Neutral Citation Number: [2022] EWCA Civ 616

Case No: CA-2021-000494

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE COUNTY COURT AT BURNLEY
HIS HONOUR JUDGE KHAN
D60YJ976/LA01/2020

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 05/05/2022

Before :

LADY JUSTICE THIRLWALL
LORD JUSTICE SINGH
and
LADY JUSTICE ANDREWS

- -

Between :

MARK STOREY	**Claimant/ Appellant**
- and -	
BRITISH TELECOMMUNICATIONS PLC	**Defendant/ Respondent**

- -
- -

The Appellant appeared in person.
Mark Diggle (instructed by **DWF Law LLP**) for the **Respondent**

Hearing date: 10 March 2022

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Approved Judgment

This judgment was handed down by the Judge remotely by circulation to the parties' representatives by email and release to The National Archives. The date and time for hand-down is deemed to be 10:30am on Thursday 5th May 2022.

Lady Justice Andrews:

INTRODUCTION

1. On 12 April 2017, the appellant, Mr Storey, issued a claim in the county court against his then employer, British Telecommunications Plc ("BT"), for damages and financial loss arising from personal injuries suffered in consequence of an accident at work. The injuries concerned are permanent bilateral multi-tonal tinnitus, hyperacusis (intolerance of loud noise), and psychological injury due to acoustic shock.

2. BT served a defence in which there is little, if any, factual dispute. They put Mr Storey to proof of the alleged accident and his injuries, and (without prejudice to the burden of proof) denied breach of duty, causation and quantum. The defence does not take issue with the existence of acoustic shock as a recognised medical condition.

3. The claim was allocated to the multitrack, and case management directions were given in October 2018 which, among other matters, gave permission to each party to rely upon the report of an acoustic engineer. Time for service of such reports was subsequently extended to 31 July 2019. The order also made the usual provision for the experts to have a joint discussion and prepare a joint report. BT obtained a report. Mr Storey did not. When the time came, neither party served a report from an acoustic engineer.

4. BT contended that in the absence of such evidence, Mr Storey could not prove that they were in breach of the duty of care which they owed him as their employee. On 5 February 2020 they applied for summary judgment or to strike out the claim under CPR 3.4(2) on the basis that Mr Storey had no real prospect of succeeding at trial. The application was supported by a witness statement from a Ms Louise Rutherford, a claims manager at Grayfern Law, BT's then solicitors. I shall return to consider the contents of that statement later in this judgment.

5. Deputy District Judge Reynolds refused the application, but BT appealed successfully to HH Judge Khan. Mr Storey appeals to this court, with the permission of Lewison LJ, on the single question whether the judge was right to decide that the claim must fail in the absence of expert engineering evidence.

6. As this appeal arises in the context of an application for summary judgment or to strike out the claim, the claimant's case must be taken at its highest. In the present case, that means that the assumption must made in Mr Storey's favour that the trial judge would accept the medical and other scientific evidence adduced by him relating to acoustic shock, which is the source of the information about that condition set out in this judgment. It must also be assumed that any contentious factual issues would be resolved in favour of the claimant at trial.

7. This case has a number of extraordinary features, including the fact that it transpired in the course of the hearing that the evidence relied on by BT in support of its application for summary judgment was unreliable. In consequence it has been necessary for me to set out certain of the evidence in much greater detail than would ordinarily be the case on a second appeal turning on a single legal issue.

ACOUSTIC SHOCK

8. There are several slightly different definitions of "acoustic shock", but in the UK it is defined as "an adverse response to an acoustic incident resulting in alteration of auditory function". An acoustic incident is defined as "a sudden, unexpected noise event which is perceived by the affected person as loud". The noise can occur due to sudden random electrical events whilst using a telephone headset or handset.

9. According to an occupational health and safety guide for call centres issued by the Acoustic Safety Programme in August 2006, acoustic shock is characterised by auditory symptoms occurring immediately after the acoustic incident, and in some individuals further symptoms develop over time. These symptoms can include discomfort or pain around the ear, altered hearing, dizziness, tinnitus, dislike or even fear of loud noises, anxiety, and depression. Both medium and late onset symptoms may continue in the long term.

10. Acoustic shock is different from, and unrelated to, noise-induced hearing loss, caused when people are exposed to sound that is loud enough to damage the ears. Acoustic shock may be caused at a level of noise well below that which presents a risk of noise-induced hearing loss, and the adverse impact may be due more to the pitch and acoustic pressure than to the sound level itself. A paper published in the Journal of Laryngology and Otology in 2007 by McFerran and Baguley makes the point that noises that generate acoustic shock do not have an intensity and duration profile that would be regarded as dangerous to the auditory system within the framework of existing workplace legislation. The learned authors refer to research conducted in Australia and Denmark which identified triggering acoustic incidents featuring sounds of intensities varying from 82 to 120 Db and 56 to 108 Db respectively.

11. The same paper identifies many potential causes of triggering sounds in a call centre workplace, including faulty telephone or headset equipment, transmission faults within the network, and misdirected tones from facsimile machines or modems, as well as malicious acts such as a whistle being blown down the telephone line. Thus the mere fact that an acoustic incident has occurred is not indicative of negligence.

THE CLAIM AND DEFENCE

12. The claim arose from an incident which occurred on the afternoon of 8 April 2014. Mr Storey was then employed as a customer sales advisor in a BT call centre in Lancaster. His monoaural headset was connected to the turret via the handset, with its own power supply. He was wearing it against his right ear. He took an incoming call. Whilst he was speaking to the customer, Mr Storey was exposed to a sudden intense high-pitched crackling sound through the headset, which he described as "feeling like someone had put a knitting needle through my ear." This caused him to remove the headset and throw it down on the desk. He reported the matter to his acting line manager, Ms Ashley Walsh, who was present at the time.

13. Mr Storey says he experienced symptoms of nausea and dizziness that evening and a high pitched multi-tonal whistling sound in his right ear, which caused him serious sleep disturbance then and since. He also had a headache down the side of his head which lasted for 48 hours. The tinnitus persisted. He became intolerant of loud noise, to the extent that even the sound of a colleague tapping a chocolate orange on the

table to unwrap it was unbearable. He underwent numerous examinations and tests, and a course of cognitive behavioural therapy to help to alleviate the symptoms of the tinnitus. Despite this, the tinnitus became bilateral in September 2014. It is now classed as permanent. He has developed a fear of putting anything over or close to his ears.

14. Mr Storey's claim is complicated by the fact that he suffered tinnitus in his right ear some six months previously, due to an unrelated incident when he was hit on the head by a football. His case is that before the incident on 8 April 2014, the symptoms had largely resolved, though the earlier incident possibly left him with a heightened sensitivity in his right ear. He has served two expert medical reports upon which he relies to prove his medical condition and that it was caused by acoustic shock. One of those reports is by Dr Laurence McKenna, a consultant psychologist, who is one of the authors of the ASP guidance.

15. In their defence, BT alleged that Mr Storey was provided with a headset which limited noise exposure to below actionable levels, and denied that he was exposed to excessive noise interference from the headset he was using. They relied upon the noise limiting capabilities of the equipment that Mr Storey was using (para 5(a)) and averred that the equipment used by Mr Storey "monitors and automatically adjusts sound levels to ensure that the noise emitted does not exceed actionable levels" (para 5(b)). BT also pleaded that the equipment provided to Mr Storey was suitable and sufficient for purpose, was maintained in an efficient state and working order, and was in good repair (para 5(c) and (d)).

THE JUDGMENT BELOW

16. HH Judge Khan accepted the submission of Mr Diggle, who appeared for BT on that occasion (as he did before us) that it was fatal to Mr Storey's claim that he could not establish the level of noise to which he was exposed on 8 April 2014. He found that without proof of the level of noise, Mr Storey could not establish that BT should have foreseen that he might have been exposed to that level of noise, but failed to take reasonable steps to avoid his being injured in the manner in which he claims.

17. The judge went on to characterise Mr Storey's failure to serve an engineer's report as a breach of case management directions, and struck out the claim. This was presumably on the basis that, although the directions for service of expert engineering reports were couched in permissive terms, the time stipulated for service of what the judge regarded as vital expert evidence had passed.

18. In my judgment, the judge was plainly wrong to accept Mr Diggle's argument. Given the evidence that acoustic shock can occur at lower levels of noise than the levels which would cause physical damage to the ear, Mr Storey would not need to prove how loud the noise was, if he can prove that it was of such a nature as to cause him to suffer acoustic shock.

19. The question whether BT should have reasonably foreseen in April 2014 that a call centre operator using a headset would be exposed to the risk of acoustic shock from acoustic incidents, is quintessentially a question of fact, depending on the state of knowledge in the industry of the existence of the condition and its causes at the relevant time. Likewise, the question whether in the circumstances that obtained at the

relevant time in the Lancaster call centre, BT ought reasonably to have foreseen the risk that Mr Storey might suffer an acoustic shock from a sudden high pitched crackling sound directed into his ear through his headset is purely an issue of fact.

20. The question for this Court is whether at this stage it is fatal to Mr Storey's claim that he has not adduced evidence from an expert acoustic engineer because, even if the judge were to resolve those issues in his favour, Mr Storey cannot prove a breach of the duty of care without such evidence.

21. In determining that question in favour of BT, HH Judge Khan failed to place any weight on the fact that, for reasons beyond his control, Mr Storey could not reasonably have served a report from such an expert. The material upon which such an expert *might* have been able to form a view about the level of the noise and whether the equipment in use by Mr Storey at the time was faulty or adequate to protect him against the incidence of acoustic shock, all of which was in BT's custody and under its control, ceased to be available long before the deadline set by the court for exchange of experts' reports:

    a) The voice recording of the call during which the noise occurred was destroyed by BT before Mr Storey even issued his claim.

    b) The headset he had been using is missing, and because it was a second-hand headset, tests on a brand-new headset, even of the same type, would tell one nothing about whether the headset was responsible for the acoustic incident, nor about the ability of that particular headset to protect the user against acoustic shock due to an acoustic incident emanating from some other source. It was not suggested that tests on a different second-hand headset would be illuminating.

    c) The precise conditions under which Mr Storey was working at the time were altered on the day after the incident and would be impossible to replicate. There is no photographic record of the cabling beneath Mr Storey's desk, before or after it was rearranged by the technician who responded to the incident report, though Mr Storey did take photos of the cabling under a colleague's desk some months later.

    Although some of these matters are referred to in para 20 of the judgment, they appear to have played no part in the judge's analysis.

22. In circumstances where they were responsible for it, BT cannot rely upon the absence of that evidence (and the consequent inability of an expert to examine it and express an opinion about it) to defeat the claim before it reaches trial. That would be most unfair.

23. Furthermore, BT's application for summary judgment relied heavily on statements from their witnesses that the manufacturers had carried out tests on the headset in use by Mr Storey at the time of the incident, and that it was found to be functioning properly and operating to keep the level of noise exposure well within acceptable parameters. It was suggested that Mr Storey could not possibly gainsay the results of those tests without the assistance of an expert.

24. As Mr Storey submitted to us that it could be demonstrated from an examination of the evidence in the appeal bundles, which had also been before the lower courts, that BT's evidence about those tests was factually incorrect, it became necessary for this Court to review and probe the evidence on this issue. It transpired that Mr Storey was right. It is obvious from the documents disclosed by BT, and BT therefore should have known, that the tests on which they sought to rely were tests on a replacement headset of an entirely different type, and the evidence about them is therefore irrelevant. It is this aspect of the case which has made it necessary to set out in much greater detail than would normally be the case, the events leading to the assertion that the relevant equipment was tested by BT.

THE EVIDENCE

A. Witnesses and contemporaneous documents

25. By the time of the application before the district judge, both parties had served the statements of the witnesses of fact on whom they intended to rely. BT did not serve statements from Ashley Walsh and Tracy Taylor, who were respectively Mr Storey's acting and regular line managers. Nor did they serve a statement from Mark Aspden, one of BT's IT support technicians based in Blackburn, who attended the Lancaster call centre on 9 April 2014, the day after the incident, to try and fix the problem. None of BT's three witnesses was directly involved at the time of the incident or in its immediate aftermath.

26. The contemporaneous documentation disclosed by BT is consistent with Mr Storey's account (recorded in his work diary) that a week before the incident, on 27 March 2014, he had a similar problem with an acoustic incident on the line, which he reported to Ms Walsh orally, and which led to a change in his headset. Mr Storey says that up till then he had been using a binaural headset, and that Ms Walsh took a second-hand monoaural headset out of the desk of Tracy Taylor, for whom she was covering, and gave him that to use, telling him to "see how he got on with it". The 27 March incident, which Mr Storey characterises as a "near miss", was not formally recorded, and no other action was taken in response to it.

27. The incident giving rise to the claim occurred at around 16.40 on 8 April 2014, near the end of Mr Storey's shift. Mr Storey reported a fault to "FixIT Assisted Support" in Blackburn at 16.51 that day, and the incident was given a Bridge Case reference number, BR924379. Mr Storey sent an email to Ms Walsh at 17.02 which reads as follows:

> "Hi Ashley
>
> I am sending you this to let you know I was very shocked by the Noise that I had to listen to today on the phone and I had to take my headset off as I was shocked as the noise was so uncomfortable. I reported this last week to you and you advised me to change my headset which I did.
>
> I asked the customer if he minded me calling him back and he was totally fine with it.

> I just want to let you know that the Fault has been officially reported now and I am unhappy with working with faulty defective equipment."

28. Ms Walsh's reply, sent at 08.35 on the following morning (which happened to be Mr Storey's day off) was to "acknowledge however expand on (sic) the initial 'noise' you experienced last week". She said he was given three options on both occasions, namely, to log a fault, move desks, or change headset, and to email her the details. "Only yesterday were the steps followed and your choice [was] to take the change of headset option, which you clarified has been fine up until yesterday". Mr Storey contends that this is inaccurate. He was not told to report the earlier incident as a fault to IT Support, to move desks, or to send Ms Walsh an email. In due course, it will be for the trial judge to evaluate that evidence and make fact-findings about it.

29. At 08.24 on the morning of 9 April 2014, Mr Aspden emailed Ms Walsh to inform her that Mr Storey had reported the incident to IT support in these terms:

> "I was on the phone with a customer at approx. 16.40pm on Tuesday 08/04/14 and I had really bad interference where I had to literally take my headset off and throw it on the desk. I had the same problem last week on a call and the customer even heard the interference, on this latest call I asked the customer if he heard the interference and he said he didn't, my manager listened in on the call Ashley Walsh and she heard this as well, I feel shook up by this and I am not happy that I have had to esperience (sic) this sound as it is quite shocking."

30. Mr Aspden asked Ms Walsh whether the similar problem the previous week happened at the same desk, and was the headset replaced after the incident? Ms Walsh replied to that email at 08.44, copying Mr Storey's email to her after the 8 April incident, and her response, to which I have referred above, and stating that "the headset was changed last week". She did not identify that the replacement was a second-hand headset. She said of the incident on 8 April:

> "I heard the noise and due to a mass of cables under his [Mark Storey] desk the noise yesterday was more of an 'electrical' surge and does need addressing please.
>
> Mark has a DSE mouse therefore he is in work tomorrow and has acknowledged he will manage for one day, he is on leave the week after, therefore the timescale to correct and test two associated desks with Mark's is more than sufficient. I state other desks as another adviser adjacent to Mark also has interference and looking at the mass of cables under the desk (Mark Storey's).
>
> If you require any additional information please do not hesitate to contact me, however, as from today I am no longer covering and Mark is badged to Tracy Taylor."

31. Mr Aspden made a log entry on 9 April stating that he would "need to replace the NIU and turret as per procedure". The "NIU" (noise interference unit, also referred to as a digital amplifier) works in conjunction with the turret and headset and acts as a

filter which is designed to limit the level of noise interference from an unexpected and unplanned noise. Mr Aspden noted that the headset "has been changed." He ordered a test on the affected line, and then added that:

> "the people in the call centre seem to think that other cables within proximity IE power cables etc. could be causing this issue. I do not know whether this could be a possible cause so happy to take advice on this one, thanks."

There is no evidence as to what, if any advice Mr Aspden received in response to that request. Nor is there any evidence relating to what, if anything, was done regarding the other desks referred to by Ms Walsh. However, there is a record indicating that the line test was carried out and no fault was detected on the line itself.

32. A "research log" for 10 April 2014 records that Mr Aspden visited the Lancaster call centre on 9 April and "tidied up all cables and separated the telephony from the electrical cables". He described some "daisy chaining" from one four gang power socket to another which he "managed to remove by use of USB power for the NIUs". Mr Aspden recorded that the turret and NIU had been removed and replaced at Mr Storey's desk. He added "the NIU is a brand new Plantronics unit and therefore should be able to cope with any line interference". The (removed) units were "returned and stored in Blackburn in case of further investigation."

33. Mr Storey's evidence is that when he returned to work for the day on 10 April, he moved to a different desk and Tracy Taylor told him that a technician had been called out to fix his desk, that the turret had been replaced and that the headset he had been using had been sent off for testing. He was issued with a new double headset, but struggled with using it because of the tinnitus. He was on annual leave for 11 days, during which time he saw a doctor, who recommended "no headset use". He was then off work for a prolonged period from 2 May until 18 August 2014.

34. The incident on 8 April was not recorded in any formal incident report until August 2014, and even then the report was internal to BT. One of Mr Storey's complaints is that it was not reported by BT as a work-related accident under the RIDDOR regulations. However, it does appear that Ms Walsh left a voicemail message with someone in the HR department at the headquarters of the union to which Mr Storey belonged, the CWU, who contacted her by email at 10.40 on 10 April, and copied in the Health and Safety Department of the CWU. Someone in that department emailed Ms Walsh later that day and commented that it sounded as if BT's agreed Noise Interference reporting procedure had been followed in this case.

35. There is no explanation from BT of why it took until August 2014 for the 8 April incident to be formally recorded. There is a dispute in relation to the accuracy of the August report, in particular the statement within it, attributed to Ms Walsh, that Mr Storey was wearing a double headset when the incident occurred. One new piece of information in that report is that the NIU in place at the time of the incident, was a DMS/Netcom unit, but the source of that information is not identified.

B. The evidence of equipment tests

36. Among the documents disclosed by BT is a Plantronics report of testing carried out on a SupraPlus headset which measured the highest levels of noise obtained as within a 118db limit, which is the industry standard adopted to protect against noise-induced hearing loss. That report is dated February 2015. It was, at least initially, heavily relied upon by BT in its application for summary judgment.

37. BT served witness statements on 28 June 2019 which expressly identified that Plantronics test report as relating to the incident of 8 April 2014. The chief witness statement is from a Ms Jane Crook who is a Health and Safety lead within BT. Ms Crook stated in para 24 that the headsets and amplifiers/filters at the Lancaster call centre were all supplied by either Plantronics or JABRA, formerly GN Netcom. Then, in para 25, Ms Crook states that:

> "Mark's headset was returned to the manufacturer, and shown at Exhibit JAC 3 are the test results. Therefore I do not believe that Mark could have been exposed to any noise above the 118 db".

Exhibit JAC 3 contains the February 2015 test results by Plantronics on the SupraPlus headset. Another document in that exhibit, but not specifically mentioned in Ms Crook's witness statement, is an "evaluation report" by GN Netcom on a Digital Amplifier GN 8210 which was tested in conjunction with "Golden Sample GN 2100 mono headset" on 11 June 2015.

38. Andrew Coldwell, a BT Sales and Retention Centre manager, says in his witness statement at para 15 that the headset Mr Storey was using at the time he heard the noise (in April 2014) was not immediately sent for testing. He then states in para 17 that he understands that Mr Storey's headset was subsequently returned to the manufacturer Plantronics for testing. He does not identify the source of his understanding. He quotes verbatim from the test results on the SupraPlus headset in the February 2015 report. From this he, too, draws the conclusion that Mr Storey could not have been exposed to a noise in excess of 118db.

39. Ms Rutherford's witness statement, served in support of the application for summary judgment and signed with a statement of truth, states at paragraph 4:

> "As BT's disclosure and witness evidence makes clear BT process is that after an operator complains of hearing an alleged noise interference/acoustic shock the kit is returned to the manufacturer for testing. *The kit passed the testing i.e. the testing confirmed the kit was not faulty. All the noise limiting properties therefore were working as they should have been*". [Emphasis supplied].

40. Consistently with that evidence, the submission was made by counsel then appearing on behalf of BT before the district judge on 24 February 2020 (not Mr Diggle) that the tested headset was the same one as Mr Storey had been using in April 2014. The transcript of the hearing records counsel referring the district judge to the test on the Plantronics headset and the test of the amplifier exhibited to Ms Crook's statement. The district judge asked: "and these are reports which were done on the actual headset used by the Claimant?" to which counsel replied: "As far as I am aware Sir, yes. Yes,

the headset and the amplifier were both tested." He then referred the district judge specifically to the evidence of Ms Crook. Deputy District Judge Reynolds refers to the SupraPlus headset test results in para 21 of his judgment.

41. However, a closer examination of the documents disclosed by BT would have revealed (as it revealed to this court) that what Ms Crook, Mr Coldwell and Ms Rutherford had stated, and what counsel told the district judge about the headset test, was incorrect. The headset that was tested was a different headset.

42. In November 2014, an access to work report was compiled by Capita to address possible solutions to the difficulty in using a headset that Mr Storey was continuing to experience. Mr Storey referred us to that report, which notes that "the headset provided by BT is a standard headset. When using the headset it makes [Mr Storey's] tinnitus worse as it blocks out background noise and he has trouble hearing customers as some of the sounds are blocked out. He now has a ringing in his left ear." Capita recommended that BT should "ensure that if Mark has to use a headset for his role, he uses a good quality headset – SupraPlus enhanced monoaural HW251H headset". The manufacturer of that headset was Plantronics. This document proves that Mr Storey was not using a SupraPlus headset in April 2014.

43. Mr Storey's evidence is that he experienced another acoustic incident through the SupraPlus headset in January 2015, which he reported to Tracy Taylor, and which caused him discomfort and distress, although it was not as bad as the incident on 8 April 2014. This is borne out by the contemporaneous documents.

44. An email sent by Mr Aspden to Ms Walsh on 17 February 2015 stated that he had been contacted by Plantronics who were in possession of a headset from Mr Storey. They needed a form to be completed before they could start testing on the headset. Mr Aspden said he suspected that "this related to an incident that happened in January this year and not the one that occurred in April last year".

45. Thereafter, Tracy Taylor completed a form relating to a noise-related incident that occurred on 12 January 2015 which she stated had caused Mr Storey further distress. She described the incident as occurring at around 11.20am in the call centre in Lancaster. Mr Storey advised he had noise interference into his left ear which he stated lasted for a few seconds. He described the sound as "very high pitched". Ms Taylor explained on the form that Mr Storey had a previous episode of noise interference which resulted in him being diagnosed with tinnitus, and that "Access to Work recommended this headset to support Mark within his role." She stated that she believed the product had already been sent for examination and testing. The form identifies the product as a SupraPlus headset with the product code HW251H.

46. An email was sent by a Ms Sarah Gardiner (from HR) to Mr Aspden at 09.17 on 26 February 2015 forwarding an "incident form for the headset from Lancaster ATE" which Tracy Taylor had asked her to forward to him. Mr Aspden forwarded this by email to Plantronics at 09.51. A summary of the results of the tests was sent by Plantronics to Mr Aspden by email at 10.26 on the same day, 26 February 2015, which said that a hard copy of the attached report, and the headset, would be sent to Tracy Taylor. Shortly afterwards, Mr Aspden sent an email to Ms Gardiner headed "Re BT Lancaster Headset Incident January 2015" and copying her in to the email he had received from Plantronics.

47. It is obvious from this evidence that the Plantronics report relates to the SupraPlus headset which was given to Mr Storey to use months after the incident which gave rise to his claim, and that it was tested because of a subsequent, different acoustic incident reported by him in January 2015. The whereabouts of the second-hand headset he was using on 8 April 2014, which he says Ms Taylor told him on 10 April had been sent off for testing, is unknown. On the material before this Court, it appears that it was preserved for some time after the incident but has been lost or destroyed subsequently.

48. It is, to say the least, unfortunate that this fundamental error was not noticed before the witness statements were finalised or before the application for summary judgment was made. It is regrettable that the error was not rectified by BT until the case reached this Court, and that even then, the correction was not volunteered but had to be extracted by us.

49. In his skeleton argument for the present appeal, Mr Diggle submitted, at para 13 that:

> "The Court would not be able to infer from the Claimant's evidence of momentary piercing intense noise that the noise interference unit that he was using was defective. *The Defendant ensured that after the incident the noise interference unit that was used by the Claimant at the time was tested.* The results of those tests are exhibited to the witness statement of Jane Anne Crook at appendix JAC 3. That statement itself was exhibited to the statement of Louise Rutherford in support of the application for summary judgment…" [Emphasis added].

50. At the hearing before us, Mr Diggle accepted that the headset test plainly related to a different headset. However, he did so only after Mr Storey had taken us to the documents which showed that he was given the SupraPlus headset in November 2014, and in response to a direct question from the Court. Mr Diggle maintained that the NIU which was tested in June 2015 was the unit in use at the time of the 8 April 2014 incident, though when pressed, he described the evidence in support of that contention as "thin".

51. The evidence is not thin: it is non-existent. There is no evidence from any of BT's three witnesses that the amplifier tested in June 2015 had anything to do with the equipment which was in use by Mr Storey on 8 April 2014. None of them mentions the amplifier test. Ms Crook exhibits the document alongside the headset tests, without making any reference to it in the body of her statement. The third BT witness, Mr Warburton, who managed the team of IT support technicians to which Mr Aspden belonged, and therefore might have been able to shed some light on what happened to the NIU that was in use by Mr Storey in April 2014, and whether (and if so when) it was sent off for testing, says nothing about it.

52. There is no evidence of the serial number of the NIU, nor of what became of it after it was removed to Blackburn following Mr Aspden's visit to the call centre on 9 April 2014 and its replacement by a brand-new Plantronics unit. The only evidence that it was a GN amplifier rather than an older Plantronics unit is in the August 2014 report of the 8 April incident, which described the headset that Mr Storey was using on that

date as a double headset and therefore may not be entirely reliable (though that is ultimately a matter for the trial judge).

53. There is no document in the evidence before us linking that amplifier test with Mr Storey, let alone with the incident on 8 April 2014. Waiting for over a year before getting the tests done is also inconsistent with BT's stated practice of sending off the equipment for testing immediately after a reported incident, which is what they did with the SupraPlus headset in January 2015. Moreover, Mr Storey was not the only person in the Lancaster call centre to complain about suffering an acoustic shock. The NIU that was tested could well have related to a different incident. There is simply no evidence to tell one way or another.

54. In short, the tests exhibited to Ms Crook's witness statement shed no light on whether the equipment that was in use by Mr Storey on 8 April 2014 was working properly. There is, and will be, no evidence about the properties of the headset or of the NIU that were actually in use on that date.

55. In answer to a question from my lord, Lord Justice Singh, Mr Diggle explained that paragraph 13 of his skeleton argument had been carefully drafted to refer only to the NIU and not to the headset. That indicated to us that BT and its legal representatives were alive to the problem with the evidence about the headset tests before that document was drafted. It is deeply regrettable that in those circumstances the Court was not told *in terms* in the skeleton argument that it was accepted that Ms Crook's witness statement contained a major factual error, and that the tests on the headset related to a different headset. Those tests were also in exhibit "JAC 3", to which the Court's attention was specifically drawn. An express correction would have saved a lot of time, but more importantly, there was a real risk that in its absence, the Court would have formed the same misleading impression as the district judge. The fact that this case is brought by a litigant in person makes it all the more important that steps were taken to ensure fairness and transparency.

56. That said, it is not for BT to establish that the headset or the NIU in use by Mr Storey at the time of the incident were in good working order. The burden of proof is on the claimant, Mr Storey, to establish that BT were in breach of the duty of care that they owed him and that this caused the injuries of which he complains.

IS THE ABSENCE OF EXPERT EVIDENCE FATAL?

57. Mr Storey's case is that in all the circumstances, BT had failed to take reasonable steps to protect him from an acoustic shock. He submitted that the 27 March acoustic incident reported to Ms Walsh was enough to put BT on notice that there was a potential problem at his desk, and a risk of acoustic shock, and that giving him a second-hand handset and sending him back to the same desk was an inappropriate and inadequate response. The incident should have been recorded and investigated and a proper risk assessment carried out. No investigation was ever carried out into the cause of the noise on that occasion, nor indeed was there any investigation into what happened on 8 April.

58. He also pointed out that Mr Aspden changed the way in which the "daisy-chained" cabling beneath his desk was arranged, from which a trial judge might infer that Mr

Aspden thought it was a problem which needed to be fixed. The reconfiguration might, for example, reduce the risk of overloading or power surges.

59. Mr Diggle complained that there was no pleaded case that the incident of 27 March was relevant to the scope of the duty of care or breach. He submitted that this was potentially prejudicial to BT because the witnesses who could have addressed the events of 27 March 2014 may no longer be available. However, BT knew from their own disclosed documents, as well as from Mr Storey's evidence, that there had been an acoustic incident involving Mr Storey the previous week which was neither recorded nor reported by Ms Walsh. They were not going to call Ms Walsh as a witness even though she was present on 8 April 2014 and heard the noise. It is fanciful to suggest that an express reference to the previous acoustic incident in the Particulars of Claim would have caused them to change their mind about calling her.

60. In any event, and irrespective of what is in the pleadings, the previous incident was part of the relevant factual background. One factual issue to be explored at a trial would be whether Ms Walsh's response of giving Mr Storey a second-hand headset was sufficient, or whether further steps and/or checks should have been carried out.

61. Mr Diggle submitted that before the trial judge could even inquire into whether BT should have done something to address the earlier incident, the court would need to have evidence about the level of the noise on 8 April. Although I do not accept that submission, for the reasons I have already stated, even if it were correct, it is impossible for Mr Storey to adduce such evidence and that is not his fault. If BT had preserved the voice recording of the call it might have been possible to measure the pitch and level of the sound, though it appears that this would require specialist equipment. But BT did not preserve the voice recording.

62. It appears to me that, unlike the district judge, the judge fell into the error of treating a claim for acoustic shock as if it were a claim for noise-induced hearing loss, which would not succeed unless the claimant was subject to sustained exposure to noise above certain acceptable limits contained in various health and safety regulations.

63. In the court below BT relied upon a report by a Dr Lower, a consultant in noise and vibration, in June 2019 in relation to a claim for acoustic shock brought against BT by someone else who worked in the Lancaster Call Centre. The judge thought this document was relevant and Mr Diggle sought to rely on it before us, but Dr Lower's report is concerned with whether the noise experienced was loud enough to cause hearing damage. Dr Lower makes much of the fact that the complainant was only exposed to the noise for a few seconds instead of over an hour, a point which is only relevant to noise-induced hearing loss. He does not address the published scientific evidence relied on by Mr Storey that noise levels below those required for noise-induced hearing loss can cause acoustic shock, and that the exposure does not have to be sustained. Dr Lower's report therefore does not advance BT's position in respect of the application for summary judgment.

CONCLUSION

64. For the reasons set out above, HH Judge Khan was in error in finding that the claim could not proceed without evidence from an acoustic engineer and the district judge was right to find that this case should progress to trial. I am reinforced in that

conclusion by the fact that Mr Storey would not be able to provide an acoustic engineer with the underlying data pertaining to the equipment he was using which might have enabled the expert to produce a report that would assist him, because BT have lost or destroyed it.

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

66. For those reasons, I would allow this appeal. For the avoidance of any doubt, I would set aside both the judge's order for summary judgment and his alternative finding that the claim should be struck out for failure to comply with case management directions, which also depended on the mistaken premise that the evidence of an expert engineer was critical to the success or failure of the claim.

Lord Justice Singh:

67. I agree.

Lady Justice Thirlwall:

68. I also agree.