SHERIFF APPEAL COURT

[2022] SAC (Civ) 15
PIC-PN2949-18

Sheriff Principal M M Stephen QC
Sheriff Principal M W Lewis
Appeal Sheriff R D M Fife

OPINION OF THE COURT

delivered by SHERIFF PRINCIPAL M M STEPHEN QC

in appeal by

HAESEL McDONALD

Pursuer/Respondent

against

INDIGO SUN RETAIL LIMITED

Defender/Appellant

Pursuer/Respondent: Langlands, Advocate; Thorntons Law
Defender/Appellant: McGregor, Advocate; BLM Law

21 April 2022

[1] Ms McDonald commenced proceedings against Indigo Sun in the All Scotland Sheriff Personal Injury Court ("ASSPIC") in respect of hearing loss and tinnitus caused by her exposure to the noise of a fire alarm whilst employed by the company on 12 December 2015. Following proof, the sheriff found Indigo Sun Retail Limited ("Indigo Sun") liable at common law having interpreted and applied the Control of Noise at Work Regulations 2005 ("the 2005 Regs") awarding damages to Ms McDonald of £241,277.00 comprising solatium and an award to compensate for the cost of privately purchased

hearing aids throughout her life. Indigo Sun have appealed. The issues tried and determined by the sheriff at proof are revisited on appeal:

(1) Whether Indigo Sun was in breach of its duty at common law to take reasonable care for the health and safety of Ms McDonald as an employee and to avoid exposing her to unnecessary risk of injury;

(2) Whether any such breach caused her tinnitus and/or her hearing loss; and

(3) The quantification of any loss, injury or damage suffered by Ms McDonald.

[2] Ms McDonald's case against Indigo Sun was based upon a single exposure to the noise of a fire alarm sounding whilst she was working in the defender's tanning salon. She had been employed by Indigo Sun on a part-time basis as a salon assistant in their salon located on Strathmartine Road, Dundee between January 2015 and February 2016. Ms McDonald, who was then a student at Dundee and Angus College, attended college Monday to Friday and worked part-time at the salon on a Saturday morning. On the day in question, 12 December 2015, Ms McDonald, who was then 19, was due to work a shift between 9am and 1pm. There were two alarm devices on the ceiling within the premises and just after 9am the fire alarm sounded and continued to sound until 12.55pm. It was known that the alarm within the premises had sounded "unnecessarily" on several prior occasions including the previous day. The sheriff held that Indigo Sun through its management was, or ought to have been, aware of this happening. On 12 December 2015 the noise of the fire alarm was excessively loud and caused Ms McDonald to have a headache and ringing in her ears. Fire alarms were sounding in other premises close by, however, either the staff in these premises were able to turn the alarm off or they were sent

home. However, in the tanning salon Ms McDonald required to endure the full effect and therefore noise of the alarm sounding until the manager arrived at 11am and applied tape to try to muffle or mask the noise caused by the alarm. The alarm was not disabled but the noise it emitted was reduced. Ms McDonald was not sent home but was instructed to remain at work. She required to converse with customers by shouting. The alarm continued to sound until near the end of her shift. She was not offered ear protection. By the time her shift ended she was distressed and suffering from headache and ringing in her ears. She continued to suffer from headache and tinnitus. The tinnitus became intermittent and fluctuating. She attributed impairment of her hearing to the tinnitus. She spoke to her flatmate and to her mother about the problem. She had difficulty in class at college. When working at the tanning salon she had problems picking up customers' names. She left her part-time job at the tanning salon in February 2016 in order to concentrate on her studies. She sought medical advice on her return home to Inverness following her final exams in 2016.

[3] Ms McDonald consulted her general practitioner in July 2016 and was referred to a Consultant ENT surgeon at Raigmore Hospital in Inverness, Ms Isa, who confirmed that she was suffering from bi-lateral sensorineural hearing loss and was advised to obtain hearing aids. She was provided with NHS hearing aids in January 2017 but was reluctant to wear them as they were uncomfortable. She was also reluctant to accept that she was suffering from impaired hearing at the age of 20. The ENT consultant referred her to Professor Laing, Consultant Otolaryngologist, for his opinion as to the cause of the hearing loss. Professor Laing arranged for further investigations to be carried out with a view to determining the cause of her hearing loss. By September 2017 Professor Laing's working

diagnosis was that she had sensitive inner ears and that most of her hearing loss had been caused by her exposure to noise, in particular, the fire alarm.

[4] Before the sheriff, it did not appear to have been in dispute that the pursuer was suffering from moderate to severe high frequency sensorineural hearing loss in both ears. The sheriff found that she did not suffer from tinnitus or hearing loss prior to the fire alarm incident. Nor was there any dispute that she now required to wear hearing aids in order to hear and communicate properly.

The appeal

[5] In the grounds of appeal Indigo Sun advances the proposition that the sheriff erred in all of the three issues which he had to determine following proof. Firstly, in finding that they were in breach of their common law duty of care towards Ms McDonald, by determining that the noise levels experienced by her were levels which breached the employer's obligations under the 2005 Regs. Secondly, it was argued that the sheriff erred in determining that Ms McDonald's hearing loss and tinnitus were caused by her exposure to noise on 12 December 2015. On the evidence, she had failed to establish a causal connection between exposure to noise and her loss and injury. Indigo Sun's argument was directed mainly at the evidence adduced on behalf of the pursuer from Mr William McKerrow, Consultant Otolaryngologist. It is clear from paragraph [82] of the sheriff's judgment that this was the most hotly disputed issue before him. The proof proceeded with parties and witnesses attending remotely via WebEx. The evidence of the witnesses is recorded using WebEx technology. However, there had been a simple error in the recording of Mr McKerrow's evidence and as a result no transcript of his evidence could be produced. Both the sheriff and the appellant's agent prepared notes of Mr McKerrow's evidence which

was then adjusted by parties under the sheriff's oversight. That note was available for the appeal. Counsel for Ms McDonald was not in a position to agree the appellant's proposed transcript from line 18 on page 13 to line 2 on page 15. During Mr McKerrow's evidence on that particular section of his evidence, counsel had been sharing his screen, on which was displayed Mr McKerrow's report, with both counsel for Indigo Sun and the court. As a result he was unable to type his own notes and his instructing solicitor's notes lacked detail. It is accepted that the reconstituted transcript properly represents the tenor of Mr McKerrow's evidence.

[6] The third ground of appeal is directed against the sheriff's approach to quantification of loss, in particular, in determining Ms McDonald is entitled to the cost of privately purchased hearing aids throughout her life. The pursuer had failed to lead evidence which would allow the court to compare the relative advantages and disadvantages of the hearing aids currently used by the pursuer against any alternative hearing aids available on the NHS and privately purchased hearing aids. Accordingly, the sheriff fell into error in concluding that it was reasonable for Ms McDonald to be provided with the particular hearing aids recommended by Mr Bradford of Hidden Hearing namely the Oticon OPN S1 Mini rite and the CIC Oticon OPN2.

First ground of appeal – breach of duty

[7] Counsel for Indigo Sun proposed that the appeal should be sustained on this ground. The sheriff erred in determining that the evidence established noise levels which were in breach of the 2005 Regs and that consequently Indigo Sun were in breach of their common law duty towards Ms McDonald.

[8] The particular circumstances of the noise exposure, being a single exposure on the particular date in question, does not justify the application of a daily personal exposure level (LEPd) measurement. The sheriff erred in applying the daily exposure level. There was no suggestion that Ms McDonald had been exposed to noise at work on other occasions. Consequently, Ms McDonald's daily exposure to noise would vary markedly from one day to the next making it inappropriate to use a daily personal exposure level. Had the sheriff applied the weekly personal noise exposure level (LEPw) there was no breach of the 2005 Regs. Even if the sheriff is correct to analyse the regulations in such a way that LEPd is the default position it is nevertheless inappropriate to use that measure given the circumstances of the pursuer's exposure to apply that measure.

[9] Counsel for Ms McDonald commended the sheriff's reasoning and interpretation of the regulations at paragraphs [73] and [74] in his judgment. The lower exposure action value stipulated by Regulation 4(1)(a) of the 2005 Regs is 80dB(A). If Ms McDonald was exposed to noise in excess of that level on either basis her employer was in breach of the duty of care owed to her if Regulations 5(1) and 7(1) were engaged: that is failure to conduct a risk assessment and failure to make hearing protection available on request. It was not suggested that a risk assessment had taken place or that protection was available to Ms McDonald. The sheriff's reasoning for accepting that LEPd was not only the correct method of calculation of the level of noise in the circumstances of this case but was the default level is rational. The 2005 Regs stipulate a lower exposure action value of 80dB(A) due to there being a foreseeable risk of injury. Exposure above 80dB(A) presented a foreseeable risk of injury. An employer was able to avoid a breach of the 2005 Regs by the simple measure of removing the source of the noise or removing the employee from the noise or by providing hearing protection. These precautions were not adopted in this case.

It is irrelevant whether the exposure to noise was single incident trauma or over a prolonged period of time.

Decision on breach of duty

[10] The sheriff made a finding that Ms McDonald was exposed to an average noise level of 82.3dB(A) LEPd on 12 December 2015 based upon the evidence of Mr Bowdler, an Acoustic Consultant, who took measurements at the locus using a calibrated sound level meter in July 2019 (finding in fact [18]). The readings were taken from a position behind the reception desk where Ms McDonald would normally be seated whilst working at the salon. That noise reading exceeds the lower exposure action value in terms of Regulation 4 of the 2005 Regs. Regulation 4 prescribes lower and upper exposure action values of 80dB(A) and 85dB(A) respectively. The purpose of the regulations is to protect persons against risk to their health and safety arising from exposure to noise at work. Mr Bowdler gave evidence under cross examination that if the noise exposure in this case, as measured by him, was adjusted so as to calculate it on a weekly personal noise exposure then the result would be 75.8dB(LEPw). On that basis, counsel for Indigo Sun submitted that had the sheriff assessed the noise exposure on a weekly basis the lower exposure action value would not have been exceeded. As there was no dispute as to the levels of noise exposure presented by Mr Bowdler in his evidence the question of which method of determining personal noise exposure ought to be the operative one was crucial to fault. The sheriff's analysis of this issue may be found in paragraphs [70] to [74] of his judgment. The sheriff considered the terms of EU Directive 2003/10/EC which was implemented in domestic law by the 2005 Regs. It is noted that the quotation from Article 3(3) of the directive in paragraph [73] of the sheriff's judgment ought to have the word "working" inserted on the second

line between the words "One" and "day" emphasising, of course, that the directive is concerned with exposure to noise at work as are the 2005 Regs.

[11] Article 3 of the EU Directive and Regulation 4 of the 2005 Regs clearly anticipate the situation where the employee's exposure to noise varies markedly from one working day to another. In that situation an employer may use weekly personal noise exposure rather than daily personal noise exposure values. In our opinion, the sheriff was entitled to read the directive and the regulations to the effect that the daily measure would be the default position subject to duly justified circumstances. In this case Ms McDonald is a part-time worker who is not employed 5 or 7 days a week at the salon. When working as a salon assistant and receptionist she is not normally exposed to significant noise levels. Nonetheless, it cannot be suggested that the regulations do not apply to single exposure noise incidents (see *Goldscheider* v *Royal Opera House Covent Garden Foundation* [2019] EWCA Civ 711). The regulations are clearly concerned with the risk to an employee's health of exposure to noise at work. LEPd is calculated over an eight hour working day. The pursuer was a part-time worker whose shift on the Saturday in question was between 9am and 1pm exactly half of the LEPd measure of the working day. LEPw is a calculation based on 5 working days of 8 hours. We therefore cannot see any justification for adopting a weekly average to assess the noise exposure level for an employee who is usually working a half shift on a Saturday and not normally exposed to noise. To use LEPw would distort any evaluation of the noise to which Ms McDonald was exposed. If LEPw was adopted the pursuer's noise exposure would be based on an artificial formula by including days when she would not be working and therefore not exposed to any workplace noise. The court requires to take account of the purpose of the regulations and to achieve, as far as possible on the evidence available, the measure which best represents the noise to which the pursuer

was exposed on the day in question. As this was patently a single exposure to high noise levels it would be manifestly illogical and inaccurate to adopt a measure which appears to average the noise levels over a full working week when Ms McDonald, a student, did not work other than part time usually at a weekend. This would distort the measurement of the noise from the alarm by, in effect, diluting the noise levels to which she was actually exposed on the day in question. In our opinion, the sheriff was correct to conclude that LEPd was the more appropriate measure of Ms McDonald's exposure to noise given her working pattern and the single value exposure to high noise levels. It follows that using LEPd the noise measurement is 82.3dB(A) and the obligations incumbent on an employer in terms of Regulations 5, 6 and 7 of the 2005 Regs were engaged as the lower noise value is exceeded. It was not suggested that Indigo Sun had carried out any assessment of risk as required by Regulation 5(1) and therefore did not trigger the requirement to identify the measures which an employer should take to comply with the regulations. Regulation 6(1) is concerned with the elimination or reduction of the risk of exposure to noise. No steps were taken to isolate or otherwise deal with the noise of the alarm when it sounded. There had been a similar incident the day prior. The steps eventually taken by the manager to reduce the noise did not achieve elimination of the risk. Ms McDonald could have been instructed to leave the premises but no such instruction was given. On the contrary, it appears she was instructed to remain despite the continuing noise from the fire alarm which even in its diminished form was still above the lower exposure action value. At paragraph [79] the sheriff concludes:

> "Given those breaches of the regulations, it is a small step in this case, to conclude that the defender was also in breach of its duty at common law to take reasonable care for the safety of the pursuer and not to expose her unnecessarily to risk of injury. I consider that in this case compliance with the regulations founded on is something that a reasonable employer would do in order to comply with its duty of

> care at common law and that in breaching the regulations in the manner indicated they also breached their common law duty of reasonable care owed to the pursuer."

We consider that the sheriff was entitled to reach that conclusion. Indeed, it was not suggested that any breach of the employer's statutory duty in terms of the 2005 Regs would not translate to a breach of common law duty. For these reasons we do not accept the submission advanced on behalf of Indigo Sun in respect of (i) measurement of noise exposure and (ii) breach of duty.

Second ground of appeal – causation

[12] Counsel for Indigo Sun submitted that the sheriff was not entitled to find that Ms McDonald suffered hearing loss and tinnitus as a result of her exposure to noise on 12 December 2015. The evidence, properly analysed, could not establish a causal connection between the noise to which she was exposed that day and any hearing loss which she may have suffered.

[13] The focus of counsel's submission was the opinion evidence given by Mr William McKerrow, Consultant ENT Surgeon, who had examined Ms McDonald and gave evidence as to the nature and cause of her hearing loss and tinnitus. The pursuer's case is predicated on his opinion. In both his written report and his oral evidence in chief, Mr McKerrow was of the opinion that there was a causal connection based on satisfaction of all three requirements of the "*Coles Criteria" (Guidelines on the diagnosis of noise–induced hearing loss for medicolegal purposes by Coles, Lutman and Buffin (2000)*). These criteria constitute the foundation to his opinion that there was a causal link. However, in cross examination, he conceded that two of the three requirements of the Coles Criteria were not entirely satisfied in Ms McDonald's case. Notwithstanding this concession Mr McKerrow considered that

Ms McDonald's hearing loss was noise induced. The first of the requirements was met namely, high frequency hearing impairment, however requirements two and three were not satisfied. The second requirement is noise exposure. Ms McDonald had been exposed to noise between 80dB(A) and 85dB(A) rather than noise levels greater than 85dB(A). The second requirement (sub-category R2A) stipulated that the lower limit of noise exposure to meet this requirement is an equivalent LEPd of not less than 85dB(A). Mr McKerrow accepted that there was no evidence of an LEPd of a minimum of 85dB(A). Furthermore, the third requirement is a notch in the audiogram at 3-6Khz. Mr McKerrow agreed that the third requirement was not met, on the balance of probabilities, in relation to Ms McDonald's right ear. Nonetheless, Mr McKerrow considered there was a causal link given the history, presentation and taking into account all the circumstances. Although Mr McKerrow had relied on Coles in his medico-legal report, when it came to cross-examination and re-examination he indicated that Coles was not the only criteria. It follows that Mr McKerrow's unchallenged evidence in the form of his report and evidence in chief was, at best, in error or, at worst, intentionally misleading. The sheriff was in error in admitting Mr McKerrow's evidence as to causation having departed from his report and his evidence in chief. There was, accordingly, no basis upon which the sheriff was entitled to conclude that a causal link was established. Mr McKerrow's evidence should not have been given any weight and amounts to no more than an "unsubstantiated *ipse dixit*" (*Kennedy* v *Cordia (Services) LLP* [2016] UKSC 6 paragraph 48). The sheriff fails to give adequate reasons for admitting Mr McKerrow's evidence.

[14] Counsel for Ms McDonald pointed out that there was no dispute that Ms McDonald suffered bilateral sensorineural hearing loss and tinnitus. Whether she had proved a causal connection between the exposure to noise and hearing loss/tinnitus was a question of fact for

the sheriff which does not, of necessity, require medical opinion. There was sufficient evidence from Ms McDonald herself, her mother and Amelia Newton, her friend, who all speak to the immediate onset of tinnitus and associated hearing loss following events on 12 December 2015. She had submitted to tests which ruled out other causes of hearing loss (finding in fact [30]). Having excluded other causes there was no plausible explanation other than the exposure to noise on 12 December 2015. This was the working diagnosis of Professor Laing who had been asked by Ms Isa, the ENT specialist, to assess Ms McDonald and give an opinion as to the cause of her hearing loss and tinnitus. His opinion is available in the medical records which are agreed. Accordingly, the sheriff had adequate material on which to make a finding as to causation. Having made the causal link between noise exposure and hearing loss the sheriff assesses the evidence given by Mr Swan the defender's medical expert. He is a Consultant Otologist. Mr Swan is of the view that the pursuer had progressive congenital hearing loss with nothing in her history to suggest that her hearing loss was caused by the noise exposure. Mr Swan comes to that opinion without reference to the Coles criteria. The sheriff assesses Mr Swan's evidence at paragraphs [89] – [92] and analyses Mr Swan's conclusions at paragraphs [105]–[110] deciding that there is no basis for Mr Swan's conclusion that Ms McDonald has progressive congenital hearing loss. There was nothing to support that conclusion in the medical records or in her history. The sheriff therefore rejected Mr Swan's evidence on causation. The sheriff was entitled, based on the evidence of the lay witnesses and the medical records to make his findings in fact and findings in fact and law as to causation. These findings should not be disturbed.

[15] Counsel for Ms McDonald reminded the court about the lack of transcript. An appellate court should be slow to reject an expert whose evidence has, in material respects, been accepted by the sheriff. The sheriff analyses the evidence given by Mr McKerrow both

in his report and his oral evidence from paragraphs [111]–[113] and paragraph [115]. Unless satisfied that the sheriff was plainly wrong in his approach to the evidence as to causation, not solely the medical evidence, then an appellate court should defer to the sheriff's analysis and assessment of the witnesses. The sheriff has carefully evaluated Mr McKerrow's evidence. He is entitled to consider Mr McKerrow's expertise; his assessment of the pursuer's symptoms and the temporal connection between the noise exposure and the onset of tinnitus and hearing loss. Mr McKerrow was well placed to form an opinion and the sheriff was entitled to accept his opinion overall. In any event the sheriff could conclude that there was a causal connection without Mr McKerrow's evidence. The critical point is that the very injury which the regulations are designed to prevent or to protect against arose in the immediate aftermath of Ms McDonald's exposure to noise. This ground of appeal should be rejected.

Decision on causation

[16] The action proceeds under Chapter 36 of the Ordinary Cause Rules. The pleadings are therefore brief but sufficiently clear as to the noise hazard to which Ms McDonald was exposed, its duration and that she considers there to be a direct temporal and causal link between the noise to which she was exposed and the injury and loss she sustained. The tinnitus and hearing difficulties are set out at article 5 of condescendence (5.1 solatium). She suffered immediate symptoms with difficulty hearing and tinnitus. She was later referred to an ENT Consultant, Ms Isa, whose testing indicated she was suffering from bilateral moderate to severe high frequency loss of hearing. She was then referred to Professor Laing, Consultant Otolaryngologist, for his opinion as to the cause of her hearing loss. Professor Laing's working diagnosis is in the medical records (which were agreed and form

part of the appendix to the appeal print). Following proof the sheriff made the following findings in fact:

> [30] Professor Laing saw the pursuer on 27 March 2017 and he arranged further investigations with a view to exploring other causes of the pursuer's sensorineural hearing loss. Blood tests and MRI scans were negative. As at 4 September 2017, Professor Laing's working diagnosis was that the pursuer had sensitive inner ears and that most of her hearing loss had been caused by the exposure to noise.
>
> [31] Prior to 12 December 2015, the pursuer did not suffer from tinnitus or hearing loss.
>
> [32] The pursuer suffered from bilateral sensorineural hearing loss and associated tinnitus immediately following, and as a result of, the exposure to noise on 12 December 2015. The pursuer's hearing loss is likely to deteriorate with age. There has been a slight deterioration since the exposure.

These findings in fact together with findings in fact in relation to the noise exposure and also findings in fact [20]–[27] underpin the crucial findings in fact and law as to causation which are expressed as follows:

> [45] On 12 December 2015, the pursuer was exposed to conditions, which gave rise to a significant and reasonably foreseeable risk of injury in the form of tinnitus and hearing loss.
>
> [46] The history and development of the pursuer's symptoms are consistent with there being a causal link between the exposure to noise and the damage to her hearing.

> [47] It is more likely than not that as a result of the exposure to noise on 12 December 2015 within the defenders (*sic*) premises, the pursuer developed tinnitus and associated moderate to severe high frequency sensorineural hearing loss in both ears.

[17] The issue is whether the sheriff was entitled to come to the conclusion firstly, that Ms McDonald's symptoms and the manner in which they emerged and developed are consistent with there being a causal link between the noise exposure on 12 December 2015 and the damage to her hearing. Was there sufficient evidence that the sheriff was entitled to accept that the exposure to the noise of the fire alarm sounding led to her developing hearing loss and tinnitus in both ears?

[18] Essentially, the issue of causation falls to be decided by the sheriff as a question of fact (*Gardiner* v *Motherwell Machinery & Scrap Company Limited* 1961 SC (HL) 1). The passage from Lord Guest at page 19 is set out in the sheriff's judgment (paragraph [100]) but deserves repetition:

> "In view of the concession made by the respondents, the question is a pure question of fact whether on a balance of probabilities the dermatitis arose from the appellant's employment; in other words, whether it was more likely that the appellant contracted the disease in his employment than elsewhere. A number of doctors gave evidence on each side. Their evidence disclosed a remarkable diversity of medical opinion, but I do not regard it as a medical question in the sense that it is necessary to decide which body of medical opinion is right. But, regarding the matter as a question of fact, I think that it is more probable that the appellant contracted the disease in his employment and that the judgment of the Lord Ordinary was right."

Therefore, all the material and evidence is available to the sheriff for the purpose of deciding whether there is a causal connection. The sheriff had available to him the evidence of Ms McDonald, her mother and her friend Amelia Newton; the medical experts

Mr McKerrow and Mr Swan together with the acoustic expert, Mr Bowdler and the productions including the medical records.

[19] Ms McDonald's evidence provides that *prima facie* connection between the incident and her symptoms. She immediately had symptoms of tinnitus and associated hearing problems. That is the first and powerful connection in time between the exposure and the symptoms. Her evidence establishes a *prima facie* presumption that her hearing loss was caused by the noise of the alarm. She was 19 and had no hearing problems beforehand. Her evidence about the onset of her symptoms is supported not only by her mother and Amelia Newton, whose evidence was accepted by the sheriff, but also by the medical records. She reported to Ms Isa an 11/12 month history of bilateral hearing loss after exposure to the noise of a fire alarm when she was examined as an outpatient on 14 December 2016 (Appendix page 479). Professor Laing, in 2017, could detect no abnormality from blood tests to account for the hearing loss. His diagnosis in September 2017 was "sensitive inner ears and most of her hearing loss has been caused by the exposure to noise" (Appendix pages 464 and 465 – finding in fact [30]). This evidence taken with the report and evidence of the acoustic expert, Mr Bowdler, is sufficient to allow the sheriff to draw the inference that Ms McDonald's hearing loss and tinnitus were more likely than not to have been caused by her exposure to noise and the consequent breach of duty arising on 12 December 2015.

[20] We reach this conclusion without consideration of the evidence led at proof from Mr McKerrow and Mr Swan. It is necessary to consider that medical evidence now.

[21] Mr McKerrow is a retired Consultant Otolaryngologist who practised as a Consultant ENT surgeon within the NHS between 1986 and 2013. The sheriff records at paragraph [84] in his judgment:

> "His primary interest and expertise has been in disorders of the ears and hearing and he has lengthy experience of treating such disorders and in providing medical legal reports on industrial deafness. In addition to his clinical experience, he also held a number of positions including Advisor in ENT matters to the Chief Medical Officer of Scotland and chairing the Advisory Board in ENT to the Royal College of Surgeons of Edinburgh. He has also been an examiner in ENT and currently has a role as Associate Post Graduate Dean for NHS Education for Scotland."

This is derived from Mr McKerrow's declaration at the end of his Medical Report dated 13 September 2018. That report was available to the sheriff and was written following an examination of Ms McDonald in Inverness on 12 September 2018. It is headed "Medical Report on Audiological Findings". It gives a summary of the pursuer's history; the examination and the findings following audiometry; diagnosis and his opinion on the cause of Ms McDonald's hearing loss together with a prognosis. In the declaration at the end of the report after setting out his curriculum vitae the author confirms "This report is provided without prejudice or bias for or against the client and is my assessment of the facts as presented to me and my interpretation of the test findings". This is required to allow the court to assess whether the witness's evidence will assist the court in its task of determining whether the noise exposure caused or materially contributed to Ms McDonald's hearing loss and also to assess damages. The court requires to assess whether the witness has the necessary knowledge and experience. These are two of the considerations set out in *Kennedy* (paragraph 44).

[22] In the body of the report Mr McKerrow refers to the accepted method of diagnosis of noise induced hearing loss as described in the publication by Coles, Lutman and Buffin which sets out three requirements for a diagnosis of noise induced hearing loss which are:

R1: High Frequency Hearing Impairment;

R2: Noise Exposure; and

R3: Audiometric Configuration.

In his report, Mr McKerrow indicates that requirements 1 and 2 are clearly met but he qualifies the R3 requirement as the audiometry is not classical for noise induced hearing loss on the right hand side. There is evidence of notching on the left which is highly significant with there being no significant bulge on the right. He goes on to explain "the absence of a notch or bulge to meet R3 (as on the right side) does not preclude the presence of NIHL having an atypical audiometric configuration." Accordingly, it appears from his report that Mr McKerrow accepts that R3 is not strictly met in accordance with the criteria but that Coles confirms that this does not preclude the presence of noise induced hearing loss. Indeed, in his opinion, which is based on his 36 years of experience of treating patients for hearing impairment, on the balance of probabilities Ms McDonald's hearing loss and tinnitus is due to noise damage caused by the incident referred to. Mr McKerrow goes on to say that Ms McDonald was a very reliable witness who gave an account which was entirely consistent with the hospital and GP records which he had perused in detail. He considered that there was no exaggeration and that, indeed, she had dealt with the impairment in a most stoical manner. By way of prognosis, he indicates that there is no treatment available to ameliorate hearing loss with the only treatment being the use of bilateral hearing aids. There would be a slow deterioration with ageing. There was evidence that deterioration with the passage of time is likely to be more rapid in ears already damaged by noise than it would be in ears not so damaged.

[23] Before this court the full force of Indigo Sun's submissions as to causation were directed against Mr McKerrow, his report and the evidence he gave before the sheriff. It was suggested that Mr McKerrow's evidence in the form of his report and evidence in chief could have been intentionally misleading. However, close analysis of the report makes clear that Mr McKerrow accepted that R3 was not met in this case as regards the audiometry of

Ms McDonald's right ear. Nevertheless, it was his opinion based on his experience, his examination of Ms McDonald and the qualification accepted by Coles that "the absence of a notch or bulge to meet R3 (as on the right side) did not preclude the presence of NIHL, having an atypical audiometric configuration." that, on the balance of probabilities, Ms McDonald's hearing loss was due to noise damage The concession on R3 had already been made in the report. It did not have to be elicited from the witness in cross-examination. Mr McKerrow accepted that he had not quoted the Coles qualification fully. Although the absence of the notch on one side did not preclude this being NIHL, Coles thought that may reduce the likelihood of it being NIHL below the balance of probabilities. He adhered to his opinion as to the cause of Ms McDonald's hearing loss having regard to what Coles said. The principal criticism therefore relates to Mr McKerrow's acceptance of R2 being met in this case namely, as regards the decibel level of noise exposure. It is accepted Mr McKerrow had not had sight of the acoustic expert's report as it had not been prepared at the time of his own report in September 2018. In cross-examination he accepted that the noise level disclosed in Mr Bowdler's report (2019) did not meet 85dB(A).

[24] What then, did the sheriff make of Mr McKerrow's evidence and did he fail to give proper reasons for admitting Mr McKerrow's evidence? The UK Supreme Court in *Kennedy (supra)* set out the considerations which will be important to the court in assessing admissibility when expert testimony is given. Clearly, the evidence of Mr McKerrow being an ENT specialist potentially had a significant bearing on the issues of (i) the extent of Ms McDonald's hearing loss and (ii) its cause. His evidence is relevant to the issues which the court had to determine. Although the issue of causation is a matter of fact medical evidence would carry significant weight. The crucial consideration for the sheriff is whether Mr McKerrow gave evidence which the court could rely on and attach weight to and

whether he was impartial in his presentation and assessment of the history and audiometric evidence available to him. The sheriff assesses Mr McKerrow's evidence at paragraphs [111] to [114]. Mr McKerrow's report pre-dates the report by Mr Bowdler. Although it would have been good practice to provide him with the acoustic expert's report that apparently did not happen. There was justifiable criticism of his acceptance that the third Coles requirement was met even with the 'Coles caveat' as the source was not fully quoted. Mr McKerrow accepted he had omitted to state the Coles qualification in full in his report however the sheriff was unable to conclude that he was being unduly selective. The full text suggested that the absence of a notch on one side does not preclude the presence of NIHL although that may reduce the likelihood below the balance of probabilities. That being so, Mr McKerrow was clear that the fact that the requirement was not fully met does not preclude there being a causal link. It was his view based on the history and presentation of the patient that there was a positive link between the noise exposure and the hearing loss. The sheriff concluded that overall "Mr McKerrow's evidence was given in a satisfactory manner, and I did not gain the impression that he was either lacking independence or impartiality in presenting his report and evidence to the court" (paragraph [113] of the judgment). In the following paragraph the sheriff is critical of parties' approach to lodging of the research underpinning the expert's evidence namely the Coles paper. At paragraph [115] the sheriff then poses the question "what is to be made of Mr McKerrow's evidence on the hypothesis that it is admissible". The sheriff concludes that his evidence as to causation is not fatally undermined by his presentation of his evidence in court. Notwithstanding the concessions he had to make he was clear in his opinion that there was a causal connection and referred in detail to Ms McDonald's history and the development of her symptoms as assessed against his many years' experience of dealing with patients with

hearing loss especially noise induced hearing loss. The sheriff properly accepts that the cogency of the witness' evidence is "to some extent diminished in light of his concessions. However, that does not mean that it should necessarily be rejected or accorded little or no weight, as was urged on behalf of the defender. It is not all or nothing." Mr McKerrow clearly had relevant evidence to present the court. Any shortcomings or flaws in the evidence were exposed in cross-examination. The sheriff is aware of the importance of the issue of causation. It is the sheriff's prime function to assess the evidence given by witnesses, including expert witnesses. Where appropriate he will determine its admissibility. The witness' evidence was capable of assisting the court in its task of determining both causation and damages. His evidence buttresses existing evidence available to the court from Ms McDonald, other witnesses and Professor Laing. The evidence he gave is certainly not out on a limb or at odds with other evidence adduced especially the medical records. The sheriff was entitled to accord weight to Mr McKerrow's evidence based upon his experience gained over many years in this area of practice. It is instructive to record that there was no evidence to the effect that there could be no link between the noise exposure and Ms McDonald's subsequent hearing loss. That is a matter of some significance. Even if the sheriff had accorded no weight to Mr McKerrow's evidence and wiped that from the slate, the sheriff was left with evidence which clearly points to there being a positive link between the events on 12 December 2015 and Ms McDonald's hearing loss and tinnitus. The sheriff has assessed Mr McKerrow's evidence carefully and decided that it can be accorded weight in the assessment of causation. We can find no error in his approach. There was a rational basis for accepting his evidence. It was in line with Professor Laing's working diagnosis. We reject the argument that the sheriff ought to have discounted Mr McKerrow's evidence entirely as "mere *ipse dixit*". The sheriff was entitled to

come to the view that the exposure to the noise of the fire alarm on 12 December 2015 was an incident which caused injury to Ms McDonald in the form of her subsequent hearing loss and tinnitus.

[25] It is convenient at this stage to mention the medical evidence adduced on behalf of Indigo Sun from Mr Swan. He considered that Ms McDonald may have had a progressive congenital hearing loss. The sheriff gives reasons for rejecting that conclusion: Firstly, there is no support for that in the medical records and secondly, contrary to Mr Swan's evidence, there is nothing in Ms McDonald's history to suggest her hearing loss was caused by anything other than noise exposure. The factual basis for Mr Swan's conclusions are contradicted by evidence from witnesses whose evidence the sheriff accepts and by the medical records which are agreed. In any event, Mr Swan accepted that it was possible that the exposure to noise could have resulted in permanent hearing loss although thought it unlikely. It is important to recognise, as the sheriff did, that Mr Swan's evidence did not reach the point of excluding a causal connection between the noise exposure and Ms McDonald's subsequent hearing loss.

[26] For the reasons we give we reject the submission that the sheriff erred in his approach to causation and by admitting Mr McKerrow's evidence.

Third ground of appeal – damages

[27] Counsel for Indigo Sun advanced the proposition that the sheriff had erred in his assessment of damages by determining that Ms McDonald is entitled to be compensated for the cost of privately purchased hearing aids. There had been no evidence which compared the relative advantages and disadvantages of the hearing aids currently used by Ms McDonald compared with alternative hearing aids available either on the NHS or

supplied on a private basis. Accordingly, the sheriff erred in concluding that it was reasonable for Ms McDonald to be provided with privately purchased hearing aids for the rest of her life. There was no evidence available to the sheriff to determine whether Ms McDonald derived any additional benefit from private hearing aids of whatever type or such as to deem them to be a reasonable outlay. The basic rule of compensation is that the measure of damages is defined 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" (*Livingstone* v *The Rawyards Coal Company* (1880) 5 App Cases 25 at page 39)

[28] In response counsel for Ms McDonald submitted that the sheriff had applied section 2(4) of the Law Reform (Personal Injuries) Act 1948 correctly. Ms McDonald was not constrained to use hearing aids provided by the NHS. Evidence with regard to hearing aids came from Ms McDonald who spoke to the difficulties she had with the NHS hearing aids which were uncomfortable, intrusive and could fall out when she was dancing. They amplify all surrounding noise rather than what she wants to hear. There was evidence from a private hearing aid dispenser, Neil Bradford, who is employed with Hidden Hearing in Inverness. He spoke of the hearing aids available on the market and the difference between those available on the NHS and those available privately. He considered that even the best NHS aids did not compare with those that are available privately. Mr Bradford recommended two types of hearing aid which are available and suitable for Ms McDonald's age; occupation and disability. One type of hearing aid is available to use 'in the ear' for more strenuous activities with the second type suitable for more routine day to day activities worn out of the ear. Mr Bradford's evidence was not challenged at proof. Applying the

well-established principle from *Livingstone* it was reasonable for the sheriff to assess damages to include the cost of both types of hearing aid throughout the pursuer's life.

Decision on damages

[29] Obviously, the sheriff's assessment of solatium depended upon his decision on causation. Counsel for Indigo Sun had proposed nominal damages for solatium on the basis that Ms McDonald had only suffered from headache and tinnitus for a short time following the exposure to noise on 12 December 2015. The court was satisfied that the noise exposure caused her hearing loss and tinnitus which would only deteriorate with age. Solatium therefore required to be substantial. There was no basis upon which to suggest that the sheriff erred in making an award of solatium of £25,000 and his apportionment to past and future.

[30] The real issue on damages relates to the award for the cost of hearing aids on the basis that those provided privately would be more suitable than her current NHS hearing aids. This ground of appeal is concerned with the reasonableness or otherwise that the award of compensation should cover the cost of privately purchased hearing aids. The sheriff's reasoning on this head of damages may be found at paragraphs [128] and [129]. Mr Bradford's evidence as to the benefits of private hearing aids over NHS hearing aids in differentiating between speech and background noise was unchallenged. Ms McDonald was young to have a hearing disability and these hearing aids helped her hear what she needs to hear. Mr Bradford's evidence appears to have been, to a certain extent, supported or at least not contradicted by Mr McKerrow. The sheriff has analysed section 2(4) of the Law Reform (Personal Injuries) Act 1948 under reference to *Harris* v *Brights Asphalt Contractors Limited* [1953] 1QB 617 and *Kemp and Kemp on Quantum of Damages*.

[31] The critical passage of the sheriff's analysis and reasoning is found in paragraph [128]:

> "In this case, it is clearly reasonable for the pursuer to have hearing aids. On the basis of section 2(4) there can be no criticism of the pursuer if she chooses to access private hearing aids. It matters not in my view whether there has been any technical evidence about the characteristics of her NHS aids to enable comparison with what has been proposed in order to evaluate reasonableness. In any event, as noted, there is the evidence of the pursuer of the problems she has with her present NHS aids and the evidence of Mr Bradford and Mr McKerrow as to the benefits of private aids. Accordingly this is a recoverable head of loss in this case."

Mr Bradford's business involves advising patients and supplying hearing aids. However, there is nothing to suggest that his evidence was in any way biased or lacking in impartiality allowing for the commercial area in which he works. His evidence is not challenged. We see no reason to depart from the sheriff's reasoning that the private hearing aids would provide the pursuer with an improvement on her NHS hearing aids which had a tendency to fall out; which she found uncomfortable; which were indiscriminate in how they amplified surrounding noise (whether speech or background noise) and annoyed her to the extent that she often did not use them. The sheriff had available to him evidence upon which to make an assessment of the reasonableness of making this award. What is reasonable compensation will depend on the facts and circumstances of each case. The sheriff had material namely the evidence of Ms McDonald, Mr McKerrow and Mr Bradford which would inform what the correct measure of damages would be to put this 24 year old pursuer in the same or similar position as she would have been before her hearing was irreparably damaged. The provision of the most effective hearing aids is the optimal response to this disability which is likely to deteriorate due to both age and he trauma she suffered. We therefore do not accept that the sheriff adopted an unreasonable approach to

damages by determining that Ms McDonald was entitled to the cost of privately purchased hearing aids in the future. This ground of appeal falls to be refused.

[32] That being so, and acknowledging that the question of what is reasonable compensation is primarily a question for the sheriff to decide, we observe from the sheriff's comments in paragraph [129] of his judgment that the schedule of damages proposed by Ms McDonald's counsel was accepted as appropriate without any real issue being raised as to the overall reasonableness of the award particularly for the second set of hearing aids (£114,895). It appeared to us that the sheriff was not addressed in any substantive respect on the reasonableness of both the multiplicand and the multiplier which made up that award by either party. The sheriff applied a multiplier of 84.45 based on the Ogden Table 2 (pecuniary loss for life (females) - appropriate to Ms McDonald's age at the date of proof [24]). The multiplicand is based on the cost of the CIC Oticon OPN2 (£3,999) with replacement every three years. The annual cost together with necessary accessories was expressed as a multiplicand of £1,360.50 bringing out the figure of £114,895 per the schedule of damages lodged on behalf of Ms McDonald.

[33] The ground of appeal advanced by Indigo Sun on damages was restricted to the question of the reasonableness of awarding compensation to cover the cost of Ms McDonald purchasing the hearing aids privately rather than the award itself. We have decided that the sheriff was entitled to make an award which allowed Ms McDonald to purchase non-NHS hearing aids. In the course of determining that ground of appeal we required to consider the sheriff's approach to quantum generally and in particular quantification of this head of damages. We take no issue with the sheriff's methodology in calculating the cost of the provision of the day to day hearing aids throughout the pursuer's life (OPN1 "Mini rite" device). However, we are more cautious on the assessment of damages in respect of the CIC

Oticon OPN2 device in particular the multiplier and multicand to be applied and decided that we should be addressed on these matters. Parties provided written submissions and we heard counsel on these submissions on Monday 7 February 2022.

[34] Counsel for Indigo Sun observed that the second type of hearing aid was primarily for the purpose of dancing/fitness classes where vigorous movement can displace the "Mini rite" device. The evidence of Mr Bradford was that the devices become unreliable after five years making it appropriate to allow for replacement every five years. A reasonable approach is to assume that Ms McDonald would not be undertaking rigorous activities for the remainder of her normal life expectancy. It was therefore reasonable to calculate the future loss on the basis that she might require the second device until the age of 55. Accepting that dancing is not limited inextricably to employment it would be reasonable to apply Table 6 of the eighth edition of the Ogden Tables which would provide for a multiplier of 34.62.

[35] Counsel for Ms McDonald submitted an amended schedule of damages in respect of the CIC Oticon OPN 2 device. The schedule sets out not only the capital cost of the hearing aid but also the monthly cost of accessories such as T-caps and wax guards. The sheriff accepted that replacement of this hearing aid every three years was reasonable (Finding in Fact [36] and paragraph [129] of his judgment). The sheriff's decision was based on the evidence of Mr Bradford. It cannot be suggested that the sheriff erred in selecting a three year cycle for replacement or that the accessories required to be replaced on a monthly basis. Based on this amended schedule the annual cost or multiplicand can reasonably be stated to be £1,371.50 per annum. The sheriff's award is based on a multiplicand of £1,360.50. The sheriff decided to make provision for the cost of the second type of hearing aid as it was recommended for use during "vigorous physical activity" for the purposes of the

respondent's future career and participation in dance (Finding in Fact [35] and Finding in Fact and Law [48]). However, counsel pointed out that Mr Bradford recommended the second type of hearing aid as suitable for any sort of training or physical activity. The sheriff was entitled to rely on Mr Bradford's evidence and did so. There was no evidence to suggest that Ms McDonald would not be active and participating in physical activity for the rest of her life. Accordingly, there was no error on the sheriff's part in awarding damages to meet the cost of this hearing aid for life. The full multiplier was therefore warranted.

[36] Mr Bradford of Hidden Hearing gave evidence. He recommended two types of hearing aid which read short are the Oticon OPN1 and 2. The Oticon OPN1 is also known as the Mini rite. Both are modern devices with blue tooth connectivity which allows the wearer to connect to phones and therefore social media. The OPN1 is a small device worn behind the ear with very good quality sound technology. It has good broadband width – broader than most other hearing aids which allows "better management of non-voice related sound" allowing the wearer to filter out unwanted sounds and background noise. He described the OPN1 as "being particularly good at that." He recommended the OPN2 when Ms McDonald was doing dance (contemporary dance) which is fairly athletic and gymnastically inclined. The OPN2 (CIC) would solve the problem of her hearing aid falling out during dance and other activities. Ms McDonald reported that she could not wear hearing aids whilst dancing for this reason. The OPN2 (CIC) is worn in the ear canal and is a much firmer fit. This would allow her to hear what she required to hear when taking or participating in dance classes and indeed to hear music. Mr Bradford would continue to recommend both the OPN1 and 2 if Ms McDonald decided to pursue a career in personal training or sports conditioning. Mr Bradford also considered the life span of the two types

of hearing aids namely five to ten years for the OPN1 and three to five years for the CIC OPN2. The sheriff refers to that evidence at paragraph [129].

[37] The sheriff's assessment of the annual replacement cost for the OPN2, based on replacement every three years, reflects Mr Bradford's evidence. On initial analysis we were concerned that by taking the most pessimistic approach to replacement (ie every three years) the sheriff may not have considered the overall effect of awarding compensation to cover the cost of two different hearing aids. It goes without saying that having two devices means that each of the devices would be worn less frequently than would have been the case had only one device been provided. However, having considered carefully the transcript of the evidence and the submissions we are satisfied that the sheriff took full account of the evidence and was entitled to assess the multiplicand as he did. Even if we were minded to take a middle course on the replacement timescale it is not appropriate to do so for several reasons. Firstly, the sheriff's approach is amply supported by the evidence from Mr Bradford and secondly we respect the judgement of the sheriff who heard the evidence and who sits in a court with specialised jurisdiction in such matters.

[38] Clearly, in awarding compensation to cover the cost of obtaining two separate types of hearing aid the sheriff accepted the evidence of Ms McDonald and Mr Bradford with regard to the most suitable devices for both Ms McDonald's intended career and love of dancing. The OPN2 hearing aid is more suited to this type of activity than the OPN1 or Mini rite device which sits, at least in part, outwith the ear. The OPN2 device which sits completely in the ear canal is more compatible with this type of physical activity which Ms McDonald hopes will be central to her career and also her lifestyle. It is reasonable for the sheriff to allow a full life multiplier (based on Table 2 of the Ogden Table) for the general or day to day OPN1 device. It is clear from the sheriff's findings ([35 and [36]) and his

reasoning (at paragraph [129]) that the award for the OPN 2 device is made on account of her anticipated future career and wish to engage in dance. Clearly, it is not realistic to expect evidence to be led as to the likelihood of Ms McDonald being able to engage in physical activity and dance towards the end of her life. It is necessary for the court to take a reasonable and common-sense approach to the assessment of damages including for the second set of hearing aids. That will involve consideration being given to the overall effect of the award in respect of privately purchased hearing aids. It is, of course, accepted that Ms McDonald may continue to dance for her own pleasure and enjoyment for as long as she feels able. The sheriff accepted that the same multiplier should be applied to the OPN2 as the general day to day hearing aids. However, the sheriff was not addressed fully on the appropriate multiplier, if at all, as it appears that no issue was taken with the figures and basis on which the pursuer's schedule of damages was calculated. Nonetheless we have considered the appropriateness of applying a full life multiplier. The purpose of the award for the second set of hearing aids is mainly but not solely occupational. Whether a whole life multiplier is justified in these circumstances, is a matter primarily for the sheriff who heard the proof. Although we have reservations whether we, sitting as an appeal court, would have taken the same approach as the sheriff to the assessment of damages under this head this was not a ground of appeal advanced before us. We raised the issue to allow parties to clarify what their approach to quantification had been at proof. Neither party advanced an argument that the sheriff had erred in his approach to the multiplier. Indeed, counsel for Indigo Sun accepted that the consequence of his approach to liability and causation led to the result that the question of damages or quantification of damages simply did not arise. No *esto* position was advanced if unsuccessful on causation. A token figure for solatium might be awarded if liability was established (see paragraph [124]) of the

sheriff's judgment). Accordingly, there being no suggestion of error on the part of the sheriff in his approach to quantification of damages we see no basis upon which we should reconsider the appropriate multiplier and multiplicand in respect of the second set of hearing aids. To do so would involve transgressing into the province of the sheriff at first instance and, of necessity, would also involve a degree of speculation which is not warranted in an appeal which raises no direct point on the assessment of damages. It is sufficient that we are satisfied that the sheriff followed the basic rule of compensation which derives from *Livingstone* (*supra*). This rule has been analysed and developed over time. Damages or compensation for injury and loss should be reasonable, fair and just. It must be based on the evidence and material available on which the sheriff exercises his judgement to assess the appropriate compensation. We are satisfied that the sheriff fulfilled his function to assess what was fair and reasonable compensation given Ms McDonald's age, loss and circumstances leading to an award of damages which can be justified on the material available to him.

[39] The appeal has been refused on all grounds advanced by the appellant who shall be liable to the respondent in expenses of the appeal as taxed. The appeal merits sanction for the employment of counsel.