

Neutral Citation No. [2002] NIQB 60

| | |
|------|-----------|
| Ref: | WEAD 3240 |
|------|-----------|

*Judgment: approved by the Court for handing down
(subject to editorial corrections)*

| | |
|------------|------------|
| Delivered: | 11/10/2002 |
|------------|------------|

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

QUEEN'S BENCH DIVISION

IN THE MATTER:

JOHN FORBES AGNEW

Plaintiff

-v-

HARLAND & WOLFF PLC & OTHERS

Respondents

WEATHERUP I

[1] This is an appeal by the plaintiff from an order of Master Wilson remitting this action to the County Court, on the ground that the value of the plaintiff's claim falls below the £15,000 jurisdiction of the High Court. The plaintiff claims as an employee of the defendants in respect of hearing problems sustained in the course of his employment. The plaintiff is now 73 years old and is a retired joiner. Between 1945 and 1973 he was employed by the various defendants and exposed to industrial noise.

[2] The plaintiff claims to suffer from, first of all, suppressed hearing affecting domestic conversation and the ability to listen to television and radio and secondly, bi-lateral tinnitus. An audiogram showed that within the hearing range of decibel levels the plaintiff had hearing loss measured in the right ear and in the left ear that translated into an overall loss of 10%. In relation to the tinnitus it was described as a ringing noise present in either ear that had been present for some years. The plaintiff expands on the problems in an affidavit that indicates that he finds difficulty with conversations, especially when there is background noise, and difficulties with television

and the telephone. In relation to tinnitus, he describes a ringing noise in both ears which is most irritating at night when he is trying to sleep and he experiences difficulty getting off to sleep most nights. He describes the problem as quite marked two nights a week. On a scale of one to ten he estimates the degree of upset at seven and he finds that his disturbed sleep makes him frustrated and irritable.

[3] Applying the conventional scale of damages the defendant has valued the hearing loss at £3,979 and the tinnitus at £1,162 giving a total of £5,141. On the other hand, the plaintiff's approach is that the scale should no longer apply and that a more generous assessment should be made of damages.

[4] The hearing loss scale appears as an appendix to the judgment of MacDermott J in Nichol v Harland and Wolff (1982) NI 1. The scale had been adopted in 1978 and the plaintiff contended that the scale should be increased. MacDermott J endorsed the continued use of the scale on the basis that fairness required uniform levels of award in respect of the large number of settlements of such cases that were being undertaken at that time. The scale set out in the appendix was amended to amalgamate the first 6 bands at the figure of £1,000.

[5] Holyoak v Harland and Wolff (1982) NI 371 again raised the issue as to whether the scale should be adjusted in some manner to reflect inflation and upgrade the level of awards and settlements. MacDermott J again endorsed the continued use of the scale on the basis that it had the virtues of uniformity and comparability which he felt would be lost if the scale was abandoned. However, he did state that while comparability mattered "the conventional must not become contemptible" (page 372F). In order to upgrade the level of awards in that case the Judge increased the percentage hearing loss by 3% when using the scale to ascertain the value of general damages.

[6] On the issue of tinnitus MacDermott J referred to the marked additional affliction for which the scale did not cater, and where satisfied of its existence he proceeded to award an appropriate additional sum. The report of the tinnitus assessments appears in the original report of Holyoak at [1982] 16 NIJB. Holyoak was a 63 year old riveter who had a hearing loss measured at 25% and tinnitus which was not severe enough to prevent sleep loss. MacDermott J awarded £2,500. Millar was a 60 year old caulker with 33% hearing loss and tinnitus which he described as a bell like noise present as he gave evidence. MacDermott J awarded him £1,500. Sherwin was a 62 year old welder and he had a hearing loss measured at 33% and noise in his ears like a bell or a hissing sound which lasted for an hour or two and had been present for a year or so. He was awarded £750. As appears from the assessments there was a variation in the awards that were made depending

upon the degree of tinnitus and not the degree of hearing loss in each particular case.

[7] In September 1982 a tinnitus scale was adopted that set out values by reference to the level of decibel loss. There was a basic scale, which on the loss of 21-30 decibels was £500, increasing to £1,500 where the decibel loss was 51-60. In addition there was provision for assessment outside the basic scale for any person with “serious tinnitus” which was defined as tinnitus which produced considerable social upset, or interference with work or which necessitated medical treatment.

[8] In Baxter v Harland & Wolff [1990] NI 147 MacDermott LJ revisited the issue of upgrading the hearing loss scale. MacDermott LJ stated that the scale was useful but not determinative, and had never been considered mathematically precise. It had been applied to ensure overall fairness and with the residue of claims against the defendants being some 800 at that date, it was thought that it would be considered unfair by those who settled promptly that the latecomers should appear to do better. The Judge refused to uplift the scale, or vary it, save that the awards of general damages would attract interest at 2% from the date of the issue of the Writ of Summons.

[9] I was informed by Counsel that in the year 2000 McCollum LJ heard an appeal against a remittal in a case such as the present. Again, the issue was raised about upgrading the scale and McCollum LJ endorsed an approach that involved the application of the Retail Price Index to the scale as a means of keeping values up to date.

[10] Accordingly, the measurement of general damages in hearing loss cases in its modern form takes a number of steps. It starts first of all, with the Nicholl appendix, which was amended by the amalgamation of bands 1-6 at the sum of £1,000. Secondly, it adds 3% to that scale in accordance with the decision of Holyoak. Thirdly it applies the Retail Price Index to date as endorsed by McCollum LJ. Fourthly, it adds 2% interest from the date of the issue of the Writ of Summons in accordance with the decision in Baxter. Similarly the 1982 tinnitus scale continues to be applied together with an increase based on the Retail Price Index to date.

[11] In the present case the calculation of damages has been completed in the manner set out above with the plaintiff’s hearing loss measured at 10%. The Nicholl appendix scale was applied and 3% was added and then the Retail Price Index was applied to date to produce the figure of £3,979. The tinnitus scale was applied at the relevant level of 21-30 decibels to yield the figure of £500 to which the Retail Price Index was applied to produce the figure of £1,162.00, making a total of £5,142.00 to which 2% interest will be added.

[12] On the basis of the above calculation the value of the plaintiff's claim falls clearly within the County Court jurisdiction. The plaintiff submits that the conventional scales should no longer apply as the current levels of damages render the scale figures significantly below the level that might otherwise be awarded. First of all I consider the hearing loss scale. As MacDermott LJ has indicated from time to time the hearing loss scale has been applied in the past in the interests of fairness to achieve uniformity and comparability. More than twenty years have elapsed since a scale was introduced and it is long past the time when it was thought that all the Harland and Wolff cases would be completed, although apparently there are very few such cases outstanding. I agree with the approach adopted by MacDermott LJ in relation to the requirement for fairness on the basis of uniformity and comparability and also that fairness requires that latecomers should not appear to do better. I propose to adopt the same approach to the hearing loss scale despite the lapse of time since the introduction of the scale. There are other areas of industrial life where claims have been made as a result of hearing problems and I should emphasise that the approach taken in this case operates in relation to claims for industrial deafness involving Harland & Wolff. Accordingly I propose in this appeal to apply the scale as the basic measure of general damages for hearing loss.

[13] If the hearing scale is to be retained there is then an issue as to whether or not that scale ought to be modified to reflect more accurately what are said to be modern values. The present approach has become a clumsy method of assessment but that is the unfortunate product of 20 years of development. Overall it would be preferable to retain the present scheme rather than to alter it at this late stage when there are a limited number of outstanding claims against Harland and Wolff. The Retail Price Index operates as a reasonable updating method. The scale is of course a guideline only and it is not to be applied rigidly. The scale produces approximately £4,000 for hearing loss of 10% in the present case and that figure could not be described as contemptible.

[14] I turn to the tinnitus scale. The defendants have applied the basic scale to the plaintiff's condition at the 21-30 db level of £500. With the addition of the Retail Price Index that produces the figure of £1,162 which in my view is out of proportion to the reasonable value of the degree of tinnitus that the plaintiff describes and could be described as contemptible. I would not apply the tinnitus scale to the present case for that reason.

In any event, there is an exemption from the basic scale in cases falling within the definition of "serious tinnitus". I consider that the plaintiff's condition must be classed as falling within the definition of serious tinnitus that has been adopted for the purposes of the scale because the plaintiff describes sleep disturbance that produces considerable social upset. Of course it has yet to be determined whether his evidence will be accepted. However, I take the plaintiff's evidence at its reasonable height for present

purposes and that would take the case outside the basic scale that was adopted in 1982. On either of the above grounds I would propose to make a general assessment of the value of the tinnitus in this case.

[15] In determining whether or not this action should be remitted and taking the plaintiff's case at its reasonable height, with the value of the hearing loss being assessed at some £4,000, it remains to determine whether at least £11,000 represents the reasonable height of the assessment of the damages for tinnitus.

[16] The Guidelines for the Assessment of General Damages in Personal Injury Cases in Northern Ireland (2002) at pages 13/14 include the heading "Partial hearing loss/Tinnitus". Band (ii) refers to moderate tinnitus and hearing loss at £12,500 to £25,000 and band (iii) refers to mild tinnitus and some hearing loss up to £12,500. In this case I would describe the hearing loss as slight as it is measured at 10%. There is no definition in the Guidelines of the degrees of tinnitus, and no category of serious tinnitus as described in the tinnitus scale, so there can be no direct correlation between the tinnitus scale and the Guidelines. An overall assessment of the position places the plaintiff's claim for both hearing loss and tinnitus, at best, at the bottom of band (ii) at £12,500.

[17] Accordingly I affirm the decision of the Master to remit the case to the County Court and the appeal is dismissed.