SOUNDING THE TRUMPET

The CA has upheld a ruling on noise pollution in the entertainment sector, explains Theo Huckle

This article outlines the issues at stake in the Court of Appeal's recent decision in *Royal Opera House Covent Garden Foundation v Goldscheider* [2019] EWCA Civ 711 (Leveson PQBD; McCombe & Bean LJJ) 2 May 2019.

Summary

The Court of Appeal dismissed the ROH's appeal, upholding Nicola Davies J's findings (in *Goldscheider v Royal Opera House Covent Garden Foundation* [2018] EWHC 687 (QB)) that the opera house was liable for a breach of statutory duty under the Control of Noise at Work Regulations 2005 Reg.6(1) and Reg.6(2), though it overturned the judge's findings of breaches of Reg.7(3) and Reg.10(1).

Judgment for the claimant for damages to be assessed was upheld.

Facts

The facts of the case are reported in detail in *PI Focus* June 2018, p8. Mr Goldscheider was a viola player who suffered of 'acoustic shock injury' after being seated directly in front of the brass section during rehearsals for a production of Wagner's Ring Cycle. The brass had been collected together in four rows of four, for artistic reasons, to boost their sound.

The issues of breach of duty and causation of injury were tried as preliminary issues by Nicola Davies J.

The judge's decision and review by the Court of Appeal

In view of the date of injury, this claim was unaffected by the amendments to s.47 Health and Safety at Work etc Act 1974 which had been made by s.69 Enterprise and Regulatory Reform Act 2013.

The claimant alleged that the defendant was in clear breach of the duties imposed by the Control of Noise at Work Regulations 2005. The defendant argued that those duties were limited to what was reasonably practicable, and that it had not been reasonably practicable to have complied with the requirements of the Regulations - as to do so would interfere with considerations of artistic integrity.

In any event, the defendant had investigated various methods of noise reduction all of which had been, for one reason or another, unsatisfactory, in particular because of those artistic demands. For example, it was not possible to reduce the number of musicians in the orchestra pit, because to do so would offend Richard Wagner's requirements for the size of the orchestra required to play De Walküre and the other Ring Cycle operas.

The only effective solution was the one adopted, namely to provide each musician with a range of personal hearing protection (ear plugs and muffs) which the musician could use as and when he or she felt necessary.

The defendant also argued that requiring it to comply strictly with the 2005 Regulations would prevent or deter the desirable activity of professional orchestra playing, and that was a result which s.1 Compensation Act 2006 required the court to avoid.

Foreseeability and application of the Regulations

The purpose of the 2005 Regulations is stated in **reg.3(1)** as 'protecting persons against risk to their health and safety arising from exposure to noise at work.' By **reg.2(1)**, 'noise' means any audible sound.

The risks to which the Regulations related were not limited to the more usual risks arising out of noise exposure at work (such as noise induced hearing loss caused by ongoing long term daily noise exposure, or the pathological damage inflicted by extreme noise levels) but could include risk of rarer types of noise induced injury, such as acoustic shock injury.

Provided that some form of noise-related personal injury was foreseeable, then the 2005 Regulations were engaged, even though the claimant's particular type of noise related injury may not have been foreseeable – *Page v*

Smith [1996] 1 AC 155 (HL) applied. It was foreseeable that exposure to the levels recorded by the dosimeter gave rise to a risk of personal injury. Therefore, the judge held that the Regulations applied.

The Court of Appeal agreed; see paras 45-6. Although it was not foreseen that exposure to noise levels of 92dBA (as opposed to peak noise levels in excess of 137dB(C)) would cause sudden injury, that was irrelevant in law.

The Regulations had been enacted to protect employees against the risk of injury to their hearing caused by excessive noise at work. It was foreseeable that if the upper EAV was exceeded by a factor of four, musicians would suffer injury to their hearing.

The ROH had failed to show that it reduced the noise exposure to as low a level as was reasonably practicable, and that it took all reasonably practicable steps to reduce it to 85 dB(A); consequently, the fact that the foreseeable risk was of long term rather than traumatic injury was irrelevant; *Hughes v Lord Advocate [1963] A.C. 837* and *Page v Smith [1996] A.C. 155, [1995] 5 WLUK 174* followed (para 45-46).

Effect of artistic requirements

The defendant's contention that artistic integrity dictated the limits of what was reasonably practicable was rejected. The judge said:

'However laudable the aim to maintain the highest artistic standards it cannot compromise the standard of care which the ROH as an employer has to protect the health and safety of its employees when at their workplace.'

Reg.5 of the 2005 Regulations imposed detailed requirements for an assessment of noise related risks. A number of those requirements had not been complied with. Contrary to **reg.5(3)(a)**, the defendant's risk assessment had not included specific consideration of the level, type and duration of exposure including peak sound pressures. Contrary to **reg.5(4)**, the risk assessment had not been reviewed when the new orchestra layout had been adopted.

The unsigned risk assessment actually prepared had been done without any assessment of the noise levels to which the claimant and colleagues were likely to be exposed in the rehearsals, and it was not until the fifth rehearsal, prompted by complaints from musicians well used to loud orchestral noise as to how loud these rehearsals were, that measurement of noise levels was first undertaken. The risk assessment was not reviewed even then.

The Court of Appeal did not separately consider this aspect, taking it into account in its consideration of the Reg. 6 duties. **Reg.6(1)** of the 2005 Regulations required the defendant to eliminate risk from noise exposure if reasonably practicable to do so or, if not reasonably practicable, to reduce that risk as far as reasonably practicable. The duty was to eliminate/reduce the risk 'at source'.

The burden of proof of reasonable practicability rested on the defendant - *Baker v Quantum Clothing Group Ltd* [2011] UKSC 17. An obvious means of reducing the risk at source was to direct the orchestra to play quieter, particularly in rehearsals. Another was not to have positioned all the brass together.

If the defendant had complied with its duties under reg.5 and given proper consideration to the noise risks and its duty to avoid them, then it would have measured the noise levels and realised the risks, and acted to prevent them as required by the Regulations, but it did not.

There was no evidence that it had not been reasonably practicable to do so. Therefore, the duty under **reg.6(1)** had been breached.

Reg.6(2) was engaged because the claimant's exposure had exceeded the upper EAV of 85 dB(A) LEP,d. Indeed, the evidence of the orchestra manager, who carried out the filed risk assessment for the production as a whole (not for the specific features of the rehearsals) was that he *assumed* (in the absence of any measurements as to noise levels) that the levels would exceed the upper EAV. Therefore the defendant was required to reduce the claimant's exposure to as low as reasonably practicable, by appropriate means other than hearing protection. As the only method which the defendant adopted to reduce noise exposure was the provision of hearing protection, the defendant was in breach.

The Court of Appeal upheld these findings; see paras 39-42. It considered that the critical issue was whether the ROH had reduced exposure to as low a level as was reasonably practicable, and in particular had taken all reasonable steps to reduce it below 85dB.

It held that the most damning evidence was the comparison between the noise measurement 92dB at the first rehearsal and 83dB at the later rehearsal.

Although ROH asserted in argument that the reduction was because the conductor had been rehearsing less noisy sections and it was a stop / start rehearsal, it had provided no detailed evidence in support of that claim.

The reconfiguration of the pit had not caused any reduction in the artistic standard of the public performances.

Alterations made after a workplace accident did not necessarily demonstrate liability retrospectively, but they made it difficult for a defendant to prove that all reasonably practicable steps had been taken - and here the defendant had failed to do that.

Reg.7(3) required the orchestra pit to be demarcated as a hearing protection zone where the wearing of hearing protection was compulsory, because the noise levels in the pit regularly exceeded the upper EAV of 85 dB(A) LEP,d. The duty under reg.7(3) was strict and not limited by reasonable practicability. The judge found that the defendant had not complied and was in breach.

Reg.10 required the defendant to provide the claimant with instruction and training regarding the risks to which he was exposed and the methods by which he could avoid or reduce those risks. Alarmingly, the claimant gave evidence that one of the prompts for him to put in hearing protection was pain in his ears, which did not suggest any adequate acquired understanding of modern noise related PPE requirements. The failure to have instructed (not just advised) him to wear hearing protection in the orchestra pit *consistently* was a breach of duty which in turn led to the breach of reg.6.

For most musical venues, space was not the problem that it was at the Royal Opera House

Here the Court of Appeal differed; see paras 51-57. It held that the judge had been right to find that the orchestra pit should have been designated a 'Hearing Protection Zone' in compliance with reg.7(3) of the 2005 Regulations, and that an appropriate sign should have been displayed. The subparagraphs reg.7(3)(a) and reg.7(3)(b) were categorical and admitted of no exceptions, unlike the duty imposed in the final part of reg.7(3) to ensure the wearing of hearing protection by any employee entering the area, which was qualified by the words 'so far as is reasonably practicable'. This was not the same as 'physically practicable'. It was not reasonably practicable for players in the orchestra pit to perform if they were required to wear PHP at all times.

The judge's finding of a breach of reg.7(3), and the consequential finding of a breach of reg.10(1) was set aside.

Compensation Act 2006 s.1

The trial judge found that the defendant's reliance on s.1 Compensation Act 2006 provided it with no assistance. It could not excuse the clear breaches of duty. She accepted the authority cited that in any event, the requirements of s.1 do not add significantly to the pre-existing law, and the approach of judges to assessment of presence and extent of a duty of care, when issues are raised as to the social utility of the impugned activity.

The Court of Appeal agreed; see paras 43-44. Whether or not the Act had altered the common law as laid down in *Tomlinson v Congleton BC [2003] UKHL 47, [2004] 1 A.C. 46, [2003] 7 WLUK 986*, it did not assist the ROH. Had the evidence demonstrated that nothing more could have been done to reduce noise without the ROH having to abandon the Wagner repertoire, it might have done, but that was not the situation. The Court followed *Tomlinson*.

Causation

On the facts, the claimant had suffered acoustic shock injury. Such an injury was not limited to those, such as telephone operators, who wore headsets. On the balance of probabilities, the cause of the injury had been the excessive level of noise to which the claimant had been exposed at the time of the onset of the symptoms of his injury.

The Court of Appeal upheld the finding of causation, but concentrated on the alternative way in which that had been argued for the claimant at trial; see paras 64-65, 68-69, 71-80.

Mr Goldscheider had established the risk of excessive exposure to noise inherent in the activity which he was carrying out at the rehearsal.

The rehearsal was not merely 'the occasion for' the injury rather than the cause of it. The ROH's failure to take the steps necessary to reduce that exposure to the lowest level reasonably practicable still allowed it to show that the breach was not causative of the injury, but, subject to the rival medical evidence, it had failed to do so; *Clough v First Choice Holidays & Flights Ltd* [2006] EWCA Civ 15, considered and *Ghaith v Indesit Co UK Ltd* [2012] EWCA Civ 642 and *West Sussex CC v Fuller* [2015] EWCA Civ 189 followed .

Comment

1. This decision confirms that the duty to comply with health and safety regulations, such as the Control of Noise at Work Regulations 2005, applies to all employers and is not subject to concerns of artistic integrity.
2. Mr Goldscheider was fortunate in one sense evidentially; the complaints in rehearsal four meant that the levels in the crucial fifth rehearsal were actively monitored and that evidence was vital and damning, critically so in the view of the Court of Appeal.
3. The upholding of the liability under Reg. 6 meant the dismissal of the appeal, hugely welcome to Mr Goldscheider whose struggle has continued for seven years now - and quantum is yet to be determined. The overturning of the judge's view of the application of Reg 7 and 10 is to my mind a little surprising, and there remains scope of re-argument as to those requirements on different, perhaps clearer facts and, in particular, evidence about the proper information and training requirements for successful protection from noise by consistent use of hearing protection.
4. This decision establishes that acoustic shock can be sustained outside the world of call centres and telephone operators.
5. It is not clear to what extent this decision will give rise to large numbers of similar claims, as apparently feared by the insurer. The Association of British

Insurers led a group permitted to intervene in the appeal. Its contention was that the decision would have a serious adverse impact on the performance of orchestral and operatic music throughout the UK.

Sir Brian Leveson P gave an additional judgment at paras 82-85 in which he sought to reassure that concerns about the wider ramifications of the judge's decision reflected a misunderstanding of the consequences of the decision.

For most musical venues, space was not the problem that it was at the ROH. Even there, a comparatively small repositioning of the layout of the orchestra pit gave a marked reduction in the sound pressure, and that was at the root of the ROH's liability here.

The President ended with what some may see as reassurance, but others as a clear warning shot:

'What the case does underline is the obligation placed on orchestras to comply with the requirements of the legislation (having had two years [2006-8] within which to prepare).

'It emphasises that the risk of injury through noise is not removed if the noise – in the form of music – is the deliberate and desired objective rather than an unwanted by-product (as would be the case in relation to the use of pneumatic machinery), all of which was recognised in the very carefully drawn document *Sound Advice*. The national and international reputation of the ROH is not and should not be affected by this judgment.'

6. In a sense, despite the sophisticated resistance to the claim, the case is a clear application of some pretty clear regulatory provisions intended to protect workers generally from exposure to noise risks and hence from resulting noise injury.
7. In the end, perhaps the most important aspect of the appeal decision is the court's adoption and application of the *Ghaith* and *Fuller* line of authority about the inference of causation and evidential obligation to rebut placed upon a defendant employer who fails properly to assess the risks, and fails to take all reasonable or reasonably practicable steps to protect its workers from harm.

   In some quarters, this line of reasoning has been seen as 'controversial', even though, without it, the duty-holder's obligations to assess risks and act to protect are obviously undermined by the impossibility of proving that action would have made a difference. The importance of those obligations was set out by Smith LJ in *Allison v London Underground Ltd [2008] ICR 719 CA* and cited with approval by the unanimous Supreme Court in *Kennedy v Cordia [2016] UKSC [2016] 1 W.L.R. 597*:

   'The importance of a suitable and sufficient risk assessment was explained by the Court of Appeal in *Allison*. Smith LJ observed at para 58 that insufficient judicial attention had been given to risk assessments in the years since the duty to conduct them was first introduced. She suggested that that was because judges recognised that a failure to carry out a sufficient and suitable risk assessment was never the direct cause of an injury: the inadequacy of a risk assessment could only ever be an indirect cause.

   'Judicial decisions had tended to focus on the breach of duty which led directly to the injury. But to focus on the adequacy of the precautions actually taken without first considering the adequacy of the risk assessment was, she suggested, putting the cart before the horse.

   'Risk assessments were meant to be an exercise by which the employer examined and evaluated all the risks entailed in his operations and took steps to remove or minimise those risks. They should, she said, be a blueprint for action. She added at para 59, cited by the Lord Ordinary in the present case, that the most logical way to approach a question as to the adequacy of the precautions taken by an employer was through a consideration of the suitability and sufficiency of the risk assessment. We respectfully agree.'

Thus it is very important that appropriate reliance is put upon these evidential principles when seeking to establish that risk was indeed converted into injury, so that legal causation is established.

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He led Jonathan Clarke of Old Square Chambers for Mr Goldscheider, instructed by Chris Fry of Fry Law.