SHERIFFDOM OF LOTHIAN AND BORDERS AT EDINBURGH
IN THE ALL-SCOTLAND SHERIFF PERSONAL INJURY COURT

[2021] SC EDIN 20

PN2949-18

JUDGMENT OF SHERIFF JOHN MUNDY

in the cause

MS HAESEL McDONALD

Pursuer

against

INDIGO SUN RETAIL LIMITED

Defender

Pursuer: Langlands, Adv
Defender: McGregor, Adv

EDINBURGH, March 2021

The sheriff, having resumed consideration of the cause, finds as follows:

Findings in fact

[1] The pursuer is 24 years old having been born on 4 March 1996. The pursuer resides at 60 Columba Road, Inverness, IV3 5HG.

[2] The defender is a limited company having its registered office at 63 Glasgow Road, Stirling, FK7 0PA.

[3] Between around January 2015 and February 2016 the pursuer was employed by the defender on a part-time basis as a salon assistant in the defender's premises, a tanning salon,

in Strathmartine Road, Dundee. Her job involved serving customers, cleaning, banking and checking stock.

[4] At this time, the pursuer was a student studying contemporary dance at Dundee and Angus College. She attended the college Monday to Friday.

[5] On Saturday 12 December 2015, the pursuer attended her work at the said premises in Strathmartine Road to carry out her shift between 9.00am and 1.00pm that day. She arrived at the premises at around 8.50am. She was working on her own in the salon.

[6] The salon comprised a reception area near to the front door, which led directly onto the street. In the reception area was a reception desk used by the defender's employees including the pursuer and where they would spend most of their time. The desk was to the right as you entered the salon. Across from the desk and to the rear of the premises were cubicles used by the customers. Within the premises there were two alarm devices on the ceiling. One was situated towards the front of the salon above and slightly forward of the reception desk. The other was situated towards the rear in between rows of cubicles on each side.

[7] Just after 9.00am on 12 December 2015 the fire alarm sounded within the premises and continued to sound until around 12.55pm. Fire alarms simultaneously sounded in other shop premises within the same building. There was no fire. The cause of the activation of the fire alarms is not known.

[8] The alarm within the premises had sounded unnecessarily on several previous occasions when different employees of the defender had been working in the salon and the defender through its management was aware of this. The defender's employee Steven Campbell was aware of this. One such occasion was the previous day. The pursuer became aware of the problem through contact with her work colleagues via social media.

[9] On 12 December 2015, the noise of the alarms made it difficult for the pursuer to concentrate on her work. The noise, which was excessively loud, caused the pursuer to have a headache and a ringing in her ears. It was painful to her ears. She was distressed. The noise could be heard by persons within their properties on the other side of the street.

[10] Around 5-10 minutes after the noise began the pursuer telephoned her manager, the said Steven Campbell, for assistance. She made it clear how loud the noise was. Her distress would have been obvious to Mr Campbell. The alarm could not be shut off by the pursuer. She had not been given any training in this respect or any information as to how to deal with the situation. Mr Campbell indicated that he would come to the salon but made it clear that in the meantime the pursuer was to remain where she was and carry on working. The pursuer was angry and frustrated. She had hoped that the alarm could be turned off or that she would be told to close the shop and go home. Had she done so without permission she was reasonably fearful that she would have lost her job. The potential for harm to the pursuer from exposure to noise from the fire alarm ought to have been apparent to Mr Campbell.

[11] For the next two hours the alarm continued to sound. For relief from the sound the pursuer spent a total of around 15 minutes, on separate occasions, standing on the pavement outside the salon.

[12] At around 11.00am the said Mr Campbell appeared at the premises and applied tape to both fire alarms devices to muffle the sound. The make, type, length and amount of tape applied is not known. Mr Campbell thereafter left the shop indicating that an engineer would be calling at some unspecified point. The distress of the pursuer and the continued risk of harm to her from the exposure to the noise of the fire alarm ought to have been apparent to Mr Campbell.

[13] With the tape applied, the sound of the alarm was to a certain extent muffled and not as loud or painful to her ears. Had the pursuer been offered ear protection by her employer she would have used it. Prior to the application of the tape the pursuer had to converse with customers by shouting.

[14] Before leaving, Mr Campbell informed the pursuer to keep working.

[15] Within the building where the salon was situated there were other premises including a chip shop and two charity shops. The alarms were also sounding in those premises at the same time. In the chip shop, the staff there were able to turn off the alarm. The staff in the two charity shops were sent home as their alarms could not be turned off.

[16] The alarm stopped sounding at approximately 12.55pm just before the end of the pursuer's shift at 1.00pm. The pursuer was near to tears. She was distressed. She had a headache and ringing in her ears. The ringing was tinnitus.

[17] The average noise level to which the pursuer was exposed on 12 December 2015 in the period prior to the arrival of Mr Campbell was approximately 87.5 dB.

[18] In the period after that until the end of the shift, the pursuer was exposed to a noise level of approximately 82.9 dB. Her exposure calculated over the period of an 8 hour' working day was approximately 82.3 dB (A) Lepd, representing an average of daily noise exposure over the course of a day.

[19] Following the shift, the pursuer continued to be aware of the ringing in both ears as well as a severe headache. The headache continued until the following day. The tinnitus has continued since although it is intermittent in the sense that the pursuer is more aware of it at some times than others.

[20] Immediately following the incident the pursuer experienced impairment of her hearing which she attributed to the ringing in her ears. She thought that this was having a

muffling effect on her hearing. She did not consider that she was suffering from deafness or loss of hearing.

[21] As a result of the noise exposure the pursuer suffered from a temporary threshold shift which has since become permanent.

[22] A few days after the incident the pursuer spoke to her mother about the problem and her mother indicated that the pursuer could be suffering from tinnitus.

[23] Immediately following the incident, the pursuer had difficulty conversing with others, as their voices seemed muffled. At college the pursuer had difficulty hearing what others had to say and had to ask them to repeat it. When she returned to college in January 2016, following the Christmas break, she was still not aware that she was suffering from hearing loss and attributed her difficulties to the ringing in her ears. In classes, she had to move to the front of the class in order to hear what was said by teaching staff. At her work with the defender, she struggled with customers' names and had to have them write down their names.

[24] At the beginning of 2016, the pursuer was in preparation for her final exams and tried to put these problems to the back of her mind. She left her job with the defender at the Dundee premises in February 2016 to concentrate on her work at college. Between January and May 2016, the pursuer was in touch with her mother in Inverness on a number of occasions and described the ringing in her ears.

[25] Following her final exams, the pursuer returned home to Inverness in around May 2016. It was apparent to her mother that the pursuer was not hearing properly. Her mother encouraged the pursuer to go to her GP in Inverness, which she did on 7 July 2016 when she reported tinnitus and hearing difficulties, the main reported concern being her

hearing. The GP referred her to Ms Aidah Isa, a consultant ENT surgeon at Raigmore Hospital, Inverness. The pursuer was not seen by the consultant until 17 December 2016.

[26] In the meantime, in view of the lengthy wait for an outpatient appointment, the pursuer consulted private hearing aid providers Hidden Hearing on 6 October 2016. They identified bilateral high frequency hearing loss and offered hearing aids at a cost of £5,298. The pursuer was unable to afford this and did not take up the offer.

[27] On 17 December 2016, the pursuer was seen by the said Ms Isa, Consultant Otolaryngologist. At that consultation, following audiometry, bilateral sensorineural hearing loss was confirmed as the diagnosis and hearing aids were suggested.

[28] Following this consultation the pursuer was provided with hearing aids on the NHS in about January 2017. The pursuer was reluctant to wear them, as they were uncomfortable. She was reluctant to accept that she had in fact sustained hearing loss at such an early age.

[29] The pursuer attended a consultation with Ms Isa once more on 22 February 2017 and repeat audiometry showed bilateral moderate to severe high frequency loss and some preservation of hearing in the lower frequencies. Ms Isa referred the pursuer to Professor Malcolm Laing, Consultant Otolaryngologist for his opinion on whether the hearing loss was due to loud noise exposure and in particular the exposure to the fire alarm.

[30] Professor Laing saw the pursuer on 27 March 2017 and he arranged further investigations with a view to exploring other causes of the pursuer's sensorineural hearing loss. Blood tests and MRI scans were negative. As at 4 September 2017, Professor Laing's working diagnosis was that the pursuer had sensitive inner ears and that most of her hearing loss had been caused by the exposure to noise.

[31] Prior to 12 December 2015, the pursuer did not suffer from tinnitus or hearing loss.

[32] The pursuer suffered from bilateral sensorineural hearing loss and associated tinnitus immediately following, and as a result of, the exposure to noise on 12 December 2015. The pursuer's hearing loss is likely to deteriorate with age. There has been a slight deterioration since the exposure.

[33] The pursuer needs to wear her hearing aids in order to hear properly when communicating with others. She wears them when working and when attending college. At home, the pursuer prefers not to wear her NHS hearing aids and will for example watch television with subtitles, and listen to music with headphones. She suffers difficulties with the hearing aids she presently has. Apart from being generally uncomfortable, her current hearing aids do not differentiate between speech and background noise. They amplify all noise, not just what she wants to hear. She hears her hair brushing against them. Despite wearing them, she has difficulties in busy environments or in environments with background music such as gyms where she intends to work after she finishes her current studies.

[34] Private hearings aids such as the Oticon OPN S1 MiniRite would be appropriate for her daily social interactions and of considerably more benefit to the pursuer, by improving the quality of what she hears and so allowing her to enjoy life to almost normal levels. The cost thereof is about £5,499 per pair (plus accessories) which would require to be replaced every 5 years.

[35] The pursuer graduated from college with first class honours in contemporary dance. However, due to her hearing impairment the pursuer has lost confidence and feels unable to pursue a career in dance. Notwithstanding her graduation, she found completing her qualification to be difficult. She has now begun a college course leading to an HND in health and fitness. She is in the first year of a two-year course. She finds that such a course

is easier given her hearing loss. She plans to embark on a second degree in sports science. The pursuer also helps children in dance classes and sports. Her future career will involve, like dance, vigorous physical activity. Her hearing aids have a tendency to flip or fall out during such activity. Further, the said private hearing aids that are appropriate for day to day activities would also fall out during such activity.

[36] In light of the activities involved in her future career, and to engage in dance, the pursuer will require to purchase private hearing aids suitable for the purpose such as the Oticon OPN 2 at an approximate cost of £3,999 (plus accessories) which would require to be replaced every three years.

Findings in fact and law

[37] At the material time the pursuer was exposed to noise in excess of the "lower exposure action value" as defined by regulation 4(1) of The Control of Noise at Work Regulations 2005 and in particular in excess of the daily personal noise exposure value of 80 dB (A-Weighted).

[38] Accordingly, the defender had an obligation in terms of regulation 5(1) of the said regulations to make a suitable and sufficient assessment of the risk from that noise to the health and safety of its employees including the pursuer, the risk assessment to identify the measures which needed to be taken to meet the requirements of the regulations, and such an assessment obliging the defender to consult with its employees or their representatives. The defender made no such assessment and was therefore in breach of regulation 5.

[39] In terms of regulation 6(1) of the said regulations the defender had a duty to ensure that the risk from exposure of its employees to noise was either eliminated at source or where this was not reasonably practicable reduced to as low a level as was reasonably

practicable. The defender did neither of these things and was consequently in breach of its duty in terms of the regulation. The application of tape to the alarm devices did not fulfil that duty.

[40] The defender had an obligation in terms of regulation 7(1) of the said regulations to provide personal hearing protectors to their employees upon request where the noise was at or above the lower exposure action value. A risk assessment carried out in accordance with regulation 5 would have identified the need for such protection and the need of the defender's employees to know of its availability. The purser would have requested such protection had it been available and had she known about it. The defender was in breach of regulation 7(1).

[41] Had the assessment required by regulation 5 of the regulations been carried out it would have identified measures needed to be taken to meet the defender's obligations in terms of the regulations and its obligations at common law to take reasonable care for the safety of their employees such as the pursuer and not to expose them unnecessarily to risk of injury through exposure to noise. That would have identified the steps to be taken to avoid exposing their employees, including the pursuer, to risk of injury from the noise of the alarm, a recurrent problem of which they were already aware.

[42] In addition to being in breach of the regulations, the defender was in breach of its duty at common law to take reasonable care for the safety of its employees, including the pursuer. The obligations in terms of those regulations were commensurate with its duties at common law. A reasonable employer would have taken such steps in furtherance of its duty of care.

[43] In particular, appropriate measures to meet the defender's obligations at common law would have been to identify and address the recurrent problem so that the alarm did

not sound unnecessarily; or to devise a system whereby, if the alarm did sound, the pursuer was instructed to remove herself from the premises when the alarm sounded in order to reduce the risk of injury; or alternatively to provide personal hearing protectors.

[44] The defender's employee Steven Campbell was negligent in failing to instruct the pursuer to remove herself from the premises when he became aware of her exposure to the noise of the alarm, both at the time of the pursuer's telephone call to him, and at any event when he arrived at the premises later. He knew or ought to have known that to do otherwise risked her safety. The defender is vicariously liable for that negligence.

[45] On 12 December 2015, the pursuer was exposed to conditions, which gave rise to a significant and reasonably foreseeable risk of injury in the form of tinnitus and hearing loss.

[46] The history and development of the pursuer's symptoms are consistent with there being a causal link between the exposure to noise and the damage to her hearing.

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

[48] The recovery in damages of the cost of private hearing aids for day to day use and use during vigorous physical activity for the purpose of the pursuer's future career and participation in dance is reasonable.

Findings in law

[49] The pursuer having suffered loss, injury and damage through the fault and negligence of the defender *et separatim* fault and negligence for which they are vicariously liable, is entitled to reparation therefor.

[50] The sum awarded in the decree to follow hereon is a reasonable estimate of the said loss and damage.

INTERLOCUTOR

Grants decree against the defender for a payment to the pursuer of the sum of TWO HUNDRED AND FORTY ONE THOUSAND TWO HUNDRED AND SEVENTY SEVEN POUNDS (£241,277) STERLING with interest thereon at the rate of 8 per cent per annum from the date of decree until payment; meantime reserves all questions of expenses, with a hearing thereon appointed on a date to be afterwards fixed.

NOTE

Introduction

[51] This is an action of damages at the instance of the pursuer against the defender, her former employer, seeking reparation for injury in the form of tinnitus and hearing loss arising from her exposure to noise from a fire alarm for almost four hours while working for the defender on 12 December 2015 as a salon assistant within their premises at Strathmartine Road, Dundee, a tanning salon.

[52] After sundry procedure, the case called before me for proof on 8 December 2020, and evidence was led on that and the subsequent three days. I heard counsel on their submissions on 16 December 2020. Counsel helpfully provided written submissions in advance. At the hearing on submissions, the sum sued for was increased from £80,000 to £250,000 on the unopposed motion of the pursuer. Following submissions I made avizandum. Thereafter on the subsequent motion of the pursuer, and by interlocutor of 24 December 2020, the case was put out for a By Order hearing so that counsel could address

me on the case of *Gardiner* v *Motherwell Machinery and Scrap Co. Ltd* 1961 SC (HL) 1. The hearing was appointed for 21 January 2021 and following further submissions from counsel, I again made avizandum.

[53] The proof was on both liability and quantum. The pursuer was represented by Mr Langlands, Advocate and the defender by Mr MacGregor, Advocate. The pursuer's proof consisted of evidence from (1) the pursuer herself; (2) Neil Bradford of Hidden Hearing; (3) Jodie Gray, another part-time employee of the defender; (4) Dick Bowdler, Acoustic Consultant; (5) Amelia Newton, a student colleague of the pursuer; (6) Larissa McDonald, the pursuer's mother; and (7) William McKerrow, Consultant Otolaryngologist. The defender's proof comprised one witness namely Iain Swan, Consultant Otologist.

[54] Putting the medical witnesses to one side for the moment, I considered the other witnesses to be credible and reliable. As will become apparent, the medical evidence on both sides was not without difficulty.

The issues

[55] The pursuer's case on record is expressed as being on the basis of fault at common law and breach of statutory duty under reference *inter alia* to the Control of Noise at Work Regulations 2005 including regulations 4, 5, 6 and 7. Vicarious liability for the actings and omissions of the defender's employee Steven Campbell is also founded upon in the pleadings but the focus of the pursuer's case came to be upon the defender's personal duty of care to take reasonable care for the health and safety of the pursuer and not to expose her unnecessarily to risk of injury under reference to its obligations under the regulations. In essence, it is said that the pursuer should not have been exposed to the noise of the fire

alarm and should have been instructed to leave the premises after it had been activated. This was developed in submissions under reference to *inter alia* the requirements of the regulations in relation to risk assessment and provision of personal hearing protectors. It is averred that as a result of the exposure, the pursuer suffered tinnitus and hearing loss with consequent loss and damage. The defender's pleadings amount to a denial of breach of duty, the only substantive averment being in relation to causation, being that the pursuer suffers from progressive congenital hearing loss unconnected to the noise exposure.

[56] There did not appear to be any issue that the pursuer suffers from moderate to severe high frequency sensorineural hearing loss in both ears. The principal issues as they came to be argued before the court were:

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

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

(3) The consequences thereof in damages if breach of duty and a causal link were established.

Enterprise and Regulatory Reform Act 2013

[57] As to breach of duty it was a matter of agreement that following the Enterprise and Regulatory Reform Act 2013 and in particular section 69 thereof a pursuer could no longer rely upon a breach of statutory duty alone to found a civil action it being necessary in this case to establish negligence on the part of a defender. However, while breaches of health and safety regulations are no longer actionable in their own right such regulations remain a

source of statutory duties with which an employer must comply and they remain relevant as evidence of standards expected of employers in civil cases (*Wright* v *National Galleries of Scotland* [2020] SAC (Civ) 6 at para. 29; *Gilchrist* v *Asda Stores Ltd* [2015] CSOH 77 at paras. 14-15).

[58] Accordingly, and this was accepted on both sides, the regulations founded upon by the pursuer in this case, the Control of Noise at Work Regulations 2005, are relevant in deciding the standards by which the defender had to comply thus informing whether or not the defender was in breach of its common law duty of care towards the pursuer. Of particular importance in this context must be the principle of risk assessment which underpins many of the health and safety regulations and it is properly to be regarded as a central consideration in determining whether or not the employer has taken reasonable care for the safety of its employees (*Kennedy* v *Cordia (Services) LLP* [2016] 1 WLR 597, paras 89 and 110; [2016] UKSC 6; *Charlesworth and Percy on Negligence* (14th Edition) at 13-75).

[59] However, the full impact of section 69 of the 2013 Act is as yet unclear in relation to those cases where the burden shifts to the employer in terms of regulations to show that it was not reasonably practicable to take certain steps to avoid a breach (see observations of the Court of Appeal in *Goldscheider* v *Royal Opera House* [2019] EWCA Civ 711 at paragraph 36).

[60] The provisions of the 2005 Regulations upon which the pursuer relies are set out later.

[61] There is no real dispute on the evidence as to what happened within the salon on 12 December 2015. That is set out in the findings in fact. Further, there is no real dispute that the pursuer suffers from tinnitus and high frequency sensorineural hearing loss. There was however, an issue as to when the pursuer's symptoms manifested themselves.

Onset of tinnitus and hearing loss

[62] That issue was in my view critical in this case for reasons that will become apparent. My findings in this respect are already as set out. The most important witness in relation to this aspect was the pursuer herself. It was submitted on her behalf that despite robust cross-examination the pursuer did not waver from her position that the onset of symptoms followed immediately upon exposure to the fire alarm. It was submitted on behalf of the defender that while the pursuer had given evidence that she had tinnitus since the index event her evidence was also that her hearing loss was not noticed by her until later in 2016 when she had returned home after completing her studies to live with her mother. Reliance was also placed on her medical records to show that the pursuer did not mention symptoms to her GP in spite of several visits subsequent to the incident until July 2016. Reference was also made to the pursuer's consultation with Ms Isa a Consultant ENT Surgeon on 14 December 2016 when it was recorded that the tinnitus went away after about two hours and subsequently returned on an intermittent basis and that the hearing problems first started in March or May of 2016.

Conclusions on this issue

[63] While the letter from Ms Isa to the pursuer's GP following the consultation (at page 79 of the core bundle) would seem to support the defender's argument, the clinical notes (at page 95) taken by Ms Isa on the day of that consultation are not entirely consistent with that summary of the position. While the notes reflect that the tinnitus had initially gone away but then had become intermittent and was now constant, they also reflect that the pursuer reported having suffered bilateral hearing loss for 11-12 months prior to the

consultation. That takes us back to December 2015 or January 2016. The notes record in addition that the pursuer noticed hearing problems from March to May of 2016. Ms Isa was not a witness and so the consultation could not be explored with her. However, taken along with the pursuer's evidence, which I have found to be credible and reliable, there is not in truth a large divergence or consistency between her evidence and that medical evidence. The pursuer's explanation, which I accept, was that she experienced tinnitus from the date of the incident but was more aware of it at some times than others. That is what she meant by intermittent problems. Further, the pursuer was not aware that she had hearing loss *per se*. I accept her explanation that she considered the ringing in her ears (i.e. the tinnitus) to be masking her hearing. It was only later on when as she put it "she joined the dots" that she realised that she was in fact suffering from hearing loss. This became apparent as time went on and clear to her when she discussed her problems with her mother after her return home. She subsequently attended her GP in July of 2016 and reported the problems, the hearing being the main concern. This was also considered by Mr McKerrow, the pursuer's medical witness, to be an account consistent with suffering hearing loss following upon the incident involving the fire alarm. The fact that the pursuer experienced symptoms immediately after the fire alarm was supported by the evidence of her flatmate and student colleague Amelia Newton who spoke about the pursuer's hearing difficulties both at home in their flat and at college. Further, the pursuer's mother Larissa McDonald spoke of conversations she had with her daughter who described ringing in her ears. It appeared to the pursuer's mother in conversations between January and May of 2016 that her daughter may have tinnitus and was not hearing properly. She also confirmed the pursuer's evidence that there had been no prior hearing difficulties. The fact that I have found that the pursuer suffered

both tinnitus and hearing difficulties following upon exposure to the fire alarm is of course relevant to the question of causation in the event of a breach of duty being established.

Breach of duty

[64] Counsel for the pursuer founded heavily upon the 2005 Regulations as forming the basis of the defender's common law duty of care and counsel for the defender framed his submissions around the regulations. While no doubt the regulations were designed to deal with protection against long-term hearing loss in the course of employment, no issue was taken on either side as to the application of the regulations in this case.

Control of Noise at Work Regulations 2005

> **"Application**
>
> **3.**—(1) These Regulations shall have effect with a view to protecting persons against risk to their health and safety arising from exposure to noise at work.
> …
>
> **Exposure limit values and action values**
>
> **4.**—(1) The lower exposure action values are—
> (a) a daily or weekly personal noise exposure of 80 dB (A-weighted); and
> (b) a peak sound pressure of 135 dB (C-weighted).
>
> (2) The upper exposure action values are—
> (a) a daily or weekly personal noise exposure of 85 dB (A-weighted); and
> (b) a peak sound pressure of 137 dB (C-weighted).
>
> (3) The exposure limit values are—
> (a) a daily or weekly personal noise exposure of 87 dB (A-weighted); and
> (b) a peak sound pressure of 140 dB (C-weighted).
>
> (4) Where the exposure of an employee to noise varies markedly from day to day, an employer may use weekly personal noise exposure in place of daily personal noise exposure for the purpose of compliance with these Regulations.
>
> (5) In applying the exposure limit values in paragraph (3), but not in applying the lower and upper exposure action values in paragraphs (1) and (2), account shall be

taken of the protection given to the employee by any personal hearing protectors provided by the employer in accordance with regulation 7(2).

Assessment of the risk to health and safety created by exposure to noise at the workplace

5.—(1) An employer who carries out work which is liable to expose any employees to noise at or above a lower exposure action value shall make a suitable and sufficient assessment of the risk from that noise to the health and safety of those employees, and the risk assessment shall identify the measures which need to be taken to meet the requirements of these Regulations.

(2) In conducting the risk assessment, the employer shall assess the levels of noise to which workers are exposed by means of—

(a) observation of specific working practices;

(b) reference to relevant information on the probable levels of noise corresponding to any equipment used in the particular working conditions; and

(c) if necessary, measurement of the level of noise to which his employees are likely to be exposed, and the employer shall assess whether any employees are likely to be exposed to noise at or above a lower exposure action value, an upper exposure action value, or an exposure limit value.

(3) The risk assessment shall include consideration of —

(a) the level, type and duration of exposure, including any exposure to peak sound pressure;

(b) the effects of exposure to noise on employees or groups of employees whose health is at particular risk from such exposure;

(c) so far as is practicable, any effects on the health and safety of employees resulting from the interaction between noise and the use of ototoxic substances at work, or between noise and vibration;

(d) any indirect effects on the health and safety of employees resulting from the interaction between noise and audible warning signals or other sounds that need to be audible in order to reduce risk at work;

(e) any information provided by the manufacturers of work equipment;

(f) the availability of alternative equipment designed to reduce the emission of noise;

(g) any extension of exposure to noise at the workplace beyond normal working hours, including exposure in rest facilities supervised by the employer;

(h) appropriate information obtained following health surveillance, including, where possible, published information; and

(i) the availability of personal hearing protectors with adequate attenuation characteristics.

(4) The risk assessment shall be reviewed regularly, and forthwith if—

(a) there is reason to suspect that the risk assessment is no longer valid; or

(b) there has been a significant change in the work to which the assessment relates, and where, as a result of the review, changes to the risk assessment are required, those changes shall be made.

(5) The employees concerned or their representatives shall be consulted on the assessment of risk under the provisions of this regulation.

(6) The employer shall record—

(a) the significant findings of the risk assessment as soon as is practicable after the risk assessment is made or changed; and

(b) the measures which he has taken and which he intends to take to meet the requirements of regulations 6, 7 and 10.

Elimination or control of exposure to noise at the workplace

6.—(1) The employer shall ensure that risk from the exposure of his employees to noise is either eliminated at source or, where this is not reasonably practicable, reduced to as low a level as is reasonably practicable.

(2) If any employee is likely to be exposed to noise at or above an upper exposure action value, the employer shall reduce exposure to as low a level as is reasonably practicable by establishing and implementing a programme of organisational and technical measures, excluding the provision of personal hearing protectors, which is appropriate to the activity.

(3) The actions taken by the employer in compliance with paragraphs (1) and (2) shall be based on the general principles of prevention set out in Schedule 1 to the Management of Health and Safety Regulations 1999(**1**) and shall include consideration of—

(a) other working methods which reduce exposure to noise;

(b) choice of appropriate work equipment emitting the least possible noise, taking account of the work to be done;

(c) the design and layout of workplaces, work stations and rest facilities;

(d) suitable and sufficient information and training for employees, such that work equipment may be used correctly, in order to minimise their exposure to noise;

(e) reduction of noise by technical means;

(f) appropriate maintenance programmes for work equipment, the workplace and workplace systems;

(g) limitation of the duration and intensity of exposure to noise; and

(h) appropriate work schedules with adequate rest periods.

(4) The employer shall—

(a) ensure that his employees are not exposed to noise above an exposure limit value; or

(b) if an exposure limit value is exceeded forthwith—

(i) reduce exposure to noise to below the exposure limit value;

(ii) identify the reason for that exposure limit value being exceeded; and
(iii) modify the organisational and technical measures taken in accordance with paragraphs (1) and (2) and regulations 7 and 8(1) to prevent it being exceeded again.

(5) Where rest facilities are made available to employees, the employer shall ensure that exposure to noise in these facilities is reduced to a level suitable for their purpose and conditions of use.

(6) The employer shall adapt any measure taken in compliance with the requirements of this regulation to take account of any employee or group of employees whose health is likely to be particularly at risk from exposure to noise.

(7) The employees concerned or their representatives shall be consulted on the measures to be taken to meet the requirements of this regulation.

Hearing Protection

7.—(1) Without prejudice to the provisions of regulation 6, an employer who carries out work which is likely to expose any employees to noise at or above a lower exposure action value shall make personal hearing protectors available upon request to any employee who is so exposed.

(2) Without prejudice to the provisions of regulation 6, if an employer is unable by other means to reduce the levels of noise to which an employee is likely to be exposed to below an upper exposure action value, he shall provide personal hearing protectors to any employee who is so exposed.

(3) If in any area of the workplace under the control of the employer an employee is likely to be exposed to noise at or above an upper exposure action value for any reason the employer shall ensure that—
(a) the area is designated a Hearing Protection Zone;
(b) the area is demarcated and identified by means of the sign specified for the purpose of indicating that ear protection must be worn in paragraph 3.3 of Part II of Schedule 1 to the Health and Safety (Safety Signs and Signals) Regulations 1996(**1**); and
(c) access to the area is restricted where this is practicable and the risk from exposure justifies it, and shall ensure so far as is reasonably practicable that no employee enters that area unless that employee is wearing personal hearing protectors.

(4) Any personal hearing protectors made available or provided under paragraphs (1) or (2) of this regulation shall be selected by the employer—
(a) so as to eliminate the risk to hearing or to reduce the risk to as low a level as is reasonably practicable; and
(b) after consultation with the employees concerned or their representatives".

[65] At this point, it is relevant to consider the evidence of Mr Bowdler the Acoustic Consultant as to the measurement of noise. He is an engineer with expertise in dealing with noise and acoustics and is used to giving evidence and writing reports in cases of industrial deafness and noise nuisance cases. He has been self-employed on that basis for about 10 years. He explained that noise is generated by pressure levels in the air. The frequency at which the levels occur is expressed in cycles per seconds or kilohertz ("kHz"). Noise may consist of a single frequency but most noise consists of simultaneous sounds and different frequencies. The loudness of noise depends on the sound pressure level of the energy producing it and the level is measured in decibels ("dB"). The dB scale is logarithmic so that each three dB increase involves a doubling of the sound energy. The human ear is more sensitive to noise at some frequencies than at others. The sound pressure level across a range of frequencies is commonly expressed by a weighted measurement described as dB (A). In July 2019, Mr Bowdler took measurements using a calibrated sound level meter, which recorded results in dB with an A weighting. Readings were taken from a primary position being a seat behind the reception desk where employees such as the pursuer would be seated for much of the time. The noise to which the human ear is exposed generally fluctuates over any given period of time. The average noise over a period of time is described as the equivalent continuous sound pressure level designated as "Leq". To identify a unit of noise exposure the level of noise experienced during a working day of eight hours is calculated. This sound level is described as dB (A) Lepd or the average daily noise exposure level. It was not disputed that the calculation made by Mr Bowdler on a daily personal noise exposure level was 82.3 dB (Lepd), an adjustment from the figure in his report (at page 154/5 of the core bundle) of 82.9 dB to take account of the fact that the pursuer spent a total of some 15 minutes on the pavement outside the premises to gain relief

from the noise. Regulation 4 of the 2005 Regulations sets out the exposure limit values and action values. The "lower exposure action values" are a daily or weekly personal noise exposure of 80 dB (A weighted). The "upper exposure action values" are a daily or weekly personal noise exposure 85 dB (A weighted). The "exposure limit values" are a daily or weekly personal noise exposure of 87 dB (A weighted). Regulation 4(4) states:

> "Where the exposure of an employee to noise varies markedly from day to day, an employer may use weekly personal noise exposure in place of daily personal noise exposure for the purpose of compliance with these regulations".

[66] It is relevant to note Mr Bowdler's evidence that while the risk of injury due to noise exposure was lower below 85 dB than it was at or above that value, it was not insignificant, although he was careful say that he did not wish to stray into a medical area. He gave evidence under cross examination that if the noise exposure in this case as measured was adjusted so as to calculate it on the basis of weekly personal noise exposure then the result would be 75.8 dB (Lepw).

[67] Counsel for the pursuer submitted that the defender was in breach of regulations 5, 6(1) and 7(1). The essential point was that the exposure of the pursuer to noise above the "lower exposure action value" of 80 Db (A-weighted) Lepd presented a reasonably foreseeable risk of injury. That was because exposure at that level required the defender to take positive steps to assess the risk of injury arising from exposure at that level, to eliminate or reduce it to as low a level as is reasonably practicable, and to make hearing protectors available. In failing to take steps to comply with the regulations, the defender was in breach of its common law duty of care.

[68] There was a subsidiary argument which can be dealt with at this stage. It was submitted that it was possible, if not likely, that the pursuer could have been exposed to a level exceeding the "upper exposure action value" of 85 dB (A-weighted) Lepd. This

appeared to be on the basis of counsel's own calculations derived from the evidence of Mr Bowdler, assuming exposure for four hours at 87.5 dB (A) and making a deduction of 3 dB to take account of the evidence that every 3 dB increase amounts to a doubling of sound energy, making 84.5 dB over an 8 hour day, with an inference favourable to the pursuer on the basis of *Keefe* v *Isle of Man Steam Packet Company Ltd* [2010] EWCA Civ 683. It appears to me that there are fundamental problems with this approach: (1) possibilities in this context are not relevant unless elevated to likelihoods; (2) it assumes, contrary to the evidence, no reduction in noise following the application of tape; and (3) the approach was not discussed in evidence with Mr Bowdler. For present purposes therefore, the court must proceed on the evidence that the level was 82.3 dB (A) Lepd. As to the whether the exposure action values should be assessed on a daily or weekly basis, counsel for the pursuer submitted that the daily basis was appropriate and that is discussed below.

[69] Counsel for the defender submitted that the pursuer had failed to prove that the defender was in breach of the regulations. Both Mr McKerrow and Mr Swan acknowledged that in general terms exposure to noise levels below 85 dB(A) across an eight hour day is unlikely to cause damage to hearing, but accepted that "risk" for present purposes had to be defined under reference to the regulations and in particular the exposure action values. However, in relation to regulation 6(1), I took counsel to argue that there could be no breach of this in the absence of a noise level which required specific action in terms of the regulation. For example, if regulation 6(4) were complied with which referred to the requirement to reduce levels below the exposure limit value, there could be no breach of regulation 6(1), the implication being that it was not engaged in this case where only the lower exposure action value may have been exceeded. He separately argued that, contrary to the pursuer's submission, the exposure action values should be assessed on a weekly

basis. It was not argued that breach of statutory duty here would not amount to breach of the defender's duty of care at common law.

Daily or Weekly Personal Noise Exposure

[70] The significance of this discrete argument is quite clear. In the event that the daily personal noise exposure figure is used then the figure arrived at by Mr Bowdler of 82.3 dB, assuming that it replicated the conditions at the time of the pursuer's exposure, would exceed the lower exposure action value as prescribed by regulation 4 with the consequences which flow from that. The weekly basis would not equal or exceed the lower exposure action value.

[71] It was submitted for the pursuer that the correct approach was for the noise to be measured using the daily basis rather than the weekly one. Counsel submitted it was evident from the terms of the Directive 2003/10/EC of the European Parliament and of the Council of 6 February 2003, which was implemented by the regulations that the phrase "day to day" in regulation 4(4) meant "working day" and a corresponded with the terminology in schedule 1 part 2 paragraph 1 of the 2005 Regulations, which envisaged a normal week of five working days. It was submitted that the employer can only take into account noise exposure on working days. If the employer was permitted to take into account non-working days in his calculations the words "working day" would not appear in the Directive and the Lepw would be calculated over seven days not five. The reason only working days fell to be counted in calculating the exposure is that the employer only has responsibility for and can only be liable for working days. It neither has responsibility or liability for non-working days. The significance, it was submitted, was that the pursuer works part-time and was a student five days a week. The day of the exposure was a Saturday. Accordingly, a

calculation using Lepw was the incorrect approach. Further, the words of a Directive made it clear that it was only in "duly justified circumstances" that the weekly measure be adopted. It was not a duly justified circumstance to use the weekly measure where the employee works part-time.

[72] On the other hand, counsel for the defender submitted that regulation 4(4) was applicable in the present circumstances. The pursuer was not exposed to levels in excess of the lower exposure action value on a daily basis. Reference was made to Mr Bowdler's evidence in cross examination when he agreed with the proposition that the use of a weekly exposure level is appropriate in situations where noise exposure varies from day to day such as, by way of example, an employee who uses a noisy power tool for two hours on one day but no such exposure for the rest of the working week. That being so there was no discernible reason why the weekly exposure level should not apply to the pursuer. In that event it was clear from Mr Bowdler's evidence that the lower action value of 80 dB (A) on a weekly basis had not been exceeded.

[73] On this issue, I prefer the arguments presented on behalf of the pursuer. It is clear from regulation 4 that the daily personal noise exposure measure is the default position and this is emphasised by the terms of article 3 of the said Directive, which the regulations sought to implement. Article 3 provides *inter alia*:

> "In duly justified circumstances for activities where daily noise exposure varies markedly from one day to the next, member states may, for the purposes of applying the exposure limit values and the exposure action values, use the weekly noise exposure level in place of the daily noise exposure level to assess the levels of noise to which workers are exposed, on condition that:
>
> (a) The weekly noise exposure level as shown by adequate monitoring does not exceed the exposure limit value of 87 dB (A); and
>
> (b) Appropriate measures are taken in order to reduce the risk associated with these activities to a minimum".

[74] I agree with counsel for the pursuer that the words "in duly justified circumstances" indicate that that daily measure is the default position. The weekly measure requires to be justified where the noise exposure "varies markedly from one working day to the next". I agree with counsel for the pursuer who submitted that the employer was not entitled to take into account non-working days. It seems to me that the weekly basis envisages the working week at least of five days and this is supported by part 2 of schedule 1 of the regulations. Further, the application of this exception is on condition *inter alia* that "appropriate measures are taken in order to reduce the risks associated with these activities to a minimum". So for the exception to apply steps require to be taken to reduce the risks associated with the exposure to noise. There was no evidence in this case that any such measures were taken aside from the application of tape around the fire alarm. There is no evidence that that was an appropriate measure. Accordingly, I have concluded that Lepd is the appropriate measure.

Conclusions on Breach of Duty

[75] That the noise of the alarm was extremely loud cannot seriously be disputed in light of the evidence of the pursuer of the effect it had upon her at the time and indeed the evidence of her student colleague and flatmate Amelia Newton that the noise could be heard from within their flat across the street, all of which is reflected in the findings in fact. The best evidence of the level of noise to which the pursuer was exposed on 12 December 2015 is the test that was carried out by Mr Bowdler in July 2019. That resulted in a personal noise exposure level of 82.3 dB(A) Lepd. I have concluded that it is more likely than not that this was the approximate level of noise and that accordingly it was in excess of the lower exposure action value of 80 dB(A) Lepd. That being the case, then it must be assumed that

there is a perceived risk of injury, and indeed a reasonably foreseeable risk of injury, which requires to be acted upon in certain ways prescribed by the regulations. "Risk" in this context must be identified and to some extent judged with reference to the regulations. Regulation 3 provides that the regulations are to have effect with a view to protecting persons against "risk to their health and safety" arising from exposure to noise at work. Regulation 4 provides a graduated scale of risk from noise exposure, the lower threshold being 80 dB(A), the next threshold being 85 dB(A) and then 87 dB(A), with increasing measures required as the thresholds rise. It may be that the perceived risk is lower if less than 85 dB(A) but it must be regarded as significant otherwise there would be little point in the lower exposure action value. The question whether noise at that level is causative of a particular injury is a different matter.

[76] Accordingly, given that the noise level exceeded the lower threshold, the defender had an obligation in terms of regulation 5(1) to carry out an assessment of risk for the purpose of identifying appropriate measures to be taken to meet the requirements of the regulations and an obligation to comply with regulation 7(1) to provide personal hearing protectors on request. Further, I consider that regulation 6(1) was engaged and in terms thereof the defender had a separate obligation to ensure that the risk from exposure of its employees including the pursuer to noise was either eliminated at source or where this was not reasonably practicable reduced to as low a level as reasonably practicable. I can see no reason why this obligation should be restricted in its application because no specific measures are set out as for example in section 6(2) which requires the establishment of a programme of organisational and technical measures to deal with noise levels above the upper exposure action value and further measures in terms of regulation 6(4) where levels are above the exposure limit. The obligation in regulation 6(1) is independent in the sense

that it is to be judged not only by reference to exposure action values but is a general obligation to do everything reasonably practicable to remove the risk of any form of noise injury (*Goldscheider* v *Royal Opera House Covent Garden Foundation* [2018] EWHC 687 (QB) at para 202). In so far as it is to be judged by exposure action values there is in my view no reason to suppose that this is restricted to the situation where the upper exposure action value or exposure limit is exceeded.

[77] I have concluded that there is a breach of regulation 5(1). The defender did not carry out an assessment of the risk as required by regulation 5(1) and therefore did not identify measures to be taken to comply with the regulations, such assessment requiring consultation with their employees or representatives in terms of regulation 5(5). Such an assessment would have identified the steps to be taken to avoid exposing its employees, including the pursuer, to risk of injury from the noise of the alarm, a recurrent problem of which they were already aware.

[78] There is also a breach of regulation 6(1) as it cannot be said that the defender either eliminated the risk from noise or reduced that risk to as low a level as was reasonably practical. No steps were taken to deal with the alarm sounding off unnecessarily. The application of tape did not achieve elimination of the risk, nor did it bring down the level of noise to below the lower exposure action value. A reasonably practical and obvious step would have been to have a system in place to instruct the pursuer to remove herself from the premises in the event of the alarm sounding. There is also a breach of regulation 7(1). It is true that no personal hearing protectors were requested by the pursuer, but that was only because no risk assessment had been carried out, which would require its employees to be consulted. Had an assessment been carried out then that would have revealed the need for ear protectors in the event that the alarm was activated as it previously had done. The

pursuer's evidence was that had she been offered such hearing protection she would have accepted it. Responsibility cannot in my view be elided by virtue of the pursuer not requesting ear protectors in these circumstances.

[79] Given those breaches of the regulations, it is a small step in this case to conclude that the defender was also in breach of its duty at common law to take reasonable care for the safety of the pursuer and not to expose her unnecessarily to risk of injury. I consider that in this case compliance with the regulations founded on is something that a reasonable employer would do in order to comply with its duty of care at common law and that in breaching the regulations in the manner indicated it also breached its common law duty of reasonable care owed to the pursuer. To put it another way the statutory duties can reasonably be said to fall within the common law duty of care. (*Goodwillie* v *B&Q Plc* [2020] SCEDIN 2 at para 142). Indeed, there was no submission that a breach of statutory duty in this case would not occasion a breach of the defender's common law duty.

[80] In furtherance of their duty of reasonable care, they ought to have at least attempted to resolve the recurrent problem of the alarm sounding unnecessarily, and in any event to devise a system whereby, if the alarm did sound, the pursuer was instructed to remove herself from the premises when the alarm sounded in order to reduce the risk of injury; or at the very least have provided ear protectors having assessed the need for same and made the pursuer aware of their availability. The absence of a risk assessment is central to the defender's failings and is particularly culpable given the defender's prior knowledge of the problem. The prior knowledge was spoken to by the pursuer and her former work colleague Jodie Gray.

[81] As previously noted there is a case on record of the vicarious liability of the actings of Mr Campbell the defender's employee. I have little difficulty coming to the conclusion

that liability is established on this basis. Mr Campbell ought reasonably to have instructed the pursuer to leave the premises when it became unsafe for her to remain. The potential for harm was apparent, as evidenced by the fact the staff in the other shops in the building were sent home when their alarms could not be de-activated.

Causation

[82] The issue of whether the pursuer's tinnitus and hearing loss were caused by her exposure to the noise created by the fire alarm was the matter most hotly disputed. There were three aspects to the evidence in relation to this issue. There was the evidence from the pursuer supported by the evidence of Amelia Newton and Larissa McDonald, the salient points of which I have already noted. In summary, that evidence, which I have accepted as credible and reliable, shows that before the pursuer's exposure to the fire alarm she had no tinnitus or hearing difficulties. Following the exposure of the noise of the fire alarm, she developed tinnitus and hearing difficulties. As a result, she now requires to wear hearing aids in order to communicate with others. Another aspect was the evidence of Mr Bowdler, from his perspective as an acoustic consultant. His evidence has been noted. The other aspect of evidence in relation to causation is the medical evidence and it is that which has caused the greatest difficulty.

The Medical Evidence

[83] The medical experts were Mr McKerrow for the pursuer and Mr Swan for the defender.

[84] Mr McKerrow is a retired Consultant Otolaryngologist who practiced as a Consultant ENT Surgeon in the NHS from 1986 until 2013. His primary interest and

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

[85] He prepared a medical report in relation to the pursuer following examination on 12 September 2018 (page 2 of the core bundle). His examination confirmed moderate to severe bilateral hearing loss principally affecting the high frequencies. This was apparent from the audiogram carried out for the purpose of the examination and report. The hearing was very slightly worse on the left than the right and there was a slight "notching" effect at 6 KHz on the left. The audiograms were broadly comparable with those carried out in the ENT Department in Raigmore Hospital, Inverness on 19 September 2017 and 14 December 2018, although there appeared to be a slight deterioration since those earlier audiograms.

[86] In his report and in his evidence he referred to the accepted method of diagnosis of noise induced hearing loss as described in the publication *Guidelines on the Diagnosis of Noise-Induced Hearing Loss for Medico-Legal Purposes* by *Coles, Lutman and Buffin* (2000) which refers to the calculation of the "audiometric bulge" to distinguish noise induced hearing loss from hearing loss due to other causes. He referred to the three requirements prescribed by *Coles* mainly: (1) High frequency hearing impairment; (2) Noise exposure; and (3) Audiometric configuration. In his evidence in chief under reference to his report he indicated that requirements (1) and (2) were met but that in relation to requirement (3) the audiometric configuration was not classical for noise induced hearing loss on the right but on the left there was evidence of a notching effect at 6 KHz which pointed to noise induced cause. He

stated however that the absence of a notch or bulge to meet requirement 3 did not preclude the presence of noise induced hearing loss (NIHL) having an atypical audiometric configuration. It was also his evidence, and indeed that of Mr Swan, that while it was possible to have tinnitus and hearing loss simultaneously for different reasons it was more likely and most common for them to be linked. In Mr McKerrow's opinion based on his 36 years of experience of treating patients with hearing impairment that on the balance of probabilities the hearing loss and tinnitus in this case was due to noise damage caused by the incident referred to. He found the pursuer gave a credible account consistent with the development of her tinnitus and hearing loss following that event, without exaggeration and had dealt with her predicament in a most stoical manner. The prognosis for this type of hearing loss was for a slow deterioration with ageing.

[87] However, in cross examination Mr McKerrow had to concede that the second requirement in *Coles* had not in fact been met because the value of noise exposure on the basis of Lepd was less than 85 dB(A). Further, in relation to the third requirement, he conceded that that had not been met because the possibility of an atypical audiometric configuration not precluding the presence of NIHL would generally be below the balance of probabilities. However, Mr McKerrow still held to the view that the hearing loss was attributable to the noise of the fire alarm given the history disclosed by the pursuer, and the timing of the symptoms all being consistent with her account. Mr McKerrow said that the criteria in *Coles* were not the only criteria he considered and that his opinion remained the same given the history and presentation. The tinnitus and hearing loss were likely to have the same cause and both emerged following the exposure to the noise. So while in general it was not likely that damage from exposure to noise was to be expected where the level was below 85 dB(A) Lepd and where there was not the classic audiometric configuration on the

right side, nonetheless the history and presentation pointed to noise being the cause on the balance of probabilities.

[88] To be fair to Mr McKerrow, when he examined the pursuer and prepared his report the results of the noise level test carried out by Mr Bowdler were not known. However, having been appraised of that result he still held to the view that this was noise induced hearing loss for the reasons stated above.

[89] The defender's medical expert Mr Swan spoke to his report (page 162 of the core bundle). He had been a consultant for over 30 years with extensive clinical and teaching experience, as well as being extensively published. Mr Swan's qualifications and experience are attached to his report (page 171 of the core bundle). Mr Swan was also retired having stopped practicing in November 2016. He is a Consultant Otologist, that speciality relating to the ear part of ENT. Mr Swan was of the view that the pursuer has progressive congenital hearing loss with nothing in the history to suggest that her hearing loss was caused by the noise exposure. It is worth noting that the reasons he gives for that opinion are not related to the criteria in *Coles*, which he did not mention in his evidence. Before coming to his reasons, there is one point to note in the history and medical records to which he refers. On page 2 of his report, he refers to the fact that when the pursuer saw her GP on 7 July 2016 her main presenting symptom was tinnitus. Pausing there, as I have found in fact, it appears from the GP notes that the hearing was more the issue than the tinnitus at that time and that was confirmed by the pursuer's evidence.

[90] The opinion of Mr Swan confirms the nature of the pursuer's problems, in other words bilateral moderate to severe mainly high tone sensorineural hearing loss. He gives four enumerated reasons why the hearing loss was not in his opinion due to the noise from the fire alarm:

1. "She did not notice significant hearing loss at the time. She did not seek advice from her GP or other professionals until seven months later. During that seven-month period, she attended her GP on at least five occasions and did not mention her hearing. Ms Isa confirms that Ms McDonald '*felt her hearing was normal at the time*'.

2. From my clinical experience I would expect a person with a sudden loss of hearing of this scale to seek advice immediately. A sudden hearing loss of this scale would appear catastrophic to that person. They would have great difficulty in hearing normal speech and would be unable to continue a normal lifestyle".

3. Ms McDonald coped very well without her hearing aids and when first offered hearing aids, she declined them because she felt she did not need them. The obvious explanation for this is longstanding pre-existing hearing loss. Like many disabilities, individuals with longstanding hearing disability develop skills to cope with it. These skills do not develop overnight.

4. Ms McDonald has a mild speech impediment which is typical of someone who has had a high tone hearing loss since early childhood."

[91] Pausing there, it will be apparent that my findings in relation to the onset of the pursuer's symptoms, which have already been explained, directly impact on the factual basis for this reasoning. I will return to that.

[92] After the enumerated reasons for his opinion Mr Swan has some further short paragraphs which he spoke to in evidence. He indicated that these other factors, which he took into account in arriving at his opinion, were very much secondary and this was indicated by the fact that they were not numbered points. He states:

> "In addition, I think it unlikely that exposure to a fire alarm for two hours and a further two hours with the sound partially reduced would cause a permanent hearing loss like this".

The following paragraph in his report states:

> "I note that Ms Isa did not attribute Ms McDonald's hearing loss to noise exposure. Similarly, Professor Laing was noncommittal in attributing the hearing loss to noise exposure".

His conclusion was that the pursuer has progressive congenital hearing loss with nothing to suggest that her hearing loss was caused by the noise exposure.

Submissions on causation

[93] Counsel for the pursuer submitted if the court found that the defender has breached the duty of care owed to the pursuer, the injuries the pursuer sustained, namely tinnitus and hearing loss, were the very injuries that the regulations were designed to guard against. As such, there existed a *prima facie* causal connection between the breach and the injury. That being so, the onus was upon the defender to disprove causation. On this point reference was made to the case of *Goldscheider* and in particular the judgment of the Court of Appeal in that case at paragraphs 66 and 67 under reference to *Ghaith* v *Indesit Company UK Ltd* [2012] EWCA Civ 642 and *West Sussex CC* v *Fuller* [2015] EWCA Civ 189. It was submitted that it was entirely foreseeable that a breach of the 2005 Regulations could result in injury to ears and hearing loss. There was nothing within the 2005 Regulations to suggest that exposure above the exposure action values could be sustained for any period of "safe" time. Therefore, once the regulations were breached and the exposure action value was exceeded the risk of injury was foreseeable. It was wholly irrelevant in law that the 2005 Regulations envisaged long-term hearing loss rather than an immediate onset of symptoms in the manner sustained by the pursuer (*Hughes* v *Lord Advocate* [1963] AC 837 in which Lord Reid said at page 847:

> "This accident was caused by a known source at danger, but caused in a way which could not have been foreseen, and, in my judgment, that affords no defence".

On this point, and as already indicated, I do not think that there was any serious dispute in this case that risk was to be measured under reference to the thresholds for exposure action values.

[94] Counsel for the pursuer made reference to the evidence of the pursuer herself, Amelia Newton and the pursuer's mother Larissa McDonald as to the onset of symptoms. He submitted that in light of that evidence, the factual foundation upon which Mr Swan's opinion was based had fallen away.

[95] Counsel submitted that *esto* the pursuer carries the burden in relation to causation, the court should prefer the evidence of Mr McKerrow, although in his evidence he required to depart from his methodology, namely an incorrect reliance upon the literature by *Coles*, his opinion remained that the pursuer was suffering from noise induced hearing loss. His evidence was that there was a 95% chance her hearing loss was caused by the fire alarm. Mr McKerrow's position was that mathematical criteria were not the only ones to be taken into account. It was necessary to take into account the pursuer's history, the circumstances surrounding the onset of symptoms and her credibility. I was invited to accept Mr McKerrow's evidence notwithstanding his concessions. It also fitted with the working diagnosis of Professor Laing. He submitted to hold otherwise would require the court to determine that despite having an immediate onset of tinnitus, despite her reported symptoms fitting both Mr McKerrow's and Mr Swan's description of tinnitus, despite her suffering an immediate hearing loss and despite it being most commonly associated with tinnitus, the onset of her symptoms immediately post exposure was nothing more than a very unfortunate coincidence. Noise induced hearing loss was the only plausible explanation.

[96] For his part, counsel for the defender submitted that the pursuer had failed to prove that she had suffered from noise induced hearing loss and tinnitus as a result of her exposure to the sound of the fire alarm, the onus being on her to do so. As this was a common law case, the approach in *Goldscheider* had no application. He challenged the evidence of Mr McKerrow head on. Under reference to the concessions made by Mr McKerrow as to the *Coles* criteria he submitted that the evidence given in cross examination at best demonstrated an error in his application of the *Coles* requirements and at worst revealed a deliberate attempt to mislead the court. Counsel made reference to the functions and duties of an expert as explained in *Kennedy* v *Cordia (Services) LLP* who in turn made reference to *The Ikarian Reefer (No 1)* [1993] 2 Lloyds Rep 68. He submitted that where an expert had failed in his duties the court might exclude the evidence as inadmissible rather than treating it as a matter of weight. Counsel was effectively challenging the independence and impartiality of Mr McKerrow. Reference was made to Mr McKerrow's evidence in examination in chief to the effect that the three requirements for NIHL in *Coles* had been met. Reference was also made to his concessions in cross-examination in relation to requirements 2 and 3. I was asked to consider that Mr McKerrow may have had sight at some point of Bowdler's report prior to giving evidence which would place the duties imposed on an expert into sharp focus and might beg the question of why it is Mr McKerrow gave the evidence he did in relation to the second requirement of *Coles* being met. Further, in relation to the third requirement, Mr McKerrow omitted to refer to the full criteria that while the absence of a notch or a bulge did not preclude the presence of NIHL having atypical audiometric configuration. Such possibilities would generally be below the balance of probabilities. It was submitted that in light of these failures it was scarcely conceivable that Mr McKerrow could be regarded as either independent or impartial in

presenting his report. I was therefore invited to reject his evidence as inadmissible. If, contrary to that submission, the court was not prepared to exclude his evidence as inadmissible, the evidence did not meet the threshold to assist the court in the absence of reasoning supporting the proposition this was a case of NIHL. Mr Swan gave evidence that the hearing loss was not noise induced. Rather that it was congenital hearing loss. However, there was no onus on the defender to establish an alternative reason for her hearing loss and tinnitus.

[97] In the course of submissions, I raised an issue with counsel for the pursuer. It related to his submission that there was a *prima facie* case and thus reversed burden for the reasons he gave. If I accepted Mr Swan's evidence then causation could not be established. However if I did not accept Mr Swan's evidence and had difficulty with Mr McKerrow's evidence in relation to causation then this was an important issue. My question was whether such a *prima facie* case could arise given the fact that this was not (unlike *Goldscheider*) a case where direct reliance could be placed on the regulations. It was a case based on the defender's common law duty of care. I asked whether there were any authorities involving use of the common law duty which could assist. Counsel was not immediately aware that there were such cases and I left the matter there. However, as previously indicated, following the hearing on 16 December 2020 a motion was enrolled by the pursuer to put the case out By Order so that I could be addressed further on this issue and in particular under reference to the case of *Gardiner* v *Motherwell Machinery and Scrap Co*. The case was put out for a hearing on 21 January 2021 when I heard further submissions by counsel. I am grateful to counsel for the pursuer who frankly accepted that the case may not be in his favour but having regard to his duty as counsel to refer the court to all relevant authorities he felt he must do so.

[98] The critical passage occurs in the speech of Lord Reid at page 17 where he said:

> "In my opinion, when a man who has not previously suffered from a disease contracts that disease after being subjected to conditions likely to cause it and when he shows that it starts in a way typical of disease caused by such conditions, he establishes a *prima facie* presumption that his disease was caused by those conditions".

That was a case where evidence had been given by a number of expert witnesses as to the cause of the pursuer's dermatitis. That evidence was not satisfactory but the Outer House and House of Lords came to the view that in light of the evidence the criteria described in the passage were met.

[99] Counsel for the pursuer submitted that those criteria were met in this case although I think he accepted the difficulty that the court had therefore to be satisfied that the pursuer had been "subjected to conditions likely to cause" NIHL. For his part, counsel for the defender submitted that those criteria had clearly not been met.

Discussion on Causation

[100] The starting point in all of this is the general rule that a pursuer must establish on the balance of probabilities that a breach of duty at common law or by virtue of statutory provisions caused him injury (*Wardlaw* v *Bonnington Castings* 1956 SC (HL) 26). It depends upon the facts in each case whether the breach leads to a legitimate inference that the injury resulted from it. In G*ardiner,* Lord Kilbrandon (in the Outer House, at pages 2 and 3) made it clear that that causation was a question of fact, a jury question. In the House of Lords, Lord Guest (at page 19) said:

> "In view of the concession made by the respondents, the question is a pure question of fact whether on the balance of probabilities the dermatitis arose from the appellant's employment. In other words, whether it was more likely the appellant contracted the disease in his employment than elsewhere. A number of doctors gave evidence on each side. Their evidence disclosed a remarkable diversity of medical

> opinion, but I do not regard it as a medical question in the sense that it is necessary to decide which body of medical opinion is right. Regarding the matter as a question of fact, I think that it is more probable that the appellant contracted the disease in his employment and that the judgment of the Lord Ordinary was right".

[101] Clearly therefore, in order for the pursuer to succeed, I have to be satisfied as a matter of fact, on the basis of the evidence, whether it be medical or otherwise, or a combination of both, that on the balance of probabilities the pursuer's exposure to the fire alarm caused NIHL. To put it another way I have to be satisfied that it is more likely than not that that was the cause. There may of course be cases where, taking a common sense and pragmatic approach to the evidence, the court is permitted to draw an inference that there must have been a causal link in circumstances where the evidence is somewhat equivocal. If a pursuer proves that a defender was in breach of duty and that damage occurred which was of a kind likely to have been caused by such a breach this may be enough for the court to infer that the damage was probably caused by the breach, even if the claimant is unable to prove positively the precise causal mechanism (*Clerk and Lindsell on Torts* (23rd Ed.) at paragraph 2-07). That is similar to the approach envisaged by the court in *Gardiner*. In the context of that case (industrial dermatitis) Lord Reid set out essentially three criteria to raise a *prima facie* case on causation: (1) a person has not previously suffered disease; (2) he contacts it after being subject to conditions likely to cause it; (3) he shows that it starts in a way typical of disease caused by such conditions. In light of the evidence in this case, and in particular the concession by Mr McKerrow as to the level of noise in terms of Lepd generally required to lead to damage, I am unable to conclude that the pursuer's exposure to the noise from the fire alarm was <u>of itself likely</u> to cause NIHL. While there is evidence in this case that would entitle the court to come to a view that the first and second requirements are met, the same cannot be said of the second requirement. However,

counsel for the pursuer did not peril his case on that criteria. His primary submission was that the approach in *Goldscheider* should be adopted and that there was a reversed onus. That case involved the claimant, a viola player, being exposed to excessive noise while playing in an orchestra and by the end of the third day of rehearsals had suffered injury to his hearing. Interestingly, the noise measurement adopted in that case was Lepd. However, the passage of relevance from the judgment of the Court of Appeal is at paragraphs 66 and 67 as follows:

> "66. In *Ghaith* the claimant sustained a back injury which he claimed had resulted from lifting "white goods" in the course of his employment. The employer had failed to carry out an adequate risk assessment to enable him to take the appropriate steps to reduce the risk of injury from manual handling activities to the lowest level reasonably practicable as required by regulations. During a stocktaking of the claimant's delivery van, taking most of a single day between 9.30am and 4/4.30pm the claimant suffered the injury. It was held that the employer had not taken all reasonable precautions to reduce the risk. As for causation, Longmore LJ (with whom Ward and Patten LJJ agreed) said this:
>
> > 'CAUSATION
> > [23] This is not a separate hurdle for the employee, granted that the onus is on the employer to prove that he took appropriate steps to reduce the risk to the lowest level practicable. If the employer does not do that, he will usually be liable without more ado. It is possible to imagine a case where an employer could show that, even if he had taken all practical steps to reduce the injury (though he had not yet done so), the injury would still have occurred e.g. if the injury was caused by a freak accident or some such thing; but the onus of so proving must be on the employer to show that that was the case, not on the employee to prove a negative proposition that, if all possible precautions had been taken, he would not have suffered any injury'.
>
> 67. In the *West Sussex* case Tomlinson LJ (with whom Moore-Bick LJ and Sir Robin Jacob agreed) commented upon this passage in Longmore LJ's judgment in *Ghaith* as follows (at paragraph 22):
>
> > '[22] It may be that this passage has been misunderstood. It is not perhaps the easiest passage to follow, perhaps because Longmore LJ has run together the two separate concepts, breach of duty and causation. It is however important to note the context in which he has done so, which is in a case with the very risk inherent in the operation of repeated lifting of heavy or awkward loads has eventuated, viz, back injury, and where the employer had carried out no sufficient risk assessment. Therefore, it is one of those plain

> cases where the claimant demonstrates without more a *prima facie* causal connection between the inherently risky operation and the injury. Furthermore, it is a case where the employer is in breach of duty in having failed to carry out a sufficient risk assessment, and in order to exonerate himself needs to show that he has nonetheless taken appropriate steps to reduce the risk of injury to the lowest level reasonably practical. Those are the circumstances in which Longmore LJ said that causation was not a separate hurdle for the employee. It was not a separate hurdle because the employee had already made out a *prima facie* case, based on the occurrence of the risk inherent in the manual handling operation he was asked to undertake. Longmore LJ recognised that, even in such a case, and where the employer cannot show that he has taken appropriate steps to reduce the risk to the lowest level reasonably practicable, it is only "usually" that he will be liable without more ado. It is still open to the employer to show that his breach of duty has not in fact been causative of the injury, as where for example the employee suffers a heart attack, which can be demonstrated to be wholly unconnected with the manual handling operation. Longmore LJ is simply making the point that once a *prima facie* connection is established between the risky activity and the injury, it is for the employer to disprove causation, not for the employee to prove that, if all possible precautions have been taken, he would not have suffered injury'.

The court in *Goldscheider* went on to say (at paragraph 69):

> "In the present case before us, as in *Ghaith*, the respondent has established the occurrence of the risk inherent in the activity which he was carrying out at his rehearsal, namely the excessive exposure to noise. It is hard to see that this rehearsal was merely 'the occasion for' the injury and not the cause of it. The failure to take the steps necessary to reduce that exposure to the lowest level reasonably practicable left it open still to the appellant to show the breach was not causative of the injury, but subject to the rival medical evidence it did not do so".

[102] The reference to the failure to take steps to reduce the exposure to the lowest level reasonably practicable was in the context of regulation 6 of the 2005 regulations, which is also founded upon in this case, albeit limited here to regulation 6(1). In that case the exposure to noise was in excess of the upper exposure action value of 85 dB(A) and so regulation 6(2) also applied along with the more stringent provisions to implement a programme of organisational and technical measures. The Court refused the defendant's appeal and upheld the judge at first instance in finding for the plaintiff.

[103] I am inclined to the view that reliance on the approach in *Goldschieder* for a reversed onus in the circumstances where, as here, a pursuer is unable to found directly on breach of statutory duty, is an open question. As already noted, the court in *Goldscheider* (at para 36), in the context of considering breach of duty, did not express a view on the effect of the 2013 Act on the shift of burden in certain cases. Clearly, if there was an onus in the manner suggested on behalf of the pursuer, that would result in the defender requiring to show, in order to succeed, that there was no casual connection between the noise exposure and hearing impairment, and that could only be on the basis of Mr Swan's evidence on that issue being accepted. However, in this particular case I consider that reliance on *Goldscheider* is misplaced.

[104] The backdrop to the approach described in *Goldscheider* under reference to the *West Sussex* case and *Ghaith* is where a breach of statutory duty has been established, where that is the direct legal basis of action, and in cases where there is a risk inherent in the activity which has eventuated. In other words, it was the circumstances in which the breach of statutory duty arose that pointed *prima facie* to a causal link. That would suggest that each case must be looked at on its own facts and circumstances rather than there being a rule of general application. A relevant background consideration may be a failure to carry out a risk assessment. As to breach of statutory duty, this must in this case be considered through the prism of the common law duty of reasonable care and qualified by it although there may be cases where the common law duty encompasses the statutory one. That depends on the facts of the case and the way the statutory duties are framed (*Goodwillie* at paras 141 and 142). In this case it is not a matter of contention that the common law duties do encompass the statutory duties. However, whether there is a breach of statutory duty or breach of common law duty, it seems to me that, for such an approach to be legitimate, the

occurrence of a risk inherent in the activity has first to be established leading to a legitimate inference that there is a casual link. The risk in this case is injury from exposure to noise. The risk is a matter of assessment, principally relating to measurement of the noise level in any given case, in order to measure the nature and extent of the risk, if any. As I am unable to conclude on the evidence in this case that the exposure to noise was at a level which of itself was likely to cause injury, then I do not think I can apply this approach. There is no *prima facie* causative link by the mere occurrence of the exposure. It would, of course, be open to a court to apply the approach in *Gardiner* in appropriate cases.

[105] Accordingly, I have come to the view that there is no onus or a burden upon the defender in this particular case to disprove of causation and the burden lies with the pursuer to prove a causative link between the exposure to the noise and the damage by the requisite civil standard. However, in considering the medical evidence, it is convenient to deal with Mr Swan's evidence first in view of the factual basis upon which he made his findings.

[106] In relation to the first two points of his reasoning relating to the failure of the pursuer to report the problem to her GP until July 2016, my findings as to the onset of the hearing loss take away the factual basis for those reasons. I have accepted the pursuer's evidence about that and have referred to the clinical notes of Ms Isa forming the basis of her subsequent letter after the consultation of 14 December 2016. As already mentioned the pursuer's evidence in this regard was supported by Amelia Newton and Larissa McDonald, the pursuer's mother. Accordingly, the factual basis for the first two points is unsound.

[107] As to his third reason – that the pursuer coped very well without hearing aids and declined them when first offered as she felt she didn't need them, one explanation is that the pursuer had learned to cope with pre-existing hearing loss – I have also rejected the factual basis for that. I do not consider that it could be said either that the pursuer coped very well

without hearing aids or that she declined them because she felt she did not need them. As indicated, the pursuer appeared to be in denial in relation to the hearing loss and one can easily imagine her attitude for a girl of her age. She was 19 at the time of the original incident. There is no question that she needs hearing aids. There is no question that she does not like wearing them. The proposition that the pursuer declined to wear the aids because she felt she did not need them is not something that can be deduced from what the pursuer said in her evidence or the circumstances of her hearing test in October of 2016. The reality was that while the hearing test was free the hearing aids discussed would cost in excess of £5,000 a sum that could not be afforded. Accordingly, I conclude that the factual basis upon which the third reason is advanced by Mr Swan in support of his opinion is unsound.

[108] The fourth reason given by Mr Swan related to the pursuer's perceived mild speech impediment said to be typical of high tone hearing loss since early childhood. In relation to this reason, there was unchallenged evidence from the pursuer herself that she had a speech impediment caused by a gap in her teeth and having been fitted with a brace her speech is improving. I accept the pursuer's evidence about this and there is no evidence from any other source to the effect that the pursuer had a prior speech impediment as a child.

[109] As to the secondary factors relied on by Mr Swan, I have decided to attach little weight to them. His proposition that it is unlikely that exposure to the fire alarm for the period in question would cause permanent hearing loss like this was not to my recollection based on any separate or distinct reasoning. He accepted in cross-examination that it was possible that the exposure could have resulted in permanent hearing loss. His reference to the views of Ms Isa and Professor Laing on cause was not in my view entirely accurate. The first thing to note is that Ms Isa did not proffer an opinion on whether the hearing loss was

due to noise exposure. As far as Professor Laing was concerned, this was the person to whom Ms Isa referred the pursuer for his opinion on the question. I think it is not fair to say that Professor Laing was non-committal in attributing the hearing loss to noise exposure. As already noted in the findings, following an MRI scan and blood tests ruling out other causes his working diagnosis was noise induced hearing loss.

[110] I have concluded that there is no basis for Mr Swan's conclusion that the pursuer has progressive congenital hearing loss. It is worth noting that there is no support for that idea in medical records. I have also been unable to accept his conclusion that there is nothing in the history of the pursuer to suggest that her hearing loss was caused by the noise exposure. I have accordingly, for the reasons given, rejected Mr Swan's evidence on causation.

[111] That of course leaves Mr McKerrow's evidence. His concessions under reference to the *Coles* criteria cannot be overlooked. The curiosity in this case however is that this is not a conflict between two experts on whether the criteria had been met. Mr Swan never mentioned *Coles* at all and he was not asked about it.

[112] I have decided that Mr McKerrow's evidence should not be rejected as inadmissible as counsel for the defender urged me to do. It is true that in cross-examination he made concessions that the requirements to establish causation in *Coles* had not been fully met. As far as requirement 2 is concerned which makes reference to the noise threshold being 85 dB(A) Lepd, Mr McKerrow indicated that he had not been aware of the content of Mr Bowdler's report on noise levels at the time he had compiled how own report. That must be correct as Mr McKerrow's report predates Mr Bowdler's report by some 10 months. It was submitted for the defender that it could be implied from Mr McKerrow's response to questions on requirement 2 that he did at some point have sight of the report of Mr Bowdler prior to giving evidence. I do not think that I can come to that conclusion. No doubt as a

matter of good preparation, he ought to have been given sight of the report. However, I do not think it is useful to speculate on what may or may not have happened. His evidence was that there was in any event a causative link in this case by reason of history and presentation. As to the third requirement of *Coles* and the defender's submission that the source was not fully quoted, Mr McKerrow again frankly accepted that this was the case. I am unable to conclude that Mr McKerrow was being unduly selective in his approach. It is often a question of judgment how much of a source to quote depending on its importance. His point was that the absence of a notch or bulge to meet requirement 3 on one side does not preclude the presence of NIHL having an atypical audiometric configuration. The question is what the passage "that such possibilities would *generally* be below the balance of probabilities," adds. On reflection, Mr McKerrow indicated, quite frankly and properly in my view, that it would have been better to include this passage in the medico-legal context. However, it is clear that, in terms, the requirement does not preclude a causal link.

[113] I have concluded that, on the whole, Mr McKerrow's evidence was given in a satisfactory manner, and I did not gain the impression that he was either lacking independence or impartiality in presenting his report and evidence to the court.

[114] I would like to say one thing in relation to this passage of evidence. The paper from *Coles* was never before the court. A copy was not produced. Whilst it was a source referred to by Mr McKerrow in his report, it was not produced by him. Certain passages were first referred to in cross-examination. When I asked counsel for the defender why the document had not been produced when he was founding upon it, he replied that this approach was taken for "tactical" reasons, no doubt with a view to catching Mr McKerrow out. Indeed, he did make concessions. It would however have been far better in a situation like this for the source to be lodged by the party seeking to found upon it, probably the pursuer in the first

instance but certainly by the defender if it sought to rely upon it. Quite apart from the question of fairness to the parties and witnesses, it would have been of assistance to the court not only to consider the passages referred to, but any other passage, which might give context to the matter at hand. To refer a professional witness to such material, piecemeal, for all that is known, is not in my view entirely satisfactory. The court must be in a position to assess the context.

[115] The question therefore is what is to be made of Mr McKerrow's evidence on the hypothesis that it is admissible? I quite accept that the strength of his evidence in relation to causation is to some extent diminished in light of his concessions. However, that does not mean that it should necessarily be rejected or accorded little or no weight, as was urged behalf of the defender. It is not all or nothing. The real question is whether his evidence on causation was fatally undermined. I have concluded that it was not. Mr McKerrow was of the view, notwithstanding his concessions, that there was a causal connection between the exposure of the pursuer to noise and her hearing loss. In doing so, he had regard to the history and development of the pursuer's tinnitus and hearing loss. He accepted the pursuer's account of suffering tinnitus immediately following the exposure as a credible one in light of that history. He accepted the account as credible that the pursuer could have mistakenly attributed hearing loss to her tinnitus – the ringing in her ears. He considered her account and assumption to be reasonable. He spoke of temporary threshold shift being a common phenomenon to loud noises. That normally resolves within 24 hours but it can, as in this case, become permanent. Mr McKerrow, and indeed Mr Swan, appeared to accept that it was possible to have tinnitus and hearing loss simultaneously but for different reasons but that this was highly unlikely and it is most common for them to be linked. In my view, that in itself allows an inference to be drawn in this case in light of the timing of

the onset of tinnitus. Mr McKerrow gave his evidence as to the link between the exposure and the damage on the basis of his many years of experience in the field. He indicated that the fact that the requirements set out by *Coles* were not fully met did not preclude a link between the exposure and the damage. There was no evidence from Mr Swan or anybody else that there could not be a link. In addition, there was the information in the medical records, as set out in the findings in fact, that Professor Laing's working diagnosis was that most of the deafness was related to the exposure to noise and Mr McKerrow had regard to that. I have, for these reasons, accepted Mr McKerrow's evidence on the causative link between the noise exposure and the damage.

[116] Of course, the pursuer's account of the development of her symptoms is corroborated by the evidence of her mother and Amelia Newton whose evidence, along with the pursuer's, I have accepted as credible and reliable. The pursuer had no symptoms before the exposure and developed them immediately after the exposure. Those facts alone are highly significant and distinguish the case from those where there is for example a gradual development of disease with more than one potential cause (as in *Gardiner*). While it is not of course for the defender to prove a cause, I have found no other credible explanation for the pursuer's problems and if there was another cause, it would be a remarkable coincidence if the symptoms emerged immediately following the exposure to noise.

[117] Finally, there was also the evidence from Mr Bowdler that the risk of NIHL, while reduced below 85 dBb(A) Lepd, was not insignificant. Albeit from the perspective of an acoustic consultant, and not a medical man, in view of his experience of measuring noise for the purpose of industrial deafness, I feel entitled to give his opinion some weight. On its

own that evidence perhaps doesn't take us very far, but it adds some support to the body of evidence pointing to a causative link.

[118] In all the circumstances, I am satisfied as a matter of fact, that a legitimate inference can be drawn that the pursuer's exposure to noise on 12 December 2015 was the cause of her hearing loss and tinnitus and not merely the occasion for it.

[119] In summary, the level of noise to which the pursuer was exposed was such as represented a reasonably foreseeable risk of injury in the form of tinnitus and hearing loss. While it cannot be established that it was at or above 85 dB(A), it was nonetheless above the "lower exposure action value" of 80 Db(A) set forth in regulation 4(1) of the 2005 Regulations in relation to which action required to be taken as previously outlined. Furthermore, while the level of noise was not such as of itself to make it more probable than not that damage would result, in light of the evidence in this case, and in particular the development by the pursuer of symptoms which are consistent with damage being caused on 12 December 2015, I have concluded as a matter of fact that it is more likely than not that the damage was caused by the exposure to noise and that the development was not mere coincidence. In other words, the pursuer has discharged the onus upon her to prove causation by the civil standard. The very risk that the regulations were designed to avoid eventuated and, as indicated, it is my view that the obligations in the regulations founded upon are within the compass of the employer's duty to take reasonable care at common law.

Damages

[120] Counsel for the pursuer submitted that an appropriate award of solatium in this case was £25,500. He did so under reference to *Bell* v *Ministry of Defence* (2011) reported in *Kemp*

and Kemp on Quantum of damages (Vol. 3 at E2-006) and the Judicial College Guidelines Part 5(B) and in particular sub-paragraph (d)(ii).

[121] Counsel also submitted that it would be appropriate to make an award for loss of employability in the sum of £10,000 to reflect her disadvantage in the labour market in the years since the end of her college course and the future. As to the future reference was made to the difficulties the pursuer will have in the absence of more suitable hearing aids capable of differentiating between speech and background noise and aids which do not displace themselves during energetic activity (see below).

[122] It was submitted that there should be an award for the cost of hearing aids on the basis that hearing aids provided privately would be more suitable than her current NHS hearing aids. The pursuer's evidence was, it was submitted, that she suffers difficulties with the hearing aids she presently has. Apart from being generally uncomfortable, they do not differentiate between speech and background noise. They amplify all noise, not just what she wants to hear. She hears her hair brushing against them. Despite wearing them, she has difficulties in busy environments or in environments with background music such as gyms where she intends to work after she finishes her current studies. It was submitted that Mr Bradford of Hidden Hearing gave evidence that even the top end NHS aids do not compare to the private aids available. He said that he had seen many NHS hearing aids and they only reach the medium level of what is on offer privately. Mr Bradford recommended two types of aid details of which are in a letter from Hidden Hearing (page 157 of the core bundle). The first was the Oticon OPN 1 MiniRite. This had now been superseded by the Oticon OPN S1 MiniRite, which carried his recommendation and was most suitable for her daily social interactions. The cost was £5,499 per pair and they had a life expectancy of 5-10 years. They come with lithium rechargeable batteries, which cost £90 per pair and

require to be replaced every three years. For those aids, she also requires domes, wax guards, T caps and O caps. The other aids recommended by Mr Bradford were the CIC Oticon OPN 2, which are suitable for any sort of training and physical activity, which the pursuer engages in both for pleasure (dancing) and for her future career working in the field of fitness. The cost is £3,999 per pair. They have a life expectancy of 3-5 years. They do not come with batteries. The recommended batteries are not the rechargeable type. In addition, these aids require wax guards, T caps and O caps. The calculation of costs was set out in a quantum table provided by counsel for the pursuer. The total costs were calculated by use of an appropriate multiplier, calculated under reference to Table 2 of the Ogden Tables, 8th Edition, relating to Pecuniary Loss for Life (Females), the pursuer's age at the date of proof being 24 and applying a discount rate of -0.75%, the resultant multiplier being 84.45. This produced sums, accordingly to counsel's calculation, of £100,082 in respect of the hearing aids for daily social interaction, assuming replacement of the aids every five years and batteries every three years, assuming an annual cost of £1,185.10. The figure was £114,395 in respect of the aids for training and physical activity assuming replacement every three years; a total annual cost of £1,360.50 and using the same multiplier.

[123] Counsel for the pursuer also sought an award of £500 to reflect inconvenience to the pursuer in having to attend medical appointments and liaise with her solicitors. Medical appointments would be required in the future due to the prognosis of a slow deterioration of the pursuer's hearing with age.

[124] Counsel for the defender submitted that, on the logic of his submissions, the question of damages would not arise. However, in the event that the court concluded that there had been a breach of duty and that this had caused the loss, injury and damage, the only loss which could conceivably be articulated was in respect of a temporary threshold shift which

was described as a temporary dullness of hearing together with tinnitus. Such symptoms would be short lived. The defender's expert Mr Swan opined that typically it would revert to normal by the next day. In those circumstances, if the court concluded that an award was appropriate, an award for solatium only would arise and that would be an award not in excess of £250.

[125] It can be seen that the foregoing submission for the defender was on the hypothesis that the pursuer's present difficulties were not in fact attributed to the noise exposure. No alternative submissions were made on damages except in relation to the question of hearing aids. It was submitted that the pursuer had failed to prove her head of damage in this respect. No valid comparison between privately purchased hearing aids and those NHS hearing aids currently being used by the pursuer could be made as the pursuer had failed to establish the type of her existing hearing aids. The court could not assess the reasonableness or otherwise of the claim for private hearing aids in the absence of evidence as to the nature, type and capabilities of her existing devices. In any event, the pursuer's direct evidence about her current hearing aids was in general terms positive.

[126] Clearly, in light of my findings, I have come to the view that the pursuer's present difficulties are attributable to her noise exposure. It therefore follows for me to consider the pursuer's submissions in respect of solatium. The present value of the award in *Bell* is £19,050. I note that that was an out of court settlement. The injury in that case was described as severe noise induced hearing loss in the left ear and moderate tinnitus. The pursuer has bilateral hearing loss and I think that her symptoms are in the whole more severe. As to the Judicial College Guidelines, I agree with the range suggested by counsel for the pursuer. That range is between £12,700 and £25,350 and relates to: "Moderate tinnitus and NIHL or moderate to severe tinnitus or NIHL alone".

[127] I agree with the submission for the pursuer that in light of her young age, the immediate onset of symptoms, the hearing deficit being bilateral, the severity of the hearing loss as demonstrated by the audiograms and being accompanied by intermittent tinnitus (in the sense described) that an award should be made at the upper end of that bracket. Account should also be taken of the prospect of deterioration in her hearing. In all the circumstances, my view is that an appropriate award is £25,000. I would apportion one quarter of that to the past (£6,250) and apply interest thereto at the rate of 4% per annum from 12 December 2015 to the date of decree.

[128] With regard to the head of loss for the future cost of hearing aids, it is clear on the evidence, including the medical evidence, that the pursuer needs hearing aids. As found, the pursuer has difficulty with her NHS hearing aids. I accept Mr Bradford's evidence of the benefits of the private hearing aids suggested over NHS hearing aids in differentiating between speech and background noise and helping her to hear what she needs to hear. Mr McKerrow highlighted the challenges given that it is technically difficult to selectively amplify the higher frequencies only without also affecting lower frequencies, there also frequently being a difficulty in discriminating speech in noise damaged ears. He suggested hearing aids more suitable to the pursuer's needs may be available in the private sector. The only evidence as to alternatives was given by Mr Bradford and this was not challenged. In this context, it is relevant to note the provisions of section 2(4) of the Law Reform (Personal Injuries) Act 1948:

> "In an action for damages for personal injuries (including any such action arising out of a contract), there shall be disregarded, in determining the reasonableness of any expenses, the possibility of avoiding those expenses or part of them by taking advantage of facilities available under the National Health Service Act 2006 or the National Health Service (Wales) Act 2006 or the National Health Service (Scotland) Act 1978, or of any corresponding facilities in Northern Ireland".

In *Harris* v *Bright Asphalt Contractors Ltd* [1953] 1QB 617 Slade J said (at 635):

> "I now come to the question of nursing attendance. Mr Crichton referred me to section 2(4) of the Act of 1948. I think all that means is that when an injured plaintiff in fact incurs expenses which are reasonable, that expenditure is not to be impeached on the ground that, if he had taken advantage of the facilities available under the National Health Service Act 1946, those reasonable expenses might have been avoided".

Kemp & Kemp on Quantum of Damages Vol. 1 at para. 14-003 states:

> "Essentially, accessing private medical care and incurring medical expenses by receiving treatment that could have been delivered by the NHS cannot be criticised or challenged by the defendant as a matter of principle. Paying for medical expenses cannot be a failure to mitigate loss".

In this case, it is clearly reasonable for the pursuer to have hearing aids. On the basis of section 2(4) there can be no criticism of the pursuer if she chooses to access private hearing aids. It matters not in my view whether there has been any technical evidence about the characteristics of her NHS aids to enable comparison with what has been proposed in order to evaluate reasonableness. In any event, as noted, there is the evidence of the pursuer of the problems she has with her present NHS aids and the evidence of Mr Bradford and Mr McKerrow as to the benefits of private aids. Accordingly, this is a recoverable head of loss in this case. I accept the figure of £5,499 as the cost of the aids, being an update from the cost of £5,299 mentioned in the letter from Hidden Hearing dated 25 March 2019 in respect of an older model. The annual cost as proposed of £1,185.10 is based on replacement every 5 years with additional charges for batteries and accessories. This is clearly at the lowest end of the 5 to 10 year period spoken to by Mr Bradford, but I do not consider it to be unreasonable, particularly given his evidence that an earlier replacement might be required if the pursuer's hearing were to deteriorate. Mr McKerrow's evidence was that, comparing the earlier audiograms with the one taken for the purpose of his examination, there had already been a slight deterioration. Further, the prognosis was for a slow deterioration in

hearing over time necessitating adjustment of hearing aids or more powerful instruments. I accept his evidence in this regard. In selecting an appropriate multiplier, Table 2 is appropriate, as is the suggested discount rate of -0.75%. Accordingly, and no issue was taken with the figures or the basis of calculation, the total head of loss is £100,082. In these circumstances, I consider that the head of claim proposed by counsel for the pursuer is reasonable.

[129] As regards those hearing aids that are recommended for training and physical activity, there was evidence from the pursuer that when she engaged in vigorous physical activity involving movement the hearing aids would be liable to "flip out". In other words, they would not be secure. The same would apply, according to Mr Bradford, to the private hearing aids suggested for daily social interaction. It seems to me to be perfectly reasonable for the pursuer to have hearing aids which allow her to follow a future career involving vigorous physical activity and also to allow her to engage in dancing. The pursuer's evidence of the liability of the present hearing aids to fall out during physical activity is given support by her report to Hidden Hearing and in particular, the report of the audiogram attached to their said letter of 25 March 2019. Mr Bradford's evidence was that the private hearing aids suggested were designed to be more secure. He said that the particular hearing aids – the CIC Oticon OPN 2 have a life of between 3-5 years. At three years' the quality suffers and at five years' they become unreliable. In these circumstances, I think it is reasonable to estimate replacement every three years. I accept the pursuer's figure for the cost of the aids at £3,999, bringing out an annual cost of £1,360.50, including accessories, and consider that to be reasonable. The same multiplier as above is appropriate. Accordingly, and again no issue was taken with the figures or the basis of calculation, the total head of loss is £114,895, which I consider to be reasonable.

[130] In relation to the claim for loss of employability, it was suggested that there was a past element in that the pursuer had been unable to secure the level of employment that she would otherwise have been able to undertake since obtaining her degree. However, there was very little evidence from the pursuer herself as to the sort of employment she could have expected had she felt confident in pursuing the same career path in contemporary dance or what level of remuneration she might have obtained in contrast to what she had received in the part-time jobs she has had prior to her embarking on her current college course. I got the impression that she wouldn't necessarily have achieved any better remuneration up to this point. There was no assessment of past loss. We are in the situation I think that any claim under this head is the more usual situation where a pursuer may have suffered little or no actual wage loss at the date of the proof yet may be entitled to a loss of employability award to reflect her poor prospects on the labour market. The pursuer did not herself suggest that her future earning capacity would be less in the career she has now chosen – in health and fitness/sports science – as distinct from the career path of dance performance. In submissions, the claim, looking to the future, seemed to be largely predicated on the difficulties the pursuer would face in the absence of suitable hearing aids. It seems to me that there could well be difficulties in choosing a career path without suitable hearing aids but as I have provided for this in my assessment of damages, there is in my view no scope, on the evidence in this case, for an award under a separate head on the basis argued. The situation would be otherwise if there were no provision in damages for the cost of private hearing aids to cater for the physical activity and movement involved in her proposed future career. In that event, an award for loss of employability to reflect disadvantage on the labour market would in my view be eminently justified, and adopting a

broad approach (in the absence of any evidential basis to do otherwise) the sum claimed of £10,000 would be reasonable.

[131] I do not think it is appropriate to make a separate award for inconvenience.

[132] In all the circumstances I have assessed damages as follows:

Solatium	£25,000
Interest on 25% thereof from 12/12/15 to date	£1,300
Future cost of private hearing aids	£214,977
Total	£241,277

[133] I note that the interest sought in the crave of the writ is 4% per annum from 12 December 2015 until payment. As noted, I have included interest at that rate on past solatium to date. It would normally be appropriate to seek interest at the judicial rate from the date of decree, interest on past elements being included in the principal sum sought. Notwithstanding the terms of the crave, interest has been added *ex lege* from the date of decree on the total sum at the judicial rate.

[134] It was a joint position that I should reserve the question of expenses. In the event that they cannot be agreed, I have appointed a hearing on a date to be fixed.