Case No: D08YX820

IN THE LEEDS COUNTY COURT

The Combined Court Centre, Oxford Row, Leeds

Date: 2 July 2018

Before:

HIS HONOUR JUDGE GOSNELL

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Between:

Roy Richardson Dalus	**Claimant**
- and -	
Lear Corporation (Nottingham) Limited (1)	**Defendants**
ATV Automotive & Industrial Components (UK) Ltd (3)	

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Mr Theo Huckle QC (instructed by Slater and Gordon) for the Claimant
Mr Jonathan Carr (instructed by BC Legal) for the First Defendant
Mr Kam Jaspal (instructed by DAC Beachcroft) for the Third Defendant

Hearing dates: 7th June 2018

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Approved Judgment

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

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HIS HONOUR JUDGE GOSNELL

His Honour Judge Gosnell:

1. On 7th June 2018 I heard the First Defendant's application to strike out the Claimant's claim. I heard helpful submissions from Leading Counsel for the Claimant and Counsel for the First Defendant. Although the Third Defendant was represented by Counsel, it adopted a neutral position on the application. At the conclusion of the hearing I indicated that I would reserve judgment and this document represents my judgment after consideration of all the documents and submissions both in writing and orally.

2. The First Defendant applied to strike out the Claimant's claim because it alleged that the Claimant had failed to serve compliant medical evidence in accordance with CPR 35 and CPR PD 16 paragraph 4.3. The application was resisted by the Claimant who submitted that he was not in breach of the rules. If I find that there has been a breach it will be necessary to determine what sanction would be appropriate to be imposed. The First Defendant would contend that the claim should be struck out pursuant to CPR 3.4(2)(c), the Claimant contends for some less draconian outcome.

3. **The factual background**

I will attempt to set out the factual background neutrally. The Claimant historically had been employed by both the First and Third Defendants and on 11th January 2014 responded to an advertisement about noise induced hearing loss. He had a screening audiogram and this was sent to the solicitors instructed by him on 19th January 2014. His general practitioner records were obtained and the usual enquiries were made from HMRC to obtain a schedule of employers. The Claimant's Solicitors instructed Audiological Measurement and Reporting Plc ("AMR") to prepare a report and as part of this process the Claimant underwent an audiometric assessment by an audiologist on 13th August 2014. For reasons which may become apparent later the report was not actually prepared until 27th October 2015 and was signed by Professor Mark E Lutman. I will deal with the content and aetiology of this report later in this judgment. On 11th January 2017 a letter of claim was sent to each Defendant and on the same day the Claim form was sent to court for issue of court proceedings which took place on 25th January 2017. On 17th May 2017 Particulars of Claim accompanied by the AMR report were served on each Defendant's nominated solicitors. The three Defendants each served a defence and the court then sent out directions questionnaires in the usual fashion. The directions sought by the Claimant about expert evidence included the provision of a single joint expert ENT surgeon. This proposal was accepted by the Second and Third Defendants but the First Defendant proposed that each party be permitted to rely on their own expert ENT surgeon. A Part 18 request was made by the First Defendant and answered by the Claimant but the issues are not relevant to this application.

4. On receipt of the Directions Questionnaires the court listed a Costs and Case Management Conference on 19th March 2018 which was later adjourned until 26th April 2018. In the meantime, this application was issued in February 2018. In the event for reasons which are no longer important the application was adjourned to be heard by me and transferred to the County Court sitting at Leeds. The Claimants commissioned a report from Mr Zeitoun a consultant ENT surgeon who reported on a desktop basis, relying on the August 2014 audiogram on 16th April 2018.

5. The AMR Report

It is necessary for me to go into some detail about how this report, and others by the same organisation are prepared as it is relevant to the decisions I have to take about the application. The following extracts which appear below are taken directly from the report in the Claimants case:

> *"Instruction requested the assessment of the extent of any hearing loss and opinion regarding the presence of any Noise Induced Hearing Loss (NIHL). The methodology for assessment and basis for determination of the existence and quantification of NIHL are described below"*

There then follows a very detailed description of how the audiologist will conduct the full audiometric assessment including taking a history, otoscopy examination and the methodology for the audiometric test. The following section appears in the report to explain how the analysis is carried out:

> *"Analysis of the audiometric thresholds here is according to requirements R1 and R3 of the CLB guidelines. The analysis is performed automatically by software written specifically for the purpose. When the outcome is unambiguous, according to the criteria of the guidelines, no further human intervention occurs. All other cases are inspected by AMR staff to implement modifying factors or notes within the CLB guidelines or to resolve ambiguities under the supervision of Professor Lutman"*

The CLB guidelines referred to is a reference to an academic paper written by Professor Lutman with two other academics in 2000 setting out guidelines for the diagnosis of Noise Induced Hearing Loss [1].

6. The First Defendant's solicitors in this case have been attempting to ascertain the level of involvement of Professor Lutman in the preparation of individual reports and have asked questions of clarification pursuant to part 35 in other cases. A sample of the questions and answers are as follows:

> "Q*: is it correct to say that the AMR NIHL assessment report is a computerised report generated by the audiologist inputting data from an audiometric testing session?*
>
> *A: Yes, although note that some cases will be automatically flagged for human intervention (e.g. where there is conductive hearing loss or where note 11 of the CLB guidelines applies). This is described in section 6 of the report. In addition, there is human overview of a random sample of cases for quality assurance purposes.*

[1] Coles Lutman and Buffin: "Guidelines on the diagnosis of noise-induced hearing loss for medicolegal purposes" *Clin. Otolaryngol. 2000,25,264-273*

> *Q: Is it correct that the audiogram is analysed by the programme rather than yourself or the audiologist and the conclusions set out in the report are of the programme not a human being?*
>
> *A; Please see previous answer.*
>
> *Q: Is it correct that your involvement in the generation of the AMR NIHL report was limited to developing the programme/ software which generates the reports? If not please confirm the nature of the work that you carried out in preparing the AMR NIHL assessment report.*
>
> *A: My involvement was the design of the administration and software systems, setting up of quality assurance processes and the general oversight of the system. I would be asked for advice in particular cases as required.*
>
> *Q: Are the resulting AMR NIHL assessment reports checked by you or anyone else? If so, please confirm who and at what stage?*
>
> *A: Please see previous answers"*

7. In this Claimant's case the report records that audiometric evidence meets requirements R1 and R3 of the CLB guidelines. Once the analysis is completed it records that Mr Dalus has a material hearing loss of 32.3 dB of which the noise-induced component is estimated at 5.9 dB, based on the binaural 1-2-3 kHz average. It was also recorded that Mr Dalus reported tinnitus about which the report states:

> *"The are no standard guidelines or criteria to determine whether tinnitus is noise-induced and determination of tinnitus causation is beyond the scope of this automated report"*

The report confirms that Mr Dalus may benefit from hearing aids and gives a generic estimate of the likely cost. The report is signed by Professor Lutman, it would appear with a computer-generated signature and contains the usual statement of compliance with the requirements of Part 35 CPR and a statement of truth.

8. It is only fair that I should record the submissions made by the Claimant's solicitor Mr Perry in his witness statement dated 17th April 2018. His firm deal with a large number of NIHL claims and there are practical difficulties inherent in such claims. They tend to be of limited value but often produce disproportionate costs in part because solicitors for both parties tend to want to instruct their own ENT surgeon to give expert evidence on causation. This often leads to disputes in court about the appropriate track for allocation and whether the defendant should be permitted to rely on their own evidence.

9. Professor Lutman is clearly an expert on the topic of audiology and NIHL. In addition to being one of the authors of the seminal guidelines referred to above as CLB guidelines he is also a joint author of a subsequent paper which updates the methodology to quantify the extent of NIHL[2]. The guidelines effectively set out how to carry out a statistical analysis of the audiometric results and Professor Lutman's computer programme performs that analysis applying the methodology set out in the guidelines. It is submitted that the audiometric analysis is carried out by accredited audiologists to robust standardised testing procedures.

10. Mr Perry relates how his firm have been involved in negotiations with a number of major Employer Liability insurers which have involved the insurers arranging audits of various cases where an AMR report has been prepared to ensure the audiometric testing is accurate. Some of these insurers have now confirmed that they are prepared to accept reliance on approved audiology reports without the need for a full ENT report from a consultant. Mr Perry has experience of insurers settling cases based on an AMR report which has the advantage of being much cheaper to obtain that a full report from an ENT surgeon. He relies on the Civil Justice Council report [3] as support for the use of audiologists reports to settle claims without the need for a report from an ENT surgeon.

11. **The relevant Rules and Practice Directions**

I will attempt to set out those rules and Practice Directions which both parties have asserted are relevant to the issues I have to decide:

> ***CPR 1.1—The overriding objective***
>
> *1.1 (1) These Rules are a new procedural code with the overriding objective of enabling the court to deal with cases justly and at proportionate cost.*
>
> *(2) Dealing with a case justly and at proportionate cost includes, so far as is practicable—*
>
> *(a) ensuring that the parties are on an equal footing;*
>
> *(b) saving expense;*
>
> *(c) dealing with the case in ways which are proportionate—*
>
> *(i) to the amount of money involved;*
>
> *(ii) to the importance of the case;*
>
> *(iii) to the complexity of the issues; and*
>
> *(iv) to the financial position of each party;*

[2] Lutman Coles and Buffin: *Guidelines for quantification of noise-induced hearing loss in the medico legal context (2016) Clin Ot pp 347-357*

[3] Civil Justice Council: establishing fixed costs and better procedures for noise claims 6th September 2017

(d) ensuring that it is dealt with expeditiously and fairly;

(e) allotting to it an appropriate share of the court's resources, while taking into account the need to allot resources to other cases; and

(f) enforcing compliance with rules, practice directions and orders.

3.4 Power to strike out a statement of case

3.4 (2) The court may strike out a statement of case if it appears to the court-

> *(c) that there has been a failure to comply with a rule, practice direction or court order*

3.9—Relief from sanctions

3.9 (1) On an application for relief from any sanction imposed for a failure to comply with any rule, practice direction or court order, the court will consider all the circumstances of the case, so as to enable it to deal justly with the application, including the need—

(a) for litigation to be conducted efficiently and at proportionate cost; and

(b) to enforce compliance with rules, practice directions and orders.

(2) An application for relief must be supported by evidence.

16.4—Contents of the particulars of claim

16.4 (1)

Particulars of claim must include—

(a) a concise statement of the facts on which the claimant relies;

(b) if the claimant is seeking interest, a statement to that effect and the details set out in paragraph (2);

(c) if the claimant is seeking aggravated damages(GL) or exemplary damages(GL), a statement to that effect and his grounds for claiming them;

(d) if the claimant is seeking provisional damages, a statement to that effect and his grounds for claiming them; and

(e) such other matters as may be set out in a practice direction

CPR 16 PD Matters which must be included in the particulars of claim in certain types of claim

Personal injury claims

4.1 The particulars of claim must contain:

(1) the claimant's date of birth, and

(2) brief details of the claimant's personal injuries.

4.2 The claimant must attach to his particulars of claim a schedule of details of any past and future expenses and losses which he claims.

4.3 Where the claimant is relying on the evidence of a medical practitioner the claimant must attach to or serve with his particulars of claim a report from a medical practitioner about the personal injuries which he alleges in his claim.

35.2—Interpretation and definitions

35.2 (1) A reference to an "expert" in this Part is a reference to a person who has been instructed to give or prepare expert evidence for the purpose of proceedings.

(2) "Single joint expert" means an expert instructed to prepare a report for the court on behalf of two or more of the parties (including the claimant) to the proceedings

35.10—Contents of report

35.10 (1) An expert's report must comply with the requirements set out in Practice Direction 35.

(2) At the end of an expert's report there must be a statement that the expert understands and has complied with their duty to the court.

Form and Content of an Expert's Report 35PD

3.1 An expert's report should be addressed to the court and not to the party from whom the expert has received instructions.

3.2 An expert's report must—

(1) give details of the expert's qualifications;

(2) give details of any literature or other material which has been relied on in making the report;

(3) contain a statement setting out the substance of all facts and instructions which are material to the opinions expressed in the report or upon which those opinions are based;

(4) make clear which of the facts stated in the report are within the expert's own knowledge;

(5) say who carried out any examination, measurement, test or experiment which the expert has used for the report, give the qualifications of that person, and say whether or not the test or experiment has been carried out under the expert's supervision;

(6) where there is a range of opinion on the matters dealt with in the report—

(a) summarise the range of opinions; and

(b) give reasons for the expert's own opinion;

(7) contain a summary of the conclusions reached;

(8) if the expert is not able to give an opinion without qualification, state the qualification; and

(9) contain a statement that the expert—

(a) understands their duty to the court, and has complied with that duty; and

(b) is aware of the requirements of Part 35, this practice direction and the Guidance for the Instruction of Experts in Civil Claims 2014.

3.3 An expert's report must be verified by a statement of truth in the following form—

"I confirm that I have made clear which facts and matters referred to in this report are within my own knowledge and which are not. Those that are within my own knowledge I confirm to be true. The opinions I have expressed represent my true and complete professional opinions on the matters to which they refer."

12. The parties' submissions

The application is made by the First Defendant in its amended form to strike out the Claimant's claim pursuant to CPR 3.4 (2) (c) for breach of paragraph 4.3 of the Practice Direction to part 16 which is set out above. It is supported by two witness statements from the First Defendant's solicitor Jordan Davies. The First Defendant submits that the Claimant is obliged by the above provision to serve with his Particulars of Claim a report from a medical practitioner about the personal injuries which he alleges in his claim. It is submitted that the report must be from a medical practitioner and must comply with CPR 35 and the Practice Direction thereto. The First Defendant accepts that the report need only deal with condition and prognosis. The AMR report is deficient in that firstly it is not a report from a medical practitioner and secondly it is not CPR part 35 compliant. Whilst the First Defendant accepts that there may be limited circumstances where a Claimant can choose not to serve a medical report in a personal injury claim, for example where the injury is so minor and time-limited that it would not proportionate to instruct a medical expert, a Claimant is obliged to do so in a claim where he intends to rely on medical evidence to prove his claim.

13. The First Defendant submits that failure to serve medical evidence with the Particulars of Claim puts both the Defendant and the court in an invidious position. The Defendant would find it difficult to decide whether it requires its own medical evidence and the Court would find it difficult to give meaningful case management directions.

14. The First Defendant contends that when medical evidence is served pursuant to 16PD par 4.3 it ought to be part 35 compliant. The Defendant submits that the AMR report is not part 35 compliant because:

    a) CPR 35.2(1) defines an expert as a "person";

    b) The analysis in the report is created by the software not personally by Professor Lutman;

    c) Although there is a statement of compliance with the expert's duties and a statement of truth it is signed on Professor Lutman's behalf electronically and he usually has not seen the report at all;

    d) Any examination is carried out by the Audiologist who does not sign the certificate;

    e) An expert is obliged to consider all material facts including those which might detract from their opinions and also provide a range of opinion. Professor Lutman cannot have done this if he has not event read the report or seen the patient.

15. On the basis that the Court finds that there has been a breach of the rules the First Defendant submits that any application for an extension of time to serve CPR compliant medical evidence or relief from sanctions should be refused. Using the well-known three stage test set out in ***Denton v White [2014] 1 WLR*** the First Defendant submits that the breach was significant. The medical evidence ought to have been served by 17th May 2017 and the report of Mr Zeitoun was not served until 18th April 2018. According to the First Defendant there is no good reason for the

breach and an examination of all the surrounding circumstances would militate against relief being granted.

16. The application is resisted by the Claimant on the basis that there is no breach of the rules an alternatively that if there is, the court should extend the time for service of a medical report until Mr Zeitoun's report was served thereby granting relief from sanctions. I have read and taken into account the statements of Stephen Perry and Jennifer Atkins. The Claimant's primary case is that the AMR audiology report is not that of a medical practitioner and therefore not covered by CPR 16PD par 4.3. This paragraph is conditional in that it commences: "*Where the Claimant is relying on the evidence of a medical practitioner…"* whereas the previous provision in paragraph 4.2 is mandatory about the service of a schedule of loss. A report may not be required where the injury is minor and self-limiting or where the Claimant can identify and describe the injury other than by reference to a medical report i.e. by the AMR report, not a report from an ENT surgeon. It is submitted that the purpose of paragraph 4.3 is to provide appropriate information to the Defendant about the nature of the claim being made. It is not to direct or constrain the evidence ultimately to be relied on by the Claimant in bringing the claim. Leading Counsel for the Claimant sought to distinguish issues of particularisation from issues of proof. It was submitted that CPR 35 only bites on expert evidence which is ultimately to be adduced at trial.

17. It is submitted that the words "Where *the Claimant is relying on*…." cannot be interpreted to include where the Claimant may wish to rely on, or intends in the future to rely on the evidence of a medical practitioner a decision about which can only be made when all the statements of case have been served. In this case the Claimant intended to rely on the AMR report for the purposes of paragraph 4.3 as it accurately identified the nature of the injury the Claimant had suffered and his solicitors invited the court to allow him to rely on that report and order a report from an ENT surgeon on a single joint expert basis.

18. As an alternative the Claimant submits that if paragraph 4.3 requires the service of a report in every personal injury case then the AMR report should be considered compliant notwithstanding that the author is not a medical practitioner as it deals fully with the identification and quantification of the injury. An example might be where a claim is made for Post-Traumatic Stress Disorder and the report of a psychologist was served. This is not a report from a medical practitioner but it would be admissible at trial and would comply with the objectives of paragraph 4.3.

19. It is submitted that Professor Lutman is qualified to give expert evidence in cases of Noise Induced Hearing Loss and has done so many times, for both Claimants and Defendants. The Claimant accepts that only a condition and prognosis report is required but it is usual in NIHL claims for causation to be also considered in the same report. The Claimant contends for a broad and purposive interpretation of paragraph 4.3 and relies on the evidence of Mr Perry about the laudable intentions to provide expert evidence at a more proportionate cost to the ultimate advantage of both parties.

20. If, contrary to the Claimant's submissions the Court finds that the Claimant is in breach of the rules it is submitted that to strike out the Claimant's claim for breach of an order for which there is no specific sanction would be wrong in principle. If the court finds that the First Defendant was entitled to a condition and prognosis report from a medical practitioner then they have such a report in the form of the report of

Professor Zeitoun served in April 2018. It is submitted they are really none the wiser from having this report as he opines that the NIHL element of his hearing loss is 5.7 dB when compared with 5.9dB in the AMR report. In the light of this information the First Defendant has suffered no prejudice and the breach is not significant. The Claimant would say the reason for the breach was a laudable attempt to identify the injury in a more economic and therefore proportionate way in accordance with the overriding objective. The court should also take into account that this application was not issued until February 2018 when the alleged breach had taken place some nine months earlier. The service of Mr Zeitoun's report cured the breach and the First Defendant could have withdrawn this application on receipt of the report and allowed the claim to continue. This is a case where the First Defendant would gain an undeserved windfall and the Claimant would suffer severe prejudice a loss of access to justice.

21. **Analysis**

Whether there has been a breach of a Rule or Practice Direction

Leading Counsel for the Claimant raised an issue rhetorically during his submissions to the Court whether the rules do require the filing and service of a medical report with the Particulars of Claim. He relies on the fact that paragraph 4.3 of the Practice Direction to part 16 CPR appears only to require it where the Claimant is relying on the evidence of a medical practitioner. My personal recollection was that a medical report had always been a requirement and I am reinforced in this view by the County Court Rules as they applied in 1998 where at Order 6 Rule 1 (5) it stated:

> *"(5) Subject to paragraph (6) a plaintiff in an action for personal injuries shall file with the Particulars of Claim-*
>
> *(a) A medical report*
>
> *(b) A statement of the special damages claimed"*

22. In my judgment the different wording in the Civil Procedure Rules is to cater for those cases where a litigant wishes to make a claim for personal injuries but does not intend to rely on a medical report in order to prove the injuries he contends he has suffered. If he has suffered bruising which resolved after two weeks he may choose to prove this injury by a combination of his own evidence and perhaps photographs reasoning that it would be disproportionate and unnecessary to go to the expense of obtaining a medical report. Both counsel appeared to accept that "medical practitioner" is not defined in the rules but is likely to follow the definition in the Medical Act 1983 which appears to refer to doctors, physicians and surgeons. Both counsel also accepted that neither Professor Lutman or the audiologist who did the audiometric tests would qualify as medical practitioners for the purposes of the Practice Direction.

23. A submission was made by Leading Counsel for the Claimant that it may be possible to prove an injury claim or an element of an injury claim by the report of an expert who is not a "medical practitioner". I accept that psychological conditions can be proved by the report of a consultant clinical psychologist and in a soft tissue injury claim the Practice Direction at 16PD par 4.3A(1)(d) envisages that the report of a physiotherapist would be sufficient. If a party chooses to prove his injury claim by the use of an expert who is not a medical practitioner then in my view he is required to serve that report with his Particulars of Claim as he is essentially relying on that report in place of a report from a medical practitioner. I also accept that a conventional expert report from Professor Lutman might fall into this category as I accept he is qualified to act as an expert in the assessment of NIHL and has given evidence before the courts on a number of occasions but he is not technically a medical practitioner. I do not accept that merely because Professor Lutman is not technically a medical practitioner that his report would not be caught by the requirement in paragraph 4.3 and the Claimant would be free to issue proceedings without serving any expert evidence and merely wait for the court to timetable exchange of expert evidence in due course.

24. My reason for reaching this conclusion is that 4.3 is intended to compel claimants to serve a medical report with the Particulars of Claim (as has been the position for decades) limited to the issue of condition and prognosis. All of the Pre-Action Protocols dealing with personal injury claims (including the Protocol for Disease and Illness claims) envisage the disclosure of at least some expert evidence as part of the protocol prior to the issue of proceedings. It cannot be right that a party could withhold disclosure of expert evidence intended to prove personal injury merely because the report was not from a medical practitioner. It was accepted by both counsel during the hearing that the obligation under paragraph 3.4 was to disclose a condition and prognosis report[4] but of course in NIHL claims the expert report normally deals with the issue of causation also, in particular the quantification of how much of a claimant's hearing loss is likely to be noise induced.

25. I do not accept the submission made by Leading Counsel for the Claimant that the purpose of paragraph 4.3 is only to provide information to the Defendant about the nature and extent of the claim being made not to direct or constrain the evidence ultimately to be relied on by the Claimant. Firstly, the Practice Direction does not state that the purpose of the rule is only to provide information and secondly the Particulars of Claim are intended to provide that information in particular the section normally entitled "Particulars of Injury". In my view, the purpose of paragraph 4.3 and its predecessors was to compel the Claimant to disclose to the Defendant some corroborative evidence from a doctor or surgeon intended to prove that the Claimant had indeed suffered some injury or illness as a result of the Defendant's breach of duty (although it was not strictly necessary that the report should deal with causation in claims such as clinical negligence claims).

26. The Claimant's submissions are of course consistent with their approach to this litigation and the use of the AMR report. The AMR report is clearly intended to be disclosed to the Defendant's insurer prior to litigation and in some cases, this may result in settlement of the claim without the need for either proceedings or further expert opinion. There appears to be a tacit acceptance however that the AMR report

[4] *Duce v Worcester Acute Hospitals NHS Trust* [2014] EWCA Civ 249

will not be the only expert evidence the Claimant intends to deploy at trial because he appears to accept that either a single joint expert will be appointed (dealing with exactly the same issue that the AMR report dealt with) or that each side will instruct their own ENT experts. There is some support for this approach in the Civil Justice Council report referred to by Mr Perry and set out in paragraph 38 of his statement. The report supported the early disclosure of a reliable audiogram but under the section Expert Evidence the following appears:

> *"5.2 In order to make a claim, a claimant who believes he or she may have suffered NIHL will be required to obtain medical evidence to show the extent of the NIHL.*
>
> *5.6 An Ear Nose and Throat (ENT) Consultant may be instructed to prepare a medical report on the results of the audiogram.*
>
> *5.11 There are perfectly valid reasons why the evidence of an ENT consultant would be commissioned in cases which are likely to lead to litigation…..Both groups accept that where liability is in dispute an ENT report is likely to be required…..*
>
> *5.12 The proposal of the working party is therefore that in a case where the Defendant admits breach within the protocol procedures and does not then dispute causation or limitation, the claimant will produce the report of an audiologist as the basis for the settlement negotiations rather than incurring the additional cost of an ENT surgeon's report."*

27. The approach of the Working Party appears to accept that there may be cases where the disclosure of a reliable audiogram may result in settlement of the claim without the need for proceedings. The AMR report is a similar resource, a reliable audiogram with the appropriate statistical calculations provided in addition. The Working Party appears to concede however that where causation or limitation is contested the report of an ENT surgeon is likely to be required. In my experience, proceedings are normally issued because either the Defendant has indicated an intention to contest causation, breach of duty or limitation or at least has failed to concede such issues within the protocol period. The Working Party appears to envisage the need to obtain the report on an ENT expert at this point.

28. It is no part of my decision on this application to consider the reliability or accuracy of the AMR report. I have to confess some discomfort however about the concept of relying on a report for the purposes of issuing court proceedings, knowing full well that if the proceedings are contested another type of expert will be instructed to cover exactly the same ground as the original report which means that permission to rely on the original report is likely to be refused. That, however would be a case management issue for a Judge later in the proceedings.

29. Notwithstanding my unease the issue in this application is whether there has been any breach of a Rule or Practice Direction. I have accepted already that it is possible to comply with paragraph 4.3 by service of an expert report from someone other than a

medical practitioner. In my view however, the report in question must comply with the CPR and Part 35 in particular. I do not accept the submission made on behalf of the Claimant that paragraph 4.3 does not require a CPR compliant report under part 35. CPR 35.2 (1) makes it clear that:

> *"reference to an "expert" in this Part is a reference to a person who has been instructed to give or prepare expert evidence for the purpose of proceedings".*

Preparing a report which is intended to be served with the Particulars of Claim (even if it is not intended to rely on it at trial) is still expert evidence prepared for the purpose of proceedings. It is clear that part 35 is therefore engaged. I accept that the AMR is deficient in a number of respects and does not comply with Part 35 and the Practice Direction thereto. The deficiencies are set out in paragraph 14 of this Judgment and I accept all the criticisms made by the Defendant are accurate. The most serious breach is the fact that the statement of truth and compliance is a computer-generated signature and Professor Lutman has not actually read or seen any of the report before his signature is automatically added. I therefore find that there has been a breach of the Rules and Practice Directions by the filing and service of the AMR report with the Particulars of Claim.

30. **Should the claim be struck out?**

I should first of all record that this is not a claim where a party has breached an order which already carried the sanction of striking out of the claim. The court has to exercise a discretion about which sanction is appropriate bearing in mind that there may be alternatives to striking the claim out under CPR 3.4[5] . Both counsel agreed however that on an application such as the present one to strike out the claim for breach of rule or order the provisions of CPR 3.9 have a direct bearing even though no particular sanction is contained in paragraph 4.3 of CPR 16PD[6].

31. The correct approach was identified by the Court of Appeal in *Denton v White Ltd* [2014] EWCA Civ 906 which recommends a three-stage test which I intend to adopt in this case. The first consideration is to identify and assess the seriousness or significance of the breach. In one sense the breach is serious in that the non-compliant expert report was served in May 2017 and the replacement compliant report was not served until April 2018 some eleven months later. Leading Counsel for the Claimant sought to argue that the breach was not significant because the Defendant was no worse off, having received a compliant ENT surgeon's report which came to a virtually identical conclusion as the non-compliant report. I accept this is a relevant consideration at the third stage but not, in my view, at this stage. It is relevant however that the application was not made until February 2018 when the issue of non-compliance was raised formally.

32. The second stage is to consider the reason why the failure or default occurred. In this case the failure to comply with the rules was caused by the use of a report part of which was computer-generated. This was intentional on the part of the Claimant's solicitors in the sense that it was a policy they would have liked to pursue more

[5] *Biguzzi v Rank Leisure Plc* [1999] 1WLR 1926
[6] *Waltham Chalet Park Ltd v Tallington Lakes Ltd* [2014] EWCA Civ 1607

generally in NIHL cases. I accept however the motivation was not to breach the CPR but to provide a cheaper and more convenient method of assessing the degree of NIHL without going to the expense of an ENT report. I have some sympathy with the underlying intent but have found that once it was clear the claim would not settle without proceedings a conventional Part 35 complaint report should have been obtained.

33. The third stage is to consider all the circumstances of the case to enable the court to deal justly with the application paying particular regard to subparagraphs a) and b) as set out in rule 3.9 above. I accept it is a relevant consideration that the CPR compliant report has produced an almost identical result to the non-compliant report and so neither party is better or worse off as a result of the breach of the Practice Direction and remedy of the breach thereafter. The delay of 11 months (partly due to the delay in identifying the alleged breach) does not appear to have prejudiced either party. If the case is struck out I accept the Claimant may categorise this as a windfall defeat of an otherwise valid claim. If the claim is not struck out and time for compliance with paragraph 4.3 CPR16PD is extended until April 2018 the First Defendant is still capable of defending the claim on any grounds available to it. I accept that it is not really an adequate remedy for the Claimant to have the right to sue his solicitors as they may be aware of weaknesses in his case which this Defendant is unaware of.

34. Whilst I do not agree with the way the Claimant's solicitors have sought to interpret the rules I accept their motivation in using the AMR report was to attempt to find a more proportionate way of providing expert evidence in NIHL cases. To that extent they were attempting to conduct litigation at proportionate cost although I think they were misguided in not obtaining a conventional medical report before issuing proceedings. Although this dispute has meant that the litigation has not been conducted efficiently it is sometimes necessary to put an issue before a court for a decision, particularly where the issue is new, and it may be relevant to a number of similar claims either now or in the future. This application has been heard by a Designated Civil Judge with the intention that it should be determinative of the issue in the future, subject of course to any successful appeal or decision by the Higher Courts. In my view, it would be a harsh application of the rules to strike out the particular case which was chosen as one of the first ones to be put before a court just because the interpretation of the rules favoured by the Claimant did not find favour with the Judge. Taking into account all the relevant circumstances I have decided it would not be just or proportionate to strike out the Claimants' claim. I intend to extend the time for compliance with CPR 16PD par 4.3 until the day after service of Mr Zeitoun's report which as I understand it would be 19th April 2018. Counsel for the Third Defendant was concerned at the hearing that this would in some way bind the court's hands in terms of giving permission to rely on expert evidence at trial but I take the view that it does not because I have merely extended the time for filing and service of the report, not given the Claimant permission to rely on it at trial.

35. This Judgement will be handed down on a date to be fixed by the court in public. The time for appealing the Judgment shall not start to run until it is handed down. CPR Practice Direction 40E shall apply. If the parties can agree the form of an order and any consequential directions arising from this Judgment then the attendance of counsel and solicitors will be excused.