

## 19 Further Observations

In general, the law may be expected to progress in fairly well-defined patterns.

1. *Common Law* The unwritten Common Law dates back to Time Immemorial and judges are supposed to discover how pre-existing law (which is in fact decided by judges only as new cases arise) applies to new situations. The law of negligence is under the jurisdiction of the Common Law, purporting to be derived from ancient usage and judges' decisions.
2. *Statute Law* When a corpus of law has been "discovered", it is consolidated into Statutes – the codified written law. Where the affairs involve the public at large, penal sanctions may be provided; the legal practitioner's involvement with Statute Law is in the area of these regulatory Acts, the most important being the Health and Safety at Work Act, 1974. Where Statute imposes a duty to protect a class of individuals and that duty is only incidentally owed to the State, it may create a corresponding civil right by implication. Statute Law and its civil consequences are largely academic at present but they will have an accelerated development because of the interest attracted by the nuclear industry.
3. *The Law of Contract* In civil cases, and most cases of negligence are civil, it is possible to contract out of liability for negligence either prospectively or retrospectively. Contractual disclaimers can circumvent liability anticipated in future. An out-of-court settlement extinguishes any alleged negligence by a binding contract. By the definition of Contract, negligence is not implied. Where the Common Law

is settled, sometimes by test-cases, this system is preferred. A request for a medical report from a firm of solicitors usually has an out-of-court settlement as the objective.

4. *Welfare Law* The Welfare State then underwrites all liabilities left over from the other systems. It provides compensation directly or indirectly for disability. Welfare Law is the creation of Parliament and is necessarily passed in statute form. The otologist processing DHSS claim forms is involved with this area of the law. Legal opinion is rarely necessary as DHSS regulations, often tedious, spell out the steps in detail.

The Statute Law applicable to hearing loss thus has two unrelated forms (1) for enforcement of industrial safety and (2) to administer Social Security. It is merely coincidental that Welfare Law is also expressed in statutory form.

The development of the law relating to occupational hearing loss has been haphazard. Statute Law came first nominally with the predecessors of the Factories Act, 1961, but they did not specifically address the issue of noise. They were formulated for other industrial issues. Only after litigation in 1984 was it clear that they could refer specifically to noise.

In the intervening period, occupational hearing loss became a prescribed disease for the purpose of National Insurance. In the late 1970s, there was a surge of claims under the Common Law. Out-of-court settlement schemes were formulated from around this time. As late as 1984, the courts were invited to sort out the confusion between the Common Law and Statute Law and whether they applied in the same way to noise, which was not specifically legislated for. Guidance from

the court under Common Law was also sought for the out-of-court settlement schemes.

Thus we have parallel developments in four areas of the law proceeding quite independently of each other: Negligence, Occupational, Contract and Welfare Law.

Some reasons for the diffuse and uncoordinated development in these areas of the law are:

1. The difficulty of proving deemed knowledge for the purpose of negligence,
2. An oversight in the Statute Law omitting occupational hearing loss,
3. The problem of determining the reasonable quantum of compensation as a basis of a settlement contract, and
4. The late adoption of occupational hearing loss as a prescribed industrial disease in February 1975.

Recently, the courts have produced a corpus of law and laid down broad guidelines. Some reconciliation of the four areas is materialising.

Scientific evidence is still conflicting and it is likely to be in the foreseeable future. There is no international consensus on the best way of assessing compensation. Political clout is often decisive [1]. In addition, the marginal change in the level of compensation also varies with economic cycles. (Barrett, 1975).

Among the occupational diseases, deafness is one which is capable of nearly exact measurement. One should not guess at a result if it is at all possible to measure. The problem with quantifying deafness is that there are too many parameters and variables. Scientists disagree on the proper weighting to be given to each.

Broad correlation between judicial and scientific conclusions have been achieved. However, different scientific weightings give rise to differing degrees of compensable loss. There is a scientific weighting system to suit every political and economic taste. Thus, where the

courts have been invited to pronounce on scientific issues, they have applied the approach they are most familiar with in Common Law: the Broad Jury Approach. They have declined to be drawn into any wider conflict.

So far, scientific research appears to be done without taking into consideration the damage done to the quality of life through hearing loss. Problems in communication are grossly underestimated. Persons suffering from deafness are isolated from more activities than audiometric findings would suggest. They are wrongly labelled as being dull and carry such a stigma. Deafness is not an immediately recognisable handicap like blindness. Blindness separates people from things, deafness separates people from people.

More research needs to be done on the effects of frequency loss beyond the normal speaking range. A person suffers from loss of enjoyment of music and indeed many warning and hazard signals in daily life are outside the normal frequency range.

Compensation should take into account that among the physical disabilities, deafness is one that evokes little sympathy. Persons speaking to the deaf often become impatient with the deaf and the sufferer also becomes irritable and exasperated. The wife or the immediate family are affected by the deafness. There is no compensation for them. This could be translated to increased compensation to the sufferer. There are without doubt marital strains. The sufferers lose confidence and become withdrawn. Compensation should take into account that those affected have been well balanced individuals before their affliction.

Many of the problems associated with deafness are not as quantifiable as the deafness itself. The medical profession should make an enhanced effort to highlight these problems when working out systems of compensation. Too much emphasis has been placed on the noticed effects of deafness. There is little

[1] "We were deciding what formula California should use. Management went along with the medical profession and said they wanted 500, 1000 and 2000 Hz used; but Labour, seeing the large losses at 4000, wanted 4000 Hz included. The fight became so bitter they almost came to blows. The man who was sitting on the bench didn't want to offend anybody ... 'I think we'll compromise, and take 3000 Hz which is halfway between 2000 and 4000 and we'll add it to the formula.' That is how California got 3000 Hz in its formula: it had nothing to do with the scientific merits." (Glorig, 1970).

regard to damage which is already present but remains unnoticed. Disability which is latent may surface later when the sufferer wishes to enjoy some amenities in life which would make use of the lost frequencies.

Compensation for hearing loss should be multi-factorial. A multi-factorial hearing loss score based on Medical and Social assessments should be adopted. They do not necessarily carry equal weight.

Each audiometric frequency should carry a different weighting and a different threshold for compensation. Not all frequencies are of equal usefulness. The present DHSS practice of selecting three arbitrary frequencies coupled with the high threshold for compensation needs revision. Tonal frequency threshold testing is not the only audiometric test available. Tests assessing ability to hear both in quiet and noisy surroundings should be included. Perhaps only the worst performance should be taken into account. Disability with one type of testing does not necessarily show up on another. [2]

Social Assessment should be done in such a

way that each important activity is recognised and accounted for individually. The potential for suffering is also taken into consideration. Social assessment should not be done by the same persons dealing with the medical assessment in an individual case. The psychological score should not be overlooked. It should not be too difficult to arrive at a broadly applicable social scoring system because the vast majority of the sufferers come from a homogeneous group; the degree of hearing loss is directly related to the amount of work done throughout their working lives. Occupational deafness is not a prevalent disease in directors and managers, though there is a trend towards them being promoted from the shopfloor.

In the long term, Common Law attitudes may be influenced and Statute Law changed in the light of scientific recommendations. For the present, the Court is not a suitable forum for an on-going series of test-cases. It should remain a forum only of the last resort. A more consolidated approach, reviewed regularly, is to be preferred to unpredictable and piecemeal reform through litigation.

[2] There is too much pre-occupation with the 4 kHz frequency. In separate studies by W.D. Ward, H. Davis, A. Glorig and others, the less dramatic 2 kHz emerges as having the best correlation with disability. An arguable legal and scientific case can be made for basing disability assessment on the 2 kHz frequency alone. Co-existing otosclerosis is not relevant in law. A paper by Alberti et al (1980) suggests that otosclerosis may not be relevant to NIHL either. 2 kHz alone is no more arbitrary than multi-frequency averaging. In some cases, 3 kHz influences hearing in noisy surroundings, but any arbitrary compensation system must allow for alternative assessment.