Case No: A90CF152

Neutral Citation Number: [2015] EWHC 616 (QB)

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
CARDIFF DISTRICT REGISTRY

Cardiff Civil Justice Centre
2 Park Street, Cardiff CF10 1ET

Date: 13 March 2015

Before :

MR. JUSTICE PHILLIPS

- -

Between :

MICHAEL DENNIS DALTON and others

Claimant

- and -

BRITISH TELECOMMUNICATIONS PLC

Defendant

- -
- -

Mr Benjamin Williams (instructed by **Hugh James**) for the **Claimants**
Mr Andrew Hogan (instructed by **BT Legal**) for the **Defendant**

Hearing dates: 16th October, 3rd November 2014

- -

Judgment

Mr Justice Phillips:

1. A large number of claims have been brought by claimants against their employers or former employers for damages for noise-induced hearing loss ("NIHL") alleged to have been caused by exposure to excessive noise at work, sometimes still referred to as "industrial deafness" or "occupational deafness". In most of these cases the claimant's solicitors (and counsel where instructed) are acting pursuant to a conditional fee agreement ("CFA"), providing for a success fee.

2. Until 1 April 2013, sections IV and V of Part 45 of the Civil Procedure Rules provided for fixed success fees to be recoverable from defendants in specified employer liability claims. Although the rules changed on 1 April 2013 to reflect that success fees were no longer recoverable from defendants, they continue to be recoverable where CFAs had been entered before that date (see s.44(6) of the Legal Aid, Sentencing and Punishment of Offenders Act 2012) and the former provisions of Part 45 of the CPR still apply. Relevant extracts from those provisions are set out in an appendix to this judgment.

3. An issue has arisen in relation to the success fee payable by a defendant employer in the (very common) situation where a claim for damages for NIHL is settled before a trial has commenced. The issue is whether, in that context, NIHL is to be regarded as a disease. If NIHL is a disease, it falls within section V of Part 45, which provides for a success fee of 62.5% on settlement of claims in relation to diseases prior to trial (other than for certain specified conditions, neither of which encompasses NIHL). If, however, it is not a disease, it would be classified as an injury and, if 'sustained' on or after 1 October 2004, would fall within section IV, attracting a success fee of 25%. If sustained before that date, the success fee is not fixed and falls to be assessed by the court if not agreed.

4. On 4 April 2013, following a number of decisions at District Judge level which reached inconsistent conclusions, the Regional Costs Judge directed that the above issue be determined by a High Court Judge as a preliminary issue in costs proceedings in four nominated cases. This is my judgment on that issue.

5. The four cases all involve claims against BT by present or former employees (Messrs Dimelow, Fletcher, Griffiths and Hall). Each claim was compromised prior to trial, BT agreeing to pay compensation for NIHL suffered by the claimant as a result of using BT equipment which exposed their hearing to unsafe levels of noise. In each case BT has also agreed to pay the claimant's costs, but disputes the quantum of costs, in particular, challenging the success fee payable to the solicitors and (where instructed) counsel.

6. It is common ground between the parties that, until 2012, employer defendants (in reality their insurers, insurance of employer's liability being mandatory) proceeded on the basis that NIHL was a disease for the purposes of calculating success fees they were liable to pay following the settlement of NIHL claims. As set out in more detail below, such acceptance reflected the long-standing categorisation of NIHL as a disease in legislative, legal and medical contexts. In particular, it had been so regarded (and recognised as meriting a 62.5% success fee) in negotiations between representatives of personal injury lawyers and of the insurance industry in 2005,

resulting in an 'industry' settlement on that basis, which settlement section V of Part 45 was intended to give effect.

7. The change in the insurers' stance resulted from the decision of Males J in October 2012 in *Patterson v. Ministry Defence* [2012] EWHC 2767 (QB) [2013] 2 Costs LR 197. The issue in that case was whether non-freezing cold injury ("NFCI") is a disease within section V or otherwise fell within section IV of Part 45. Males J concluded that, as NFCI would not be regarded as a disease as a matter of ordinary language, and as he was not satisfied that the term disease had an extended meaning in Part 45 (other than by virtue of the express inclusion in section V of various specified types of injury), NFCI was not a disease, but an injury falling within section IV: even if claims such as those for NIHL had in practice generally attracted the higher success fees applicable under section V, that was not a sure foundation on which to conclude that an extended meaning of the term 'disease' was intended. At paragraph 50, Males J stated as follows:

> "*Notwithstanding the objective of CPR 45 is to provide a clear and certain test for the award of success fees, inevitably questions may arise as to whether particular conditions are to be characterised as 'diseases'. When that occurs, and when the answer is not obvious, there is in my judgment no single test or definition which can be applied. In circumstances where the rule itself provides no definition of disease, and where the dictionaries do not assist, it would not be practicable or sensible for the court to attempt to supply its own definition. Instead it will be necessary to apply the natural and ordinary meaning of the word, and in cases which are near the borderline to form a judgment by taking account of the various factors which point in one direction or the other.*"

8. The insurers (through the defendant) now contend that, applying the natural and ordinary meaning of the words, NIHL is not a 'disease' but rather an 'injury'. They rely upon the following aspects of the aetiology of NIHL, which are common ground between the parties' medical experts:

   i) NIHL is caused by the physical force which excessive noise (energy transmitted through the air in the form of waves) inflicts on the structure of the inner ear, in particular degrading hair cells which do not regenerate, but are replaced by scar tissue. The damage is primarily mechanical;

   ii) long-term exposure will typically lead to gradual progressive hearing loss, the symptoms often being first noticed when age-related hearing loss (presbyacusis) overlays the traumatic loss;

   iii) however, the damage suffered from each instance of exposure occurs immediately (although the subsequent scarring will affect the auditory system). If there is any progressive worsening of the damage (which is not proven in humans and the defendant's expert does not accept), it is limited to days or weeks after the exposure.

9. Mr Hogan, counsel for the defendant, asserts that the above aetiology demonstrates that NIHL is clearly an injury, being the result of damage to the ear caused immediately by physical trauma, and cannot be regarded as a disease in any natural or ordinary sense. He submits that therefore, applying the test formulated by Males J in *Patterson*, NIHL falls within section IV of Part 45. To regard NIHL a disease, he contends, would require a strained construction of the rules which, in this case, cannot be justified.

10. Mr Williams, counsel for the claimants, accepts that a layman, coming to the matter with no background, might well regard NIHL as an injury and not a disease. However, he contends that, when the rules are placed in their proper context, it is clear that the term 'disease' has an established meaning that includes NIHL and that the legislation must be taken to have adopted that established meaning. Further, he does not accept that the natural and ordinary meaning of the term 'disease' is limited to the view of the uninformed layman, but must reflect its usage, in particular, by doctors and lawyers.

11. Before considering the parties' respective contentions in detail, it is necessary to refer to the background materials (and in particular the legislative history) upon which the claimants, in particular, place heavy reliance.

<u>The background materials</u>

<u>(a) The medical classification of NIHL</u>

12. The defendant's medical expert, Mr A J Parker (a consultant ENT surgeon at the Royal Hallamshire Hospital, Sheffield), expresses the opinion that NIHL has the characteristics of a traumatic injury and is not a disease. However, as the claimants' expert, Dr Louisa Murdin (a consultant in audiovestibular medicine at Guy's and St Thomas' NHS Foundation Trust) points out, NIHL is frequently referred to in medical literature as a 'disease' of the ear. Mr Williams referred me, in particular, to the following:

    i) the World Health Organisation's International Statistical Classification of Diseases and Related Health Problems (ICD-10) in Occupational Health, published in 1999, which states that classifications of occupational diseases have been developed mainly for two purposes: (1) notification of labour safety and health surveillance and (2) compensation. Category A.7, Diseases of the ear and mastoid process, includes as a disease "*Noise effects on inner ear*";

    ii) Hunter's Diseases of Occupation (10th Ed, 2010), which includes, as Part 3, Diseases Associated with Physical Agents, section one of which relates to "*Sound, noise and the ear*".

    iii) Ludman's Diseases of the Ear (6th Ed, 1998), which includes a chapter (35) on traumatic senorineural hearing loss, dealing specifically with NIHL.

13. Mr Williams asserts that there is no medical literature expressing the view that NIHL is not a disease and Mr Hogan does not dispute that assertion. I am satisfied that, in medical terms, NIHL may properly be categorised as a disease and frequently is so categorised.

(b) The legislative history

14. It was common ground that the relevant terminology employed by the former CPR Part 45 has its origins in the Workmen's Compensation Act 1897 and subsequent legislation relating to employers' liability and national insurance. Section 1 of the 1897 Act provided:

> "*If in any employment to which this Act applies personal injury by accident arising out of and in the course of the employment is caused to a workman, his employer shall ... be liable to pay compensation ...* ".

15. It was soon recognised that liability to pay compensation should not be limited to accidents, but should be extended to conditions caused by extended exposure to noxious agents during work processes. By section 8(1) of the Workmen's Compensation Act 1906, employers' liability to pay compensation was extended to six 'diseases' specified in the Third Schedule to the Act, namely, anthrax, various forms of poisoning (lead, mercury, phosphorus and arsenic and ankylostomiasis (hook worm)). In each case the specified disease was defined in terms of a specified process by which it was contracted (in the case of lead poisoning, for example, any process involving the use of lead or its preparations or compounds). Section 8(6) provided that:

> "*The Secretary of State may make orders for extending the provisions of this section to other diseases and other processes, and injuries due to the nature of any employment specified in the order not being injuries by accident ...*"

16. It is apparent that the term 'disease' in the Third Schedule was being used as broad label for the newly-added conditions caused by work processes for which compensation would be payable, the term being used in contra-distinction to the term 'accident', not the term 'injury'. That was made even clearer in a 1907 report of the Departmental Committee on Compensation for Industrial Diseases which considered which conditions should be added to the Third Schedule to the 1906 Act. The report referred to the proper line of demarcation between 'accidents', which were already included in the 1906 Act, and 'diseases' which might be added to its Third Schedule. In fixing the boundary, the report regarded:

> "*as a result of 'accident' those symptoms which are due to 'mishap', an 'occurrence' or an 'event' – that is to say, to a cause which operates at a definite moment of time – and to regard as 'diseases' or as 'injuries not being injuries by accident' those which cannot be attributed to a cause of that character*'.

17. The report considered that boilermaker's deafness was a injury due to employment, but recommended that it should not be added to the list of diseases for which compensation was payable because it "*did not prevent a man from continuing his trade*".

18. In *Roberts v. Dorothea Slate Quarries Co Ltd* [1948] 2 All ER 201 the House of Lords considered whether silicosis qualified as an injury by accident within the meaning of s1(1) of the Workmen's Compensation Act 1925. Silicosis was recognised to be a disease, but not one which attracted compensation under that Act. The appellant therefore contended that his incapacity for work was caused by the final clotting of his lungs by particles of silica he had inhaled whilst working in slate quarries and was due either to one final accident or to a number of successive accidents. The House of Lords rejected his contention, Lord Porter stating at page 205:

> "*The distinction between accident and disease has been insisted on through out the authorities and is, I think, well founded. Counsel for the employers formulated the proposition on which he relied by suggesting that, where a physiological condition is produced progressively by a cumulative process consisting of a series of occurrences operating over a period of time, and the microscopical character of the occurrences and a period of time involved are such that in ordinary language that process would be called a continuous process, the condition is not produced by an accident or accidents with in the Acts. I do not know, however, that any explicit formula can be adopted with safety. There must, nevertheless, come a time when the indefinite number of so-called accidents and the length of time over which they occur take away the element of accident and substitute that of process. In my opinion, disability from silicosis is one of such instances. It cannot be said to be the result of injury by accident.*"

19. Lord Simonds concluded at page 208 as follows:

> "*... it is just because I find it impossible to say of a sufferer from silicosis that his disease is due to 'a series of accidents each one of which is specific and ascertainable,' that I cannot admit his claim under s 1 of the Workmen's Compensation Act, 1925. It was the same reason that led Parliament to supplement that section by other provisions for the benefit of workmen suffering from silicosis and similar diseases.*"

20. It is accordingly clear that the concept of a 'disease' was introduced in the relevant legislation to cover symptoms and injuries for which compensation was to be payable by employers, but which were not caused by accident. Certainly at this stage Parliament was not using the term disease in (what the defendants now contend is) its 'natural and ordinary' sense, but rather to cover injuries by process as opposed to injuries by accident.

21. The distinction between 'accident' and 'disease' was maintained in the National Insurance (Industrial Injuries) Act 1946. Section 1 provided that all persons employed in insurable employment shall be insured against personal injury caused by accident arising out of and in the course of such employment. Section 55 provided that such persons shall be insured also against any prescribed disease and against any

prescribed personal injury not so caused being a disease or injury due to the nature of that employment.

22. In October 1973 the Industrial Injuries Advisory Council reported, in accordance with section 62 of the National Insurance (Industrial Injuries) Act 1965, on the question of whether there were degrees of hearing loss due to noise that would satisfy the conditions for prescription under that Act. The report concluded that occupational deafness could meet the conditions for prescription and recommended that the disease should be covered by the industrial injuries scheme. Occupational deafness became a prescribed disease in 1975.

23. The same distinction between accident and disease was again maintained in the Social Security Act 1975 (which consolidated, among others, the National Insurance (Industrial Injuries) Acts 1965-1974) and in the Social Security Contributions and Benefits Act 1992. Section 94 of the 1992 Act provides that industrial injuries benefit shall be payable where an employed earner "*suffers personal injury by accident ...*". Section 108(1) then provides:

> "*Industrial Injuries benefits shall, in respect of a person who has been in employed earner's employment, be payable ... in respect of*
>
> *(a) any prescribed disease, or*
>
> *(b) any prescribed personal injury (other than an injury caused by accident arising out of and in the course of his employment),*
>
> *which is a disease or injury due to the nature of that employment ...*"

24. Regulations made under the 1975 Act, the Social Security (Industrial Injuries) (Prescribed Diseases) Regulations 1985, which remain in force, define prescribed diseases as "*a disease or injury described under ... these regulations, and references to a prescribed disease being contracted shall be deemed to include references to a prescribed injury being received".* Schedule1 lists prescribed diseases, including: "*A10 Substantial sensoineural hearing loss (occupational deafness)*". Occupational deafness is defined in the Regulations as "*the disease numbered A10 in part one of schedule 1 to these regulations*".

25. It follows that NIHL has been expressly defined as a 'disease' in subordinate legislation governing statutory compensation for industrial injuries for about 30 years and had been so defined about 20 years prior to the introduction of section V of CPR Part 45 in 2005.

(c) The Pre-Action Protocols

26. The distinction between 'injury by accident' and 'disease' further survives in the Pre-Action Protocols made under the Practice Direction on pre-action conduct. A Protocol in relation to personal injury claims was introduced with the CPR in April 1999. On 8 December 2003 a further Protocol for Disease and Illness Claims came into force. Section 2 contains the following:

> "*2.1 This protocol is intended to apply to all personal injury claims where the injury is not as the result of an accident but takes the form of an illness or disease.*
>
> *2.2 .... Disease for the purposes of this protocol primarily covers any illness physical or psychological, any disorder, ailment, affliction, complaint, malady, or derangement other than a physical or physiological injury solely caused by an accident or other similar single event.*"

27. It is quite clear that NIHL would constitute a disease under this definition and, indeed, the template for a letter of claim makes express reference to providing details of "exposure to noise or substances".

(d) The genesis of sections IV and V of CPR Part 45

28. In *Lamont v. Burton* [2007] 1 WLR 2814 (CA) the provenance of the rules relating to fixed success fees in various types of personal injury claims, including employer liability claims, was explained by Dyson LJ at paragraph 6 as follows:

> "*Although Sections II to V of CPR Pt 45 were recommended by the Civil Procedure Rule Committee and they subsequently received parliamentary approval, their genesis lies in a series of negotiations which were conducted under the auspices of the Civil Justice Council. The parties to the negotiations were some liability insurers who promoted the interests of defendants, and the combination of claimants' solicitors (represented by Association of Personal Injury Lawyers and the Motor Accident Solicitors Society) and legal expenses insurers who promoted the interests of claimants. The figures in sections II to V were the product of those negotiations.*"

29. The negotiations referred to by Dyson LJ were informed by reports by Paul Fenn and Neil Rickman, commissioned by the Civil Justice Council and the Department of Constitutional affairs, certain of the contents of those reports being referred to by the Court of Appeal in both *Lamont v. Burton* (at paragraph 7) and *Atack v. Lee* [2005] 1 WLR 2643.

30. Section IV of Part 45 came into force on 1 October 2004 pursuant to the Civil Procedure (Amendment No.2) Rules 2004. As already indicated, it provides for a fixed success fee of 25% in employer liability claims for injuries sustained after that date, but expressly excludes cases where the dispute relates to a disease. The next step was the negotiation, agreement and implementation of rules relating to fixed success fees in disease claims. It is common ground that there was no suggestion by any party at this stage that NIHL claims were already encompassed within section IV.

31. In December 2004 Fenn & Rickman produced the final version of their report on *Calculating Reasonable Success Fees for Employers' Liability Disease Claims*. The data used included that received from several insurers (including "AXA", a reference to a company in the same group as the defendant's insurer in these cases) and their panel solicitors, that data including details of NIHL claims. The report proceeded on

the unquestioned assumption that 'deafness' was a disease, including it in a list of five named 'diseases'. NIHL was the third largest category considered, after asbestos diseases and vibration white finger ("VWF"). The other diseases identified were Repetitive Strain Injury ('RSI') and 'stress'. Each named disease was analysed in terms of pre-claim failure rates and expected revenues (contrasting CFA revenues, with a 100% uplift on success at trial, with revenues if a traditional hourly rate applied). The report concluded that, in order to be revenue neutral, the success fee required on settlements of NIHL cases was 64.07%. The equivalent figure for VWF was 69.54%, whilst for all other unidentified diseases it was 58.51%.

32. The negotiations referred to in *Lamont v. Burton*, to which AXA was a party, concluded in April 2005. On 1 July 2005 the Civil Justice Council issued a press release announcing that:

> "*… agreement has been reached on fixed recoverable success fees for Employers Liability (Disease). The final mediation meeting on 25th April 2005 culminated in agreement in principle after a year of work on this difficult issue. The detail of that agreement has since been refined and approved by the Civil Procedure Rule Committee and will be implemented in October 2005.*"

33. The press release noted that the key provisions of the agreement included:

> "*27.5% success fee in claims arising from asbestos-related diseases ....*
>
> *62.5% success fees in claims arising from deafness, VWF and other diseases ... except RSI and stress claims.*
>
> *100% success fee in claims arising from stress and RSI ...*"

34. It therefore could not be clearer that the parties to the negotiations, the Civil Justice Council and the Civil Procedure Rule Committee all understood and intended (and the parties agreed) that NIHL (and VWF) would be included within the categories of disease claims in respect of which a 62.5% success fee would be payable on settlement prior to trial. Apart from the express reference to NIHL and VWF in the press release, it is plain that the figure of 62.5% has been reached by taking into account the data for those two conditions: in particular, as the figure suggested by Fenn & Rickman for 'other diseases' was only 58.51%, the only explanation for the insurance industry agreeing to the adoption of an overall figure of 62.5% is that the higher failure rates for NIHL and VWF claims were put into the equation.

35. Section V of CPR 45 came into force on 1 October 2005 pursuant to the Civil Procedure (Amendment No.3) Rules 2005. It divides disease claims into three types. Asbestos-related claims (type A) and stress and RSI claims (type B) were allocated success fees as per the agreement announced by the Civil Justice Council (27.5% and 100% respectively). All disease claims not falling within either type A or type B (type C) were allocated 62.5%. From the history set out above, the clear and obvious conclusion is that, although not expressly named, NIHL and VWF are included within type C. If that is not the case (as the defendant now contends), the scheme has

completely miscarried in that respect and the industry-wide agreement in relation to NHIL and VWF was not given effect.

36. The possibility of a last minute change of mind on the part of the Rules Committee as to the intended inclusion of NIHL and VWF can be ruled out. In its Annual Report for 2005 the Civil Justice Council recorded the following:

> "***Success fees in industrial disease cases:*** *as a result of further mediation work the Civil Justice Council was pleased to be able to report to the Department for Constitutional Affairs in April 2005 an 'industry' agreement on levels of success fees to be paid in conditional fee cases in claims relating to industrial diseases caused by asbestos, vibration white finger and industrial deafness among others. After receiving ministerial approval the agreement was implemented by the Rules Committee in CPR 45 effective from October 2005*."

(e) The classification of NIHL in litigation

37. Mr Williams further relies on consistent reference to NIHL as a disease in the litigation context (although, he accepts, not in an authoritative sense), including at the highest judicial levels. In particular:

    i) In *Barker v. Corus* [2006] 2 AC 572 HL, Lord Walker of Gestingthorpe, in considering whether mesothelioma amounted to 'indivisible damage', stated at paragraph 112:

    > "*It is not an industrial disease (such as hearing loss eventually leading to profound deafness) which becomes progressively more severe (though not necessarily at a uniform rate) with continuing exposure to harmful agents (such as excessive noise in shipyards).*"

    ii) In *Sienkiewicz v. Greif (UK) Ltd.* [2011] 2 AC 299 (SC) Lord Phillips of Worth Matravers P compared the divisible and non-divisible nature of various diseases, stating at paragraph 14:

    > "*More commonly, diseases where the contraction is dose-related are divisible. The agent ingested operates cumulatively when we are first to cause the disease and then to progress the disease. Thus the severity of the disease is related to the quantity of the agent that is ingested. Asbestosis and silicosis are examples of such diseases, as are the conditions of vibration white finger and industrial deafness, although the insults to the body that cause these conditions are not noxious agents. …*"

38. Further, legal textbooks such as *Occupational Illness Litigation and Monkman on Employers Liability* treat NIHL claims as claims for an occupational disease. The Health and Safety Executive notes on its website that "*industrial hearing loss remains*

the occupational disease with the highest number of civil claims accounting for about 75% of all occupational disease claims".

The interpretation of sections IV and V

39. In *Patterson* (above), Males J at paragraph 18, set out a number of established principles of statutory interpretation as follows:

> "*(1) The task of the court is to ascertain the intention of the legislature expressed in the language under consideration. This is an objective exercise.*
>
> *(2) The relevant provisions must be read as a whole, and in context.*
>
> *(3) Words should be given their ordinary meaning unless a contrary intention appears.*
>
> *(4) It is legitimate, where practicable, to assess the likely practical consequences of adopting each of the opposing constructions, not only for the parties in the individual case but for the law generally. If one construction is likely to produce absurdity or inconvenience, that may be a factor telling against that construction.*
>
> *(5) The same word, or phrase, in the same enactments, should be given the same meaning unless the contrary intention appears.*"

40. Mr Hogan submits that, applying those principles:

i) The starting point is the ordinary meaning of the words 'injury' and 'disease', that is, their 'proper and most known signification': *Bennion Statutory Interpretation* 6th Ed, page 1058.

ii) There is nothing in the language of sections IV and V, or any other part of CPR 45, that would require or justify a departure from the ordinary meaning of the words 'injury' and 'disease'. The literal meaning of the provisions (at least in relation to a modern Act) is to be treated as pre-eminent and of far greater weight than applies to any other interpretative criterion: see *Bennion*, page 781.

iii) As the provisions are public legislation (albeit secondary legislation) which applies to all employers liability claims funded by CFAs (whether or not the parties and their representatives were privy to or otherwise aware of the 'industry' agreement referred to above), they should be read and understood on their face, without reference to extraneous materials such as those relied upon by the claimants and set out above. That approach is necessary to ensure certainty and consistency.

41. As for the result of applying the "natural and ordinary meaning' test, Mr Hogan submits in paragraph 26 of his skeleton argument as follows:

> "*Is noise induced hearing loss a disease, or an injury inflicted by invasive sound energy? On consideration of the evidence of both Mr Parker and Dr Murdin on a natural and ordinary application of the word 'injury', NIHL/tinnitus is an injury and not a disease.* "

42. It can be seen that the thrust of Mr Hogan's argument is based on what he contends is the natural and ordinary meaning of the word 'injury', his starting point being the assertion that NIHL is an injury in ordinary parlance. He then simply assumes that it *follows* that NIHL, if it is an injury, cannot be a disease. He does not offer any analysis as to what does or does not fall within the ordinary meaning of the word 'disease', nor any basis for excluding NIHL from inclusion within that ordinary meaning (save for the assertion that it is an injury).

43. The problem with the above approach is that it is only valid if 'injury' and 'disease' are mutually exclusive terms. However, it is clear from sections IV and V themselves (leaving aside the lengthy legislative history and continuing current usage as referred to above) that there is (at least the very least) a degree of overlap between injury and disease, as recognised by Males J in *Patterson* (above) at paragraph 14. Although section IV applies only to injuries, rule 45.20(2)(a)(i) expressly excludes disputes relating to diseases from its scope: that would be otiose unless a disease could also be an injury. Further, although section V relates to diseases, it expressly includes a disease *or* physical injury caused by asbestos (rule 45.23(3)(c)) and a psychiatric injury caused by stress (rule 45.23(3)(d)(i)). Such injuries are expressly excluded from section IV by rule 45.20(2)(a)(iv) and are deemed to be 'diseases' for the purposes of section V.

44. It follows that the fact that NIHL may clearly be an injury does not determine whether or not it is also a disease within section V. That puts squarely in issue the true meaning of the term 'disease' in Part 45 and whether NIHL falls within that meaning.

(1) The meaning of 'disease' in the former section V of CPR Part 45

45. If viewed in isolation, the term 'disease' is far from easy to interpret and apply, as demonstrated by the fact that Mr Hogan did not attempt to explain its meaning or to explain why NIHL is not a disease (other than by asserting that it is any injury). In isolation, the term does not provide the certainty as to the success fee due in injury and disease claims funded by a CFA that was plainly the legislative purpose of sections IV and V.

46. However, as set out above, the term 'disease' has been used in legislation relating to employers' liability claims and insurance since 1906, legislation which Mr Hogan accepts represents the origins of the terminology used in the relevant section of Part 45. That legislation has consistently used the term 'disease' to cover conditions (including 'injuries') which have arisen by process rather than by accident. That exact distinction was adopted, only shortly before section IV and V were introduced, in the definition of 'disease' utilised in the Pre-Action Protocol for Disease and Illness claims. Pre-Action Protocols are published pursuant to a Practice Direction and their use is governed by provisions of the CPR and can have costs consequences: CPR 44.2(5)(a).

47. In *R v. Secretary of State for the Environment Ex parte Spath Holme Ltd* [2001] 2 AC 349 Lord Nicholls explained the proper approach to using legislative history and extraneous materials in interpreting a statute as follows (397C-398D):

> "*Additionally, the courts employ other recognised aids. They may be internal aids. Other provisions in the same statute may shed light on the meaning of the words under consideration. Or the aids may be external to the statute, such as its background setting and its legislative history. This extraneous material includes reports of Royal Commissions and advisory committees, reports of the Law Commission and the statute's legislative antecedents….*
>
> *Nowadays the courts look at external aids for more than merely identifying the mischief the statute is intended to cure. In adopting a purposive approach to the interpretation of statutory language, courts must seek to identify and give effect to the purpose of the legislation. To the extent that extraneous material assists in identifying the purpose of the legislation, it is a useful tool.*
>
> *This is subject to an important caveat. External aids differ significantly from internal aids. Unlike internal aids, external aids are not found within the statute in which Parliament has expressed its intention in the words in question. This difference is of constitutional importance. Citizens, with the assistance of their advisers, are intended to be able to understand Parliamentary enactments, so that they can regulate their conduct accordingly. They should be able to rely upon what they read in an act of Parliament. This gives rise to a tension between the need for legal certainty, which is one of the fundamental elements of the rule of law, and the need to give effect to the intention of Parliament, from whatever source that (objectively assessed) intention can be gleaned ...*
>
> *This constitutional consideration does not mean that when deciding whether statutory language is clear and unambiguous and not a productive of absurdity, the courts are confined to looking solely at the language in question in its context within the statute. That would impose on the courts much too restrictive an approach. No legislation is enacted in a vacuum. Regard may also be had to extraneous material, such as the setting in which the legislation was enacted. This is a matter of everyday occurrence.*
>
> *That said, courts should nevertheless approach the use of external aids with circumspection. Judges frequently turn to external aids for confirmation of views reached without their assistance. That is objectionable. But the constitutional implications points to a need for courts to be slow to permit external aids to displace meanings which are otherwise clear*

> *and unambiguous and not a productive of absurdity. Sometimes external aids may properly operate in this way. In other cases, the requirements of legal certainty might be undermined to an unacceptable extent if the court were to adopt, as the intention to be imputed to Parliament in using the word in question, the meaning suggested by an external aid. Thus, when interpreting statutory language courts have to strike a balance between conflicting considerations.*"

48. Mr Hogan submits that, whilst accepting that the court can consider the legislative history and extraneous materials set out above in this case, undue weight should not be given to them and that the 'literal' meaning should be preferred.

49. However, reference to the legislative history is particularly relevant in interpreting these provisions, not only because the terms 'injury' and 'disease' are otherwise relatively ambiguous, but also because the longstanding usage of those terms in antecedent legislation is reflected in the definition of disease in the Pre-Action Protocol, which can be regarded as 'internal' to the CPR, the very legislative scheme under consideration.

50. In my judgment consideration of the legislative history in this case strongly indicates that Parliament intended the term 'disease' in sections IV and V of CPR 45 to include any illness (whether physical or physiological), disorder, ailment, affliction, complaint, malady or derangement other than a physical or physiological injury solely caused by an accident or other similar single event. The provisions of section IV are therefore restricted to injuries caused by accidents (or other single events), preserving the long-established distinction.

51. The above conclusion is reinforced both by certain wording of the sections and by their substantive effect:

    i) Section IV provides that it does not apply to injuries sustained before a specified date (rule 45.20(20(a)(ii)), consistent with its application to injuries caused by a single incident, when the precise date the injury was suffered will be known. In contrast, that provision would be inapposite in relation to injuries resulting from process (such as NIHL). It would rarely be possible to identify a date on which such a condition was 'sustained' and the need to do so would give rise to uncertainty and argument (as indeed has incurred in relation to the four test cases). That issue does not arise if conditions and injuries not caused by a single incident or accident are diseases within section V, which does not provide a cut-off date.

    ii) The broad effect of sections IV and V is that success fees in injury claims are limited to 25% whereas higher percentages are provided for in disease claims. The rationale for higher success fees in disease claims must be that it is harder to prove how and when a disease was contracted than to prove how and when an injury was sustained. But that greater difficulty can only be to do with the difference between a (possibly) lengthy and unobservable process on the one hand and a single observable occurrence on the other, namely the difference between injury by process and injury by accident. No other distinction has

been suggested to explain the assumed difference in failure rates which must underlie the provisions.

52. I recognise that the above conclusion differs from that reached by Males J in *Patterson*, but it does not appear that the lengthy legislative history, nor its relationship with the current Pre-Action Protocol, was drawn to his attention.

53. Applying the above meaning of 'disease', there is no doubt that NIHL falls within section V of the former CPR Part 45. Whilst not forming part of the issue I am deciding, I should add (in the hope of clarifying a further area where disputes may arise) that the same conclusion would apply in relation to VWF.

54. Mr Hogan referred throughout to "NIHL/tinnitus", no doubt in order to ensure that claims for tinnitus (a perception of ringing in the ears) were covered by my ruling on the preliminary issue. To the extent that tinnitus is a symptom of NIHL or otherwise is caused by exposure to excessive noise, it also clearly falls within section V.

(2) Whether NIHL is a 'disease' for the purposes of sections IV and V of the former CPR 45

55. If I am wrong about the meaning of 'disease' in sections IV and IV, it is nevertheless entirely clear, in my judgment, that the term (however it is defined) must be taken to include NIHL.

56. First, the categorisation of NIHL has its own legislative history, pointing in only one direction. It has been a 'prescribed disease' for the purpose of national insurance and social security legislation since 1975, following detailed consideration and recommendation by an advisory council mandated to undertake that task by statute. Occupational deafness has been expressly defined a disease since 1985. In using the term 'disease' in section IV and V without any list or definition, Parliament must be taken to have intended to include conditions such as NIHL which had been and were currently defined as diseases for the purposes of closely-related legislation.

57. Second, in the context of claims for occupational diseases, NIHL claims are not only recognised as that type of claim, but account for a substantial majority of all such claims. NIHL is not merely an occupational disease, but is the paradigm case of such a disease. That accounts for the fact that, when considering issues arising in occupational disease claims, courts give as examples claims relating to NIHL (see paragraph 37 above). Further, given that section V makes specific provision for asbestos, RSI and stress claims, the category of other diseases which comprises type C would be denuded of content if it did not include the two other main types of widely recognised occupational disease, NIHL and VWF. It is inconceivable, when looked at in its proper litigation context and considering the mischief being addressed, that Parliament did not intend to include NIHL (and VWF) in type C in section V.

58. Third, the Civil Justice Council's press release puts the matter beyond any sensible argument, expressly recording that an 'industry' agreement was to be embodied in rules and would prove for the success fee in claims for NIHL and VWF to be 62.5%. Mr Hogan does not dispute that the press release is an admissible document and that it demonstrates that the intention of the parties to the industry negotiation, the Civil Justice Council and the Rules Committee was (at least at the date of publication) that

NIHL and VWF should be included as diseases in section V. His submission is that such private intentions must be ignored in favour of the literal meaning, which must prevail in public legislation, even if that means that (as in this case) the intended effect of the legislation miscarries.

59. However, sections IV and V were designed to regulate an aspect of claims between two clearly identifiable groups following negotiations and agreement between those groups under the auspices of the official bodies responsible for the legislation. The report of one of those bodies on the result of that process is a powerful factor in interpreting the legislation which is intended to enact the agreed outcome. In *R (Public and Commercial Services Union) v. Minister for the Civil Service* [2010] ICR 1198, Sales J considered the 1972 report of the Joint Superannuation Committee of the national Whitely Council in interpreting the effect of s2(3) of the Superannuation Act 1972. After stating his initial impression of the effect of the provision, Sales J stated at paragraph 38:

> "*That impression is reinforced by the terms of paragraph 12 of the joint committee report, which records the understanding of the staff and management sides at the time regarding the protections which would apply with the introduction of the Superannuation Bill. Such contemporaneous understanding of the effect of an act, particularly by an official body like the joint committee, constitutes a powerful form of contemporanea expositio and is a legitimate aid to the construction of that Act: see Bennion on Statutory Interpretation, 5th ed (2008) pp 702-706, 711-712. That is especially the case where, as here, an Act is being introduced specifically to regulate relations between certain persons and it is those persons who have the understanding in question and the*."

60. I accept that there might be cases where the language of legislation is so clear that the court would be compelled to find that an intended scheme, even one as clearly evidenced as that reported in the Civil Justice Council's press release, had totally miscarried, the words actually used failing to give effect to what was intended by those who devised the scheme. But this is not such a case. I have set out above examples of NIHL being categorised as an occupational disease in medical literature, legislation, House of Lords and Supreme Court decisions, legal texts and the Pre-action Protocol for Disease and Illness claims, all of which goes to demonstrate that, consistently with the 'industry' agreement and the Civil Justice Council report of that agreement, NIHL may properly be categorised as a disease.

Conclusion

61. I therefore determine the preliminary issue in favour of the claimants: NIHL is a disease which falls within section V of the former Part 45 of the CPR, claims for damages for NIHL therefore attracting a 62.5% success fee if settled before trial. Such claims are not subject to section IV of Part 45.

62. I would add that defendant's insurers attempt to re-open (if not renege on) the industry agreement made in 2005 does them little credit. The large number of NIHL claims in which the argument about the success fee has been raised will have been

funded by CFAs which were entered on the basis that a 62.5% success fee would be recovered. To seek to limit such success fees to 25% is an opportunistic attempt to avoid part of the overall bargain (in relation to NIHL) whilst taking the benefit of the remainder (for example, in relation to asbestos claims, fixed at 27.5%).

63. I was invited by the parties to determine the further question of whether, if NIHL is not a disease within section V, the claimants in the test cases 'sustained' their 'injuries' before 1 October 2004 in order to determine whether their success fees were at large or whether they were fixed by section IV of the former Part 45. Given my ruling above on the preliminary issue, this question does not arise for determination. Indeed, one of the reasons for my decision on the preliminary issue is that the concept of the date an injury was sustained is inapposite where injury results from a process, such as in NIHL cases. For that reason, and because the question of date of injury is highly fact-specific, I do not consider it would be appropriate to express any views on that question.

64. I would like to thank both counsel for their co-operative approach to identifying the relevant questions and materials and for their helpful written and oral submissions.

APPENDIX

IV FIXED PERCENTAGE INCREASE IN EMPLOYERS LIABILITY CLAIMS

Scope and interpretation

45.20

(1) Subject to paragraph (2), this Section applies where –

(a) the dispute is between an employee and his employer arising from a bodily injury sustained by the employee in the course of his employment; and

(b) the claimant has entered into a funding arrangement of a type specified in rule 43.2(1)(k)(i).

(2) This Section does not apply –

(a) where the dispute –

i) relates to a disease;

ii) relates to an injury sustained before 1st October 2004; or

iii) arises from a road traffic accident (as defined in rule 45.7(4)(a)); or

iv) relates to an injury to which Section V of this Part applies; or

(b) to a claim –

i) which has been allocated to the small claims track; or

ii) not allocated to a track, but for which the small claims track is the normal track.

(3) For the purposes of this Section –

(a) 'employee' has the meaning given to it by section 2(1) of the Employer's Liability (Compulsory Insurance) Act 1969; and

(b) A reference to 'fees' is a reference to fees for work done under a conditional fee agreement or collective conditional fee agreement.

Percentage increase of solicitors' and counsel's fees

45.21

In the cases to which this Section applies, subject to rule 45.22 the percentage increase which is to be allowed in relation to solicitors' and counsel's fees is to be determined in accordance with rules 45.16 and 45.17, subject to the modifications that –

(a) the percentage increase which is to be allowed in relation to solicitors' fees under rule 45.16(b) is –

…

(ii) 25% in any other case; and

(b) the percentage increase which is to be allowed in relation to counsel's fees under rule 45.17(1)(b)(ii), (1)(c)(ii) or (1)(d) is 25%.

…

V FIXED RECOVERABLE SUCCESS FEES IN EMPLOYER'S LIABILITY DISEASE CLAIMS

Scope and Interpretation

45.23

(1) Subject to paragraph (2), this Section applies where –

(a) the dispute is between an employee (or, if the employee is deceased, the employee's estate or dependants) and his employer (or a person alleged to be liable for the employer's alleged breach of statutory or common law duties of care); and

(b) the dispute relates to a disease with which the employee is diagnosed that is alleged to have been contracted as a consequence of the employer's alleged breach of statutory or common law duties of care in the course of the employee's employment; and

(c) the claimant has entered into a funding arrangement of a type specified in rule 43.2(1)(k)(i).

(2) This Section does not apply where –

(a) the claimant sent a letter of claim to the defendant containing a summary of the facts on which the claim is based and main allegations of fault before 1st October 2005; or

(b) rule 45.20(2)(b) applies.

(3) For the purposes of this Section –

(a) rule 45.15(6) applies;

(b) 'employee' has the meaning given to it by section 2(1) of the Employers' Liability (Compulsory Insurance) Act 1969;

(c) 'Type A claim' means a claim relating to a disease or physical injury alleged to have been caused by exposure to asbestos;

(d) 'Type B claim' means a claim relating to –

(i) a psychiatric injury alleged to have been caused by work-related psychological stress;

(ii) a work-related upper limb disorder which is alleged to have been caused by physical stress or strain, excluding hand/arm vibration injuries; and

(e) 'Type C claim' means a claim relating to a disease not falling within either type A or type B.

(The Table annexed to the Costs Practice Direction contains a non-exclusive list of diseases within Type A and Type B.)

Percentage increase of solicitors' fees

45.24

(1) In the cases to which this Section applies, subject to rule 45.26, the percentage increase which is to be allowed in relation to solicitors' fees is –

(a) 100% if the claim concludes at trial; or

(b) where –

(i) the claim concludes before a trial has commenced; or

(ii) the dispute is settled before a claim is issued,

To be determined by rule 45.24(2).

(2) Where rule 45.24(1)(b) applies, the percentage increase which is to be allowed in relation to solicitors' fees is –

…

(c) in type C claims --

…

(ii) 62.5% in any other case.

…

Percentage increase of counsel's fees

45.25

(1) In the cases to which this Section applies, subject to rule 45.26, the percentage increase which is to be allowed in relation to counsel's fees is –

(a) 100% if the claim concludes at trial; or

(b) where –

(i) the claim concludes before a trial has commenced; or

(ii) the dispute is settled before a claim is issued,

to be determined by rule 45.25(2).

(2) Where rule 45.25(1)(b) applies, the percentage increase which is to be allowed in relation to counsel's fees is –

(a) if the claim has been allocated to the fast track, the amount shown in Table 6; and

(b) if the claim has been allocated to the multi-track, the amount shown in Table 7.

(3) Where a trial period has been fixed, rules 45.17(2) to 45.17(5) apply for the purposes of determining the date fixed for the commencement of the trial.

TABLE 6

Claims allocated to the fast track

	If the claim concludes 14 days or less before the date fixed for commencement of the trial	If the claim concludes more than 14 days before the date fixed for commencement of the trial or before any such date has been fixed
Type A Claim	50%	27.5%
Type B Claim	100%	100%
Type C Claim	62.5%	62.5%

TABLE 7

Claims allocated to the multi-track

	If the claim concludes 21 days or less before the date fixed for commencement of the trial	If the claim concludes more than 21 days before the date fixed for commencement of the trial or before any such date has been fixed

Type A Claim	75%	27.5%
Type B Claim	100%	100%
Type C Claim	75%	62.5%

SECTION 25B OF THE COSTS PRACTICE DIRECTION

25B.1 The following table is a non-exclusive list of the conditions that will fall within type A and Type V claims for the purposes of rule 45.23.

Claims Type A Asbestosis
Mesolthelioma
Bilateral Pleural Thickening
Pleural Plaques

Claims Type B Repetitive Strain Injury/WURLD
Carpal tunnel syndrome caused by Repetitive Strain Injury
Occupational Stress