SHERIFFDOM OF LOTHIAN AND BORDERS AT EDINBURGH

IN THE ALL SCOTLAND SHERIFF PERSONAL INJURY COURT

[2026] SC EDIN 61

PIC-PN2456-25

JUDGMENT OF SHERIFF D R G KEIR

in the cause

JOHN POLLOCK

Pursuer

against

(FIRST) MARSHALL & ANDERSON LIMITED AND
(SECOND) TATA STEEL UK LIMITED

Defenders

Pursuer: McQuade, advocate; Jones Whyte LLP
Defenders: Oliver, advocate; Clyde & Co Scotland LLP

EDINBURGH, 15 May 2026

The sheriff, having resumed consideration of the proof, finds the following facts admitted or proved:

Finds in fact

1. The pursuer, John Pollock, is 76 years old. He is retired.

2. The first defender is Marshall & Anderson Limited. They are the successors to the rights and liabilities of Alexander Anderson and Sons Limited ("AASL").

3. The second defender is Tata Steel UK Limited. They are the successors to the rights and liabilities of the British Steel Corporation.

4. The pursuer's HMRC employment history lists his employers for the tax years from 1964/65 to 2014/15.

5. The pursuer was employed as a boiler fitter by the first defender and their predecessors AASL at their factory in Carfin, Lanarkshire from the tax year 1964/65 to the tax year 1967/68 and also during the course of the tax years 1969/70 to 1970/71.

6. He was employed as a boiler fitter by ISMAC Limited ("ISMAC") in the tax year 1968/69 and during the course of the tax year 1969/70. He was also employed by Macleod & Miller (Engineers) Limited ("MMEL") for a period of 3 months during the tax year 1969/70.

7. The pursuer worked for the first defender and their predecessors on a full-time basis and generally worked around 40 hours per week.

8. He worked on steam boilers that were built from scratch. He carried out work inside the metal shells of boilers while colleagues worked on the external surface of the shells using pneumatic chipping tools. He was exposed to reverberating noise while working inside the metal shells.

9. He worked alongside colleagues who used pneumatic tools such as chippers and riveting equipment. This work was carried out on a daily basis. Due to the noise levels in the Carfin factory, the pursuer and his colleagues required to shout to each other in order to communicate.

10. The pursuer was exposed to noise for around 75% of his working day at the Carfin factory. This noise was generally symmetrical.

11. The pursuer was employed by the second defender's predecessors Clyde Alloy and British Steel Corporation as a shift engineer and then shift foreman from tax year 1970/71 until the tax year 1983/84. The second defender and their predecessors operated Craigneuk Steel Works in Netherton, Lanarkshire.

12. The first defender and their predecessors did not provide any form of hearing protection to the pursuer during the course of his employment with them.

13. The second defender and their predecessors provided hearing protection in the form of ear defenders to the pursuer during the course of his employment with them. It was mandatory for employees such as the pursuer to wear hearing protection. The pursuer wore the hearing protection provided to him except when it was impracticable to do so.

14. The pursuer suffers from a number of health conditions including heart failure, type 2 diabetes, Crohn's disease and is also an ex-smoker.

15. The pursuer suffered several episodes of loss of consciousness while boxing as a young man.

16. The pursuer has bilateral high frequency sensorineural hearing loss. This hearing loss is at least 35 dB in the right ear and 48 dB in the left ear.

17. The pursuer has mild to moderate tinnitus. He experiences this as a zinging sensation. His tinnitus has been caused by his hearing loss.

18. The pursuer's hearing loss is age associated hearing loss.

19. The pursuer has not attended his GP in relation to his hearing loss and does not currently wear hearing aids. He would benefit from wearing hearing aids due to the extent of his age associated hearing loss.

Finds in fact and law

1. The pursuer has not suffered loss, injury and damage through the first defender's fault and negligence or breach of statutory duty in terms of section 29(1) of the Factories Act 1961.

NOTE

Introduction

[1] In this action the pursuer seeks damages for the loss, injury and damage he suffered arising from his alleged exposure to excessive noise during the course of his employment with the first and second defenders between 1964 and 1984 at their respective premises at Carfin and Craigneuk.

[2] A proof proceeded on 10 March to 13 March, 24 March and 30 March 2026. In addition to the witness evidence, parties lodged a joint minute of agreement.

[3] The pursuer abandoned his claim against the second defender on day three of the proof which thereafter continued against the first defender alone.

[4] The pursuer called the following witnesses:

(i) The pursuer

(ii) Michael Pavlovski, Audiologist

(iii) Frazer Paterson, Audiologist

(iv) Gary Percival, Acoustic Engineer

(v) Mr Jonathan Newton FRCS, Consultant ENT Surgeon

[5] The first defender called the following witnesses:

(i) Danielle Randall, Audiologist

(ii) Mr Stuart Robertson FRCS, Consultant ENT Surgeon

The evidence

The pursuer

[6] The pursuer was 76 years old. His current health was poor and he suffered from a number of medical conditions including heart failure, type 2 diabetes and Crohn's disease. He was a heavy smoker in his younger years and had suffered from lung cancer which had been successfully treated.

[7] He categorised his hearing as "terrible". He struggled to hear people's voices in a crowd and he needed to turn up the volume when he was watching television. His hearing was worse in his left ear. He also experienced a "zinging" noise in his ears which was present all the time.

[8] His hearing had deteriorated over a long period of time but he had not taken any steps to address the problem. He had occasionally used his late father's hearing aids to assist.

[9] He had been employed by the first defender at their factory in Carfin. He joined them in 1964 at the age of 15 when he left school. He started off as an apprentice before qualifying as an engineer at the age of 21. He worked on a full-time basis, initially working from 0800 to 1700 hours with breaks although his hours reduced to around 40 hours per week as his employment progressed. He also worked overtime when it was available.

[10] The Carfin factory was a corrugated steel building about two to three storeys in height. He worked in a large L-shaped room that contained a variety of industrial machinery including a large air compressor that was used to run different hand-operated pneumatic tools.

[11] He was exposed to noise for at least 75% of his working day in the factory. He assessed the noise as either loud or very loud. It was so loud that he had to shout to communicate with his colleagues.

[12] He worked throughout the factory in close proximity to colleagues who used pneumatic hand tools. He worked inside the metal shells of boilers while colleagues used pneumatic chipping tools on the external surface of the shells. The chipping tools were very noisy and also caused vibrations that went right through his body. He would work inside boiler shells on a daily basis for up to 2 or 3 hours. This was where he was exposed to the greatest amount of noise.

[13] He also worked alongside colleagues using a pneumatic gun to insert rivets into boilers. He would hold the rivet in place while his colleague used the gun on the rivet. The colleague stood on his left hand side while using the gun on the majority of occasions but would also stand on his right hand side.

[14] The first defender did not take any steps to mitigate the noise levels to which he was exposed. He was not provided with any hearing protection.

[15] He joined the second defender's predecessors in 1970 when the first defender went into liquidation. He worked at Craigneuk steelworks on a full-time basis. He worked for 39 hours per week together with regular overtime. He worked for 6 years as a shift engineer and then around 7 years as a shift foreman.

[16] The Craigneuk factory consisted of a large building made from corrugated steel and brick. As a shift engineer, he used a variety of pneumatic hand tools and worked throughout the factory. The noisiest area was the electric arc furnace where there were loud cracking and banging noises. He was exposed to much less noise in his role as a shift foreman as he was largely office-based.

[17] He was provided with ear defenders by the second defender's predecessors. It was compulsory to wear them and notices were displayed around the factory in that regard. He wore his ear defenders when he worked in the vicinity of the furnace. However, there were occasions when it was impracticable to wear them when working on smaller machines. He estimated that he wore his ear defenders for around 70 to 80% of his shift when he worked as a shift engineer and around 30 to 40% of his shift when he worked as a foreman.

[18] He was subsequently employed by Greater Glasgow Health Board. Any noise exposure in that employment was very low compared to the exposure with the first and second defenders.

[19] During cross-examination, with reference to his HMRC Schedule (Joint Bundle page 5), the pursuer explained that ISMAC was an amalgamation of three companies: Ideal Standard, Marshall Anderson and Carfin. He carried out the same job for ISMAC as he had done for Marshall Anderson. When ISMAC closed down, he joined MMEL for 3 months.

[20] He accepted that he occasionally worked for the first defender outwith the Carfin factory when he accompanied a colleague to customer sites in England. The work on those sites could involve significant noise but not all of the time. He estimated that he was exposed to noise for around 70% of his time at a customer site if he was working on a boiler.

[21] He maintained that he had worn the hearing protection provided to him by the second defender's predecessors notwithstanding that he had told one of the medico-legal experts instructed in relation to his claim (Mr Stuart Robertson FRCS) that no such protection had been provided.

[22] He also confirmed that he took a significant amount of medication on a daily basis notwithstanding that he had told another medico-legal expert (Mr Jonathan Newton FRCS) that he did not take any medication.

[23] He accepted that he underwent a hearing assessment around 10 years ago and was told at that time that his hearing loss was age-related. He confirmed that he did not currently use hearing aids. He was aware that hearing aids were available through the NHS but had not taken any steps in that regard.

Michael Pavlovski

[24] Michael Pavlovski was a qualified audiologist with 17 years' experience. He carried out an audiological assessment of the pursuer for the medico-legal report prepared by Mr Jonathan Newton FRCS on 21 February 2025. The results of that assessment were contained within the audiogram he had prepared (JB page 35).

[25] The assessment was carried out at the pursuer's home address and in accordance with the applicable industry guidance. He had monitored the ambient noise level of the room where the assessment was carried out throughout the assessment. It had remained below 35 dBA at all times and was therefore compliant with industry standards.

[26] As part of the assessment, he had manually removed some minor debris in one of the pursuer's ear canals but otherwise there were no problems. The equipment used for the assessment had been appropriately calibrated and checked. He had used insert earphones for the assessment which had a foam tip that went inside each ear to ensure a secure fit.

[27] While he did not recall the pursuer specifically, if the pursuer had presented with any issues during the assessment, such as ill-health or cognitive disability, he would have stopped the assessment. No such issues had arisen.

Frazer Paterson

[28] Frazer Paterson was also a qualified audiologist with 13 years' experience. He carried out an audiological assessment of the pursuer for the medico-legal report prepared by Mr Jonathan Newton FRCS on 3 March 2026. The results of that assessment were contained within the audiogram he had prepared (JB page 425).

[29] The assessment was carried out within a soundproof booth and in accordance with the applicable industry guidance. The ambient noise level of the booth was compliant with industry standards. The equipment used for the assessment had been appropriately calibrated and checked.

[30] During cross-examination, he accepted that using a soundproof booth for assessment purposes was the gold standard but the minimum standard was to ensure that the ambient noise level remained below 35 dBA. An assessment of a person's hearing at their home could produce accurate results provided the ambient noise level remained below that level.

Gary Percival

[31] Gary Percival was an acoustic consultant. He held an honours degree in audio and music technology, a diploma in acoustics and noise control from the Institute of Acoustics, an MSc in environmental and architectural acoustics and was a member of the Institute of Acoustics. He had prepared a report dated 23 July 2025 (JB page 367) which he adopted as his evidence. He had been instructed to assess and calculate the level of noise exposure experienced by the pursuer during his employment with both defenders.

[32] His report was based on the information provided by the pursuer's agents about the pursuer's work activities. This information consisted of a precognition obtained from the pursuer, a questionnaire completed by the pursuer, and a series of emails sent by the

pursuer's agents in response to questions he had raised following his initial review of the papers. He had not interviewed the pursuer. The questionnaire was a standard template document used for hearing loss claims and included questions about the nature of the work, the type and duration of the noise sources, and whether any hearing protection was provided. None of these documents were appended to his report or otherwise lodged with the court.

[33] In relation to the first defender, he understood that the pursuer had worked as an engineer building steam boilers from scratch. This involved the pursuer working in close proximity to colleagues using a variety of noisy handheld tools, including tools for chipping and riveting. These tools were used continuously and the pursuer was exposed to this noise throughout his working day. The pursuer was unable to converse with colleagues and had to shout to be heard.

[34] Standing the passage of time since the noise exposure, he had referred to two documents published by the Health and Safety Executive ("HSE") to assist with his estimation of the noise levels experienced by the pursuer: (i) "*Noise in Engineering – Sheet No.26*" published in 1988 and (ii) "*Controlling Noise at Work – The Control of Noise at Work Regulations 2005 – Guidance on Regulations*" published in 2005.

[35] On the basis of the first HSE document, noise levels were estimated as follows:

- Hammering steel – noise range from 95 dBA to 100 dBA.
- Riveting – noise range from 100 dBA to 110 dBA.
- General noise level in fabrication shop – noise range from 85 dBA to 95 dBA.

[36] Mr Percival considered that the figures for hammering steel would be an appropriate comparator for a pneumatic chipping hand tool and the figures for riveting would be an appropriate comparator to the riveting work referred to by the pursuer in his evidence.

[37] On the basis of the second HSE document, Mr Percival estimated that the probable noise level where a person had to shout to talk to someone 1 metre away was 90 dBA.

[38] Based on the pursuer's working conditions and working patterns, Mr Percival estimated the pursuer's average daily noise exposure to be in the range 98.2 dB LEPd to 107.5 dB LEPd.

[39] On this basis, the second requirement for noise-induced hearing loss ("NIHL") set out in the publication "*Guidelines on the diagnosis of noise-induced hearing loss for medicolegal purposes*" by Coles, Lutman and Buffin dated 12 April 2020 ("the Coles Guidelines" – JB page 467), ie exposure to an average LEPd of 85 dB or more, was met. In his opinion, it was very likely that the pursuer's average LEPd exceeded 95 dBA.

[40] In relation to the pursuer's Noise Intromission Level ("NIL"), namely the cumulative level of noise exposure over his period of employment with the first defender, he calculated that to be in the range 106.4 dB to 115.6 dB.

[41] He confirmed that the figures in his report related solely to the work carried out by the pursuer at the Carfin factory. Having been appraised of the pursuer's occasional work at customer sites, he did not consider that would have a material impact on his calculations. Any reduction to the NIL figure would be no more than 1 to 2 dB and his conclusions would remain the same.

[42] Mr Percival had little doubt that the first defender would have been aware of the risk of injury to employees caused by exposure to noise. The pursuer was not provided with any form of hearing protection and no other steps had been taken to mitigate the risks posed by the working environment.

[43] Under cross-examination, Mr Percival confirmed that he was entirely reliant on the information provided by the pursuer's solicitors. He had assumed for the purposes of his

calculations that the pursuer had been exposed to noise at a similar level throughout his employment.

[44] Mr Percival accepted that if the pursuer had only been exposed to noise for around 75% of his working day, his figures for average noise exposure and NIL would be lower than stated in his report. He did not think that it would make a significant difference but he was unable to provide an exact figure.

[45] He agreed that the pursuer's work at customer sites would also have an impact on his calculations. However, he maintained that the impact of the remote working would not have a material impact on his figures. He also agreed that if the pursuer had been allowed slightly longer breaks during his working day, it would only have a modest impact on his figures.

[46] He accepted that he had not carried out any calculations in relation to the impact of any safeguards that might have been implemented in respect of noise exposure. As such, he was unable to comment on what the levels of noise exposure would have been in those circumstances.

[47] For the purposes of his calculations, he had assumed that the first defender, their predecessors AASL, and ISMAC were to be treated as the same entity. He had therefore not carried out any apportionment exercise among those different companies.

[48] He accepted that when factoring in all of the variations in the pursuer's evidence, it was possible that the NIL figure would be reduced by a significant amount although the extent of that reduction was unclear. He also accepted that he had not produced the workings for the various calculations he had carried out to arrive at the figures in his report.

[49] In re-examination, Mr Percival stated that standing the additional information put to him at proof, he would be surprised if his figures reduced by more than 1 or 2 dB. Standing

the pursuer's evidence about working inside boiler shells while colleagues operated pneumatic tools in close proximity to him, he considered such work would be extremely noisy and fall at the upper end of the scale.

Mr Jonathan Newton FRCS

[50] Jonathan Newton was a consultant ENT surgeon. He had been a consultant for 15 years. He interviewed the pursuer by telephone on 29 April 2025 and prepared a report dated 6 May 2025 (JB page 348). He subsequently prepared letters dated 12 February 2026 (number 5/26 of process) and 4 March 2026 (JB page 424). He adopted these documents as his evidence other than the reference in his report to the pursuer not being on any regular medication. He was aware that the pursuer had a number of chronic health conditions that required ongoing treatment.

[51] The pursuer had undergone separate audiological assessments for his report and his March letter. The first assessment was carried out by Michael Pavlovski on 21 February 2025 and the second was carried out by Frazer Paterson on 3 March 2026. The resulting audiograms were reproduced in his report and March letter respectively.

[52] Mr Newton noted a history from the pursuer that he had hearing loss in both ears that had worsened significantly over the past 3 years. The pursuer told him that his left ear was worse than his right ear. He also complained of tinnitus in both ears which had been present for a few years. He did not wear hearing aids and had not sought any medical advice in respect of his hearing problems. His general health was poor. Mr Newton noted the pursuer's employment history and that he had never been in the army or otherwise used firearms. There was no history of ear infections, ear surgery, chemotherapy or brain injury.

[53] There were two forms of sensorineural hearing loss ("SNHL"): age-associated hearing loss ("AAHL") and noise-induced hearing loss ("NIHL"). The former was caused by the gradual ageing of the human ear whereas the latter was caused by exposure to noise. The symptoms associated with both were similar. Persons suffering from NIHL often but not invariably had symmetrical hearing loss affecting hearing at the 3, 4 and 6 kHz frequencies.

[54] The accepted method of diagnosis of NIHL was detailed in the Coles Guidelines (JB page 467). Applying those guidelines, the three criteria that required to be satisfied to produce a diagnosis of NIHL in the particular circumstances of the pursuer were:

(1) high frequency sensorineural hearing impairment when a single measurement of hearing threshold level ("HTL") at 3, 4 or 6 kHz was at least 10 dB greater than the HTL at either 1 or 2 kHz ("R1");

(2) exposure to noise whereby the lower limit of such noise exposure that would meet this requirement was considered to be an equivalent daily continuous noise exposure (LEPd) of not less than 85 dBA for a sufficient number of years to lead to a cumulative exposure of at least 100 dBA (the Noise Intromission Level "NIL")("R2(a)"); and

(3) audiometric configuration whereby a sufficiently large downward notch or bulge in the 3 to 6 kHz range was present in the audiogram ("R3(a)").

[55] In terms of the Pavlovski audiogram (JB page 353), he considered that the pursuer had moderate to severe bilateral sensory hearing loss.

[56] The R1 criterion was met in both ears on the basis that there was a single measurement of HTL at 3, 4 and 6 kHz that was at least 10 dB greater than at 1 or 2 kHz.

[57] Having regard to the employment history provided by the pursuer, it was reasonable to assume exposure to loud noise and therefore the R2(a) criterion was also met.

[58] In relation to R3(a), there was an obvious downward bulge present in the pursuer's left ear while there was a small bulge in the pursuer's right ear. R3(a) was therefore satisfied in both ears.

[59] With all three criteria met, Mr Newton considered that the pursuer suffered from NIHL in both ears together with bilateral tinnitus of moderate severity.

[60] Mr Newton calculated the pursuer's overall hearing loss over 1, 2 and 3 kHz to be 35 dB in the right ear and 47 dB in the left ear. These figures demonstrated that his hearing was worse than a man of his age in the 25th percentile for hearing loss. He calculated the pursuer's NIHL to be 2 dB in the right ear and 15 dB in the left ear. The figure for the left ear was greater than 10 dB and therefore satisfied the R3(a) criterion. Standing the differential between the right and left ear, there was an obvious asymmetry in the hearing loss. There could be a number of reasons for such asymmetry including handedness, the tools used or simple chance.

[61] Mr Newton considered that the pursuer's evidence about being right-handed and that colleagues worked with pneumatic tools on his left hand side was helpful in terms of providing a potential explanation for the asymmetrical hearing loss. Mr Newton also referred to certain academic papers which provided comment on asymmetrical hearing loss including a research paper by Da Silva and others ("*Progressive Asymmetry in Occupational Noise-Induced Hearing Loss*" – JB page 654).

[62] It was appropriate to have regard to Note 11 of the Coles Guidelines where there was asymmetrical hearing loss (JB pages 474 to 475). As per Note 11, where one ear (in this case the pursuer's left ear) met the R3(a) criterion and the other ear (the pursuer's right ear)

showed a bulge/notch which was smaller than 10 dB then the probability of NIHL remained high. In Mr Newton's opinion, provided there was some identifiable deficit in the right ear, even though that might be small, when taken alongside the deficit of greater than 10 dB in the left ear, that was sufficient for a diagnosis of NIHL on the balance of probabilities.

[63] In relation to tinnitus, Mr Newton was satisfied that the pursuer suffered from this condition and that it had been caused by his hearing loss.

[64] He recommended that the pursuer should be provided with bilateral hearing aids on a private basis. The cost of such hearing aids was around £5,000 including aftercare for a 5 year period.

[65] Mr Newton had prepared his March letter (JB page 424) following receipt of the Paterson audiogram conducted on 3 March 2026. He considered that the R1 criterion was still met in respect of both ears.

[66] Based on the Paterson audiogram, Mr Newton calculated the pursuer's NIHL over the 3, 4 and 6 kHz frequencies to be 2 dB in the right ear and between 8 and 12 dB in the left ear. These figures still met the requirements of R(3)(a).

[67] Mr Newton prepared his February letter (number 5/26 of process) following receipt of the first report prepared by Stuart Robertson FRCS (JB page 404). He disagreed with Mr Robertson's suggestion that the pursuer's medical history of hypertension, high cholesterol and smoking were relevant to his hearing loss. However, Mr Newton now agreed that the most significant factor in the pursuer's hearing loss was AAHL in contrast to his initial opinion that there was only a small amount of AAHL present.

[68] With reference to Mr Robertson's first report, while there was agreement that the criterion for R1 was met, there was a difference in opinion in relation to R3(a). Mr Newton considered that the audiogram prepared for Mr Robertson's report (the Randall audiogram)

showed significantly worse hearing threshold levels for the pursuer in both ears. However, it also showed slightly smaller bulges in both ears. He was unable to comment on why the Randall audiogram showed different results but considered that it was an outlier compared to the Pavlovski and Paterson audiograms.

[69] Under cross-examination, Mr Newton agreed that the alternative criteria specified in the Coles Guidelines in R3(b) did not apply to the pursuer's case – the sole focus was R3(a). He accepted that the bulge calculated in the right ear at 2 dB would be regarded as small but maintained that it was still sufficient to meet the requirements detailed in Note 11 where there was a significant bulge (greater than 10 dB) in the left ear. He did not accept that there was only a possibility of NIHL in the pursuer's case.

[70] While he had reviewed all three audiograms in arriving at his opinion, he considered that the Pavlovski and Paterson audiograms were more reflective of the pursuer's hearing loss. He accepted that the Randall audiogram did not demonstrate a bulge greater than 10 dB in either ear but he doubted the accuracy of that audiogram.

[71] While he had asked the pursuer about his exposure to noise at work, he could not recall precisely what the pursuer had told him. However if the pursuer had mentioned any asymmetrical noise exposure, he would have included that in his report. He was not aware that the pursuer had boxed regularly as a young man and had suffered several episodes of loss of consciousness. He accepted such information would be relevant in relation to hearing loss.

The first defender's evidence

Danielle Randall

[72] Danielle Randall was a qualified audiologist with 7 years' experience. She conducted an audiological assessment of the pursuer for the medico-legal report prepared by Mr Stuart Robertson FRCS on 15 January 2026. The results of that assessment were contained within the audiogram she had prepared (JB page 420).

[73] The assessment was conducted within a soundproof booth and in accordance with the applicable industry guidance. The ambient noise level of the booth was compliant with industry standards. The equipment used for the assessment had been appropriately calibrated and checked. The use of a soundproof booth was the gold standard for hearing assessments and the ambient noise level had to be below 35 dBA.

[74] The pursuer had presented in a normal fashion. She did not have any concerns about his ability to proceed with the assessment. She did not have any concerns about the accuracy of the results of the assessment.

[75] Under cross-examination, Ms Randall denied that her report was not impartial. The only information she had been provided with by Stuart Robertson was the pursuer's name and date of birth. She did not know the source of Mr Robertson's instruction for the report.

Mr Stuart Robertson FRCS

[76] Stuart Robertson was a consultant ENT surgeon. He had been a consultant for 16 years. He interviewed the pursuer in person on 15 January 2026 and prepared a report dated 23 January 2026 in relation to the pursuer's claim (JB page 404). He subsequently prepared supplementary reports dated 18 February 2026 and 9 March 2026 (numbers 6/3 and 6/11 of process respectively). He adopted these reports as his evidence.

[77] Danielle Randall conducted an audiological assessment of the pursuer on 15 January 2026 for the purposes of his report. The resulting audiogram was reproduced in his first report (JB page 420).

[78] The pursuer told him that he had been aware of hearing loss in both ears for many years and that the hearing loss was symmetrical. He also complained of tinnitus in both ears over a similar period of time. His general health was poor and he suffered from a number of medical conditions including heart failure, angina, hypertension, type 2 diabetes, Crohn's disease and lung cancer. While there was no history of any ear condition, the pursuer had suffered multiple episodes of loss of consciousness as a young man whilst boxing.

[79] In terms of his occupational history, Mr Robertson formed the impression that the pursuer had been exposed to noise all around him. The pursuer had not mentioned any specific asymmetrical noise exposure.

[80] Mr Robertson agreed that it was appropriate to use the Coles Guidelines for the purpose of diagnosing NIHL. The criterion for R1 was met while R2 was dependent upon the court accepting the opinion of Gary Percival in relation to the noise levels to which the pursuer had been exposed.

[81] In relation to R3, he agreed with Mr Newton that R3(b) did not apply and the dispute between them focused on the interpretation and application of the criterion detailed in R3(a).

[82] On the basis of the Randall audiogram, there were no audiometric bulges/notches greater than 10 dB in either of the pursuer's ears. As such, R3(a) was not met and the diagnosis of the pursuer's hearing loss was therefore AAHL, not NIHL. It therefore followed that any tinnitus suffered by the pursuer related to his AAHL.

[83] While Mr Robertson accepted that the Pavlovski audiogram demonstrated an audiometric bulge greater than 10 dB in the pursuer's left ear, there was no corresponding bulge/notch in the pursuer's right ear. The only bulge in the right ear was at 6 kHz (6 dB) while the pursuer's hearing in that ear at 4 kHz (the frequency most commonly affected by noise exposure) was materially better than would be expected for a man of his age. The overall figure for NIHL in the right ear (across 3, 4 and 6 kHz) based on the Pavlovski audiogram was only 2 dB.

[84] Applying Note 11 from Coles Guidelines to the Pavlovski audiogram, he classified the bulge in the right ear as "little or no trace of NIHL" which meant that there was only the possibility of NIHL. Mr Robertson added that if a person was given a hearing aid calibrated to improve their hearing by 2 or 3 dB, they would not notice any difference

[85] Based on the Pavlovski audiogram, the pursuer had total binaural hearing loss of 51 dB measured across 3, 4 and 6 kHz. As such, the binaural NIHL figure of less than 5 dB suggested by Mr Newton would not be considered to be either significant or disabling within the context of their overall hearing loss.

[86] Mr Robertson highlighted academic research carried out by Lie and others in 2014 ("*The prevalence of notched audiograms in a cross-sectional study of railway workers*" – number 7/1 of process) which found that audiometric bulges/notches were a common finding in populations of workers who had never been exposed to excessive noise levels (in that particular study, out of a study size of 12,000 railway workers, 53% of the group who had not been exposed to excessive noise (4,000 workers approximately) were found to have an audiometric bulge/notch). In terms of the research paper by Da Silva and others referred to by Mr Newton (JB page 654), it was notable that across the three groups of metallurgy workers involved in the study, where one group had no exposure to excessive noise at all,

there was a tendency across all three groups for the left ear to have poorer hearing than the right ear in cases of asymmetrical hearing loss. Therefore, in the absence of a convincing history of asymmetrical exposure to excessive noise levels within an industrial setting, the finding of a significant bulge/notch (ie greater than 10 dB) in one ear and little or no trace of a bulge/notch in the other ear did not support a diagnosis of NIHL on the balance of probabilities.

[87] Mr Robertson reviewed the Paterson audiogram in his third report (6/11 of process). The results were similar to the Pavlovski audiogram in that they demonstrated asymmetrical hearing loss with a significant bulge (greater than 10 dB) in the left ear and little or no trace of a bulge in the right ear. While "little or no trace" was not defined in the Coles Guidelines, Mr Robertson interpreted that phrase to mean a figure substantially less than 10 dB.

[88] Having regard to the pursuer's extensive medical history, Mr Robertson considered that his cardiovascular conditions in particular had exacerbated the extent of his AAHL. The pursuer's repeated episodes of loss of consciousness while boxing could also be relevant.

[89] When the data from all three audiograms was combined, he assessed the pursuer's hearing loss as moderately severe according to the World Health Organisation guidelines published in March 2021 (number 6/5 of process at page 56 – where the hearing threshold in the better hearing ear sat in the range 50 dB to less than 65 dB).

[90] Where there were multiple reliable audiograms and there was concern about potentially missing a diagnosis of NIHL, it was reasonable to take an average across the various examinations. This sort of exercise was detailed in Note 3 of the Coles Guidelines where it was stated that the 10 dB threshold for a bulge/notch could be reduced by up to

3 dB. Having carried out that exercise in respect of the three audiograms available, Mr Robertson calculated that the bulge in the pursuer's left ear was greater than 7 dB and the bulge in the right ear was 5 dB.

[91] The Coles Guidelines did not specify how to use Note 3 and Note 11 together. However, even where there was a significant bulge in one ear having carried out the Note 3 averaging exercise, it remained Mr Robertson's opinion that the bulge in the right ear was not a significant bulge and should be classified as "little or no trace". There was therefore only a possibility of NIHL.

[92] Mr Robertson noted that for someone of the pursuer's age, their hearing would deteriorate by around 5 to 10 dB every 5 years due to the ageing process alone. Even if Mr Newton's figure for binaural NIHL (less than 5 dB) was accepted, the pursuer's need for hearing aids had been accelerated by no more than 2 to 3 years. However, it remained his opinion that the pursuer's hearing loss was AAHL rather than NIHL.

[93] Under cross-examination, Mr Robertson agreed that the main area of difference between him and Mr Newton was the application of the Coles Guidelines in interpreting the hearing loss in the pursuer's right ear.

[94] Mr Robertson was clear that the pursuer's presentation at interview on 15 January 2026 gave him no cause for concern. He had no reason to doubt the accuracy of the results of the Randall audiogram.

[95] In relation to the pursuer's evidence about being exposed to excessive noise at work on his left hand side, in the absence of the pursuer wearing hearing protection in one ear alone, he would still consider such noise exposure to be bilateral and would expect to see NIHL present in both ears. It could not be equated with classic asymmetrical exposure to

noise such as from the use of firearms as that involved noise of a completely different character (impulse noise) to the broadband noise found within a factory setting.

[96] In relation to Note 11 in the Coles Guidelines, Mr Robertson did not agree that the audiological findings in relation to the pursuer's right ear equated to a smaller bulge/notch. He considered that a smaller bulge would still need to be at least 7 dB to meet the Note 11 criteria and that was not the case for the pursuer. Adopting the Note 3 averaging approach, the bulge was only 5 dB. He remained of the opinion that there was little or no trace of a bulge in the right ear.

[97] Mr Robertson maintained that it was appropriate to have regard to the pursuer's significant medical history and that he was an ex-smoker. In the Da Silva study (JB page 654), workers with a variety of health conditions, such as hypertension and central nervous system diseases, as well as a history of smoking, were excluded from the study. This supported his contention that there was a link with hearing loss, otherwise there was no reason to exclude them from the study.

[98] Mr Robertson questioned the reliability of the Pavlovski audiogram on the basis that it was conducted at the pursuer's home. It was insufficient to simply monitor the ambient noise level during the assessment as that did not involve testing the ambient noise level at all of the different frequencies tested, something that was carried out for sound booths.

[99] Mr Robertson reiterated that it was not uncommon to find audiometric bulges in the general population, ie where there no exposure to excessive noise. This highlighted the importance to identify bulges of a sufficient magnitude to meet the R3(a) criteria for the purposes of a diagnosis of NIHL.

Submissions

[100] Both parties lodged written submissions which were adopted and supplemented by oral submissions. During the course of the proof, the pursuer objected to the admissibility of certain evidence given by Mr Robertson in relation to audiology assessments. This objection was not maintained during submissions and it is therefore repelled. The first defender objected to the admissibility of Mr Percival's evidence in its entirety. This objection was renewed during submissions and I have dealt with that at paras [120] to [126] below.

[101] I summarise parties' submissions as follows.

Pursuer's submissions

[102] The pursuer sought decree against the first defender for the sum of £25,500 plus interest together with expenses.

[103] The key issues for determination by the court were:

(1) Whether the first defender was in breach of their duties at common law and in terms of section 29(1) of the Factories Act 1961 in relation to the pursuer's exposure to excessive noise; and

(2) Whether any such breach caused the pursuer to develop NIHL.

[104] In relation to the first issue, when the evidence of the pursuer and Gary Percival was combined, it was clear that the pursuer had been exposed to an average weekly noise exposure in excess of 95 dB LEPd and a Noise Intromission Level in excess of 100 dB while employed by the first defender.

[105] The first defender had not provided the pursuer with any hearing protection or taken any other steps to reduce the level of noise exposure within the factory. The first defender was therefore in breach of their duties at common law and under statute.

[106] Turning to the second issue, parties agreed that it was appropriate to use the Coles Guidelines for the diagnosis of NIHL. Where the views of the medical experts differed, Mr Newton's opinion that the large audiometric bulge in the pursuer's left ear and the smaller bulge in his right ear were sufficient to meet the R3(a) criteria should be preferred. When the Coles Guidelines were applied to these findings, there was a probability that the pursuer was suffering from NIHL.

[107] The pursuer's evidence regarding exposure to noise on his left hand side had provided an explanation for the asymmetrical hearing loss detailed in the audiograms.

[108] In terms of the medical experts' respective approaches to the interpretation of Note 11 of the Coles Guidelines, Note 3 could be used in conjunction with Note 11 to enable the pursuer's hearing loss to meet the criteria for NIHL notwithstanding the smaller bulge in the right ear.

[109] The results contained within the Randall audiogram should be viewed with caution as they were at odds with the other two audiograms.

[110] Finaly, in relation to quantum, the pursuer sought £20,000 for solatium and £5,500 in respect of the cost of private hearing aids.

First defender's submissions

[111] The first defender sought decree of absolvitor.

[112] It was a matter of admission that the first defender knew of the risk of injury to employees exposed to noise. It was accepted that the first defender would be in breach of their duties to the pursuer if he was exposed to an average weekly noise of 90 LEPd or above. It was also accepted that it was appropriate to use the Coles Guidelines for the diagnosis of NIHL. In so doing, each of the R1, R2 and R3(a) criteria had to be met.

[113] There was no dispute that R1 was met but R2 could only be met if the court accepted the engineering evidence of Mr Percival while R3(a) was not met based on the medical evidence.

[114] The pursuer's claim failed for a number of reasons. Firstly, the pursuer's evidence was neither credible or reliable and should be rejected. There were significant inconsistencies between what he had told the court and the various experts instructed for the purposes of his claim. These inconsistencies had a fatal impact on the calculations carried out by Gary Percival in relation to noise exposure.

[115] Secondly, the evidence of Gary Percival was inadmissible and should be rejected. Mr Percival had failed to produce the pursuer's precognition and questionnaire upon which he had based his calculations. He had also failed to include the workings for the calculations contained within his report.

[116] Thirdly, even if Mr Percival's evidence was accepted, it did not provide an evidential basis to allow the R2 criterion to be met standing the unsatisfactory nature of the pursuer's evidence and the erroneous assumptions made by Mr Percival in arriving at his conclusions.

[117] Fourthly, the pursuer had not established that the first defender was the successor to the rights and liabilities of ISMAC, to whom both the pursuer and Mr Percival had attributed excessive noise exposure. As such, the cumulative noise exposure and NIL figures prepared by Mr Percival fell to be disregarded.

[118] Finally, the pursuer had not proved that any breach of duty on the part of the first defender had caused him to develop NIHL and, in any event, the pursuer did not suffer from NIHL. There was no evidence about what difference the provision of hearing protection or other protective measures might have made if they had been implemented. In terms of the medical evidence, where there was conflict between the opinions of Mr Newton

and Mr Robertson, the latter should be preferred. The pursuer had asymmetrical hearing loss. The hearing in his left ear was significantly worse than his right ear. There was no reliable evidence that the pursuer had been consistently exposed to asymmetrical noise. Adopting the language of Note 11 in the Coles Guidelines, there was little or no trace of NIHL in the pursuer's right ear. As such, the criterion in R3(a) was not met and NIHL was only a possibility, not a probability.

[119] Turning to quantum, if NIHL was established it was at a low level, particularly when compared with the AAHL element. The appropriate figure for solatium was £2,000. In relation to hearing aids, there was no reliable evidence that the pursuer would actually obtain any and no evidence as to their cost. Moreover, any award made to the pursuer would require to be apportioned to take account of his exposure to noise while employed by ISMAC.

Decision

First defender's objections

[120] The first defender maintained their objection to the admissibility of Mr Percival's evidence. While it was accepted that Mr Percival was a skilled person who had the necessary qualifications and experience, his report was inadmissible on the basis that he had (i) failed to produce the documentation relied upon in arriving at his conclusions and (ii) failed to include the workings for the calculations contained within his report.

[121] In response, the pursuer submitted that Mr Percival had provided an adequate explanation for his calculations and had revised his opinion where appropriate during the course of his evidence to take account of the variations in the pursuer's evidence in court.

[122] It is trite to say that a skilled person's report has limited evidential value unless the facts upon which it is based are proved. As commented upon elsewhere in this judgment, the pursuer's evidence in court in relation to certain key issues contrasted sharply with the information he had provided on various occasions prior to that time. As a result, Mr Percival was faced with the challenge of applying his expertise to a different factual matrix while giving evidence in court. However, these are issues that relate to the weight to be attached to his evidence rather than its admissibility.

[123] While the first defender highlighted the failure to include the pursuer's precognition and questionnaire, it was clear from Mr Percival's report what information had been extracted from those documents. He detailed in sections 2.1, 2.3 and 2.4 of his report (JB pages 372 to 373) the pursuer's description of the work he carried out for the first defender, the hearing protection provided (or lack thereof) and his estimation of the pursuer's average daily noise exposure. He repeated the exercise in relation to the second defender in sections 3.1, 3.3 and 3.4 of his report (JB pages 375 to 376).

[124] Turning to the failure to include detailed workings for the calculations he had carried out, the results of which were contained within tables 4, 5, 7, 8 and 9 (JB pages 373 to 377), Mr Percival had set out the basis for those calculations in Appendix E of his report (JB pages 395 to 397) with reference to the logarithmic formulae used. I did not understand there to be any challenge to those formulae.

[125] Again, while it might have been the case that the factual matrix underpinning the figures used in the calculations had changed, that is relevant to the weight to be attached to those calculations rather than their admissibility.

[126] On that basis, I am satisfied that Mr Percival's report is admissible and the first defender's objection is accordingly repelled.

Liability

[127] The pursuer abandoned his claim against the second defender on the third day of the proof, leaving his claim against the first defender. In terms of the first defender's position, they accepted that they had duties of care in relation to the pursuer during his period of employment with them both at common law and under the 1961 Act. They also accepted that they knew of the risk of injury to employees such as the pursuer who were exposed to noise during that employment. Further, they accepted that they would be in breach of their duties if the pursuer proved that he was exposed to LEPd of 90 dBA or more during that employment.

[128] As can often be the case in claims for hearing loss dating back many years (in this case over 55 years), only the pursuer gave evidence about his working environment. While his evidence received support from Mr Percival and Mr Newton, the essentials of his claim fall to be assessed on his own credibility and reliability.

[129] I consider that the pursuer made a reasonable impression in court and appeared to be doing his best to assist the court. Standing the nature of his employment with the first defender, it cannot be reasonably disputed that he was exposed to high levels of noise. However, it was clear that there were material discrepancies between what he told the court and what he had told his solicitors and the experts involved in the case prior to that time in relation to key issues to be determined by the court.

[130] In relation to his employment by the second defender, the pursuer told the court that he had been provided with ear defenders, that it had been compulsory to wear them and that notices had been displayed around the factory in that regard. He estimated that he wore his ear defenders for around 70 to 80% of his shift when he worked as a shift engineer.

[131] This should be contrasted with:

(i) the pursuer's averments on Record (Stat 5 at lines 157 to 161):

> "They [the second defender] provided hearing protection in the form of ear defenders but did not instruct him in its use or enforce its use. The hearing protection was impractical and could not be worn when completing some tasks. The pursuer wore hearing protection about 10% of the time."

(ii) The employment history noted by Mr Newton during his interview with the pursuer on 29 April 2025 (JB page 351):

> "He advises he was never provided with hearing protection."

(iii) what Mr Percival noted in his report (JB page 375):

> "[The pursuer] states that he sometimes wore ear muffs but this was not enforced…he estimates that he only wore hearing protection for approximately 15% of the time, for no more than 1-2 hours per shift and only in certain noisy areas."

(iv) and what the pursuer told Mr Robertson at interview on 15 January 2026 (JB page 408):

> "No hearing protection was ever provided."

[132] While it is unnecessary to speculate about what precipitated the pursuer's decision to abandon his claim against the second defender during the course of the proof, these material discrepancies did not assist the pursuer in my assessment of his reliability as a witness.

[133] In relation to the first defender, discrepancies arose regarding the duration of the pursuer's noise exposure and whether or not it could be characterised as asymmetrical. The latter point was particularly important standing the asymmetrical nature of his hearing loss.

[134] According to the pursuer's averments on Record, he was exposed to excessive noise throughout his working hours. There were no averments regarding any asymmetrical exposure. Neither Mr Newton nor Mr Robertson noted any asymmetrical exposure to noise during their interviews with the pursuer. Both confirmed that they would have noted such

exposure if the pursuer had mentioned that. Similarly, Mr Percival did not note any asymmetrical exposure in his report and stated in his report (JB page 373): "…the noise to which he was exposed occurred all day and was continuous."

[135] In contrast, the pursuer told the court that he was exposed to noise for at least 75% of every working day. He also described occasions when colleagues would use pneumatic tools on his left hand side to insert rivets into boilers.

[136] I accept that the pursuer was giving evidence about events that occurred over 55 years ago and he should be afforded some latitude in that regard. I also accept that a witness will not necessarily give the same answer to a question asked by a different person at a different time, particularly in the unfamiliar confines of a witness box in court. However, I consider these discrepancies on critical issues to be significant and undermine the reliability of key elements of his evidence. Moreover, insofar as Mr Percival's opinion is reliant on certain facts being established, the weight to be given to his evidence is similarly weakened.

[137] Notwithstanding these significant discrepancies, I am prepared to accept as credible and reliable the following from the pursuer's evidence:

(i) that he worked for the first defender and their predecessors on a full-time basis and generally worked around 40 hours per week;

(ii) that he was exposed to noise for around 75% of his working day at the Carfin factory;

(iii) due to the noise levels in the Carfin factory, he and his colleagues required to shout to each other in order to communicate;

(iv) that he worked on steam boilers that were built from scratch and carried out work inside the metal shells of boilers while colleagues worked on the external surface of the shells using pneumatic chipping tools; and

(v) that he was exposed to reverberating noise while working inside the metal shells and he also worked alongside colleagues who used pneumatic tools such as chippers and riveting equipment - this work was carried out on a daily basis.

[138] I do not accept the pursuer's evidence that there was any exposure to asymmetrical noise on a regular basis. His evidence about this was vague and, more importantly, at odds with what he had reported to the three expert witnesses involved in the case. It therefore follows that the noise he was exposed to at the Carfin factory should be characterised as generally symmetrical.

[139] A separate issue arose regarding the pursuer's employment history. It was a matter of admission that the first defender was the successor to the rights and liabilities of AASL. The pursuer averred that he was employed by the first defender and their predecessors from the tax year 1964/65 to the tax year 1970/71. However, according to the HMRC Schedule (JB page 5), the pursuer was only employed by them from the tax year 1964/65 to the tax year 1967/68 and also during the course of the tax years 1969/70 to 1970/71. He was employed as a boiler fitter by ISMAC in the tax year 1968/69 and during the course of the tax year 1969/70. He was also employed by MMEL for a period of 3 months during the tax year 1969/70.

[140] The pursuer accepted that MMEL had no connection to the first defender. However, other than the pursuer's vague statement that ISMAC was an amalgamation of three companies that included the first defender, there was an absence of evidence that they should be considered to be one of the first defender's predecessors. More fundamentally,

there were no averments to support such a suggestion. Against that background, there is no basis to make any finding about the relationship between ISMAC and the first defender, including the issue of whether the first defender had any liability for the acts and omissions of ISMAC. This has an impact on Mr Percival's noise exposure calculations which I will return to below.

[141] As mentioned above, the various calculations originally carried out by Mr Percival were based on the factual matrix detailed in his report. This matrix included:

(i) that the pursuer was exposed continuously to noise throughout every working day; and

(ii) that the pursuer was employed continuously by first defender from 1964/65 to 1970/71.

[142] As detailed in para [137], I have accepted the pursuer's evidence that he was exposed to noise for around 75% of his working day. Mr Percival accepted that this would reduce his calculated figures for the pursuer's average daily noise exposure and NIL but he was unable to provide a revised calculation.

[143] Mr Percival's assumption that the pursuer was continuously employed by first defender for the period in question was also wrong. The pursuer was employed by ISMAC for over 12 months followed by MMEL for around 3 months. During his employment with ISMAC he carried out similar duties so it would be reasonable to assume that he was exposed to similar levels of noise. This period of employment was included in Mr Percival's figures for the pursuer's average daily noise exposure and NIL.

[144] During cross-examination, Mr Percival conceded that when the discrepancies regarding daily noise exposure and employment with ISMAC were taken into account, it

was possible that his figures would be reduced by a significant amount, albeit he was not in a position to provide revised figures in that regard.

[145] As referred to in para [122], Mr Percival was faced with the situation where the factual bedrock upon which he had based his opinion had changed in several material aspects. Standing the need to revisit the figures he had originally produced in the light of the pursuer's evidence in court, it was unfortunate that such figures were not produced. While I consider that Mr Percival did his best to attempt to address these evidential challenges, he was candid enough to admit that he could not provide revised figures while in the witness box and only offered vague approximations for those figures. As a result, I am unable to rely on his evidence insofar as it relates to his calculation of both the pursuer's average daily noise exposure and NIL with the first defender.

[146] It therefore follows that, in the absence of reliable evidence regarding these essential matters, the pursuer has failed to establish on the balance of probabilities that he was exposed to a sufficient level of noise that would constitute a breach of duty either at common law or in terms of the 1961 Act as averred on Record. His claim therefore fails and the first defender is entitled to decree of absolvitor.

Causation

[147] If I am wrong about the pursuer's level of noise exposure while employed by the first defender, and that they were in breach of their duties towards him, it is necessary to consider whether or not those breaches caused the pursuer to develop NIHL.

[148] There was no dispute that the pursuer suffered from a significant level of hearing loss. All three audiograms showed hearing loss of at least 35 dB in the right ear and at least 48 dB in the left ear which would be classified as moderately severe bilateral hearing loss.

Although Mr Newton had initially stated that the pursuer's hearing loss was only partly age-associated, he subsequently revised that opinion and agreed with Mr Robertson that the pursuer had a significant level of AAHL.

[149] It was a matter of agreement that it was appropriate to apply the Coles Guidelines for the purposes of diagnosing NIHL. In that regard, parties agreed that (i) R1 was met and (ii) satisfying R2 was conditional on the engineering evidence of Mr Percival being accepted. However, there was a sharp contrast in the evidence in relation to R3(a) and how it should be applied to the pursuer.

[150] Three audiograms had been prepared for the purposes of the pursuer's claim. I am satisfied that all three were accurately carried out. While I appreciate that the Paterson and Randall audiograms had the benefit of being conducted in a soundproof booth, the Pavlovski audiogram at the pursuer's home was conducted in line with the guidance issued by the British Society of Audiology and I make no criticism of the steps taken to ensure that there was an appropriate ambient noise level during the testing, including the use of correctly fitted insert earphones.

[151] I am also satisfied that the pursuer did not give the three audiologists any reason to believe that he was not fit for assessment. On that basis, I reject the pursuer's attempt to dismiss the Randall audiogram as an outlier. The simple fact that the results in that audiogram did not correspond exactly with the other audiograms does not of itself point to error. I accepted Mr Robertson's evidence that it is not unusual to find variations in test results conducted on different days even in the same test conditions and that there was an acceptable degree of consistency across all three audiograms. While the pursuer's misjudged attempt to question the partiality of Ms Randall was not insisted upon during

submissions, I considered that all three audiologists gave their evidence in a professional manner that gave me no concern about the credibility or reliability of their evidence.

[152] Focusing on the requirements for R3(a), there must be a sufficiently large downward bulge/notch demonstrated in the audiograms between what would be expected in AAHL and the pursuer's actual hearing in the 3 to 6 kHz range. Both experts agreed that, as detailed in the Coles Guidelines, for a bulge/notch to be sufficiently large to indicate the probable presence of NIHL, it would need to be at least 10 dB in size.

[153] The issue for the pursuer was that such a bulge/notch was only evident in the left ear and, moreover, it was only shown in the Pavlovski and Paterson audiograms but not the Randall audiogram. There was no evidence in any of the audiograms of a bulge/notch of at least 10 dB in the right ear. There was no dispute that the pursuer's hearing loss should be categorised as asymmetrical on that basis.

[154] Where there was such asymmetrical hearing loss, parties agreed that it was appropriate to have regard to Note 11 in the Coles Guidelines (JB pages 474 to 475).

[155] Note 11 states as follows (numbering and emphasis added):

> "**Note 11 Asymmetrical hearing impairment**
>
> (i) …for instance, if one ear meets R3(a)… and the other ear also shows a notch or bulge but it is smaller than the 10 dB… required, then the probability of NIHL is still high.
>
> (ii) If one ear is markedly better at high frequencies and shows a significant notch or bulge but the worse ear shows little or no trace of such then there is still a probability of NIHL…
>
> (iii) In other cases there is not much difference between the two ears at high frequencies but, without apparent explanation, only one ear shows a significant notch or bulge and the other shows little or no trace of one: such cases should be regarded as very borderline and be decided on the strength of other evidence (e.g. severity of noise exposure or of temporary postexposure symptoms).

(iv) Finally, if only the worse ear at high frequencies shows a significant notch or bulge and there is little or no trace of NIHL in the better ear, then there is only a possibility, not a probability, of NIHL."

[156] Parties agreed that categories 11(i) and 11(iv) were relevant in this case. The pursuer submitted that category 11(i) applied and that NIHL was a probability on the basis that there was a bulge in the pursuer's better ear (right ear) albeit it was smaller than 10 dB. The defender submitted that category 11(iv) applied and that any bulge in the right ear fell to be classified as "little or no trace" and therefore there was only a possibility of NIHL.

[157] In approaching the application of the Coles Guidelines, it should be emphasised that they are only guidelines and should be viewed as such. Paragraph 3.1 of the Coles Guidelines (JB page 468) states "guidelines are a matter of judgement. They should be interpreted as guides, not rigid rules". Moreover, no definition is provided either for what level of bulge qualifies for the purposes of N11(i) other than it is "smaller than 10 dB" or what constitutes "little or no trace" for the purposes of N11(iv). Against that background, it is therefore important to assess all of the evidence accepted by the court in reaching a conclusion about whether or not the pursuer has proved on the balance of probabilities that he has developed NIHL.

[158] In carrying out that assessment, the frequencies typically affected by noise exposure are 3 kHz, 4 kHz and 6 kHz, with both experts in agreement that 4 kHz was the frequency typically most susceptible to damage. I therefore considered it significant that in the Pavlovski and Randall audiograms, no deficits in hearing were identified in the right ear at either 3 kHz or 4 kHz, with a deficit of only 3 dB at those frequencies detailed in the Paterson audiogram. Indeed, in the Pavlovski audiogram, the pursuer's hearing in the right ear at 4 kHz was assessed as better than someone of his age. The greatest deficit found in

the right ear was 6 dB at 6 kHz as per the Pavlovski and Randall audiograms (the Paterson audiogram assessed the deficit to be 3 dB at 6 kHz).

[159] Another relevant adminicle of evidence is that the simple presence of a large bulge/notch is not of itself necessarily indicative of NIHL. As noted in the Coles Guidelines at paragraph 7.3 (JB page 470), and accepted by both Mr Newton and Mr Robertson, such a bulge/notch is not a definitive or unique characteristic of NIHL and can be found in people with no significant noise exposure. Furthermore, it was significant that the pursuer's asymmetrical hearing loss did not correspond with the evidence I have accepted regarding his exposure to generally symmetrical noise.

[160] Turning to the competing medical evidence, I have concluded that Mr Robertson's analysis falls to be preferred. Both Mr Newton and Mr Robertson were suitably qualified and gave their evidence in a professional and straightforward manner. However, I formed the view that Mr Robertson gave his evidence in a more detailed manner. He provided careful justification for his views where they differed from the position adopted by the pursuer. For example, in contrast to Mr Newton's dismissal of the Randall audiogram whereby he questioned its accuracy without providing any satisfactory justification for such criticism, Mr Robertson was prepared to take account of the findings of the Pavlovski audiogram notwithstanding his own reservations about hearing assessments conducted at home. Mr Robertson had also met the pursuer in person and carried out a full review of the pursuer's medical records. As a result of those investigations, he identified that the pursuer suffered from a significant level of AAHL from the outset of his involvement, something that Mr Newton only latterly agreed upon. He also identified that the pursuer suffered several episodes of loss of consciousness while boxing as a young man, evidence which Mr Newton agreed could be clinically relevant in the context of a hearing loss claim.

[161] I also considered that Mr Robertson's approach to the application of the Coles Guidelines, particularly having regard to the content of Note 11, made more sense in the context of the evidence available in this case. Prior to the start of the proof, the pursuer had not told anyone involved in the case that he had been exposed to noise on an asymmetrical basis. For the reasons given at paras [129] to [138], I have rejected the pursuer's evidence that there was such exposure. As a result, there was no reliable evidence of asymmetrical exposure on a consistent basis throughout the pursuer's working day which, in any event, was the basis upon which both ENT experts had proceeded when they prepared their reports. Even if the pursuer's evidence had been accepted in that regard, Mr Robertson was able to provide a reasoned explanation for why such exposure would not necessarily assist the pursuer.

[162] Separately, taking the pursuer's case at its highest, a potential diagnosis of NIHL was borderline standing Mr Newton's quantification of NIHL in the right ear of only 2 dB based on the Paterson audiogram (the most recent of the three). Notwithstanding his acceptance that such a bulge was small, Mr Newton considered that it was still sufficient to satisfy Note 11(i) for a diagnosis of NIHL where there was a bulge of at least 10 dB in the left ear. His assertion that such a small bulge should be viewed as decisive was at odds with his evidence that a bulge would have to be 5 dB to be clinically significant. It was also at odds with Mr Robertson's unchallenged evidence that a noise differential of 2 dB would be imperceptible to the listener.

[163] For all these reasons, I therefore prefer the evidence of Mr Robertson to Mr Newton with particular regard to their key areas of dispute. It follows that I accept Mr Robertson's evidence that any NIHL in the pursuer's right ear sits squarely in the Note 11(iv) category and should be classified as "little or no trace".

[164] Parties also referred to Note 3 of the Coles Guidelines as an alternative route to a potential diagnosis of NIHL in cases where there were multiple reliable audiograms. In such circumstances, Note 3 (JB page 472) states that an average can be taken of the hearing threshold measurements across the relevant frequencies to reduce the R3(a) "at least 10 dB" requirement "by up to 3 dB". It also states that "in borderline cases, an average of all the audiograms available and acceptable for averaging should be used in assessing the evidence for or against the presence of high-frequency hearing impairment, notch or bulge".

[165] I have already rejected the pursuer's attempt to dismiss the Randall audiogram as an outlier. Mr Newton did not address the application of Note 3 in any great detail whereas Mr Robertson carried out a careful review of the three audiograms available. There was only a significant bulge (ie in excess of 7 dB) in the pursuer's left ear. As such, the R3(a) requirements were not met using this modified approach. I accepted this evidence.

[166] Accordingly, when taking into account all of the evidence I have accepted in this particular case, the pursuer has failed to prove on the balance of probabilities that he has developed NIHL and his claim fails.

Quantum

[167] For the sake of completeness, I will deal with quantum. The only heads of claim advanced by the pursuer at proof were solatium and the cost of hearing aids.

[168] As per parties' submissions, there was little dispute that even if the pursuer had developed NIHL, it was at a modest level when compared with the significant level of AAHL present.

[169] In terms of the JC Guidelines (17th edition), I was referred to both chapter 5(B)(d)(ii) for NIHL and moderate tinnitus, with a suggested figure for solatium of £20,000, and

chapter 5(B)(e) for the acceleration of, or time-limited need for, the use of hearing aids with a suggested figure of £2,000.

[170] According to the JCG notes for chapter 5(B):

> "the disability is not to be judged simply by the total measurement of hearing loss; there is often a degree of tinnitus present and age is particularly relevant because impairment of hearing affects most people in the fullness of time and impacts both upon causation and upon valuation, such that the amount of noise-induced hearing loss ('NIHL') is likely to be less than an individual's total hearing loss".

[171] If I had found that the pursuer was suffering from NIHL together with associated bilateral tinnitus then any award for solatium would have to reflect the fact that such NIHL was at a modest level relative to the level of AAHL, that his need for hearing aids had been accelerated by no more than two to three years, and that his tinnitus symptoms were constant and would be classified as mild to moderate in their severity. Taking these factors into account, I consider that an award of £8,000 for solatium would be appropriate together with interest.

[172] In relation to the claim for hearing aids on a privately funded basis, it is relevant that the pursuer underwent an audiological assessment around 10 years ago when he was advised that he had AAHL. Notwithstanding the fact that (a) his hearing was causing sufficient concern to have it formally tested and (b) he was advised that he had AAHL, he had not taken any steps to obtain hearing aids. I am not persuaded that he would take such steps now. I therefore make no award for this head of claim.

Conclusion

[173] Decree of absolvitor is granted in favour of the first defender.

[174] At the request of parties, expenses are reserved. The sheriff clerk will fix a hearing on expenses.