Neutral Citation Number: [2020] EWHC 3029 (QB)

Case No: QB-2015-004401

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 11 November 2020

Before :

MR DAVID LOCK QC SITTING AS A DEPUTY JUDGE OF THE HIGH COURT

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Between:

MR WARREN CONSTANCE **Claimant**

- and –

MINISTRY OF DEFENCE (1)
PORTSMOUTH HOSPITALS UNIVERSITY NHS TRUST (2) **Defendants**

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- -

Mr Leslie Keegan (instructed Hilary Meredith Solicitors Ltd) for the Claimant
Ms Isabel McArdle (instructed by The Government Legal Department) for the First Defendant
Mr Sam Stevens (instructed by DAC Beachcroft LLP) for the Second Defendant

Hearing dates: 19, 20, 21, 22 and 23 October 2020

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JUDGMENT

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic

Mr David Lock QC, sitting as a Deputy Judge of the High Court:

INTRODUCTION.

1. In this case Mr Warren Constance, who was a serving soldier in the Royal Artillery from 18 January 1993 until his enforced medical retirement from the Army on 10 August 2011, claims damages arising out of the failure of two doctors, for whom the Ministry of Defence ("**MoD**") and the Portsmouth Hospitals University NHS Trust ("**the Trust**") are vicariously liable, to advise him that his hearing problems had the potential to be largely cured by surgery and against the MoD for treating his hearing loss as permanent Noise Induced Hearing Loss ("**NIHL**") as opposed to hearing loss caused by otosclerosis, a condition which was largely curable by surgery. His case is that, had he been given the right advice, he would have had the surgery and would have been able to continue his successful career in the Army, including being deployed overseas to work as a mission controller for Unmanned Aerial Vehicles ("**UAVs**"), instead of being sidelined with a non-career job, namely working as Mess Manager, and then being medically retired in 2011. The negligence on the part of both the doctors and the MoD is partially admitted but there are considerable disputes between the parties about what would have happened to Mr Constance if he had been given proper advice about his hearing problems and, in particular, what path his career would have followed if he had had a timely stapedectomy operation.

2. The Claimant was represented by Mr Leslie Keegan, the MoD by Ms Isabel McArdle and the Trust by Mr Sam Stevens. I am grateful to all counsel for their assistance.

3. The material events go back over an extended period but no point is taken on limitation by either of the Defendants. However, I am conscious that the material facts in this case happened over 10 years ago and, in some cases, over 15 years ago. There is a

wealth of documentary material about these events in the 11 bundles of papers that were used at trial, not all of which were in a form that was arranged either in a chronological order or in any other scheme which made the documents straightforward to navigate. Witnesses were able to refresh their memories from documents but they were also giving evidence of things they recollected from more than a decade ago and, in particular, were attempting to explain how they considered events would have played out if mistakes had not been made. Whilst this is not a case where anyone appears to have set out to mislead the court, I am conscious of the need to adopt a proper approach to the balance between the evidence of accounts of events as set out in the documents and an individual's recollections of things that happened a long time ago. That is an even greater problem where witnesses are attempting to give evidence about what would have happened in projected scenarios, relating to things which ought to have happened but, in the event, did not happen.

4. In considering the evidence of all witnesses in this case, I have had regard to the comments of Leggatt J in *Gestmin SGPS SA v Credit Suisse (UK) Ltd* [2013] EWHC 3560 and the observations of HHJ Pearce in *AB v Pro-Nation Ltd* [2016] EWHC 1022 (QB). In *Gestmin* Leggatt J was considering events that took place in July 2005 to July 2006. His assessment of the evidence in that commercial matter was highly dependent on the recollection of witnesses. In dealing with the reliability of memory, the judge stated:

> *16…Two common (and related) errors are to suppose: (1) that the stronger and more vivid is our feeling or experience of recollection, the more likely the recollection is to be accurate; and (2) that the more confident another person is in their recollection, the more likely their recollection is to be accurate."*

5. Leggatt J also said:

> *"19. The process of civil litigation itself subjects the memories of witnesses to powerful biases. The nature of litigation is such that witnesses often have a stake in a particular version of events. This is obvious where the witness is a party or has a tie of loyalty (such as an employment relationship) to a party to the proceedings. Other, more subtle influences include allegiances created by the process of preparing a witness statement and of coming to court to give evidence to one side of the dispute. A desire to assist, or at least not prejudice, the party who called the witness or that party's lawyers, as well as a natural desire to give a good impression in a public forum, can be significant motivating forces.*
>
> *20. Considerable interference with memory is also introduced in civil litigation by the procedure of preparing for trial. A witness is asked to make a statement, often (as in the present case) when a long time has already elapsed since the relevant events. The statement is usually drafted for the witness by a lawyer who is inevitably conscious of the significance for the issues in the case of what the witness does or does not say. The statement is made after the witness's memory has been "refreshed" by reading documents. The documents considered often include statements of case and other argumentative material as well as documents which the witness did not see at the time or which came into existence after the events which he or she is being asked to record. The statement may go through several iterations before it is finalised. Then, usually, months later, the witness will be asked to re-read his or her statement and review documents again before giving evidence in court. The effect of this process is to establish in the mind of the witness the matters recorded in his or her own statement and other*

written material, whether they be true or false, and to cause the witness's memory of events to be based increasingly on this material and later interpretations of it rather than on the original experience of the events."

6. In the circumstances identified by Leggatt J (now Lord Leggatt JSC), HHJ Pearce observed that any Judge considering the evidence of witnesses needed to bear in mind that "*there are forces at play here which may affect the reliability of the evidence given by witnesses*": see *AB* at §31. I am however also, mindful of the observations of Floyd LJ in the Court of Appeal in *Martin v Kogan* [2019] EWCA Civ 1645 at §88 as follows:

"First, as has very recently been noted by HHJ Gore QC in CXB v North West Anglia NHS Foundation Trust [2019] EWHC 2053 (QB), Gestmin is not to be taken as laying down any general principle for the assessment of evidence. It is one of a line of distinguished judicial observations that emphasise the fallibility of human memory and the need to assess witness evidence in its proper place alongside contemporaneous documentary evidence and evidence upon which undoubted or probable reliance can be placed. Earlier statements of this kind are discussed by Lord Bingham in his well-known essay "The Judge as Juror: The Judicial Determination of Factual Issues" (from The Business of Judging *(Oxford, 2000)). But a proper awareness of the fallibility of memory does not relieve judges of the task of making findings of fact based upon all of the evidence. Heuristics or mental short cuts are no substitute for this essential judicial function. In particular, where a party's sworn evidence is disbelieved, the court must say why that is; it cannot simply ignore the evidence"*

7. I have carefully considered the whole of the insightful judgment in *Martin v Kogan* in assessing how to approach the evidence in this case, and in particular to resolve any conflicts between the approaches which were required to be taken by decision makers in relevant documents which were in force between 2005 and 2011 and how witnesses say that decisions were actually made in practice in that period.

8. I am also conscious of the problem of confirmation bias, as that term was identified by Stewart J within the context of a clinical negligence case in *Tracey King (As Personal Representative of the Estate of Kevin King, Deceased) v South Tees NHS Hospital Foundation Trust* [2020] EWHC 416 (QB) at §73 to §75. I interpret confirmation bias in this context as the tendency to process information by looking for, or interpreting**,** information in a way that is consistent with one's existing beliefs or seeks to confirm the correctness of previous decisions made by a person, even if those earlier decisions were made on the basis of a partial or even erroneous understanding of the facts. It is the understandable psychological comfort of a reasoning process which allows a person to say "*well that shows I was right all along*" or to say "*well even if I made a mistake, it made no difference to the final outcome*".

9. That does not mean that evidence from witnesses as to what might have happened if other things had been appreciated at the time (but were not so appreciated) must automatically be assumed to have less credibility or are to be ignored. Decision makers often make mistakes about facts or details but a proper analysis shows that the same decision would have been taken even if the mistake had not been made. However, bearing in mind the factors set out above, it does mean that evidence from a person who attempts to argue that the same decision would have been made even if a mistake had not been made should be looked at carefully and assessed within the context of all the

surrounding evidence, including the evidence in contemporaneous documents, before it is accepted.

The facts.

10. Mr Constance was born on 31 July 1968 and grew up in Cornwall. After school he went into the building trade. He enlisted in the Army on 18 January 1993 when aged 24. Like all new recruits, he was required to attend basic training over a period of 10 weeks. During this period, he was taking part in a live firing exercise when a thunder flash landed very close to his body and exploded. That loud explosion caused ringing in his ears and lasted for some time afterwards. He explained that the ringing did eventually disappear and he continued with his basic training, passing out as a Gunner after having satisfied all the physical training requirements. He was then posted to 39 Regiment Royal Artillery which was then based at Dempsey Barracks, in Germany. Over the next 10 years Mr Constance served in Cyprus, Northern Ireland, Kosovo and in Iraq.

11. Whilst in the Army, Mr Constance developed an expertise in working with UAVs, which are commonly known as "drones". He rose to become a "mission controller", which I understand to be the team leader of a small group of soldiers who were responsible for deploying UAVs. During the time when he was operational, his expertise lay in working with Phoenix Drones. That type of drone was subsequently replaced by the Watchmaker Drone which came into service after Mr Constance had ceased to work with UAVs. I shall return to the significance of the change in the type of UAV below.

12. I heard Mr Constance giving evidence during this trial. He struck me as an honest, careful and thoughtful witness who was genuinely doing his best to explain what had

happened to him. He did not exaggerate things and was quick to accept where he did not have a precise memory of words used when events happened many years ago. In particular, I accept his evidence that it was particularly difficult to be open about the consequences for him of suffering from any form of disability or bullying within the Army environment. He also struck me as a person who respected authority, including respecting the authority and expertise of doctors, and would have generally acted on advice given to him by doctors. He also came across as a man who would not unduly complain or push doctors to justify treatment decisions. It may well be that the problems Mr Constance encountered would not have occurred if he had had a less respectful and more questioning attitude towards the doctors who provided him with treatment, but that is not his character. I acknowledge that his interactions with doctors and senior Army officers happened within the context of a largely hierarchical military structure. Mr Constance's largely unquestioning and respectful attitude towards medical professionals served him well within the military and was not unique to Mr Constance.

13. Mr Constance reports that he noticed that his hearing started to deteriorate from about 2001. His ears were syringed to remove wax in February 2002, but this did not appear to assist with his hearing loss. He reported his concerns about the deterioration in his hearing to his General Practitioner, known as his Medical Officer, at the Primary Health Centre, Larkhill, in September 2004. The Medical Centre was run by the Army and the doctors serving there held military rank as well as being medical professionals. I will refer to them by their medical titles in order to distinguish them from non-medical Army decision makers. Where it is unclear from documents whether a person is a doctor or not, I shall refer to that person by their military rank.

14. A note by Dr Chris Hodgkinson, records that Mr Constance had observed gradual hearing loss for at least 5 years and, by that date, that he could not hear conversation in his right ear. He was referred by Dr Hodgkinson to the Ear Nose and Throat Department at the Royal Haslar Hospital. That was an entirely appropriate referral.

15. On 17 November 2004, Mr Constance was seen by Mr Caldera, a consultant otolaryngologist who was employed by the Army. Mr Caldera has now left military service and is working in Australia, from where he gave evidence by video. Although Mr Caldera was doing his best to assist the court, I have come to the decision that Mr Caldera's evidence can do little to assist me to understand what was and was not discussed at the various appointments he had with Mr Constance. Mr Caldera was entirely frank that he has no memory of Mr Constance and does not recollect these appointments. That is hardly surprising as Mr Caldera must have seen thousands of patients over the years and these appointments took place many years ago. It is entirely reasonable for him to have no recollection of precisely what was said by him to Mr Constance. The series of appointments Mr Constance had with Mr Caldera had far more significance to Mr Constance than they did to Mr Caldera.

16. Mr Caldera explained his recollection of his general practice when dealing with patients who presented with hearing difficulties. That evidence has some value in understanding what happened on each occasion, particularly where it is supported by contemporaneous notes made by the doctor. However, where a professional is giving a general account of what he tended to do when faced with a particular situation, and there is no evidence in the medical notes to show that he did something, his evidence about his general approach to such situations can only go so far in demonstrating what did in fact occur.

17. The Haslar Hospital was operated by the Trust. The precise arrangements between the Army and the Trust are not relevant for present purposes, save to note that some clinical staff working at the Hospital were Army personnel, for whom the MoD bears vicarious responsibility, and some clinical staff were employees of the Trust. Where Mr Constance was treated by a Trust doctor, the Trust is vicariously liable for any breaches of duty by Trust staff. Mr Caldera was employed by the MoD and accordingly the MoD are vicariously liable for any breaches of duty by him.

18. Mr Caldera made handwritten notes of this appointment with Mr Constance but also dictated a record of the appointment which was then included in Mr Constance's Army medical records, known as the F Med 7 records. These dictated notes summarised Mr Caldera's findings as follows:

> *"Thank you for referring Bombardier Constance to the ENT clinic. He noticed decreased hearing in his right ear around the year 2000 or so. He had a hearing test at this time which showed decreased hearing in his right ear. He feels as though his hearing has generally got worse. He is now missing conversations at work and often he does not hear people when they talk to him. He also has right-sided tinnitus. He does not describe any otalgia, otorrhea or vertigo. He has had no previous ear problems. In childhood he cannot recall having much in the way of ear trouble. There is no family history of deafness and he works in and Artillery Unit and has been exposed to the expected noise. He has no serious illnesses.*
>
> *On examination both tympanic membranes looked normal. There is no evidence of middle ear disease or effusion. Both eardrums looked mobile on Valsalva*

manoeuvre. He does however have a conductive hearing loss which seems to be worse on the right than on the left. I have organised a CT scan of his temporal bones to ensure there is no middle ear disease. It is just possible, looking at the pattern of his hearing loss, that he has otosclerosis. We will however review him following his scan and we will have more information at that stage"

19. Mr Constance was next seen by Mr Caldera on 11 January 2005. The F Med 7 form records say as follows relating to this consultation:

"I reviewed Bombardier Constance in the ENT clinic this afternoon. I am pleased to report that his CT scan of his temporal bones has not shown any sign of middle ear disease. He has conductive hearing loss which is moderate on the left. In the first instance I have advised him to use a hearing aid and have sent him to Audiology for discussion regarding this. We will check his hearing again in a year's time"

20. I have had the benefit of hearing from 3 expert ENT surgeons. There was a large measure of agreement between the experts as to the meaning of the term "*conductive hearing loss*". This was helpfully explained in a report by Mr David Strachan on behalf of the Trust dated 13 August 2019 as follows:

"Different types of hearing loss

Fundamentally there are two types of hearing loss:

1. Sensorineural

This is where the problem lies with the inner ear (the "cochlea") or the nerve of hearing. It is the most common type of hearing loss often associated with increasing age or exposure to noise.

2. Conductive

This is where sound is not conducted to the inner ear and generally is due to a problem with the ear canal, the eardrum or the three bones (the "ossicles") that transmit sound from the eardrum to the middle ear. The causes of a conductive hearing loss are numerous however if the appearance of the ear canal and eardrum are normal (as in this case) then otosclerosis is a likely cause"

21. Mr Caldera correctly diagnosed that Mr Constance was suffering from moderate form of conductive hearing loss. The expert evidence confirmed that a high proportion of patients presenting with conductive hearing loss will develop the problem in both ears, but the degree of hearing loss can be different between the 2 ears. In the case of Mr Constance, Mr Caldera correctly noted that his hearing loss was greater in his right ear than his left ear.

22. Mr Constance says that he informed Mr Caldera about the incident which occurred during his basic training when his hearing was affected by the thunder flash which had landed very close to the right side of his body and exploded. The handwritten notes made by Mr Caldera on 17 November appear to confirm that Mr Constance mentioned this incident to Mr Caldera and exposure to noise in military life is referred to in the F Med 7 report.

23. One of the key features of this case is that the documentary records show that Mr Constance appears to have believed that he suffered from sensorineural hearing loss,

NIHL. As will be seen later, his case was presented to the Army Medical Board on the basis that he had NIHL and he was eventually discharged from the Army on the grounds that his hearing meant he was not fit for military service on the grounds that he was suffering from NIHL. Following his discharge from the Army on medical grounds in 2011, Mr Constance made an application for additional pension on the grounds that his hearing loss had been caused by his military service, and in particular the thunder flash incident in 1993. No one has suggested that, in making this application, Mr Constance did anything other than set out the facts as he understood them to be. It thus appears reasonably clear that, until about 2012, Mr Constance did not understand that he was suffering from conductive hearing loss as opposed to hearing loss caused by exposure to loud noises.

24. Mr Constance struck me as a careful, attentive and conscientious man who would carefully listen to those in authority. His hearing difficulties were important to him and I do not think he was the sort of person who would have failed to listen if a doctor had taken the time to explain the potential causes of his hearing loss. In those circumstances, the most likely explanation for his lack of understanding of the causes of his hearing loss is that no doctor had explained to him that there were different causes of hearing loss and that his hearing loss was not due to exposure to loud noises but was due to otosclerosis. Accordingly, whatever was said between Mr Constance and Mr Caldera during the appointments in November 2004 and January 2005, and indeed on later occasions when both Mr Caldera and Mr Ahmed treated him, I accept that Mr Constance did not appreciate that he was suffering from conductive hearing loss as opposed to suffering from NIHL. He did not understand the cause of his hearing loss until 2012.

25. It is common ground between the medical experts that there are 2 recognised treatment options for a patient suffering from otosclerosis, namely the provision of hearing aids or an operation to insert a small piston in the bones of the middle ear, known as a stapedectomy. Mr Caldera says that he was aware of the option of treating otosclerosis by a stapedectomy operation, although this is not a procedure that he would carry out himself. He says that it was his normal practice to discuss both treatment options with a patient, but at a first appointment he would usually recommend a trial of hearing aids.

26. All of the experts agreed that an ENT surgeon should discuss both options with the patient and that it is negligent not to do so. The ENT surgeon called by the MoD, Mr Ram Moorthy, explained the position at paragraph 7.7 of his report dated 14 October 2019 as follows:

> *"Mr Constance should have had all the options discussed with him to enable him to make an informed choice having understood the risks and benefits of the various treatment options available"*

27. When giving oral evidence Mr Strachan confirmed that it was a professional obligation on a doctor to make a record of anything clinically significant which occurred during a medical consultation. The purpose of such a record is to inform doctors, including the ENT surgeon himself, as to what has occurred on a previous appointment. Mr Strachan accepted that ENT surgeons who see multiple patients cannot be expected to remember the details of precisely what has been discussed with each patient on each occasion, such as the patient's preferences between treating conductive hearing loss through hearing aids or by a stapedectomy. Accordingly, Mr Strachan expressed the view, which I accept, that a doctor was under a professional obligation to record any discussion with a patient concerning different treatment options, and to record any

views expressed by the patient regarding his or her preference amongst those treatment options. That does not mean, of course, that anything that is omitted from the medical notes did not happen or that all doctors comply with their professional obligation to make notes of anything of significance which occurs during a medical examination on every occasion. However, I accept that if there was any significant discussion during the medical appointments with Mr Caldera about treatment options for Mr Constance's otosclerosis, it ought to have been recorded. I consider that, if this discussion occurred, it is likely that some reference would have been made to that discussion in the medical notes or in the F Med 7 document which was returned to the Army Medical Centre which provided GP services so that the GPs knew there was a surgical option for this condition.

28. There is no reference in the notes made by Mr Caldera in any of the consultations where he saw Mr Constance to clinical treatment options for the treatment of his otosclerosis being discussed. There is no record of Mr Constance being offered the option of having his hearing problems addressed by surgery or Mr Constance's views on the potential risks and benefits to Mr Constance of having surgery to tackle his hearing difficulties. Given that Mr Constance was never disabused of his belief that he was suffering from untreatable NIHL, it seems to me likely that the fact that his hearing loss was caused by a defect in the bones in his middle ear was never discussed with him in a way that he was able to understand. If it was never explained to him that the problem with his hearing was changes to the bone structure in his middle ear, it seems likely that he was never advised that these bone structures could be corrected by surgery as an alternative to struggling on with hearing aids.

29. Mr Constance's evidence was that, although he could not precisely remember what was said to him in consultations with Mr Caldera, no one ever explained to him that he was suffering from conductive hearing loss and he was not told that there was a surgical option to treat that condition. He says that he would have remembered that if it had been said. When he finally learned in 2012 that his hearing could be improved by an operation, he described this news as being "quite a shock" and that he "couldn't believe it".

30. He accepts that he was offered hearing aids and had conversations with both Mr Caldera and later with Mr Ahmed about how he was getting on with his hearing aids. He describes those as brief conversations when he confirmed that the hearing aids were assisting his hearing. It would, of course, have been a completely different conversation if he had known that his hearing difficulties could have been addressed by a surgical option. Mr Constance's evidence was that these conversations were brief because, at that time, Mr Constance did not think there was any other option to address his hearing difficulties apart from hearing aids. The hearing aids were broadly effective in assisting his hearing and I can therefore understand why he responded as he did. His evidence about the nature of the conversations he had about his hearing aids adds weight to the case that he was never advised of a surgical option until 2012. I therefore accept his evidence and find as a fact that he was not given advice by Mr Caldera that there was a surgical option to treat his hearing loss at any time. I accept that he did not understand there was an option to treat his hearing loss by surgery until 2012. On that factual basis, I find that Mr Caldera had breached his duty of care to Mr Constance by failing to discuss the option of surgery with him during, at latest, the appointment in January 2005, and that the MoD are vicariously liable for his negligence. On the

assumed factual basis, I understand that a finding of negligence is not disputed by the MoD.

31. Mr Constance was provided with hearing aids and returned to his work with 32 Regiment Royal Artillery at Larkhill. On 3 February 2005 there is an entry in his GP records noting the opinion of the ENT consultant and the fact that he had been recommended to wear hearing aids. That entry states "*Fit for Full Duties within current MES*". MES stands for "Medical Employment Standards".

32. Mr Constance had an appointment with another GP, Doctor Hardman, on 21 February 2005. It appears clear that Mr Constance was worried about the effect of his hearing loss and having to manage with hearing aids on his military career. The GP notes record as follows:

> *Conductive hearing loss. Due to have hearing aid for right ear. Not downgraded. Unsure what grading appropriate. Patient fairly anxious about the impact on career.*
> *Plan: refer to PSMB Tidworth*
> *Fit For Full Duties within current MES"*

33. That entry is of some significance because it confirms that the Medical Centre notes recorded that Mr Constance was suffering from Conductive hearing loss as opposed to NIHL. The evidence was that NIHL was more common amongst soldiers as a result of exposure to noise in the military environment. A GP is not an ENT specialist and cannot be expected to understand all of the nuances of the treatment options for different types of hearing loss. However, I understand that it is not disputed that both

GPs and doctors concerned with occupational health medicine should have a general understanding of the different causes of hearing loss and should understand the difference between conductive hearing loss and sensorineural hearing loss.

34. Mr Constance was duly referred to the Medical Board to determine whether his medical grading would be affected by the fact he had a measure of hearing loss and needed to wear hearing aids. The Medical Board operated under the PULHHEEMS medical decision making system which I describe below.

35. On 5 May 2005, Mr Constance was seen at Tidworth by a Medical Board consisting of Lt Col. Noon and Dr Ingram. His medical status was temporarily downgraded to P7 CPND (Geo) because of his hearing problems. CPND stands for "Caveated Posting Non-Deployable (Geographic)". In summary an individual who is graded in this way as "P7" can only be deployed on active service by an order made by the Army Personnel Centre ("**APC**"), and that order would only be made after the APC had sought advice from an Occupational Health Physician. The notes to the Board explain the reasons for this decision as follows:

> *"Sgt Constance is a 36 year old mission controller in the Phoenix Battery who first noticed decreased hearing in his right ear in 1999 when his audiogram showed a hearing loss of H3. This has slowly progressed and started to interfere with his work being unable to hear conversations. He was referred in September 2004 for an ENT opinion who confirmed bilateral conductive deafness worse in the right. A CT scan was carried out and found to be normal.*
>
> *Sgt Constance has been fitted with a hearing aid which has much improved his symptoms. He currently works as a mission controller in his unit which is carried*

out inside a box body vehicle. This is a quiet environment but does involve wearing a headset. ….

Sgt Constance has yet to test his hearing aid in the field. He is therefore graded P7 H4 H3 CPND (GEO) until he can be assessed in the field conditions and then he will be reviewed. Sgt Constance understood the Board's findings and had no further questions"

It thus appears clear that the decision was made that there should be an assessment of Sgt Constance's ability to function as a UAV mission controller "*in the field*" before a further decision was made about his medical grading.

36. There is a further entry in the GP notes for 9 May 2005 which notes that a workplace assessment in camp and an exercise is to be undertaken, but that Mr Constance was "*pretty fed up*".

37. On 19 October 2005 the GP notes as recorded by Dr Hardman are as follows:

*"**Hearing loss***

Ongoing. Hasn't had in field noise assessment. Struggled when hearing aid battery ran out on exercise. Fed up with bullying about hearing aid. Mild but getting to him.

I have written to Col Noon to try and sort out a permanent solution and hurry up in field assessment.

Fit For Full Duties within current MES"

38. This is a useful indicator of the sequence of events for 3 reasons. Firstly, it is contemporary evidence to show that Mr Constance was suffering a degree of bullying as a result of being a relatively young man who was wearing hearing aids. Secondly, it suggests that he was having significant difficulties with his work as mission controller in the field when his hearing aid batteries ran out. Thirdly, it shows that no assessment had been made in the field to determine whether he could function as a UAV mission controller with hearing aids.

39. The next stage of this saga happened a few weeks later but the precise sequence of events is not entirely clear from the documents. There is an entry in the GP notes made by Dr Hardman for 11 November 2005 as follows:

> ***"Hearing loss***
>
> *PSMB said yesterday that he cannot deploy regardless of findings of workplace assessment, therefore need sending back to PSMB for ?med discharge. Will not deploy, could work in officers mess and then be discharged at later date, but not thrilled with the prospect"*

40. That entry suggests that a decision had been made by the "PSMB", which I understand is the Medical Board, not to deploy Mr Constance regardless of the outcome of any assessment. However, if such a decision was made, it appears to have been made without any formal decision-making process having been followed. The documentary trail suggests that, following the incident when Mr Constance had difficulties in the field due to the loss of his hearing aid batteries, someone decided that Mr Constance could not continue as a UAV mission controller and he was transferred to working in the Officers' Mess as the Mess Manager.

41. The documents do not suggest that the proposed field assessment was ever completed by the Army at a point that Mr Constance had working hearing aids. It thus appears that the failure of the hearing aids on an exercise appears to have been treated as the trigger for Mr Constance's move out of the battery and into the Mess Manager job, even though a proper assessment of his ability to continue in the role of a Mission Controller with functioning hearing aids had never been undertaken.

42. Following that decision, Mr Constance's case came back before the Board 10 January 2006 although, by that point, it appears the die was cast. The members of the Board at that time were Lt Col Noon and Col P Langford. The Clinical Summary states:

> *"Sgt Constance is a 36 year old mission controller in the Phoenix Battery who was reviewed at PSMB with regard to his hearing loss. It has been noted that he has had difficulties with his current role within the unit particularly when deployed on exercise. However his unit are very keen to keep him and the adjutant has agreed that he would be considered for posts as an instructor or in recruiting. He has now been offered a management post in the Officer's Mess and is currently happy with this post. He doesn't want to be medically discharged and future postings where [this must be a mistake for "were"] discussed.*
>
> *He understands that his grade will remain P7 H4 H3 CPND (GEO) hearing aids for the foreseeable future. He is restricted from noise exposure and firing weapons other than his annual personal weapons test which should be performed in controlled environment with double hearing protection. Sgt Constance understood the board's recommendations and had all his questions answered"*

43. The reference to Mr Constance being "*restricted from noise exposure and firing weapons"* can only have been based on an assumption that Mr Constance was suffering from NIHL and so should not be exposed to further hearing loss because it may cause further hearing loss. However, that rationale does not apply to a person suffering from conductive hearing loss. The expert evidence confirmed that there is no good reason to impose these restrictions on a soldier who is suffering from conductive hearing loss. This appears to be the start of a series of occasions on which Mr Constance was treated by the Medical Board as a person who suffered from NIHL. That mistake caused wholly unnecessary restrictions to be put on his training and thus meant that his military skills became out of date.

44. It also appears that, by the time this Board was held in January 2006, Mr Constance had already been transferred from being a UAV mission controller to working as the Mess Manager or was on his way to commencing that new role. Nonetheless, the notes confirm that his unit were keen to keep him and it was envisaged that he may have a future role as an instructor or in recruiting. That former role is particularly important because Mr Constance had been identified by the Army as having the potential to be a good instructor. In 2001 he attended the Basic Instructional Techniques Course and his report noted:

> *"Bdr Constance proved that he is a very capable instructor who grasped the concepts of good instruction relatively easily. ….*
>
> *LBdr Constance has the potential to be an excellent instructor, he has few weaknesses and with experience will easily overcome them"*

45. However, at this point in January 2006, no instructing role had been identified for Mr Constance. The reference in the notes from the January 2006 Board to protecting Mr Constance from further noise exposure and the firing of weapons is the first indication that the Board were proceeding on the basis that he had NIHL as opposed to conductive hearing loss. The expert evidence in this case makes it clear that further exposure to loud noise is a potential problem for individuals who have NIHL since further exposure has the potential to aggravate their existing condition. However, further exposure to loud noise is no greater a problem for those suffering from conductive hearing loss than anyone else. The limitations imposed on Mr Constance's exposure to noise were accordingly inappropriate. They had the effect of preventing Mr Constance maintaining his military skills because he was excluded from any course which exposed him to any degree of noise.

46. An appointment was arranged for Mr Constance to see an ENT surgeon in January 2006, but it appears that there was a misunderstanding and the information about the appointment did not get through to Mr Constance in time. He was therefore not seen again at the ENT clinic until June 2006. On this occasion he was reviewed by Mr Caldera. The handwritten clinic notes are extremely brief, there does not appear to be an F Med 7 record but there is a short letter from Mr Caldera which states as follows:

> *"I reviewed Bombardier Constance in the ENT clinic this morning. He is getting on well with his hearing aids and his audiometry today is essentially unchanged from that of last year. His eardrums looked normal and I have reassured him regarding the audiometry. I would however like to perform further audiometry in*

a further year's time, here at the Royal Hospital, Haslar and I have arranged for this"

47. Mr Constance's evidence is that this was a brief meeting at which he was asked how he was getting on with his hearing aids and he said words to the effect that, when working, they improved his hearing. His evidence was that he was not told that his hearing problems could be improved by surgery. I accept that evidence.

48. On 6 November 2006 Mr Constance attended the Medical Centre and was seen by Dr Willman. The notes of the consultation are as follows:

"Problem: Tinnitus

Known as sensorineural deafness, has come in as hearing aid is away being repaired & he has suddenly realised how bad the problem is, clutching at straws as he says as asking about operation. I am not aware of any as it would be destructive. PiL given. I will do a literature search but I suspect it may well be a case of conservative Mx only"

49. The reference to "sensorineural deafness" was an error. Mr Constance's hearing was not affected by sensorineural deafness. He suffered from conductive hearing loss, as the earlier medical notes held by the GP practice clearly identified. The description of Mr Constance "*clutching at straws*" in seeking an operation in place of his hearing aids is some evidence that he was not aware that such an operation was possible. This was a missed opportunity for him to have had proper treatment identified. However, any literature search undertaken by Dr Willman to seek to identify an operation that would cure sensorineural deafness would not have been productive because the expert evidence in this case shows clearly that there is no such operation. There is an

operation to cure conductive hearing loss but it appears that this was not identified by Dr Willman.

50. Mr Constance was referred to the Queen Alexandra Hospital, Portsmouth and was seen by Mr Feroze Ahmed, FRCS, a locum ENT Consultant on 5 June 2007. Mr Ahmed was an employee of the Trust and he produced a detailed statement for these proceedings in which he frankly accepted that he had no recollection of this particular appointment. His witness statement said that it was not his usual practice to recommend surgery to a patient who seems to be coping well. However, when he came to give oral evidence he frankly accepted that he ought to have explored a surgical option for Mr Constance when he saw him in 2007. Mr Ahmed saw Mr Constance again on 18 March 2008. Once again, he accepted that a surgical option was not discussed and that it should have been.

51. It is possible that Mr Ahmed's evidence came as much as a surprise to counsel and solicitors for the Trust as it was welcomed by counsel and solicitors acting for Mr Constance. Mr Keegan, asking questions on behalf of Mr Constance, did not need to apply any pressure whatsoever to Mr Ahmed to get him to accept that the standard of medical care that he provided to Mr Constance fell below that which Mr Constance was entitled to expect. In those circumstances, it is unclear why the allegations of negligence were defended by the Trust in these proceedings. However, having heard Mr Ahmed's evidence, the Trust promptly and properly conceded that Mr Ahmed had acted negligently in failing to advise Mr Constance of the surgical option in the 2007 and 2008 appointments. It did not make any admissions as to any loss flowing from that negligence.

52. Meanwhile, Mr Constance was continuing to work as the Mess Manager. He reports that he was subject to low level bullying and that his general mood was pretty low. He was attempting to do the best he could in difficult circumstances but was clearly frustrated by the limitations on his career as a result of this appointment. In October 2007 a proposal was put forward for him to return to his unit, initially for a training exercise in Israel. I heard evidence from Dr Colin Wall, who was working as an Army GP, to whom this request was referred. The first indication of this proposal emerges in a note made by Dr Wall on 23 October 2007. It states:

> *"Unit want to consider deploying him in soundproof role. Ask for him to come in for review of this"*

53. That review occurred on 2 November 2007 where Dr Wall recorded as follows:

> ***"Problem (FIRST): Hearing difficulty***
>
> *Unit asking to deploy him. Looking at PSMB notes - not a wise option and not what was agreed. Also talking to him he would like to be able to deploy but feels in his current state it would not be possible. Unable to wear radio/headphones. If lost/broke hearing aid would be completely useless. For 6/52 [a period of 6 weeks] and had major problems. Does not want increased risk of noise exposure.*
>
> *I feel it is not the right thing to deploy this soldier and will contact his Adj to tell them this, I will also write to PSMB just to clarify"*

54. It seems clear from this entry that Dr Wall was firmly opposed to Mr Constance being deployed, at least for as long as he needed to use hearing aids. It also seems clear that Dr Wall had picked up the reference in the earlier Medical Board notes to Mr

Constance suffering from sensorineural deafness and had not appreciated that this was erroneous because the GP notes held by the Medical Centre made it clear that he had been diagnosed as suffering from conductive hearing loss. The reference to Mr Constance not wanting any "*increased risk of noise exposure"* is also evidence that Mr Constance thought further noise exposure could adversely affect his hearing. That would have been the case if, as he thought, he had NIHL. It is further evidence that no one had explained to him the true cause of his hearing loss.

55. The MoD have accepted that the error in attributing his hearing loss to NIHL constituted negligence. In summary, the Board refused to permit Mr Constance to be deployed to Israel. Part of that reasoning appears to be that they were concerned that any deployment to Israel would be used as a "stepping stone" to a request to deploy Mr Constance to Afghanistan or Iraq in a UAV role. That concern was raised by Dr Wall in his memo to the Board dated 13 November 2007.

56. The Medical Board first met on 21 January 2008. The only member of the Board on that occasion was a Dr Brownhill. Dr Nicholas Cooper was also supposed to have been a member of the Board but was not present when the Board met to consider the case. Dr Cooper later signed the documents "*in absentia*". Dr Brownhill referred to Mr Constance as suffering from NIHL and said:

> *"His unit were questioning whether he might be able to deploy. Because of his worries of losing his hearing aid while on deployment, and his current low mood, I do not think this is appropriate at the moment"*

57. Mr Constance raised the possibility of a medical discharge and a further Medical Board was held on 23 July 2008. It consisted of Col Thornton, Major Austin and Major Ker. The notes of the Board record that Sgt Constance has noticed a deterioration in his

mood since his hearing loss became severe and noticed that he didn't socialise as much as he used to. It also records that he feels unfulfilled in the role of Mess Manager. The notes state as follows:

> ***"Other Considerations:*** *The Appendix 18 and highly respected SNCO [Senior Non-Commission Officer] who is unable to be employed in any other role within the regiment apart from Mess Manager. In particular, the CEO states that "Sgt Constance is an outstanding SNCO who, if you were fit, could easily be promoted to WO2 [Warrant Officer 2] in the time he has left in the Army". Sgt Constance can only fill the Mess Stuart appointment and this job does not offer him career progression, only a job. He has already been in the post for 2 years and if he were fit he would be moving and promoting into another job.*
>
> *Prognosis: the prognosis is that of chronic noise induced hearing loss with low mood associated.*
>
> ***Employment Restrictions:*** *Sgt Constance is non-deployable and is unable to be exposed to any loud noise. He is able to do his APWT once a year with double hearing protection.*
>
> ***Recommendations****: The Medical Discharge confirm a grade of P7 ND and recognise that Sgt Constance is in a difficult position as he does not meet the grades, he does not meet the criteria for Medical Discharge and yet has no other meaningful employment within his unit. The board have recommended that Sgt Constance talk to his unit about the options of an AF B204 Discharge and the Board will annotate that they will support this should the unit was to go down this*

route. The Board also recognise that Sgt Constance has a deteriorating mood and to that end we have referred him to DCMH Tidworth for assessment by a CPN"

58. Although Dr Cooper was not a member of the Board that met in July 2008, he explained in his witness statement that he signed the record of the Board's deliberations on behalf of Major Ker after discussing the case with other members of the Board.

59. The Medical Boards that met in January and July 2008 proceeded erroneously on the basis that Mr Constance was suffering from NIHL. Accordingly, as the MoD accept, the Boards acted negligently as it made a series of decisions which affected Mr Constance's career on an incorrect factual basis.

60. Having been turned down for both deployment a medical discharge, Mr Constance had no practical alternative but to continue to serve as Mess Manager. It appears clear from his annual appraisals that this role constrained the development of his career. His annual appraisal for January 2008 noted:

"Sgt Constance's performance in his first year as a SNCO has been steady and comfortable. He is a quiet yet highly capable individual, is thorough and hard-working and has established himself amongst the SNCOs within the Battery and is well regarded .....

For promotion to SSgt [Staff Sergeant] but his current performance does not yet warrant a strong recommendation. His medical downgrading to P7 restricts his employment, but should he be promoted to SSgt, I would see him as a candidate for Regional Equipment Manager, a UK based position"

61. His annual performance noted that his potential for promotion was developing and his first reporting officer, Major Whittle, expected to be able to recommend him for promotion in the next report. That report noted:

> *"Sgt Constance has confirmed his versatility and would be employable as an instructor on the Phoenix UAV, though I believe for the moment he should remain in his current employment"*

62. It seems to me that this is a further indication that Mr Constance had the capacity to work within the Army as an instructor.

63. His next annual appraisal is dated 29 January 2008 and states:

> *"Sgt Constance needs to move on from this post in order that he does not become complacent and prove his ability to perform in a more competitive role. He is judged to be in the top third of 12 Sgts on whom I report, 4th overall. He is highly recommended for promotion to SSgt where I would see him employed in the OSC or as a BQMS"*

64. That promotion did not happen until the following year but, at that point, Major Hammond observed:

> *"Sgt Constance is ready for promotion now and I see him as developing the potential for Warrant rank in time. Due to his experience, he would be best employed in the logistics field, but could also would be employed in a training establishment"*

65. Mr Constance obtained a promotion to Staff Sgt and continued to discharge his duties as the Mess Manager. His review in November 2009 stated:

> *"Furthermore, given SSgt Constance's hearing impediment, it is also unlikely that he will be able to deploy operationally, thus limiting his employment. However, he is widely employable in a range of non-deployable posts including that of BQMS or RQMS in a training unit, given his track record as a SNCO of immense reliability and integrity"*

66. Despite the fact that Mr Constance was identified as having substantial potential for a role outside that of Mess Manager and in particular despite the fact that he was noted to be able to work as an instructor, no other role for him was ever identified. Eventually, following changes in the way the Mess was organised, a decision was made that he should be the subject of a medical discharge from the Army, with his last day of service was 10 August 2011.

67. Mr Constance then made an application to the Armed Forces Compensation Scheme for a war pension based on his understanding that he was suffering from service related NIHL. He was referred to an ENT surgeon and saw a Mr Patel at the Spire Hospital, Southampton in January 2012. Mr Patel recommended further investigations and saw Mr Constance again on 1 June 2012 when he explained to Mr Constance that he was not suffering from NIHL but was suffering from otosclerosis. Mr Constance explained that this was entirely new information to him because, up to that point, he believed that he had suffered noise induced hearing loss due to blast noise and that there was nothing that could be done to improve his hearing, and that he was required to wear hearing aids for the rest of his life.

68. Mr Constance was provided with information about an operation which he was told could be carried out to improve his hearing, namely a stapedectomy. He was also told about the risks but he agreed to have the surgery. It was carried out successfully at Salisbury Hospital in May 2013. This surgery has left Mr Constance with a normal level of hearing. He has therefore been denied any form of service related medical pension because he is not continuing to suffer from any medical condition caused by his service in the Army. Accordingly, he has been left in the unfortunate position where his Army career was curtailed because it was understood that he suffered from a permanent, untreatable condition, namely NIHL. Then, once he has lost his career in the Army, he discovered to his surprise that his hearing loss had been treatable all the time.

69. It is not disputed that the standard of medical care provided to him by Dr Ahmed constituted negligence. The MoD also accepts that Army decision-makers acted negligently in ascribing Mr Constance's hearing difficulties to NIHL when it should have been clear from the information provided by Mr Caldera in the Medical Centre's notes that Mr Constance was not suffering from NIHL but had conductive hearing loss. I have found as a fact that Mr Constance was not advised that his hearing loss could be treated by surgery. Given that factual finding, there is no dispute that Mr Caldera acted negligently in failing to provide that advice.

70. The next question is what would have happened if Mr Constance had not been the victim of the multiple acts of negligence set out above. McGregor on Damages explains the proper approach at 2-002 as follows:

> *"The statement of the general rule as to the measure of compensatory damages, a rule equally applicable to tort and contract, has its origin in the speech of Lord*

Blackburn in Livingstone v Rawyards Coal Co (1880) 5 App. Cas. 25 at 39. *He there defined the measure of damages as:*

> *"that sum of money which will put the party who has been injured, or who has suffered, in the same position as he would have been in if he had not sustained the wrong for which he is now getting his compensation or reparation."*

71. Applying that principle to the current facts, Mr Constance is able to recover damages to reflect any losses he suffers by reference to the position he would have been in if he had not been the victim of negligence. In this case it means damages against the MoD have to be assessed on the basis of the events that would have happened if he had been advised by Mr Caldera that a surgical option was available to treat his hearing loss. Damages against the Trust have to be assessed on the basis of the events that would have happened if he had been properly advised by Mr Ahmed. Damages against the MoD can also arise based on the basis of the events that would have happened if the Medical Boards from January 2006 onwards had appreciated that Mr Constance suffered from conductive hearing loss as opposed to suffering from NIHL.

72. I am conscious that, at all points, the onus of proof in establishing what would have happened is on Mr Constance. He can only recover damages where he is able to prove, on the balance of probabilities, that something different would have happened if he had not been the victim of negligence by others and that he has suffered loss as a result of that difference.

73. Mr Constance ought to have been advised in January 2005 at the latest that his conductive hearing loss could be treated by a stapedectomy operation. He should have been given advice by Mr Caldera about the potential benefits of such an operation and

about the risks of that operation. It seems likely that, even if he had been provided with this information, Mr Caldera would have recommended him to try hearing aids in the first instance as opposed to proceeding straight to surgery. However, if he accepted that advice, he should also been advised that he could ask for a further appointment to discuss the possibility of being referred for surgery if he wanted to explore that option in the future, and depending how he reacted to the hearing aids. I find that it is likely that Mr Constance would have accepted that advice and would have agreed a trial of a hearing aid for his right ear. Accordingly, I find that Mr Caldera's failure to advise Mr Constance about the surgical option to treat his otosclerosis made no difference to the sequence of events immediately following the appointment in January 2005.

74. However, having regard to Mr Constance's evidence and, in particular, the matters recorded in the GP notes, in my judgment it would not have been very long before Mr Constance would have realised that there would be substantial limitations on his career as a serving soldier if he had to continue to wear hearing aids. The notes from the Medical Centre make it clear that Mr Constance was worried about his Army career in February 2005 and he was already fed up by May 2005. By October 2005 he was struggling with undertaking operational duties when the batteries on his hearing aids failed and soon after was, in effect, transferred away from operational duties and into being the Mess Manager.

75. A further factor is that after Mr Constance was diagnosed with a hearing condition in 2005, he developed a psychiatric condition which met the criteria for an adjustment disorder with both depressive and anxiety symptoms. The psychiatric experts agree that he became symptomatic in 2005 and his condition abated after surgery in 2013 and, from that date, they agree that he no longer fulfilled the criteria for a formal mental

health condition. The fact that Mr Constance started to experience low mood in 2005 so soon after the diagnosis of hearing loss to such an extent that it could be classified as a psychiatric illness is a further reason which leads me to consider that Mr Constance would have decided reasonably quickly that he wanted to explore surgery because that had the potential to alleviate his psychiatric condition as well as improving his hearing.

76. In order to address the likely counterfactual scenario, I have to ask when Mr Constance would have decided that he should seek further advice about the surgical option, on the assumption he had been aware that this was open to him. In this assumed case, Mr Constance would have known that surgery was an option and that, if it was successful, he would no longer need hearing aids. In my judgment, by October 2005 he is likely to have asked for a further ENT appointment in order to discuss the possibility of surgery as an alternative to continuing to struggle on with his hearing aids. At the very latest, it seems to me he would have done so when it was proposed that he move away from operational duties to become the Mess Manager in November 2005.

77. At that point, it is likely that he would have been referred by the Medical Centre for an appointment with an ENT surgeon for a discussion about the surgical option. The best evidence about Mr Constance's likely reaction in late 2005 to the risks of undergoing surgery is his decision to accept the surgical option when it was offered to him in 2012. It seems to me that he would have had a far greater incentive to accept the risks in late 2005 or early 2006 because, at that point, it seems highly likely that he would have considered that his continuing Army career depended upon him having good hearing and, in particular, not having to rely on hearing aids. I accept that it would have taken some time for that referral to the ENT surgeon to be arranged. If, following that meeting, Mr Constance had decided to proceed with the surgery, a further appointment

would be needed with the ENT surgeon because this was a specialist operation which is not carried out by general ENT consultants like Mr Caldera.

78. Doing the best I can on the limited information available to me and bearing in mind the general standard then operating within the NHS of completing referrals within 18 weeks, in my judgment it is likely that if the process had been commenced in the autumn of 2005, the operation would have been carried out by about September 2006 at the latest. I heard evidence that operations that were needed for soldiers were moved through the NHS system as quickly as was reasonably practicable and were given some priority. Nonetheless, it still would have taken some time and it seems likely that Mr Constance would still have been deployed to work as a Mess Manager even if he was attempting to follow the path towards a stapedectomy operation.

79. A counterfactual case was put to me in submissions on behalf of the MoD to the effect that, if he had sought appropriate advice, he would have been advised that his career options would be just as limited after he had had a stapedectomy operation as they would have been with his continual reliance on hearing aids, and it would have been better for him to continue with hearing aids. I do not accept that submission. That advice would only have been given if there was an established practice of allocating a medical grade of P7 to a soldier who had had a stapedectomy. I do not consider that the evidence establishes that there was such a practice for the reasons set out below and so it seems unlikely that this advice would have been given by a GP at the Medical Centre. Accordingly, I do not accept that Mr Constance would have been likely to have continued to struggle on with hearing aids if he had known there was a surgical alternative. I therefore find that, in this assumed counterfactual situation, Mr Constance would have had a stapedectomy operation in mid-2006 and that would have meant that

his hearing was, for all practical purposes, entirely adequate and he would not have needed to rely on hearing aids.

80. The question as to what would have happened to Mr Constance's career if he had had a stapedectomy operation is essential to the assessment of his damages. I fully accept that, in considering this matter, the onus of proof is on Mr Constance. In order to claim damages based on an alternative career path, Mr Constance has to demonstrate that, on the balance of probabilities, he would have had a different Army career if he had had a timely stapedectomy operation.

81. Mr Constance's career options would, to some extent, have depended on his medical grading following a stapedectomy operation. The system for the medical grading of soldiers in the British Army is set out in the "PULHHEEMS Administrative Pamphlet". Referring to the PULHHEEMS document a "pamphlet" gives the wrong impression. It is a hugely detailed medical decision making policy running to several hundred pages, and is supplemented by detailed advice.

82. PULHHEEMS takes its name from the first letters of the division under which each part of the medical examination is carried out. The two "H" letters stand for the hearing assessment in the right and left ears. The "Pamphlet" is an operational policy which defines how medical decision-makers are required to reach decisions on the medical fitness of individual soldiers. The Pamphlet was revised and was reissued in 2000, 2007 and 2010. No counsel suggested that there were any material differences between the different versions for present purposes and I will therefore refer to the 2007 document.

83. Paragraph 0101 provides:

"The PULHHEEMS system classifies Personnel in two ways. The P grading of the PULHHEEMS system describes the overall health capacity of an individual. The PULHHEEMS Employment Standard (PES) element of the PULHHEEMS system describes the functional and geographical employability and is principally defined in relation to deployability. The allocation of a P grade and a PES is the responsibility of medical staff. In individual cases Director of Manning (Army) (DM(A)) has the authority (after taking appropriate medical advice) to waive or vary employment restrictions contained within the definitions of the P grade or PES. Any application for such a waiver should be made through the appropriate chain of command to the appropriate Manning and Career Management Division (MCM Div) at the Army Personal Centre (APC) prior to submission to DM(A)"

84. There are two aspects of 0106 that appear relevant. The Physical Capacity section provides:

"Physical Capacity (P). *This quality is used to indicate an individual's overall physical and mental development, his or her potential for physical training and suitability for employment worldwide (i.e. the overall functional capacity). The 'P' is affected by other qualities in the PULHHEEMS profile"*

85. The references to Hearing are as follows:

"Hearing (HH). *Records the ability to hear. Diseases of the ear are assessed under the P quality. Severe hearing loss will also affect the 'P' grading"*

86. The meaning of the 'P' grades is set out at 0107 which provides:

"The meaning of each P grade is linked to employment and are further described in Table 7. P grades arise from the PULHHEEMS assessment. This classification applies to males and females equally. The exact criteria for each P grade and associated PES are discussed below. PES are described at para 0122. The P grade may be Temporary (annotated with a T suffix – see para 0102) or Permanent.

a. P2 – Fit for Combat. The functional meaning of P2 or physical limitation that would prevent the soldier undertaking all aspects of his/her military duties. This grade would attract a PES of FD"

b. P3 Fit for Light Duties. The P3 grade is to be used for an individual who has a medical condition that prevents him/her undertaking the full range of military duties. Such individuals are able to perform useful duties in barracks, but may not be able to carry out all aspects of their employment. They may require medication or medical follow-up. The individual's condition is unlikely to significantly deteriorate if there is an interruption to the supply of medication or the delay in planned medical review. The individual's condition is unlikely to impose a demand on the medical services if deployed on operations. Deployment on operations requires a pre-deployment medical risk assessment by either a Medical Officer (MO) or a Regional Occupational Medicine (OM) consultant (as indicated in Appendix 9). This grade will attract a PES of LD.

c. P4 –Pregnant personnel are graded P4 and attract a PES of RE(PP).

d. P5 and P6. P5 and P6 are not to be used.

e. P7 – Fit for Limited Duties. P7 is to be used for an individual who is capable of performing useful military duties within the limits of his/her disabilities, expected to give regular and efficient service and not likely to deteriorate if suitably employed and allowed time for regular meals and rest. Individuals may be restricted in their ability to work at night or undertake shiftwork. They may require regular, continued medical care or supervision and may require regular long-term medication. They may require access to secondary level (hospital) medical facilities. They are not normally fit to deploy on military operations. The PES will normally be ND, H or HO(UK). In exceptional cases a PES of LD may be awarded by a Regional OM Consultant"

87. The reference to "Table 7" is a reference to a Table within the PULHHEEMS Administrative Pamphlet titled "*Functional Interpretation of PULHHEEMS Grades*". The PULHHEEMS letters are along the top of the table and the PULHHEEMS grades are down the left-hand side. The definition of P2 for the P category – namely "Age, build, strength and stamina" is as follows:

"Fully Fit - The absence of a medical condition likely to affect the individual's ability to perform their normal military duty and general military skills, attempting all MATTs (to the individual's Arm or Service) or worldwide deployment"

MATT stands for "Military Annual Training Test". The wording of these sections makes it clear that the presence of a "*medical condition"* of itself will not prevent a

soldier being graded as P2. A medical condition will only result in a soldier being downgraded if an assessment is made that the medical condition is "*condition likely to affect the individual's ability to perform"* the tasks set out in the definition.

88. The section of this table dealing with hearing for the P2 grade provides that a soldier has to have "*Acceptable practical hearing for service purposes*". If Mr Constance had had a stapedectomy operation, his hearing would have been entirely functionally adequate. The standard of hearing is further explained in Annex B to the PULHHEEMS Administrative Pamphlet which states that "*Generally, perfect hearing is not essential*..". There was no evidence that Mr Constance's role as a UAV mission controller was one where he needed particularly acute hearing. Accordingly, I consider that, if he had had a stapedectomy operation, his 'HH' assessment would have been sufficient to allow him to be fully deployable.

89. Nonetheless, his 'P' classification may be affected if it could be shown that an individual would be likely to be unable to undertake normal military duties or if the individual was unable to perform in accordance with the other factors listed in the relevant part of the Table as a result of having had a stapedectomy operation.

90. In seeking to advance its case that Mr Constance would have been graded at P7 if he had a stapedectomy operation, the MoD led evidence from Dr Nicholas Cooper, an Army Consultant Occupational Physician who retired in May 2012. Dr Cooper explained that his practice was that soldiers who had had a stapedectomy operation were classified as P7 and thus were not deployed on active service overseas because Dr Cooper considered that the existence of a piston in the ear following the operation meant that such a soldier faced increased risks to his (or I assume her) hearing. Two factors were identified by Dr Cooper as being relevant to that assessment. First, Dr

Cooper asserted that rapid changes in air pressure caused by tactical flying could have an effect on a post- stapedectomy soldier and could do further damage to the soldier's hearing if those air pressures caused the stapedectomy piston to become dislodged. Secondly, Dr Cooper asserted that there was a danger of the same thing happening if a soldier was in the vicinity of blasts, and that this could leave the soldier unable to hear and thus being a danger to himself and his colleagues. Dr Cooper considered that both of these potential events gave rise to a risk of dislodging the piston introduced by the stapedectomy operation and that this risk was sufficient to justify classifying such soldiers as P7.

91. As the MoD's Skeleton Argument made clear, Dr Cooper's evidence is at the heart of the MoD's defence to the Claimant's claim. It is thus necessary to look at this evidence carefully.

92. Dr Cooper said in evidence that he was involved in making decisions for about 20 soldiers over his career who had had stapedectomy operations and they were "*never graded Medically Fit For Deployment*". However, he accepted that this did not mean that such soldiers were never deployed. He gave one example of a soldier who was permitted to be deployed to Camp Bastion in Afghanistan in about 2012 because he had special intelligence knowledge, but said that his deployment was only sanctioned for a limited period.

93. Dr Cooper was peripherally involved in both of the Medical Boards which considered Mr Constance's case in 2008. However, Dr Cooper's involvement with both of these Medical Boards raised questions about his approach because his involvement was far from standard practice. Dr Cooper accepted that he had signed the Board papers confirming the decision on each occasion without being present at either Board

meeting. He was therefore a party to making important decisions about Mr Constance's career without ever having met Mr Constance, examined him or listened to his case. It is perhaps unfortunate that it was not put to Dr Cooper that signing the paperwork after the event was not consistent with rules for the operation of Medical Boards at Appendix 3 and 4 of the PULHHEEMS Administrative Pamphlet because the details of the PULHHEEMS scheme were only examined at a later point in the trial. Nonetheless, given his peripheral and unusual involvement, his value as a decision maker in Mr Constance's individual case is of limited weight.

94. Dr Cooper gave oral evidence which was tested on cross examination. Having considered all of the documents in this case and both re-read his evidence and my notes of his cross-examination, I have reached the view that I cannot safely be confident that Dr Cooper was giving evidence about decision making generally by Medical Boards at that time in relation to soldiers who had had a stapedectomy operation.

95. I have reached that view because I consider that there were a number of aspects of Dr Cooper's evidence which were far from satisfactory. First, Dr Cooper retired from the Army 8 years ago and is giving oral evidence as to how the Army approached these decisions as long as 12 years ago. He is thus giving evidence of things which happened a long time ago. That, of itself, is sufficient to raise some doubt about the reliability of his evidence, particularly where it is not supported by documentary evidence.

96. Secondly, there was no documentary evidence to support the factual case advanced by Dr Cooper as to how Medical Boards treated other soldiers who had had a stapedectomy operation. There was not a single document which recorded how, at the material time, the risks of deployment of soldiers who had had a stapedectomy operation were assessed or ought to be assessed. No examples of this supposed

approach were provided in relation to any other soldier who had had a stapedectomy. There was, of course, no evidence about what happened in the case of Mr Constance because his case was never considered by a Medical Board after he had had a stapedectomy operation.

97. Thirdly, Dr Cooper sought to defend the correctness of the decision making in relation to the 2 Medical Boards in 2008 despite the fact that it was clearly deficient. The MoD acknowledged that those decisions were made on a false factual basis because Mr Constance never suffered from NIHL. However, Dr Cooper appeared to be hugely resistant to accepting that the Medical Board had made any form of error at all. His witness statement said at paragraph 45:

> *"From the records I have reviewed, I do not consider the Claimant's grading was mismanaged in any way. The functional impact of the Claimant's hearing loss, however it was caused, meant he was not fit for deployment. That was the primary concern of the Board"*

98. He also said earlier in his statement:

> *"While Capt. Wall's reference to noise-related hearing loss in his fax to me may have been in error, the readings from the audiograms undertaken in April 1999 and November 2004 do not preclude a diagnosis of noise-related hearing loss ("NIHL") and I recall that NIHL had been considered by the ENT specialists as a possible diagnosis"*

99. I regard this part of his evidence was wholly unsatisfactory for a whole series of reasons, namely:

i) There was no question as to whether the reference to NIHL "*may*" have been an error. It was an error. That error has been was conceded by the MoD and it raises questions about the objectivity and judgment of a witness who seeks to defend a decision making process which was so clearly based on erroneous facts;

ii) Dr Cooper referred in the above paragraph to audiograms which he claimed supported a finding of NIHL. However, in oral evidence he accepted that he did not see either of the audiograms dated April 1999 and November 2004 when decisions were made in 2008. Thus, his supposed reliance on these audiograms is misplaced. They were irrelevant to any decision making by the Board in 2008 and he gave an incorrect impression of their relevance in his witness statement;

iii) In any event, Dr Cooper's view was clinically erroneous in saying that these audiograms did not preclude a diagnosis of noise-related hearing loss. The expert evidence was that they were only consistent with conductive hearing loss, not NIHL. Mr Hughes further made the point that, although Dr Cooper was an occupational medicine doctor, he had a specific qualification in ENT medicine and therefore ought to have known that these audiograms did not support a diagnosis of NIHL;

iv) Further, Dr Cooper was wrong to suggest that the ENT specialists were unclear about the cause of Mr Constance's hearing loss. Mr Caldera had diagnosed that Mr Constance was suffering from conductive hearing loss, not NIHL. There is no evidence that any ENT specialist had ever advised the Army that Mr Constance may have been suffering from NIHL, and Dr Cooper was wrong to seek to attribute a share of the blame to the ENT specialists. They may not have advised Mr Constance properly about the options to treat his conductive hearing loss but,

contrary to Dr Cooper's evidence, they never suggested the cause was anything other than conductive hearing loss;

v) I also consider that paragraph 45 of Dr Cooper's witness statement gives a misleading impression. The 2008 Boards took decisions based on the fact that Mr Constance had noise induced hearing loss and so failed the HH grading under the PULHHEEMS system. On the assumed hypothesis (i.e. post a stapedectomy operation), Mr Constance would have had entirely adequate hearing. The question in such a case would have had to focus on an entirely different problem, namely whether on deployment there was any threat of dislodging the piston inserted in Mr Constance's ear as a consequence of the stapedectomy operation and, if so, whether that risk could have justified a down-grading. Whilst the Board could, in theory, have come to the same decision by a completely different reasoning process, Dr Cooper was wrong at paragraph 45 to suggest that the original decision making of the Medical Board could be supported or that it did not make any errors.

100. Hence in a number of material respects, Dr Cooper was giving evidence which was plainly wrong. Those errors tend to undermine his credibility as a witness in other areas.

101. There is, however, a more fundamental problem with the medical hypothesis advanced by Dr Cooper that a soldier who had had a stapedectomy operation should be classified at P7 because of 2 identified risks for further damage to his hearing, namely that Dr Cooper provided no medical evidence to show that this medical hypothesis was correct.

102. The ENT experts confirmed that there is no published medical evidence to support the case that a soldier who had had a stapedectomy operation is at any greater risk of having his hearing damaged by rapid changes in air pressure or a blast than a soldier who had not had the operation. This is an area where, by definition, randomised controlled trials cannot be undertaken. Accordingly, the only evidence is likely to be from case studies which look at patients who have had a stapedectomy operation in order to see whether there is evidence that they are more prone to further ear damage in any particular circumstances. Dr Cooper did not provide any evidence but he did refer in re-examination to a discussion he had had with an ENT surgeon, Group Captain Skipper who was an advisor to the RAF, and who Dr Cooper reported supported his approach. But there are so few details about that supposed conversation and it appears to have happened after Dr Cooper retired, and so I do not consider I can place weight on that evidence.

103. The published medical evidence does not support Dr Cooper's hypothesis. The evidence was set out in detail by Mr Hughes by reference to a series of published papers. I accept that this evidence, which was available in 2008, shows that a person who has had a stapedectomy operation is not at any greater risk of further ear damage from rapid changes in air pressure or blasts than anyone else. It must follow that, if it was Dr Cooper's practice when he was a serving occupational health doctor to downgrade soldiers who had had a stapedectomy operation to P7, this was a practice which was based on a theory of risk which was not backed up by any proper evidence.

104. Mr Hughes accepted that Dr Cooper was not alone in having these concerns. He accepted that a minority of ENT surgeons approach patients who had had a stapedectomy operation with a degree of caution and some might have supported the

approach which Dr Cooper claimed to have taken. However that was very much a minority view and he pointed out that a survey of UK otolaryngologists showed that 18% did not give any advice about flying restrictions, whilst 82% gave advice to restrict flying between one and twenty four weeks. There were similar figures in the United States but no evidence of any practice of recommending permanent restrictions after the operation. He also pointed out that the United States Air Force allows post-stapedectomy pilots to fly single seat aircraft, where substantial pressure changes could be anticipated.

105. Mr Hughes' evidence, which I accept, was that there was no substantially greater for a post-stapedectomy patient from either a blast or from rapid changes in air pressure. However, in fairness to Mr Hughes, he also accepted that a relatively small minority of ENT surgeons were concerned that there may be such a risk and would be more cautious, even though there was no proper body of medical evidence to back up that concern. Accordingly, the position appears to be that Dr Cooper set out an approach to the medical grading of soldiers after a stapedectomy which was, at best, a minority medical view and, at worse, placed limits on the careers of soldiers without any proper evidence base to support that view.

106. I have some difficulty in accepting Dr Cooper's evidence relating to his personal practice, but accept it to the extent that he would have raised questions as to whether soldiers who had had a stapedectomy should be classified as P2. I do not accept his evidence that a soldier who had had a stapedectomy before a Medical Board would automatically be classified as P7. That approach does not fit with the medical evidence and also is inconsistent with the way that decision making was supposed to have been carried out under the PULHHEEMS system.

107. A soldier's medical classification ought to have been determined by applying the tests in the PULHHEEMS Administrative Pamphlet. As I have indicated above, the fact that a soldier has a medical condition should not exclude a P2 classification unless that condition is "*likely to affect the individual's ability to perform their normal military duties*". I fully accept that the use of the word "likely" in an official government policy (which the PULHHEEMS Administrative Pamphlet is) does not necessarily mean that a decision maker has to be satisfied that an unwelcome outcome is more likely than not. However, it does require that a substantial level of risk of that outcome is established before a medical condition should prevent the individual being classified as P2.

108. In circumstances where a majority of ENT surgeons would have advised that there was no or virtually no additional risk in deploying a soldier who had had a stapedectomy and there is no published evidence to support the existence of such a risk, I cannot accept that Army Medical Boards would have routinely taken decisions which not only failed to apply the decision making system in accordance with the tests set out in the policy documents but also were making decisions without any published evidence existing to support the supposed risk of such soldiers being deployed.

109. I thus do not accept that the evidence led in this case establishes any accepted practice amongst occupational health doctors in the Army of refusing to deploy soldiers who had had a stapedectomy or that the fact that they have had such an operation means they should not be classified as P2.

110. If Mr Constance had been offered a stapedectomy operation, as I have found he ought to have been, and if that operation had been completed by about September 2006 which seems to be the most likely date, Mr Constance would not have had hearing aids from

that time and would have satisfied the HH part of the PUHHEEMS tests. Thus, at the point that his unit were pushing for him to go to Israel to work as a UAV trainer, the only medical factor which would have stopped him being approved for that deployment was any residual risk presented by his stapedectomy.

111. It seems reasonably clear that doctors on a Medical Board who had a proper understanding of the risks to a soldier following a stapedectomy operation and who properly applied the PULHHEEMS system would not have come to the view that Mr Constance had a medical condition which was likely to affect his ability to perform normal military duties, especially outside of a war zone such as in Israel, or otherwise prevent him being classified as P2.

112. I accept that a Medical Board called on to make this decision may have sought advice from an ENT specialist on the risks of deployment. I accept Mr Hughes' evidence that, if asked, a majority of ENT surgeons would have advised that there were no substantial additional risks to deployment of a soldier following a stapedectomy operation. Accordingly, if an occupational health doctor on a Medical Board in 2008 had sought advice from an ENT surgeon about the post-operative risks, it is probable that he would have been advised that there were no substantial risks. I thus consider that, applying the tests under the PULHHEEMS system, if the hypothetical Board did not contain Dr Cooper, it is likely that Mr Constance would have been graded as P2 because he did not have a medical condition that was likely to interfere with his performance as a soldier.

113. All counsel accepted that, in the "but for" situation, the hypothetical Board may or may not have included Dr Cooper. I thus accept that it was possible that Mr Constance's assessment would have fallen to a hypothetical Board which included Dr Cooper. If that had happened, the views expressed by Dr Cooper in evidence may have influenced

the Board not to classify Mr Constance as P2 or it may have been that others on the Board would have been informed by a combination of better evidence and a proper adherence to the tests set out in the PULHHEEMS Administrative Pamphlet and graded him as P2. I do not accept that, even if Dr Cooper had been on the Board, it is likely to have followed Dr Cooper's views.

114. However, even if the decision was made by a Medical Board to classify Mr Constance as P7, Mr Constance would have had the ability to submit an appeal under Appendix 19 of the PULHHEEMS system. Counsel for the MoD submitted that no appeal could have been made by Mr Constance without the support of his commanding officer and so no appeal would be made. That submission has 2 problems. First, at this time Mr Constance's unit was pressing for him to be deployed and his assessments speak of his suitability as a trainer. It thus seems likely that his commanding officer would have supported this move.

115. Secondly, paragraph 4 of Appendix 19 shows that an appeal in respect of a soldier who is "within training" is made to their Commanding Officer, and that the Commanding Officer can then invite an Occupational Health Consultant to review the findings of the board. Mr Constance was not within training. In all other cases, the procedure set out in Appendix 19 of the PULHHEEMS Administrative Pamphlet allows the soldier to lodge an appeal against the decision of the Medical Board. Accordingly, even if Mr Constance's case was reviewed by a Medical Board including Dr Cooper, and Dr Cooper had persuaded the other members of the board to grade him as P7 based on Dr Cooper's assessment of the risks to his health on deployment, the PULHHEEMS Administrative Pamphlet of 2007 allows an individual soldier to make their own appeal without the need to obtain the support of their commanding officer.

116. If there was such an appeal, it seems to me that the primary issue (and, with pressure from the Unit, probably the only real issue) would have been whether the deployment of Mr Constance as a trainer to Israel gave rise to the risk that he was likely to suffer further damage to his ears as a result of either being exposed to a blast or as a result of rapid changes in air pressure. That question would have been determined after seeking expert ENT evidence. The combined evidence of the 3 ENT experts in this case does not support the view that there was any real risk to a soldier in such circumstances. Accordingly, it must be more probable than not that a classification of P7 would not be upheld.

117. Counsel for Mr Constance puts his case on the basis that he would have been graded P2. Counsel for the MoD, supported by counsel for the Trust, say that their case is that Mr Constance would have been graded P7. His case is that, but for the negligence, he would have continued to serve as a soldier and would have progressed through his career until the time came for him to retire in either January 2015 or, if his service was extended for a further 2 years, in January 2017. He says that he would have been classified as P2 and hence been deployable. However, both the expert medical evidence and the expert employment evidence explored the possibility of Mr Constance being engaged in another role within the Army even if a decision was made that he should not be deployed abroad because of his stapedectomy.

118. However, counsel for the MoD, supported by counsel for the Trust, go further and say that the only case I am entitled to consider in the "but for" scenario is that Mr Constance would have been graded P2 and had been able to return to full operational duties. That submission is made because the pleaded case advanced on behalf of Mr Constance is that he would have been graded as P2. No pleaded case is advanced on

the basis that he would have stayed in the Army under a P3 or P7 classification but been able to maintain his Army career despite that medical grading, and they assert that this case therefore cannot be considered by the Court.

119. In this case, the counterfactual position advanced by the Claimant is that but for the negligence he would have stayed in the Army and would have continued his Army career until he ended his NCO commission in either January 2015 or January 2017. Whilst there are allowances which would be paid if he went on deployment, his salary would be tied to his rank and thus would have been the same regardless as to whether he was P2, P3 or P7. Hence the differences in money terms between the gradings only makes a limited difference to any damages award.

120. Counsel for the MoD, Ms McArdle, relies on *Domsalla v Barr* [1969] 1 WLR 630. In that case the plaintiff was a steel erector who sustained a head injury when a steel structure on which he was working 35 feet from the ground collapsed. He made a good recovery, but his residual disabilities, dizziness, tinnitus and slight deafness, made it impossible for him to return to work as a steel erector. However, he later got a job as a crane driver at a similar wage. Although this case was not pleaded, he advanced a case at trial that he had lost the opportunity to start his own steel erecting business and hence his losses were the loss of this commercial opportunity, not just the loss of his salary as a steel erector (whether in the UK or abroad). Damages were awarded on that basis and the Defendants appealed to the Court of Appeal, arguing *inter alia* that this case was not open to the Court as it had not been pleaded. Edmund Davies LJ accepted that there was "*some basis*" for a criticism that the pleaded case was inadequate to support this head of loss. He said at 634H:

> *"Where it is proposed to allege that there are any special circumstances which will probably lead the plaintiff to sustain in the future losses over and above those which in the ordinary way would reasonably be expected to flow from the accident I hold that those special circumstances should be pleaded"*

121. The Judge also made reference to *Perestrello e Companhia Limitada v. United Paint Co. Ltd., on December 13, 1968, [1969] 1 W.L.R. 570* where Lord Donovan was dealing with a similar point and said:

> *".... if a plaintiff has suffered damage of a kind which is not the necessary and immediate consequence of the wrongful act, he must warn the defendant in the pleadings that the compensation claimed will extend to this damage, thus showing the defendant the case he has to meet and assisting him in computing a payment into court. The limits of this requirement are not dictated by any preconceived notions of what is general or special damage but by the circumstances of the particular case"*

122. The Claimant's case here is that, for the reasons set out above, his Army career was limited by successive acts of negligence by staff for whom the MoD and the Trust are responsible. Applying the test from *Domsalla v Barr*, the question is whether continuing in the Army in a role such as a UAV trainer at a P3 or even P7 medical grading is sufficiently different to continuing as a P2 soldier (whether on deployment or not) that it amounts to "*special circumstances*" and is of a sufficiently different kind that it should be the subject of a separate pleading. I do not accept that submission. In circumstances where there are multiple references in the evidence to the Claimant being suitable for acting in a training role where he would not need to be deployed to a war zone, it seems to me that the details of precisely what the Claimant would have done if

he had been able to continue his military career does not amount to "special circumstances" as that term is used in *Domsalla v Barr* or damage of a different kind, as set out in *Perestrello*.

123. The MoD and the Trust both advanced an argument that they were prejudiced by the failure of the Claimant to plead alternative career paths because they had both taken decisions not to lead evidence about the extent to which the Claimant's skills meant that he would or would not have had been in demand in a role other than as a fully deployable P2 graded soldier. I do not accept that this is a proper prejudice argument. There was nothing preventing the MoD leading that evidence and there were numerous references in the papers to Mr Constance being potentially suitable for roles other than being deployed in the material to which I have referred above, and it was considered by the employment experts. The main factor that appeared to have held Mr Constance back was not the marketability of his skills but the fact that he had been labelled P7 because of a combination of his hearing loss and concerns about the extent to which he could function in an operational role with potentially unreliable hearing aids. Those problems would have dropped away if he had had a stapedectomy operation and hence he would have been in a far better position to seek an alternative and far more fulfilling role within the Army than being the Mess Manager. In my judgment that is not the type of wholly different or alternative case of the type envisaged by the Court of Appeal in either *Domsalla v Barr* or *Perestrello*.

124. In circumstances where there was an issue plainly raised in the material concerning a range of potential career routes for the Claimant in the Army, a Claimant is entitled to plead his best case. I do not accept that it was necessary for the Claimant to have pleaded multiple alternative cases about what would have happened if he had had a

stapedectomy and thus been able to explore other roles in the Army apart from being deployed. It seems to me that a variety of potential military careers would have been open to Mr Constance as a Senior Non-Commissioned Officer of high standing.

125. In the light of my decision that it is more probable than not that Mr Constance would have been graded P2, this issue does not strictly arise. However, in case it becomes relevant, I am satisfied that, even if he were not able to go on deployment to Camp Bastion or Iraq, if he had had the stapedectomy operation by the autumn of 2007, it is likely that he would have been approved to act as a UAV trainer in Israel when his unit made that application in late 2007/early 2008 regardless as to whether he was classified as P2, P3 or P7 because there is insufficient evidence that any residual problems that he may have had could not have justified a decision to prevent him acting as a trainer in Israel. It is clear that he had valuable skills and that his knowledge of UAV procedures made him ideal to work as a trainer in this field.

126. Thereafter, I do not consider that it is possible to be certain what route Mr Constance's career would have followed if he had gone to Israel in 2008 as a UAV trainer. However, that step would have taken him away from the role of Mess Manager and it seems likely that, having shown that he could function effectively back in the field, his career would have continued either with him continuing to train soldiers on how to deploy UAVs or operationally as a mission controller in locations such as Afghanistan.

127. There are 2 elements of the evidence which support this hypothesis as being likely. First, there is evidence from a variety of sources that Mr Constance had both the character and the skills needed to resume an operational military career from about 2008 onwards. That is seen in his annual appraisals, the fact that his unit were seeking

his return in late 2007. Secondly, Mr Constance relies on an email from his former commanding officer, Lt Col Craig Palmer, RA, dated 7 June 2019 who said:

> *"You were a very accomplished Senior Non-Commissioned Officer of high standing and reputation within the Regiment. Had it not been for your hearing condition I am sure you would have continued to flourish in the Regiment and finish a full engagement. .. The Regiment was very short of suitably qualified and experienced UAS SNCOs such as yourself … I have no doubt that, if you were to have continued to serve with the Army, I would have employed you in a Flying Supervisor, Flight Safety or UAS Training role within the Regiment or the wider 1 Arty Bde structure – either in the UK or deployed to Camp Bastion"*

128. That email was subject to trenchant criticism by the MoD because it was said to be too vague or was, in some way, self-serving or on the grounds that Lt Col Palmer had not been called. I do not accept that criticism. It has less weight because Lt Col Palmer did not attend to give evidence to back up his opinion but nonetheless I accept that evidence because it is consistent with a great deal of the remaining documentary evidence.

The Assessment of Damages.

129. I shall start by assessing damages against the MoD and then consider what proportion of those damages should also be payable by the Trust.

130. The Claimant endured a period of loss of hearing from about September 2006 until 31 May 2013 when the stapedectomy operation was successfully carried out, a period of about 6 years and 8 months. However, he was provided with hearing aids throughout that time and the evidence is that although these were inconvenient, when he used them

he was able to hear to a reasonable level. In *Aston v Cannon Industries*, a decision of HHJ McKenna of May 2012. HHJ McKenna awarded £6,900 for pain, suffering and loss of amenity as part of an award of 15 years acceleration in the use of hearing aids due to deafness caused by industrial noise. That would equate to award today of about £9,000 but was for a longer period. The nearest case on damages for loss of hearing alone for a temporary period appears to be a case from March 2020 where DJ Adams sitting in the Newcastle upon Tyne County Court awarded £5,000 for pain, suffering and loss of amenity for 5 years acceleration in the use of hearing aids due to deafness caused by industrial noise. I consider that damages for pain, suffering and loss of amenity for the hearing loss that Mr Constance ought to have been able to avoid between 2007 and 2013 should be set at £6,000. I have taken account of the 10% uplift in reaching that sum.

131. Mr Constance also developed a psychiatric condition of an adjustment disorder, with both depressive and anxiety symptoms. Mr Caldera's negligence was not the original cause of his psychiatric condition because Mr Caldera properly advised a trial of hearing aids and the original development of Mr Constance's psychiatric condition thus occurred in a period where his condition was not caused by any negligence for which the MoD are responsible. However, it seems likely that the abatement of his psychiatric condition which he experienced in 2013 would have occurred in a similar manner if he had the stapedectomy operation in 2006. I have found, he would have left the role of Mess Manager soon after the operation in early 2008 to travel to Israel and thus returned to active service. Thus, in round terms, Mr Constance suffered a psychiatric condition caused by negligence for which the MoD is responsible from about early to mid-2007 to mid-2013, namely a period of about 6 years.

132. There was a disagreement between the psychiatrists about the severity of Mr Constance's psychiatric condition. Dr Denman says that the condition was mild whereas Dr Baggaley says it was mild to moderate. Mr Constance gave evidence that he was affected by reasonably low level bullying from other soldiers who made fun of the fact that he was wearing hearing aids. On this point, I prefer the evidence of Dr Denman because the contemporaneous evidence shows that whilst Mr Constance was struggling with his mental health, he was largely able to live with the symptoms to such an extent that they did not have such a sufficient effect on his life to be classified as being "moderate". Having said that, both psychiatrists agreed that these were real psychiatric symptoms that endured for over 6 years and had a real and substantial effect of Mr Constance's life as he pulled in on himself, reacted badly to bullying, socialised less and was continually frustrated with his options in life. The Judicial College Guidelines suggest the categories of damages are classified in a different way to the way in which the psychiatrists have approached them in this case, with the lowest level of awards (£1,310 to £5,500) being paid at the bottom level for distress which can fall short of a formal psychiatric diagnosis but also include the very lowest form of diagnosis (which this is not).

133. Mr Constance's case seems to me to fall within the lower tier of the "Moderate" awards as defined in the Judicial College Guidelines. There are no other authorities which have been cited to me for such awards but it seems to me that this award should be at least as serious as the award for his deafness because his psychiatric problems were largely untreated where the hearing aids assisted with the deafness. I do not accept the Claimant's case that an award of £30,000 is appropriate and award £1,500 per year for Mr Constance's psychiatric condition for the period of about 6 years, namely an

amount of £9,000. That amount also includes a limited award for the continuing effects of the conditions after 2013.

134. Both psychiatrists agree that the residual symptoms of this condition could be improved by a course of cognitive behavioural therapy and recommend 8 sessions at £150 per session. I accept that evidence and add £1200 for these sessions. As a result of the anticipated outcome of the sessions, I award no damages for future psychiatric illness because it has not been shown that, on the balance of probabilities, Mr Constance will suffer any psychiatric illness in the future.

Loss of congenial employment.

135. The Claimant claims £10,000 damages for loss of congenial employment between 2005 and 2013. The MoD defend the claim on the basis that Mr Constance would have been in the same role but for the negligence of Mr Caldera and the Medical Board. I have rejected that case but nonetheless do not accept that the initial move to Mess Manager was the result of Mr Caldera's negligence because that happened during his hearing aid trial period. Any award for loss of congenial employment can only start in early 2008 when Mr Constance would have moved back into operational duties when he transferred from his role as Mess Manager to work as a UAV instructor in Israel.

136. In *Hale v London Underground Ltd.* [1993] PIQR Q30 Otton J said regarding loss of congenial employment "It is now well recognised that this is a separate head of damage". It is payable where, as a result of the negligence of the Defendant, a Claimant loses out on a role which has given him purpose and fulfilment and instead undertakes a job which provides him with less job satisfaction. Where, as here, that loss of satisfaction results in a psychiatric illness, there is a danger of an overlap between the two heads of damage because they are both compensating a person for

similar areas of loss. However, that argument was rejected by Mr David Foskett QC (prior to his appointment to become Mr Justice Foskett) in *Keith Pratt v Collie Smith* [Unreported - 19th December 2002] at §63.

137. The period of loss of congenial employment in this case depends on the period during which Mr Constance would have remained in the Army and the extent to which his Army role would have been more congenial than his role as a postman, the job he took up after leaving the Army in 2011. I consider that Mr Constance is entitled to an award of loss of congenial employment for the period from 2008 to 2011 when he was required to work as Mess Manager and, to a lesser extent, for the period when he worked as a postman after 2011 and up until 2017 when he would have had to leave the Army in any event. Having regard to the award in the cases referred to above and taking account of inflation, I award Mr Constance £1500 per year for the years 2008 to 2011 and a lower sum of £500 per year between 2011 and 2017, making a total award under this head of £7,500.

Loss of earnings.

138. I have found that, if Mr Constance had not been the victim of negligence, he would have returned to active duty as a soldier or, as an alternative, would have pursued his career in the Army as a UAV instructor or in one of the other roles identified in his performance appraisals.

139. The Claimant and the Defendant both called employment experts who were highly experienced former Army officers who were able to provide evidence as to the likely career path that Mr Constance would have followed if he had had a stapedectomy operation and been returned to active service or had been able to work in another area outside of his role as Mess Manager. The Claimant's expert was Mr Ian Stafford of DJ

Fox and Associates and the Defendant called Mr Alasdair Cameron of HJS Personnel Services. I am grateful to both experts for their careful reports. There was, in reality, relatively little difference between them.

140. Based on these reports and bearing in mind the overall evidence in the case, I accept the evidence of the joint experts as follows:

i) It is likely that Mr Constance would have remained in the Army and completed his 22 year commission;

ii) It is likely that he would have been promoted from being a Staff Serjeant to being Warrant Officer 2 but it is not likely that he would have been promoted to Warrant Officer 1;

iii) It is likely that he would have been offered the opportunity to transfer to VEng (Full) career post and thus been able to extend his period of military service until January 2017; and

iv) Mr Constance would have left the Army in January 2017 and would have pursued a civilian employment post at that point.

141. Although Mr Constance received good annual appraisals, both Mr Cameron and Mr Stafford agree that he did not progress as quickly up the ranks of NCOs as an average non-commissioned officer in the Army. The experts accept that it is likely that he would have made it to WO2, but they disagree as to when this would happen. I prefer the analysis of the Defendant's expert, Mr Cameron, on this point for the reasons set out in his report. I therefore conclude that it is likely that Mr Constance would have been promoted to WO2 by January 2016, and would have served a further 12 months in that rank prior to his discharge in January 2017. During the period when Mr Constance

was working as Mess Manager, he achieved a promotion from Sergeant to Staff Sergeant. I do not accept that he is able to prove that it is likely that he would have achieved this promotion more quickly if he had been back undertaking operational duties.

142. When Mr Constance left the Army he became a postman. He remained in that position until after January 2017 when he would have left the Army in any event. I consider that Mr Constance is entitled to an award of damages for loss of earnings between the date when he was discharged from the Army on medical grounds, namely 10 August 2011 until the date when he would have left in any event, namely 17 January 2017. I find that he would probably have served as a Staff Sergeant during this period until 1 January 2016 when he would have been promoted to WO2.

143. The Defendants led evidence that, after his early discharge from the military, Mr Constance could have earned a higher salary by choosing to work in the transport industry as opposed to working as a postman. The Defendants submitted, as set out at §32 of Ms McArdle's Skeleton Argument, that Mr Constance had made a "lifestyle choice" to become a postman and that his post-military earnings level was not depressed as a consequence of any negligence for which the Defendants are responsible. I raised in argument whether the Defendants' case was that Mr Constance failed to mitigate his losses by taking a job as a postman but, as I understand matters, the case was not put on that basis.

144. Instead it was not suggested that whilst his initial earnings as an HGV driver would have been higher than his earnings as a postman, if he had chosen to work in the transport industry rather than becoming a postman, he would have had the potential to rise to a junior management position in the transport industry and thus would have

increased his earnings. Thus, it was argued that the Defendants should not have to pay damages based on his lifestyle choices.

145. This submission was based on a combination of *South Australia Asset Management Corporation v York* [1997] AC 191 and *Khan v Meadows* [2019] 4 WLR 26. The key issue arising from those cases is that a tortfeasor is only liable in damages for a type of loss which falls within the scope of the appellant's duty, and is not liable for losses of a type which fall outside the scope of the duty. That principle was set out Nicola Davies LJ at §29 in Khan where she said:

> *"The SAAMCO test requires there to be an adequate link between the breach of duty and the particular type of loss claimed. It is insufficient for the court to find that there is a link between the breach and the stage in the chain of causation, in this case the pregnancy itself, and thereafter to conclude that the appellant is liable for all the reasonably foreseeable consequences of that pregnancy"*

146. In this case the "type of loss claimed" is loss of earnings following an early discharge from the Army where that early discharge arose as a consequence of the negligent advice Mr Constance was given by Mr Caldera and Mr Ahmed. That, in my judgment, is a "type of loss" where there is an adequate link between the breach of duty and the loss. In simple terms, if Mr Caldera or Mr Ahmed had provided Mr Constance with the advice that he should have received, it is likely that he would have had the stapedectomy operation by September 2006 and then been able to continue his military career and serve as a soldier until January 2017 as opposed to being medically discharged in August 2011. Thus his loss of earnings in the period between August 2011 and January 2017 arise directly as a result of the negligence and within the scope of the type of losses for which the Defendants are liable.

147. I accept Mr Constance's evidence that his job choices were made at a time when he was recovering from a period when he had suffered fragile mental health, and that that fragile mental health was brought on by the negligence for which the Defendants are liable. In those circumstances, I do not accept that Mr Constance acted unreasonably in deciding to take a job as a postman when he left the Army in August 2011 or that he made the decision solely as a "lifestyle choice". At that stage his mental health was fragile and the job with the Post Office offered him the opportunity to work in a reasonably low-stress environment and thus rebuild his confidence after his experiences of the past few years. I reject the submission that his damages should be discounted because he should be treated as someone who ought to have chosen a career path after being medically discharged which would have led to him securing a higher paid role. However, I accept that his decision to move to Padstow in 2019 was a lifestyle decision. I thus accept that any losses that flow from his decision to leave his role as a postman in Amesbury and to move to Padstow are not losses which sound in damages for which the Defendants are liable.

148. Any damages paid to the Claimant will not attract income tax. Accordingly, damages need to be calculated on the basis of the Claimant's net loss of earnings. The only figures I have been provided for net loss of earnings are in the Claimant's Schedule of Loss which suggest that his net loss in the years 2011 to the end of 2016 would have been as follows:

Year	Net Loss of Earnings
2011	£5,785.04

2012	£14,508.41
2013	£14,412.46
2014	£12,846.78
2015	£14,216.30
2016	15,912.00
Loss to 17.01.2017 (i.e. 17 days at 2016 rates)	£741.10
Total to 17 January 2017	£78,442.09
Add WO2 supplement	£78,922.09

149. Those figures appear to be based on Mr Constance remaining at the rank of Staff Sergeant. However, I find that, adopting the assessment of the Defendant's employment expert, he would have had 1 year at WO2 rank. The evidence from Mr Cameron is that the annual starting pay for WO2 was only about £600 higher than the level that would have been paid to Mr Constance as a Staff Sergeant (namely £43,943 as opposed to £44,545). Allowing for income tax at 20%, I add a further sum of £480 to account for this potential salary increase in the final year.

150. Mr Constance argues that if he had returned to active duties in 2008, he would have been trained on the Watchmaker range of UAVs and would have come out of the Army in 2017 with up to date skills, and thus been able to exploit his skills in the market. I accept that it is likely that he would have been trained on the Watchmaker range of

UAVs but the evidence that he would have been likely to have been able to use that experience to secure a new career working with drones is unconvincing. I accept the evidence of Mr Cameron that there is little market for individuals who simply have experience of flying drones and that he would probably have needed another qualification in order to be able to secure a role involving drones. Even then, the evidence does not suggest that such a role would result in Mr Constance having a significantly higher earning potential than his earnings as postman. Given the relatively small difference in salary and the fact that Mr Constance would have come out of the Army with an immediate pension, I am not satisfied that he has shown it would be more probable than not that he would have been able to use his experience of flying drones to secure a role that paid more than he earned as a postman. I thus do not accept that Mr Constance has proved any continuing loss of earnings following his projected discharge from the Army in January 2017. In those circumstances, issues about his subsequent move from Amesbury to Padstow do not affect the calculation of his damages.

The value of other benefits.

151. The experts have reached a measure of agreement on the value of the benefits that Mr Constance lost as a result of not being deployed before he left the Army and in the years August 2011 to January 2017 (a period of 77 months), namely;

    i) Health, fitness, medical and dental care at £840 per year, namely £5,390;

    ii) Mr Constance had used his ELC in his Diploma in Management Development in 2010/11 and so could not make further claims on that fund but was entitled to claim £175 per year Standard Learning Credits, namely £1,123;

iii) Both experts agree that Mr Constance would have been entitled to Operational Allowances if he had been deployed. I have accepted a midway figure between the figures proposed by Mr Stafford of £9,380;

iv) Both experts agree that Mr Constance would have been entitled to Long Separation Allowance. Mr Stafford provides an estimate of between £10,000 and £11,000. Mr Cameron does not disagree with that figure and so I fix that sum at £10,500.

152. I thus conclude that the total loss of the value of other benefits amounts to £26,393.

Pension Issues.

153. If Mr Constance had continued in the Army, he would have had a higher pension as a result of his additional years of service. The Army pension is a non-contributory pension scheme and the benefits depend on the period of service, rank and salary of a soldier when he or she leaves the military. Mr Kenneth McAdam who works in the Army Personnel Centre gave evidence about the level of pension payable to soldiers. His evidence was that Mr Constance would have been paid a terminal grant of £39,285. However, Mr McAdam states that he was using the 1 April 2014 rates to undertake this calculation. In contrast, the Claimant's employment expert, Mr Stafford used the 2017 rates and calculated that he would have been paid a terminal grant of £41,531 if he had left service in 2017. That seems to me to be the correct figure. He was paid a lump sum on leaving the Army in 2011 of £33,600. Mr Constance is thus entitled to claim the difference in lump sum payments of £7,931.

154. Calculations concerning any reduction in Mr Constance's annual pension are more complicated because on leaving the Army in 2011 he was paid an Army Pension of

£11,200.11. This was an invalidity pension and thus it was paid tax free. According to Mr McAdam, if Mr Constance had remained in service, he would have received a higher pension of £13,095 per year but that pension would be taxable. Mr Stafford puts the pension at £13,258. Whilst the difference is not explained, I prefer Mr Stafford's figure as Mr McAdam's is stated to be based on 2014 rates. However, after taking account of taxation, there does not appear to be any net loss of pension for the years after 2017 because, on the assumed hypothesis, Mr Constance would entirely use up his tax free allowance in relation to his earnings as a postman. The net value the higher Army pension that he would have, if he had served through to 2017, is thus less than the value of the tax free pension that he has in fact received. I thus do not consider that Mr Constance has proved any annual loss in the value of his Army pension after January 2017.

155. However, that position will change when Mr Constance reaches the age of 67 because, at that point, his Army Pension will become a standard deferred pension and will be taxable. Mr Stafford's evidence is that, at present values, Mr Constance's deferred Army pension at state pension age is worth £14,233. That is a different figure to the figures in the Claimant's Schedule of Loss, but the origin of those figures is unexplained. However, there is about a 15.5% difference in the gross value of Mr Constance's pensions between his actual payment and his "but for" level of payment. Hence the present value of his future loss of retirement pension at age 67 appears to be about 15% of £14,233 namely a sum of £2,209 per annum. That is a gross sum and hence sum needs to reduced for taxation by 20%, leaving a net loss of £1,767.48 per year. It follows that, doing the best I can on the evidence available to me, it appears that Mr Constance will suffer a reduction in his Army pension for each year he continues to live of (at present values) of £1,767.48 per year.

156. I was provided with no submissions at trial on the appropriate multiplier but the Claimant's Schedule of Loss suggested that a multiplier of 21.69 should be applied to this element of the pension loss. Paragraph 113 of the Ogden Tables explains:

> *"In the broadest of terms pension loss in Defined Benefit schemes is assessed by first calculating the expected net of tax pension from retirement age had the accident not happened and from this deducting the net of tax pension he or she will now receive from retirement age. To this multiplicand will be applied a multiplier from Tables 19 to 34, suitably discounted for contingencies other than mortality"*

157. Mr Constance is now aged 52 and the Odgen Table No 25 provides for the multiplier for pension losses where male pensions start at 65 and Table 27 provides for pension losses where male pensions start at 68. Applying a discount rate of -0.25% (the rate fixed by the Lord Chancellor), the figures for a multiplier were 21.24 in Table 25 and 18.39 in Table 27. That suggests a multiplier of 20.29 for a 52 year old man who secures a pension at 67. On that basis, the value of the loss of Mr Constance's pension rights from aged 67 would be £35,862.

158. However, following circulation of this draft judgment the parties have agreed that the multiplier should be 19.31. I set out the reasoning for that conclusion as a schedule to this judgment. Given that the parties have agreed the multiplier should be 19.31, I am content to award damages on that basis and award damages under this head of £34,130.03.

159. Mr Constance has also claimed incidental expenses of £539 which were not the subject of any challenge and I thus allow them.

160. I thus calculate the damages payable by the MoD as follows:

Heading	**Amount**
PSLA for hearing loss	£6,000
PSLA for psychiatric injuries	£9,000
Counselling	£1,200
Loss of congenial employment	£7,500
Loss of Earnings	£78,922.09
Incidental Expenses	£539.00
Loss of other benefits	£26,393
Reduction in lump sum pension	£7,931
Loss of Pension Benefits	£34,130.03
Total:	**£171,615.12**

Damages payable by the Trust.

161. The loss and damage that Mr Constance suffered as a result of Mr Ahmed's failure to advise him that there was a surgical option to cure his hearing problems was the same loss that was caused to him by Mr Caldera's negligence. Whilst I accept that the Medical Board was negligent in labelling Mr Constance's hearing loss as being NIHL

as opposed to being conductive hearing loss, it has not been established that the Medical Board would have taken a different course if they had appreciated that there was a different cause of Mr Constance's hearing loss because only an ENT surgeon would have been likely to have known that there was a surgical option to treat this condition. Hence, in my judgment, all of the losses suffered by Mr Constance flowed from the failure of the doctors to provide him with the right advice.

162. The MoD do not argue that Mr Ahmed's failure constituted an effective novus actus interveniens. Accordingly, the MoD continue to be liable for the consequences of Mr Caldera's negligence notwithstanding that those losses might have been substantially avoided if Mr Ahmed had advised Mr Constance in June 2007 that a surgical option was available to him. If that advice had been given it is likely that Mr Constance would have decided that the time had come when he wanted to explore that option. It is thus likely that he would have been referred to a specialist surgeon and would have had the stapedectomy operation by the end of 2007 or early in 2008.

163. I thus consider that, but for the negligence of Mr Ahmed, Mr Constance would have had the operation and is likely to have become available for deployment from early to mid-2008. It seems unlikely that he would have been available to take up the opportunity of being an instructor in Israel at the commencement of that operation but it is more likely than not that other similar opportunities would have been open to him fairly soon afterwards. I thus consider that the losses suffered by Mr Constance were the exclusive responsibility of the MoD in the period mid-2006 to mid-2008, and thereafter both the Trust and the MoD are jointly responsible for the damages suffered by Mr Constance.

164. Doing the best I can based on the information set out above and discounting the above figures for the more limited period for which the Trust is liable, I find that the Trust is jointly liable with the MoD to Mr Constance as follows:

Heading	Amount
PSLA for hearing loss	£4,500
PSLA for psychiatric injuries	£7,000
Loss of congenial employment	£5,000
Incidental Expenses	£539
Loss of Earnings	£78,922.09
Loss of other benefits	£24,000
Reduction in lump sum pension	£7,931
Loss of Pension Benefits	£34,130.03
Total:	**£162,022.12**

Interest.

165. The Claimant claims interest at the rate of 2% on general damages from the date of service of proceedings to the date of trial. That is interest on a sum of £15,000 for a

period of almost exactly 5 years, namely £1,500. The interest due on the portion of general damages for which the Trust is liable is £1,150.

166. The damages for loss of future pension benefits are calculated at present value and thus do not attract interest. I invite submissions in writing from all parties on the level of interest to be paid on all other aspects of special damages and on the terms of an order.