenance/repair would be carried out on fully operational machines on anything but an occasional basis. Additionally, if a mill stand is shut down due to repair/maintenance work, then it is likely that the entire mill line would be shut down, as the progressive size reduction achieved by the mill would be interrupted. Additionally, working in close proximity to hot rolled product passing through a series of mill stands would present serious safety issues (in other respects).
> The Claimant also describes working on installation of machinery at the premises. Clearly, such machinery would not be operational for the majority of the period of installation, with operational conditions only occurring during testing/adjustment of machine operation. Hence any exposure to noise during such work would be limited to background noise in the mill in general.
>
> Based on the above discussion, 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 90dB(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 average daily noise exposure level would have reached or exceeded 90dB(A) during these periods of employment. Hence, substantiation of this claim, on engineering grounds, would be very difficult."

56. I have set out those paragraphs in full because they show the following:
    1) That Mr Worthington's opinion is not based solely upon the data contained in the Newport survey. Those data form a basis for his conclusion, but he has had regard to the nature of the work which the Claimant was carrying out and the circumstances in

which it is likely that that work was done, based upon his own engineering experience.

2) That his conclusion, when read fully, is not simply that the Claimant cannot discharge the burden of proof. It is his opinion that as a maintenance employee the Claimant is unlikely to have been regularly exposed to levels of noise in excess of 90dB(A) when working at the Second Defendant's factory.

57. When Mr Worthington set out this opinion the information he had was that the Claimant said that he worked 70 hours a week. He must have understood therefore that those hours had to be taken into account when coming to his conclusion. As I have said, the evidence which the Claimant gave in court suggested that the information provided to Mr Worthington was an exaggeration of his hours of exposure to noise."

13. The Judge set out his conclusions in paragraph 58-66:

"58. I do not accept the submission of Mr Johnson that I should ignore the engineering evidence because the Second Defendant has not produced noise surveys.

59. I conclude that the absence of noise surveys at the Second Defendant's factory is a matter which I should take into account when deciding whether the survey at the Newport factory can properly be regarded as relevant evidence.

60. I accept that there are factors which suggest that the Newport survey should be regarded with some circumspection as a guide to the level of noise at the Second Defendant's factory. It was carried out in 1989. The process was different and it is likely that some of the machines were different. However, other pieces of equipment are likely to have been common to the aluminium processing industry. I accept that it gives a general guide to the levels of noise likely to have been produced by aluminium processing before the commencement of the 1989 Regulations. I accept that Mr Worthington was entitled to use it in the course of coming to his opinion."

61. I conclude that Mr Worthington's opinion is not based solely on the Newport survey. It also takes account of the work which the Claimant was doing, the (exaggerated) hours which he understood the Clamant to have been working and Mr Worthington's own experience of aluminium processing.

62. Mr Worthington's opinion is that it is unlikely that the Claimant, dong the job he was, was regularly exposed to levels of noise above 90dB(A).

63. Having come to those conclusions about the expert evidence, I have to consider whether I should nevertheless prefer the evidence of the

> Claimant. He said that he had to shout to make himself heard and sometimes to use hand signals. Mr Johnson refers to a study on the Effectiveness of the Noise at Work Regulations (page 144b of the trial bundle) where it is said that if a person has to shout to be heard at 4 feet, his noise exposure is 99dB(A).
>
> 64. Of course, if a person has to shout to make himself heard at 4 feet, that is a good indication of the noise in his environment, but his exposure, weighted to an 8 hour day, would depend upon the length of time he remained in that environment. The Claimant's evidence that there were occasions on which he had to shout to communicate is likely to be accurate. Mr Worthington accepted that it is likely that there were areas of the Second Defendant's factory where noise levels exceeded 90dB. But the Claimant's evidence could not be regarded as sufficiently precise for me to reject the engineering evidence in favour of it. That is not to criticise the Claimant. It is simply unrealistic for him to be able to remember in detail the events of more than 50 years ago.
>
> 65. Accordingly, I accept the evidence of the jointly instructed engineer Mr Worthington that it is unlikely that the Claimant was exposed to levels of noise at the Second Defendant's factory which exceeded 90dB(A).
>
> 66. The Claimant therefore fails to prove tortious exposure to noise by the First and Second Defendants."

Grounds 1-3

The Competing Arguments

14. Mr Limb for the Respondent contended that the Judge was right to dismiss the case against his client for the reasons the Judge gave. He pointed out, correctly in my view, that this was a careful and considered judgment by a judge who had the benefit of hearing the live evidence.

15. Mr Johnson for the claimant argued that the Judge erred in finding that the respondent was not in breach of duty in failing to carryout noise surveys.

16. He referred to a Ministry of Labour publication in June 1963, called "Noise and the Worker" ("1963 Guidance"). At page 4 of that publication, under the heading "Have you a noise problem ?" the following passage is found:

> "A convenient test of hearing impairment is whether the workers can hear and understand everyday speak under everyday (quiet) conditions. If they begin to find this difficult it may well be that they are being exposed to excessive noise. This effect may not, however, show itself for some considerable time. The following points should also be considered:

> 1. Do workers find it difficult to hear each other speak while they are at work in a noisy environment.
>
> 2. Have workers complained of head noises or ringing in the ears after working in noise for several hours?
>
> 3. Have workers who have been exposed to very high noise levels for short periods experienced temporary deafness, severe enough for them to seek medical advice.
>
> 4. Have workers, exposed for longer periods complained of a loss of hearing that has had the effect of muffling speech and certain other sounds? Have they been told by their families that they are becoming deaf?
>
> 5. Has there been a higher labour turnover in workshops where there is a lot of noise?
>
> 6. Have management formed the opinion that noise affecting production?
>
> If the answer to several of these questions is 'yes', there may well be a problem of excessive noise. If so, efforts should be made to reduce it, or, if it cannot be significantly reduced…to reduce the exposure of workers to the noise or to provide them with the ear protection, or both if necessary."

17. On the following page the following text appears:

> "The first steps in the program (namely a noise reduction and hearing conservation program) are to carry out a noise survey to obtain specialist advice."

18. Initially, Mr Johnson suggested that, as a result of that publication, 'employers' had been under a duty since 1963 to carry out noise surveys. However, in argument, he accepted that he was only able to point to one of the 6 criteria having been met, namely the first. He accepted that he was not able to show the "answer to several of these questions is yes". When pressed he conceded that, that being so, he could not allege breach of duty in the period immediately after the production with the 1963 Guidance.

19. There was evidence before the Judge, however, that the 1963 Guidance was amended in 1968. In the later version of the guidance, employers were advised to take such actions if the answer to any one of the questions posed was "yes".

Discussion

The Duty

20. It was necessary for the judge first to determine when, if at all, the duty to carry out a noise survey first arose, and then to consider the evidence of breach.

21. The Judge said at paragraph 33 that "The duty to carry out noise surveys is said to arise by reason of the Code of Practice issued in 1972." I confess that that is not my reading of the pleadings. They allege breach of statutory duty and negligence throughout the period of the claimant's employment at the second defendant's premises. The particulars of negligence and breach of statutory duty include a failure to make "a noise assessment…at all", a failure "to investigate and take advice on the noise level in the said premise" and a failure "to monitor the noise level at the premises properly, sufficiently, frequently or at all…". Although not crystal clear, in my judgment, the better view is that, taken together, those allegations incorporate a case that there was a failure to conduct a noise survey as required by "Noise and the Worker".

22. In my judgment, Mr Johnson's concession that, given the terms of "Noise and the Worker", he could not maintain an argument that the defendants were under a duty to conduct a noise assessment between 1963 and 1968 was properly made. Although this was not a point expressly addressed by the Judge, in my view it is a complete answer to the appeal in respect of the period until publication of the second edition of the document in 1968.

23. As the expert evidence before the Judge made clear, however, in 1968 the advice changed. From that date, the advice from the Ministry of Labour was that the answer to the question "Have you got a noise problem?" would be "yes", if just one of the suggested questions was answered in the affirmative. On that basis, Mr Johnson said that the duty to conduct a noise survey arose no later than 1968.

24. The position became clearer still in 1973 with the publication by the Government of a code of practice entitled "Hearing and Noise in Industry". As noted by Lord Dyson (at [143]) in *Baker v Quantum Clothing Group Limited* [2011] UKSC 17, that Code followed publication in March 1970 of pioneering work on deafness in industry by Professor Burns and Dr Robinson.

25. In my judgment, on the evidence before the Judge, it could not be said there was a duty to conduct noise surveys at the second defendants' premises before 1968 but there was such a duty after 1972.

26. As to the intervening period, the answer lies in, my judgment, in the joint expert's report that was before the Judge. At 4.1.12, Mr Worthington said:

> "It is the opinion of the author that, prior to 1972, a reasonable and prudent employer would reasonably be expected to have been aware of the existence of "Noise and the Worker" and its recommendations and guidance. However, they may have been unaware as to how to conduct a detailed assessment where they could engage the services of a specialist consultant."

27. Plainly, the duty to consider conducting a noise survey did not arise instantly upon publication of the 1968 edition. Had the defendants applied their minds to the issue and appreciated that the first point under "Have you a noise problem?" should be answered in the affirmative, they ought to have considered the next paragraph of the publication and sought to obtain specialist advice. That advice, in all probability, would have included the need to conduct a noise survey.

28. Before concluding that there was an operative duty on the defendants to conduct such a survey, however, some allowance has to be made for the time it would take for a reasonably prudent employer to appreciate the effect of the 1968 edition, to identify appropriate specialist advice, to commission that advice and to receive and act upon the resulting report. In *Baker v Quantum Clothing,* a period of two years was recognised as reasonable for such a process. I see no grounds for a judge taking a different approach and, in those circumstances, I would hold that the Judge ought to have concluded that the defendant was under a duty to conduct noise surveys from 1970.

The Breach

29. No evidence of any noise survey relating to the site of the claimant's employment was disclosed at the trial. No evidence was adduced from the defendants to explain the absence of such surveys. The claimant contends, relying on *British Railways Board and Herrington* [1972] AC 877, that if a defendant fails to call witness available to him who could have evidence related to an issue in the case, the defendant runs the risk of adverse findings.

30. The facts of *Herrington* are well known. The defendant owned an electrified railway line which was fenced off from a meadow where children played. In 1965, the fence had been in a dilapidated condition for several months. The defendant's station master was notified that children had been seen on the line but the fence was not repaired. On 7 June 1965, the plaintiff, then aged six, trespassed over the broken fence from the meadow where he had been playing and was injured on the live rail. He brought an action claiming damages for negligence.

31. At page 930, Lord Diplock said:

> "The appellants, who are a public corporation, elected to call no witnesses, thus depriving the court of any positive evidence as to whether the condition of the fence and the adjacent terrain had been noticed by any particular servant of theirs or as to what he or any other of their servants either thought or did about it. This is a legitimate tactical move under our adversarial system of litigation. But a defendant who adopts it cannot complain if the court draws from the facts which have been disclosed all reasonable inferences as to what are the facts which the defendant has chosen to withhold.
>
> A court may take judicial notice that railway lines are regularly patrolled by linesmen and gangers. In the absence of evidence to the contrary, it is entitled to infer that one or more of them in the course of several weeks noticed what was plain for all to see. Anyone of common sense would realise the danger that the state of the fence so close to the live rail created for little children coming to the meadow to play. As the appellants elected to call none of the persons who patrolled the line there is nothing to rebut the inference that they did not lack the common sense to realise the danger. A court is accordingly entitled to infer from the inaction of the appellants that one or more of their employees

> decided to allow the risk to continue of some child crossing the boundary and being injured or killed by the live rail rather than to incur the trivial trouble and expense of repairing the gap in the fence."

32. In my judgment, the present case is plainly distinguishable on its facts from *Herrington*. First, *Herrington* was a case where the court was considering near contemporaneous events, whereas in the present case the Judge was considering events of some antiquity. The absence of evidence of noise surveys was more obviously explainable, given the passage of time, then was the absence of the failure to repair the fence in *Herrington*. Second, in *Herrington*, the House of Lords took judicial notice of the fact that railway lines were regularly controlled by linesman and 'gangers' and that they would have been able to see the danger created by the broken fence. Here, whilst it can properly be concluded that noise surveys should have been carried out by 1970, it cannot, without more, be concluded what these noise surveys would have revealed.

33. In any event, it appears from the judgment below that *Herrington* was not the focus of Mr Johnson's argument before HHJ Vosper. Instead, he directed the Court's attention primarily to *Keefe v The Isle of Man Steam Packet Company* [2010] EWCA Civ 683.

34. As the Judge noted at paragraph 28, the claimant in *Keefe* claimed damages for hearing loss caused, he said, by the noise to which he had been exposed when working in the galley of the defendant's ship. There was no engineering evidence as to the noise level in the ships in which Mr Keefe served, during his 20-year period of employment with the defendants. There was no evidence that the defendants took any measurement of noise levels in their ships and the Judge found that they did not do so. They were, nonetheless, aware of noise problems in that they provided ear protectors for employees in the engine room and, for a time, to employees working with the cars embarking or disembarking the ship. The Judge at first instance found for the defendant because Mr Keefe had failed to discharge the burden of proving he was exposed to excessive noise.

35. The Court of Appeal reversed that decision. The reasoning for the Court of Appeal was set out in paragraph 18-19 of the judgment of Longmore J:

> "18 If matters had rested there, it might have been difficult for this court to reverse the judge on what is, at any rate primarily, a question of fact namely whether excessive noise in the course of Mr Keefe's employment caused his undoubted hearing loss, however unsure this court might be that the judge had reached the correct conclusion. But in the present case there is the potent additional consideration that any difficulty of proof for the claimant has been caused by the defendant's breach of duty in failing to take any measurements. The judge does not appear to have given any weight to this important factor. Indeed, his whole judgment on the question of breach of duty is something of a puzzle. In para 2.4 he isolates the issue whether the defendants were in breach of duty. In para 4.4 he makes what is apparently a clear finding of breach of duty in that they failed to measure

> noise levels at most locations on board ship. But in para 6.3 he says that breach of duty is not proved. This is, to say the least, something of a muddle on an important issue.
>
> 19 If it is a defendant's duty to measure noise levels in places where his employees work and he does not do so, it hardly lies in his mouth to assert that the noise levels were not, in fact, excessive. In such circumstances the court should judge a claimant's evidence benevolently and the defendant's evidence critically. If a defendant fails to call witnesses at his disposal who could have evidence relevant to an issue in the case, that defendant runs the risk of relevant adverse findings see *British Railways Board v Herrington* [1972] AC 877, 930G. Similarly, a defendant who has, in breach of duty, made it difficult or impossible for a claimant to adduce relevant evidence must run the risk of adverse factual findings. To my mind this is just such a case."

36. HHJ Vosper QC distinguished *Keefe* on a number of grounds. First, at paragraph 33, he noted that for part of Mr Keefe's employment The Noise at Work Regulations 1989 were in force. Second, he noted that whilst in *Keefe* there was positive evidence that no noise survey was carried out, here the only evidence to whether noise surveys were carried out was from the claimant who had said that "Although he would not have been involved in such surveys, he was not aware of any being carried out." Third, he accepted a submission on behalf of the defendants that given the passage of time it was likely the relevant documentation would have been lost. Fourth, at paragraph 37, he regarded as a significant distinguishing factor the fact that unlike the judge in Keefe, he had had the benefit of expert engineering evidence to the effect that it was not possible to say whether the claimant would have been exposed to excessive noise.

37. In my judgment, and with great respect to the Judge, none of those factors constitute good grounds for distinguishing *Keefe*. It is true that the 1989 Regulations were applicable in *Keefe* but not here. But that was simply the source of the obligation to conduct noise surveys. The fact that the source of the duty in the present case is different, namely the publication of "Noise and the Worker" and the 1972 Code of Practice, says nothing about the applicability of the principle in *Keefe*.

38. Second, as to the point about noise surveys, there is little between the cases. In *Keefe*, there was a finding that no noise surveys had been carried out; here, there was some evidence to similar effect but that was limited to the claimant's recollection.

39. Third, whilst it might be reasonable here to accept that the passage of time might explain the absence of some noise survey reports, it remains surprising that none at all were produced, despite the development of relevant regulatory requirements during the ensuing period.

40. The point upon which it appears the Judge placed greatest stress was the fourth distinguishing feature, namely the existence in the present case of engineering evidence. Certainly, when engineering evidence is produced which provides positive evidence as to the level of noise to which workers were in fact exposed at the relevant time and the relevant premises, that is likely to mean the absence of noise surveys is

of little significance. But where, as here, the engineering evidence serves simply to explain why it was not possible now to establish to what level of noise workers would have been exposed, that does not make the absence of noise surveys irrelevant. To the contrary, it serves to underline the significance of the absence of such surveys.

41. In my judgment, it follows that the judge was wrong to distinguish *Keefe*. The dicta in that case did apply. From 1970 the defendant should have been obtaining noise surveys. None were produced at trial. No evidence, as opposed to mere submissions, was advanced to explain why no noise survey could be produced. In the circumstances, applying Keefe, it does not lie in the defendant's mouth to say that noise levels were not excessive.

41. The consequence of the Judge's rejection of the application of *Keefe*, is that he did not give the claimant's evidence the beneficial interpretation which *Keefe* called for. Had he given such an interpretation, it seems to me inevitable that he would have concluded that the likelihood was that the claimant was exposed to tortiously high levels of noise.

42. A benevolent interpretation of the claimant's evidence would have involved accepting that the "entire process" in the foundry or strip mill was noisy, that the extrusion mill was noisier still, that the claimant was required to work on machinery whilst the line continued and other blowers and cutting machines were still working, that he was never more than a few feet from operating machinery, that he was exposed to noise throughout his working day, that he had to shout or to use hand signals to express himself and that he was provided with no formal protection and given no warning. Against that the Judge would have had to consider the evidence of the joint expert which was that, on occasions at least, the noise level would reach or exceeded 90dBA and that the expert evidence was unable to disprove that this could not have been the cause of his hearing loss.

Grounds 4-5

43. Mr Johnson had argued at trial that, for peripatetic workers, the duty from 1972 was to avoid *any* exposure at or exceeding 90dB(A). That, it was argued, was to be contrasted with the pre-1972 duty to avoid exposure which exceeded an average dose of 90 dB(A), (lepd). That argument had featured prominently at the hearing, being referred to in both parties' skeleton arguments and closing arguments. For reasons that are not apparent, that argument was not addressed at all in the judgment. In fact, there is no acknowledgment that the argument was even advanced.

44. By Ground 4, the claimant seeks to challenge the Judge's failure to address the argument. In support of that argument, Mr Johnson relies on the judgment of Lord Phillips MR in *English v Emery Reimbold* [2002] EWCA Civ 605.

45. Mr Limb acknowledges that the Judge did not expressly consider the point but argues that his conclusion in [65], which I have set out above, that it is unlikely that the appellant was exposed to noise above 90dB(A), was a finding of fact that disposed of the point. He says the finding at [62] (also set out above), that it was unlikely he was regularly exposed to noise above 90dB(A), implicitly accepts the possibility that on occasion the claimant was exposed to places of work where noise levels were over 90dB(A). But, says Mr Limb, a level is not the same thing as a dose.

46. In my judgment, the claimant is right in his contention that the Judge ought expressly to have addressed this issue and given his reasons for rejecting it, if reject it he did. In light, in particular, of the discrete arguments that had been advanced on this issue, it was incumbent on the Judge to explain why he was rejecting the claimant's arguments or why he preferred the defendants.

47. In those circumstances, I find for the Claimant on Grounds 1, 2, 3 and 4.

48. In the draft judgment sent to counsel for typographical correction, I indicated a provisional view that the case should be remitted to the county court for resolution of the issue raised in Ground 5. I sought further submissions on that issue. I received helpful written submissions from both parties. Neither party supported the approach I had said I was minded to adopt; the claimant indicated that a ruling on ground 5 was not necessary in the light of my decision on grounds 1-3; the defendants indicated that such remission was inappropriate and that they would be seeking permission of the Court of Appeal to appeal my decision.

49. In those circumstances, since my conclusions on grounds 1-4 is sufficient to ground a conclusion that this appeal should be allowed, that is the order I make.

Quantum

50. HHJ Vosper QC indicated that he had considered the disagreement between the medical experts called by the parties and he preferred the evidence of Mr Carruth, the claimant's doctor. It was his view that hearing at 4kHz does contribute to the understanding of human speech. "It is engaged in hearing and distinguishing between constants and asperate sounds". Accordingly, he would have awarded compensation in accordance with Mr Carruth's opinion of the injuries sustained.

51. I have received no submissions on Quantum and I am not in a position, therefore, to reach a view on this issue. I remit the case to the County Court for assessment of damages.