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Is expert evidence crucial to a claim for acoustic shock?

Storey v British Telecommunications Plc (2022) EWCA Civ 616

The claimant/appellant (a litigant in person) brought a claim against the defendant/respondent (BT) for damages and financial loss arising from personal injuries suffered in consequence of an accident at work. The injuries concerned were permanent bilateral multi-tonal tinnitus, hyperacusis (intolerance of loud noise), and psychological injury due to acoustic shock. At the time, the claimant was employed as a customer sales advisor in a BT call centre. His monoaural headset was connected to the turret via the handset, with its own power supply. He was wearing it against his right ear. He took an incoming call. Whilst he was speaking to the customer, the claimant was exposed to a sudden intense high-pitched crackling sound through the headset, which he described as "feeling like someone had put a knitting needle through my ear." This caused him to remove the headset and throw it down on the desk. He reported the matter to his acting line manager, who was present at the time.

In its defence, BT put the claimant to proof of the alleged accident and his injuries, and (without prejudice to the burden of proof) denied breach of duty, causation and quantum. The defence did not take issue with the existence of acoustic shock as a recognised medical condition.

The claim was allocated to the multitrack and each party was given permission to rely upon the report of an acoustic engineer. BT obtained

IN BRIEF

The Court of Appeal held that the claimant was entitled to proceed to a trial of his claim for acoustic shock, notwithstanding that he had failed to exchange experts' reports in accordance with the order for directions.

It would be for the trial judge, having heard all the evidence and made relevant fact findings, to decide the issue of liability.

a report, the claimant did not and when the time came for the exchange of reports, neither party served a report from an acoustic engineer.

BT contended that in the absence of such evidence, the claimant could not prove that they were in breach of the duty of care which they owed him as their employee. They applied unsuccessfully to a Deputy District Judge (DJ) for summary judgment or to strike out the claim under CPR 3.4(2) but on appeal a Circuit Judge (the judge) allowed BT's application.

The claimant appealed to the Court of Appeal on the single question whether the judge was right to decide that the claim must fail in the absence of expert engineering evidence.

Having reviewed the parties' evidence, the Court of Appeal found that the claimant's case was that in all the circumstances, BT had failed to take reasonable steps to protect him from an acoustic shock. The contemporaneous documentation disclosed by BT was consistent with the claimant's account (recorded in his work diary) that a week before the incident he had a similar problem with an acoustic incident on the line, which he reported to his supervisor orally, and which led to a change in his headset. That incident, which the claimant characterised as a "near miss", was not formally recorded, and no other action was taken in response to it.

Allowing the appeal, the Court of Appeal held that the judge had been in error in finding that the claim could not proceed without evidence from an acoustic engineer and the DJ was right to find that this case should progress to trial. This view was reinforced by the fact that the claimant would not be able to provide an acoustic engineer with the underlying data pertaining to the equipment he was using, which might have enabled the expert to produce a report that would assist him, because BT had lost or destroyed it.

It would be for the trial judge, having heard all the evidence and made relevant fact findings (which would include drawing such inferences as might be proper both from the evidence and from the absence of evidence) to decide whether BT was sufficiently on notice of acoustic incidents and the risk of acoustic shock arising from such incidents that it should have taken steps to safeguard against the possibility of operators at this call centre suffering acoustic shock, and if so, whether, on the facts of this case, BT took reasonable steps to protect the claimant from a foreseeable risk of personal injury. It might be, when all the evidence was considered in the round, that the judge would reach the view that the claimant failed to discharge the burden of proof which was upon him, but that depended very much on the facts and, as matters presently stood, that could not be regarded as a foregone conclusion.

The full judgment may be found at: [Storey v British Telecommunications Plc \[2022\] EWCA Civ 616 \(05 May 2022\) \(bailii.org\)](#)

