



FIXED COSTS IN NOISE INDUCED HEARING LOSS CLAIMS

FINAL REPORT OF

THE CIVIL JUSTICE COUNCIL WORKING PARTY

TABLE OF CONTENTS

	Page no.
INTRODUCTION	3
1. SUMMARY OF PROPOSALS FOR FIXED COSTS	4
2. METHODOLOGY	7
3. BACKGROUND AND CONTEXT	9
4. PRE-ISSUE PROCESS AND BEHAVIOURS	14
5. OBTAINING EXPERT EVIDENCE	20
6. LITIGATION PROCESS AND POST-ISSUE BEHAVIOURS	24
7. THE OPTIONS FOR FIXED COSTS AND THE POSITION OF THE PARTIES	30
8. AGREED PRE-LITIGATION COSTS	36
9. AGREED POST-LITIGATION COSTS	40
10. CONCLUSION AND RECOMMENDATIONS	43
APPENDICES	
A. WORKING PARTY'S TERMS OF REFERENCE AND MEMBERSHIP	A1
B. NIHL LETTER OF CLAIM	B1
C. NIHL RESPONSE LETTER	C1
D. ABI CLAIMS HANDLING GUIDELINES	D1
E. DOCUMENTS RELATING TO HMRC	
E1. CORRESPONDENCE WITH TREASURY SELECT COMMITTEE	E1-1
E2. ARTICLE BY HELEN BLUNDELL	E2-1
F. AUDIOGRAM REQUIREMENTS	F1
G. EXAMPLES OF STANDARD DIRECTIONS CURRENTLY IN USE	
G1. FAST TRACK DIRECTIONS	G1-1
G2. DIRECTIONS FOR PRELIMINARY ISSUE TRIAL ON LIMITATION	G2-1

H. SUGGESTED CONSULTATION QUESTIONS INTRODUCTION

H1

Recent years have seen an increase in the number of Noise-Induced Hearing loss (NIHL) claims, and the Government asked the Civil Justice Council (CJC) to look into two particular aspects:

- How the handling of NIHL claims could be improved, with a view to cases being resolved more quickly and with the costs reduced, and
- How a fixed costs regime for these cases might work.

The CJC set up a working party of specialist practitioners, with a balance of representation for claimant and defendant representatives and with input from the judiciary and the Bar. The CJC's experience over many years is that bringing together experienced practitioners with expertise in a particular field leads to common ground being found and this working party has been no different.

It is in both claimants' and defendants' interests that these claims are handled efficiently by both sides in the initial pre-issue stages, to avoid unnecessary costs being incurred and to ensure that all parties get the earliest possible resolution of a claim.

This report provides a summary of the party's work and, critically, proposes a matrix of fixed recoverable costs for those claims which remain within the fast track and which do not fall into the various exclusions. We also make a number of recommendations to improve the handling of claims.

All of this will assist the Ministry of Justice in determining the best course of action to improve the conduct of NIHL cases.

Inevitably the scope of those cases covered by the fixed recoverable costs proposals is a compromise. We found as negotiations progressed that we made more progress by excluding non-standard cases or those which were more likely to involve greater costs or complexity. The resulting scope is still expected by all sides to cover a significant majority of NIHL claims which succeed.

I am very grateful to all members of the group for their positive and constructive approach to this work and for having given so freely of their time and expertise in an effort to improve the process for all parties and for the administration of justice. The result is a testament to their commitment.

I should also record my personal thanks: to the CJC Secretariat, for their advice and support throughout; to David Marshall, who as my Deputy Chair gave a good deal of valuable help in maintaining the balance between the positions of the claimant and defendant groups; to Sir Alan Ward and Peter Hurst, who as mediators helped bring the parties together during 2 mediations; and to my researcher, Michael McCabe, who marshalled the material and helped me turn initial thoughts on content into the finished article.

I have done my best to represent the views of the various working party members fairly and without personal input, although I have been on record as advocating fixed costs throughout the fast track for many years. The responsibility for any errors or misunderstandings in this report is mine alone.

Andrew Parker

Chair of the Noise-Induced Hearing Loss Claims Working Party and CJC member

1. SUMMARY OF PROPOSALS FOR FIXED COSTS

1.1 This chapter summarises the working party's proposals for fixed recoverable costs both for cases which settle pre-litigation and for those which settle after litigation has commenced. The matrix of proposed fixed recoverable costs is set out in table 1 at the end of this chapter.

Agreement on fixed recoverable costs

1.2 The Civil Justice Council has a well-established track record of promoting the development of fixed recoverable costs, achieved by negotiation or mediation between the parties, in personal injury litigation.

1.3 This working party is pleased to report the agreement reached, with the benefit of expertise on all sides and with the assistance of mediators, on a matrix of fixed recoverable costs for both pre-litigation and post-litigation stages in NIHL claims, as set out in Table 1 below.

1.4 The agreed matrix is based in large part on a joint proposal for a new pre-litigation process involving greater transparency between the parties. This process and the matrix of costs were initially proposed for all NIHL claims. As the discussions progressed, the parties have narrowed this down to the more straightforward types of NIHL claim, which are still the majority. This was done by restricting the proposed matrix of costs to cases which would remain within the fast track (both on value and on complexity) and by excluding specific types of case which were considered less suitable for fixed costs or more complex than the norm.

1.5 The underlying philosophy recognises that in NIHL claims, probably uniquely among industrial disease claims, an early test of the claimant's hearing loss in the form of an audiogram can provide reasonably objective evidence for both sides as to whether the claimant is likely to have sustained occupational exposure to noise resulting in damage to their hearing. The production of such an audiogram, from a reputable source, with the letter of claim together with greater relevant information about the claimant's working history, including a schedule from HMRC, will significantly assist the defendants in forming an early view of whether the claim is likely to succeed.

1.6 In turn, defendants armed with better information from the claimant should be expected to produce a fuller and more reasoned response to the letter of claim when providing their formal protocol response. This early exchange of information should lead to the potential for more cases to settle pre-litigation. Where litigation is still required, it is likely to have more focus on the true issues in dispute.

1.7 Post-litigation we have also made proposals for a more streamlined litigation process, in which standard directions could be made in the majority of fast track cases. It was during the consideration of post-litigation costs that we gave more thought to the types of case which were unsuitable for the fixed recoverable costs regime as a whole and agreed on a series of excluded case types.

1.8 The parties ultimately recognised that a robust fixed recoverable costs regime should provide fixed costs both pre-litigation and post-litigation, should cover cases where liability is in dispute as well as where liability is admitted and should extend to cases involving more than one defendant. This last point is of critical importance: the majority of NIHL claims involve more than one active defendant, as it is rare for a claimant to allege exposure to noise solely with one employer. Having said that, the working party acknowledged that once the number of active defendants grows, it becomes increasingly difficult to contain the case within the confines of the fast track or of any suitable fixed

costs regime. The working party therefore agreed that any case properly involving 4 or more defendants should be excluded from the fixed costs regime.

1.9 It was also recognised that the number of defendants has an effect on the costs which have to be incurred by the claimant. However, it is not simply the case that the involvement of two defendants means that the work is doubled. Much of the work involved in preparing and litigating a case is of a common nature. The working party therefore agreed that incremental increases were necessary to address those cases where the claimant successfully pursues more than one defendant and these are set out in Table 1 below.

1.10 The matrix of costs for cases which settle pre-litigation contains two refinements:

- Lower costs are available in those cases where the defendants make formal admissions of liability. The benefits of such a refinement are obvious.
- There will sometimes be cases where the claim settles pre-litigation, but only after the papers for litigation have already been prepared.

1.11 The allowances made for both these eventualities are contained within Table 1 and are self-explanatory.

1.12 The pre-litigation fees in Table 1 include any involvement of counsel at the pre-litigation stage. Indeed the additional allowance for the cost of preparing the papers for proceedings, where reasonably incurred, assumes the involvement of counsel or of a solicitor advocate who would present the case at trial. There is a recognition that the involvement of specialist counsel at a relatively early stage in NIHL cases is of benefit to both parties.

1.13 Counsel's involvement post-litigation will be in addition to the matrix of fixed recoverable costs as proposed, although any involvement of counsel must be "justified" as reasonable: see 9.6 below for further information.

1.14 The fixed recoverable costs proposed do not include any allowance for the trial itself. The fixed fast track trial advocacy fees (usually for counsel) will be payable in addition. There is a recognition that the majority of NIHL claims are of relatively low value, often between £3,000 and £5,000, but are of a complexity which outweighs that monetary value.

1.15 For this reason the working party recognised that the fast track trial advocacy fees applicable to claims of that value would probably be unsuitable for this fixed recoverable costs regime. Although the working party agreed that fast track trial fees should remain fixed, they could not agree on a level for the increased trial fees.

1.16 The working party was unable to agree on whether a preliminary issue trial on limitation would take the case outside fixed recoverable costs or could be accommodated within the fixed costs regime. Further detail of the views expressed by the working party is set out in Chapter 6.

1.17 All the figures quoted are exclusive of VAT and disbursements, save for the comments as to counsel's fees post-litigation at 1.13 above.

1.18 There are two other types of costs sometimes incurred in NIHL claims, which were considered by the working party. The handling of NIHL claims will frequently involve the restoration of dissolved

companies to the Register of Companies. This incurs additional costs of a standard nature and figures have been agreed for separate fixed costs, to be paid in addition to the above fees. The fee per restored defendant successfully pursued will be £1,280 inclusive of counsel's fees, plus reasonably incurred disbursements as explained in Chapter 9.

1.19 Pre-action disclosure applications are also sometimes made in NIHL claims. The working party considered these should fall outside any fixed costs regime and be dealt with separately.

Table 1

Stage	1 Defendant	2 Defendants	3 Defendants
Pre-Litigation			
2A	£2,500	£3,000	£3,500
2B	£3,000	£3,500	£4,000
3A	£3,500	£4,000	£4,500
3B	£4,000	£4,500	£5,000
Post-Litigation			
L1	£1,650	£1,980	£2,310
L2	£1,656	£1,987	£2,318
L3	£1,881	£2,257	£2,633
Max possible (3B+L1+L2+L3)	£9,187	£10,724	£12,261

2. METHODOLOGY

2.1 This chapter explains how the working party divided its work into phases and the work done to reach an agreement both on the fixed recoverable costs and on the proposed process improvements.

2.2 The working party was set up to provide the widest possible perspective available on NIHL claims. The representatives came from a range of claimant solicitor firms and defendant bodies, plus the Bar and the judiciary. All those who served on the working party were specialists in this field and gave valuable insight into the handling of such claims in practice. Details of all those involved and of our terms of reference are in Appendix A.

2.3 In an effort to streamline the task undertaken by the working party, it was decided to break the task into two phases. The first phase began work in August 2015. During that phase, we addressed the current state of play and sought to agree proposals to improve the handling of NIHL claims on both sides. We also considered the possible structure (without figures) for a matrix of fixed recoverable costs for NIHL claims. During that first phase, the working party met four times and produced an interim report that was submitted to the CJC on 28 January 2016 and was met with general approval.

2.4 The second phase immediately sought to focus on trying to agree figures for the fixed recoverable costs, and members were added to the working party on both sides for this purpose. We also involved the Bar at this point for the first time. The focus was on pre- and post-litigation costs, both being felt to be integral to the project; we also spent more time looking at how litigation should work in practice. During the second phase, the working party met seven times in all.

2.5 A significant core of the agreement set out in this report was reached during the second phase by means of mediation. Two formal mediation meetings were held, with the claimant and defendant groups acting as the opposing parties but with the Bar also represented. These were presided over by Sir Alan Ward and Peter Hurst as joint mediators to great effect, and the groups must be commended for their coming together to agree the process and costs laid out in this report, whether during the mediation itself or at a further meeting in Manchester shortly afterwards.

2.6 As well as these meetings, there have been two further telephone discussions involving the chairman and claimant and defendant representatives to iron out issues of detail. The claimant and defendant representatives have also spoken directly to resolve matters.

2.7 In addition, the claimant group and the defendant group have each met separately on a number of occasions and done a lot of work on the detail of various aspects between the working party meetings, for which we are very grateful.

2.8 As a result of these meetings, it has been possible to write this final report, which reflects the entire scope of the working party's findings on NIHL fixed costs and procedures. The report draws extensively on the material compiled during the first phase but is presented as a stand-alone report covering both phases.

2.9 Our focus has been solely on NIHL claims: given the complexity of agreeing fixed costs and process improvements for this category of claim, it was not possible to expand the work to other types of claim (as originally envisaged in our terms of reference). The work builds on certain specific features of such claims, such as the benefit of disclosing an audiogram and a full working history with the letter of claim. Some of those disciplines could be relevant to other types of low value disease

claim, others less so. In any event NIHL claims make up the vast majority of occupational disease claims in the fast track.

3. BACKGROUND AND CONTEXT

3.1 This chapter explains what constitutes noise induced hearing loss and summarises the history of such claims, including highlighting relevant pieces of legislation on which claims can be based. The chapter concludes with some information on trends and developments in claim volumes and cost.

What is Noise Induced Hearing Loss (NIHL)?

3.2 NIHL is hearing loss that is caused by exposure to high intensity sound. For the purposes of this report, that exposure is occupational in nature. NIHL of this kind is most commonly caused by prolonged exposure to excessive sound levels over time.

3.3 If exposed to noise levels as low as 85 decibels (dB)¹ over a long period of time, a person can suffer permanent hearing damage, especially if his or her ears have not had sufficient recovery time before being re-exposed to high intensity sound. There are many occupations where workers historically may have been exposed to such levels of noise.

3.4 NIHL is not a matter of scientific certainty. Present medical knowledge is not such that it is possible to prove conclusively that SNHL (Sensorineural Hearing Loss) in a particular individual is caused by exposure to noise. It is a matter to be determined on the balance of probability, taking into account all factors, whether NIHL has occurred.

3.5 The exposure to noise and consequent cumulative trauma to the hearing has usually taken place over a number of years and sometimes decades. Presbycusis or age-associated hearing loss (AAHL) is always present, age itself resulting in SNHL. The longer the period of exposure, inevitably the greater part that age has to play.

3.6 NIHL is typically only detected some years after the exposure has taken place, largely because of the involvement of AAHL. It is what is known as a "long-tail disease", in that a claim will inevitably be presented many years after the facts complained of have occurred. This creates obvious problems for both parties in the claims process:

- Defendants have to be correctly identified
- Their insurance history has to be found
- The companies themselves may no longer trade and may have been dissolved
- There may be no records of a claimant's employment still in existence
- Memories of the claimant and any witnesses fade
- Disputes over application of the limitation period are common.

A Brief History of NIHL - milestones²

3.7

1963: 'Noise and the Worker' was published by the Ministry of Labour. The report introduced the concept that excessive noise in the workplace could lead to hearing loss and suggested measures

¹The term decibel (abbreviation dB) is used both to calibrate the level of noise to which a person is exposed and the extent of hearing loss suffered. There are distinctions between the way in which the two are measured but they are not material to the contents of this report.

² A more detailed history can be found in the judgment of Lady Justice Smith in *Baker v Quantum* in the Court of Appeal: [2009] EWCA Civ 499

employers could take to identify and lower the risk. It was suggested that employees should not be exposed to an equivalent to a noise level over 90dB over an eight hour working day. In *Thompson v Smith Shiprepairers* [1984] QB 405, the courts decided that this report marked the point at which employers should have been aware of the risk of loud noise at work. As a result, exposure to excessive noise from 1963 will amount to negligence for most employers. Pre-1963 exposure is generally non-actionable.

1972: The 'Code of Practice for Reducing Noise' was introduced. Thereafter any exposure to noise equivalent to 90dB over an eight hour working day would be considered negligent for all employers.

1974: Several pieces of legislation were enacted to protect employees – Health and Safety at Work Act; Woodworking Machines Regulations; Agriculture (Tractor Cabs) Regulations.

1980: The Limitation Act revised the detail of the limitation period of 3 years for personal injury claims. NIHL claimants as a consequence have to issue their claims within 3 years of becoming aware that their condition is significant and attributable to the acts or omissions of their employers. A limitation defence will otherwise accrue, although under section 33 the court has a discretion to disapply the 3 year period.

1984: Following the decision in *Thompson v Smith Shiprepairers*, the GMBATU/Iron Trades Deafness Scheme was adopted by many but not all unions and insurers. Compensation payments under the Scheme, commonly known as the Iron Trades Scheme, were calculated against a simple matrix of dB loss and age. Damages were agreed below the usual levels awarded by the courts; in return insurers did not raise arguments concerning limitation and pre-1963 exposure. Tinnitus categorised as moderate or more severe was separately negotiable as were special damages. Costs were initially fixed at £350 plus VAT and disbursements but were subject to several increases over the life of the Scheme. The Scheme was very successful and was the basis for very many NIHL claims settlements from its implementation until it was ended in 1998. The claims were generally by people who had worked in well-recognised heavy industries for many years, often against single defendants, where breach of duty and causation were unlikely to be in issue.

1990: The Noise at Work Regulations 1989 came into effect. These determined the varying measures employers need to take to protect workers. The noise levels requiring action were set at 85 and 90dB. Regulation 6 requires that "Every employer shall reduce the risk of damage to the hearing of his employees from exposure to noise to the lowest level reasonably practicable."

1992: The Management of Health and Safety at Work Regulations introduced, in particular, the concept of Risk Assessment.

The Provision and Use of Work Equipment Regulations introduced, with regards to work equipment, core duties of suitability, maintenance and the provision of information, instruction and training to those using the equipment.

The Workplace (Health, Safety and Welfare) Regulations required maintenance of the workplace and its systems.

1999: The Management of Health and Safety at Work Regulations, amending the 1992 Regulations, introduced the Principles of Prevention, which emphasise a hierarchical approach to health and safety commencing with eradication of risk.

2005: In *Harris v BRB* [2005] EWCA Civ 900, Neuberger LJ pointed out that claims for personal injury arising out of exposure to noise, vibration, or other health risks, particularly where the exposure was over a long period of time in different circumstances, notoriously give rise to difficulties.

2005: Success fees for NIHL claims were set at 62.5% reflecting a level of complexity higher than for accident claims against employers: research commissioned by the CJC at the time noted that "(We) often perceive considerable risk which may be reflected in a discount as to damages".

2006: The Control of Noise at Work Regulations 2005 provided protection against lower average levels of noise exposure of 80 and 85dB.

2010: The Employers' Liability Tracing Office (ELTO) was formed to help those who have suffered injury or disease in the workplace identify the relevant employers' liability insurer quickly and efficiently.

2011: *Baker v Quantum Clothing* [2011] UKSC 17 determined that a typical employer with average knowledge would not have been aware of the dangers of exposure below 90dB over an eight hour working day prior to the 1989 regulations. It was also decided that some of the defendants had a greater than average knowledge prior to the 1989 regulations, and that their liability should attach for exposure down to 85dB over an eight hour working day from 1985. It is likely that there are other employers with an earlier date of knowledge of the risk of injury from such exposure, e.g. British Leyland in 1975.

2013: The Legal Aid, Sentencing and Punishment of Offenders Act 2012 (LASPO) came into effect in April and implemented the bulk of the Jackson Review recommendations:

- Success fees and After the Event insurance premiums are no longer recoverable from defendants for most types of claim;
- Success fees can be recovered from the claimant but capped at 25% of claimant damages;
- Personal injury referral fees are banned for regulated entities.

From 31 July 2013, the Ministry of Justice Claims Portal and associated low value protocol were expanded to include Employers Liability and Public Liability (EL/PL) claims in England and Wales, though only for single-defendant claims. The provisions included fixed costs for accident cases, but disease claims were largely excluded from the fixed costs due to their complexity³.

Claim volumes and cost

3.8 The Working Party's terms of reference do not require us to investigate the volume and cost of NIHL claims, nor to make out a case for the introduction of fixed recoverable costs. However, we do consider that some background information is helpful, to explain what the changes we propose are intended to tackle.

3.9 Before the Iron Trades Scheme took effect, there were fewer than 8,000 NIHL claims a year. In 1991, there were over 45,000 claims recorded and in 1993 there were over 67,000. The number of claims then tapered off and by 2001, after the closure of the Iron Trades Scheme, there were only around 7,300 annually.

3.10 The last decade has seen a significant rise in the number of NIHL claims. By 2010 the insurance industry was reporting over 24,000 claims annually and by early 2015 the reported annual number

³ See letter from Lord Chancellor dated 27 February 2013 accompanying consultation response

from Institute and Faculty of Actuaries was 87,000, though this dropped to 57,000 claims annually by the end of 2015⁴. Data from the Claims Portal for single defendant disease claims shows reductions since 2015.

3.11 These claims come at a total cost which is much higher than that incurred during the running of the Iron Trades Scheme. That in itself is entirely to be expected, as the claims are being considered on a common law basis and disputed claims now are inherently more complex. Additionally, no fixed costs scheme for the current environment has yet been developed.

3.12 It is difficult to predict the future trend of claim numbers. Data sources are limited: NIHL claims are often not reported to the Compensation Recovery Unit, especially if withdrawn prior to issue of court proceedings. Insurers' market aggregated data may not be complete and may involve some double counting where a claimant presents multiple claims to different defendants. However there does appear to have been a reduction in the number of claims presented to defendants in 2016 and into early 2017 – see further below.

3.13 One factor may be that April 2016 saw the 3rd anniversary of the implementation of the Jackson reforms. Any claims taken on in the period of intense activity immediately before April 2013 and not withdrawn would therefore have had to be issued in early 2016 and served by Summer 2016 at the very latest. Litigation rates may now be reducing or at least stabilising.

3.14 In spite of the rise in the number of claims to its peak around 2013/2014, there has not so far been a corresponding rise in the number of claims paid. The percentage of cases successfully repudiated by defendants has risen in the last few years, although resources are still required to handle all these claims. The current high rate of unsuccessful claims leads to defendants assuming that the majority of claims are going to fail, leading to more disputed claims and more litigation.

3.15 Part of the high repudiation rate problem stems from the marketing activities of claims management companies (CMCs), a cause for concern that has been addressed by the Regulator.⁵

3.16 From 31 July 2013, any new EL accident claim has to be presented via the Claims Portal and its conduct is governed by the Pre-action Protocol for Low Value Personal Injury (Employers' Liability and Public Liability) Claims. This regime also extends to EL disease claims against a single employer. There is a fixed costs structure in CPR Part 45 but for disease claims, it only applies if liability is admitted and the case is retained within the Claims Portal.

3.17 The majority of NIHL claims are multi-defendant and so will automatically be dealt with outside the Portal due to their complexity. They are subject to costs assessed by the court on normal hourly rates. Average legal costs related to NIHL claims, including disbursements and VAT, significantly exceed the average award of damages. The reasons for the high level of costs will, of course, be complex and linked to the extent to which claims ultimately settled are disputed by one or more defendants.

Recent trends and developments

3.18 NIHL numbers fell over 2016, though they are still higher than they were in 2011 and 2012 and

⁴ Institute and Faculty of Actuaries UK Deafness Working Party

⁵ In 2015, two CMCs were fined by the Claims Management Regulator (CMR) for making unwanted cold calls relating to NIHL: The Hearing Clinic was fined £220,000 for making millions of unsolicited calls regarding potential NIHL claims; the National Advice Clinic was fined £850,000 for making nearly 6 million NIHL-related nuisance calls in 6 months. See Claims Management Regulator, Press Releases 5 August 2015 and 2 December 2015.

are still high enough to warrant the Government's concern. Some members of the working party have theorised that the number of NIHL claims is in decline, but the data currently available do not conclusively confirm this. What is definite is that whilst the current numbers are below 2013 levels, they are still high.

3.19 In November 2016, it was announced that Lord Justice Jackson would review fixed recoverable costs in civil claims on behalf of the Senior Judiciary. In chapter 15 of his *Review of Civil Litigation Costs: Final Report*⁶, he recommended that the costs of all litigation in the fast track be fixed, and that once these reforms have been established, serious consideration should be given to developing a general scheme for fixed costs across the lower reaches of the multi-track.

3.20 Lord Justice Jackson's final report is to be published on 31 July 2017. Whilst Lord Justice Jackson's review formed part of the backdrop of our work, at least in the later stages, there was always a desire to see through this working party's report for a distinct area of litigation.

⁶ Published 14 January 2010:
<https://www.judiciary.gov.uk/wp-content/uploads/JCO/Documents/Reports/jackson-final-report-140110.pdf>

4. PRE-ISSUE PROCESS AND BEHAVIOURS

4.1 This chapter identifies concerns about the current pre-litigation process and makes proposals for improvement. It sets out proposals for new letters of claim and letters of response under the relevant pre-action protocol arrangements and considers the use of ADR.

Issues with the current process

4.2 The current pre-issue process is controlled by the Pre-Action Protocol for Disease and Illness Claims, first introduced in 2003. For convenience we will refer to this as the Disease Protocol.

4.3 As its title suggests, the Disease Protocol is designed to cover all types of non-single event disease claims. It provides for the delivery of a detailed letter of claim containing specific information and for the defendants to respond within a set time limit to indicate their position on liability. There are also provisions for disclosure of documents by defendants, appointment of experts etc.

4.4 Whilst the Disease Protocol works well in general, the working party all felt that the way in which it is used in NIHL claims could be significantly improved. The sheer volume of NIHL claims may have contributed to letters of claim becoming generic and lacking in detail. This has led to standard defendant requests for additional information which may not take account of information already supplied. Response letters are either not sent or delayed and of limited value. Denials of liability are almost standard.

4.5 A further feature is that the majority of NIHL claims involve multiple defendants and multiple insurers. Whilst the insurance industry did produce a set of informal handling guidelines, under which there was a process by which a single coordinating insurer might be identified, these were frequently not followed and the claimant's solicitor would not know who to engage with, resulting in unnecessary additional correspondence as well as confusion.

4.6 The working party has been able to agree some firm proposals for change and the ideas are designed to streamline the process as much as possible. Importantly these ideas have been incorporated into the thinking from which the parties reached agreement on the fixed recoverable costs proposals, both pre- and post-litigation.

New Letter of Claim

4.7 It might be possible to improve conduct simply by more consistent adherence to the Disease Protocol on both sides. However the working party has come up with some detailed proposals for change, with a focus on relevant information exchange. These changes should result in significant improvements in conduct on both sides. A new letter of claim has been agreed upon by the members of the working party (see Appendix B). There will also be a new letter of response: see further under paragraph 4.30 below.

4.8 The new letter of claim is designed to contain more meaningful and relevant information, to avoid the need for requests for further information, to enable defendants to make early decisions on breach and to consider limitation and causation. This in turn should lead to costs savings and early filtering of and settlement of meritorious claims. The work put into shaping this letter from both sides has been a particularly positive feature of the group's work.

4.9 The working party considered whether the new letter of claim should work as a "living document"

that would be shared between the parties. While the working party was open to this idea, there were concerns over version control. The key to accepting the use of a shared document is elimination of doubt over the authenticity of the final version, without requiring significant IT input. In the event, the working party accepts that the use of the new letter of claim, with letters of response from the defendants, will be sufficient to improve the process significantly if the requirements for both are followed by the parties.

4.10 A key requirement is that the letter of claim should be accompanied by:

- An audiogram produced by a suitably experienced and approved provider
- Schedule of employment from HMRC (see commentary below)
- Search results from the Employer's Liability Tracing Office (ELTO)

We deal with each of these in turn below.

Audiogram

4.11 The audiogram should be from an acceptable UK “quality standard” audiologist and from tests conducted in acceptable conditions. A sufficiently robust independent audiogram is central to the proposal, as it enables the defendant to have some certainty that there is a diagnosis of NIHL which merits detailed investigation. Whilst the detail of a system of accreditation could not be agreed upon, the working party concluded that it is a fundamental part of the new process and needs to be put into place. We deal with medical evidence in more detail in chapter 5 below, but as long as both sides can have confidence in the provider of a compliant audiogram at an early stage, this alone should significantly reduce the need for defendants to request a repeat audiogram.

HMRC Schedule

4.12 Both sides also agreed that the HMRC schedule of employment is an important if not essential part of the presentation of a claim in nearly every case. The claimant is likely to be able to provide a more accurate and detailed working history after the HMRC schedule has been obtained, and the defendant will get an independent verification of working history.

4.13 For the last 2 to 3 years, the time taken for HMRC to produce a schedule on receiving a compliant request was significantly delayed (anecdotally up to 12 months on occasion), notwithstanding the 40 day response required by the Data Protection Act. The working party understands that this was due in part to resources because of the volume of such requests⁷ and in part due to the fact that records can only be accessed by old microfiche technology which is of limited availability and inefficient to cope with the volume. This therefore created an immediate delay in notification and progress of claims.

4.14 During the first phase of our work, this backlog was seen as a significant problem and a potential obstacle to efficient handling of claims under any new process. A series of options were considered and the Chairman and others had extensive and constructive dialogue with HMRC, facilitated by the Ministry of Justice, to explore possible options.⁸

4.15 It is therefore gratifying to report that HMRC has been able to eliminate their backlog and move to

⁷ 150,000 requests were received by HMRC in 2014-15, 90% of which were for NIHL

⁸ The problem also reached the attention of the Treasury Select Committee: see correspondence at Appendix E1, made public in December 2016 as the work of the working party was nearing conclusion

a position where compliant requests are now answered within the 40 day response period. We comment on how this was achieved below, but it is worth recording the options considered in the light of the backlog.

4.16 The problem with any alternative to producing the schedule with the letter of claim, such as allowing claimants to justify the reason why the HMRC schedule is not attached, is that the schedule will inevitably be requested by one or more defendants, who very often have no surviving employment records from which to verify their period of exposure. Such defendants will properly argue that they cannot make any progress towards a decision on issues such as breach, without waiting for the HMRC to be produced. This creates real risk that the position then largely defaults to the current model and only limited progress is achieved. Typically defendants will also use the HMRC schedule to verify whether there could have been any other sources of occupational exposure.

4.17 The working party considered whether there was any other way in which the claimant's working history could be verified. There may be occasional cases where a good history is already held by either the claimant or their most recent employer, such that the HMRC schedule can be dispensed with; but these cases will be the exception. No other acceptable and widely available alternative has been found. Whilst it should be open to the parties to agree to dispense with the requirement for an HMRC schedule in appropriate cases, this will not tackle any wider concerns.

4.18 HMRC have introduced some improvements of their own in the last 12 to 18 months. They have decided that requests relating to claims where there is a limitation issue will be processed within 10 days, upon presentation of evidence demonstrating that the request qualifies for prioritisation. They have also considered whether the evidential requirement for a full employment history could be amended to focus on providing claimants with information relating to a smaller number of relevant years. The advantage would be that HMRC could process more requests more quickly if this were the case, but the difficulty in NIHL cases is that it is nearly always essential to have a complete working history – and with the typical age of claimants still being between mid-50s and mid-70s, that extends significantly into the period where the records are stored only on microfiche.

4.19 In September 2016, Helen Blundell of the Association of Personal Injury Lawyers (APIL) published a helpful article urging claimant solicitors to notify HMRC upon receipt of an audiogram if the claim will no longer proceed.⁹ This it was felt would greatly reduce the queue, allow HMRC to reduce the backlog and ease pressure on new claims.

4.20 Additionally, the working party agreed that another way to reduce the HMRC's workload and improve turnaround time would be to reduce the number of requests. The best way of achieving this would be to require any claimant's solicitor seeking a schedule to certify that they were in receipt of a compliant audiogram. Such a requirement would also serve to reduce the backlog if the requirement was applied retrospectively. This is a behaviour that would need to be regulated by the solicitors themselves, as it is not appropriate for HMRC to restrict access to information which they are obliged by law to produce. The working party were unable to agree on the best means of enforcing compliance with such a requirement, but discussion centred around a possible costs penalty within the fixed costs regime.

4.21 The working party is pleased to report that these suggestions have already been voluntarily accepted and have produced results. Most claimant solicitors who deal with large numbers of NIHL claims have agreed to defer applying for the schedule until an audiogram is obtained, and many have followed APIL's advice and withdrawn their requests after receiving audiograms. This has resulted in a

⁹ Helen Blundell 'Beating the Queue' *PI Focus*, September 2016, 8-9 – see Appendix E2

dramatic reduction in requests to HMRC, which has been able to eliminate the backlog and now deals with requests within 40 days. Credit is due to all parties who made this possible, particularly HMRC.

ELTO search

4.22 The search results from ELTO are also needed in most cases. The claimant's solicitor will routinely make a search via ELTO for records of insurance for all named defendants. Although the filing of policy details with ELTO has only been mandatory since 2011 (and in respect of historic policies only when claims are presented), the record on the proportion of ELTO searches which do produce insurance details is significantly improved.

4.23 There was a corresponding increase in the number of searches made on ELTO for NIHL claims (their statistics identify the type of claim presented). The figures for NIHL searches for the last 4 years are as follows:

2013: 95,673 searches

2014: 134,283 searches

2015: 188,159 searches

2016: 96,779 searches

4.24 Although the volume of searches has not of itself created problems for the operation of ELTO (apart from requiring the provision of system capacity), any reduction on the volume of searches needed is likely to be an improvement.

4.25 The claimant group reported during the first phase that the delay experienced with HMRC replies was also driving up ELTO searches, as ELTO searches were being carried out initially before the HMRC schedule is returned. At that time between 30 and 50 per cent of cases for which an HMRC schedule was requested did not proceed.

4.26 With HMRC now having a quicker turnaround, the reduction in ELTO figures may have followed naturally as the number of claims presented would also be reduced. Although the return to around 2013 total search numbers is a welcome trend, the need for both costs control and process improvement remains.

Application

4.27 The new process proposed will only work if the new letter of claim and letter of response are used properly and provide meaningful information from both sides. The Ministry of Justice and/or the Civil Procedure Rule Committee will have to consider how best to enforce use of the new precedents. We have already remarked that proper adherence to the existing protocol would go a long way towards resolving the issues over information exchange and the new process must be one that parties will use and not abuse.

4.28 The proposals for a new letter of claim are essentially confined to NIHL claims, although the issue with delays at HMRC has been a broader one. We do not advocate the production of a separate protocol for NIHL claims, but the recommended process changes would have to have appropriate force. In particular and despite some calls for a separate "multi-defendant" portal process, the working party is not convinced that the creation of an electronic portal for such claims is either necessary or likely to lead to improvements in process and behaviour.

4.29 This issue has not been addressed further by the working party as the focus in the second phase

of our work was on reaching agreement on the costs matrix. One option could be a specific annexe to the current Disease Protocol, as the procedures and timings of that protocol still apply. Such an annexe would focus on the content for the letter of claim and letter of response and the documents to be produced with both. Experience of the protocols drafted for the existing fixed recoverable costs regime for low value personal injury claims suggests that such an annexe might also need to include provisions making compliance mandatory, rather than the usual language of protocols which is designed to promote best practice (i.e. "will" or "must", as opposed to "should").

New response letter

4.30 The Disease Protocol remains the starting point when responding to the letter of claim. The response should address the issues fully, including identifying whether delegated authority applies (if relevant) under the ABI's Claims Handling Guidelines (see 4.34 and 4.35 below) and the name of the coordinating insurer and reference. Defendants should consider all information provided in the new letter of claim and only make a request if there is any material information missing.

4.31 The information provided in the new letter of claim should allow defendants to make decisions on breach of duty and to consider limitation and causation, prior to receiving any further medical evidence. It will be important to create a process in which the defendants cannot simply use this information to make a "pre-medical" offer; that said, if the claimant chooses to make an offer to settle with or around the time of the letter of claim, the defendants should not be prevented from responding to that offer at any stage. In general, though, the working party agreed that pre-medical offers should be discouraged and that the time period for accepting any Part 36 offer made in this way should not start to run until the medical evidence (full audiologist's or ENT report) is served upon the defendant.

4.32 Where breach is denied, the defendants should comply with the protocol and disclose any noise surveys and other relevant documents with the response letter. The defendants should also indicate whether their records reveal any previous claims brought by the claimant.

4.33 Where there are multiple defendants, coordination by defendants of their positions needs to be improved and communicated to claimants.

4.34 The working party considered it important that the ABI Guidelines on interaction between defendants and handling insurers be published as part of this report, in an effort to promote transparency. This should also encourage more insurers to sign up to the Guidelines and those who have signed up to abide by them more strictly, which the working party recommends. Those defendants who deal with claims without insurance cover, such as Government departments, might also be persuaded to adopt them. We are pleased that the ABI have agreed to publication of the Guidelines which can be found in Appendix D.¹⁰

4.35 These Guidelines encourage participating insurers to work together to coordinate a common position on all issues, in the hope that this will lead to earlier settlement. They incorporate a commitment to delegated handling by a single coordinating insurer, which is much to be encouraged as it has obvious benefits for both sides.

4.36 The working party also agreed a new letter of response, to follow on from the work on the letter of claim. This is very much focused on defendants making early admissions of breach of duty where they can do so and generally narrowing the areas of dispute: with the advantage of the letter of claim producing a better working history and a suitable audiogram, it should be easier for defendants to

¹⁰ This version is up to date as at June 2017.

conduct meaningful investigations and form a reasoned position on the issues in play. The proposed costs structure reflects the financial benefit to both sides in using early admissions to control the work needed by the claimant's solicitor.

4.37 The new letter of response can be found at Appendix C.

ADR

4.38 The proposals for improving the letter of claim and response letter are themselves designed to narrow the issues between the parties, such that genuine disputes should be reduced.

4.39 Paragraph 10.2 of the Disease Protocol also provides that:

"Where a claim is not resolved when the protocol has been followed, the parties might wish to carry out a 'stocktake' of the issues in dispute, and the evidence that the court is likely to need to decide those issues, before proceedings are started."

It is unclear to what extent this "stocktake" is adopted in practice (whether under this or under similar provisions in other pre-action protocols).

4.40 The working party suggested in the first phase of work that the stocktake procedure could be more meaningful; it could for example produce a document which could then be provided to the Court, so as to demonstrate that the parties had already considered many of the issues to be addressed in court directions.

4.41 The working party also agreed that appropriate use of ADR should apply in NIHL claims as much as in any other type of claim. Whether formal ADR has a place pre-issue in such generally low-value claims is another matter; any solution would have to be cost-effective to be of value to the parties.

4.42 Ultimately we were not able to return to these matters in the second phase of our work.

5. OBTAINING EXPERT EVIDENCE

5.1 This chapter explains the use of medical evidence in NIHL claims. It supports the concept of early disclosure of an audiogram from an accredited audiologist and considers the question of defendant requests for their own medical evidence or for retesting.

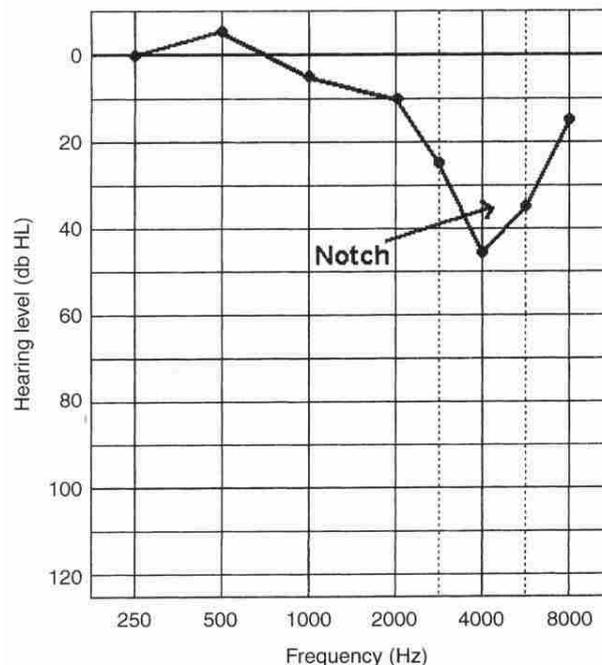
What evidence is used?

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.

5.3 The claimant will be seen by an audiologist, who should test the claimant's hearing in clinical surroundings and produce the results in the form of an audiogram. Inappropriate testing environments with background noise above accepted levels are likely to lead to distorted results.

5.4 An audiogram is a graph that plots hearing levels across various sound frequencies for the left and right ear. The result is compared against the standard expected hearing levels according to the claimant's age and gender.

Example of an audiogram graph with a typical NIHL 'notch'.



5.5 An audiogram based on pure tone audiometry is by far the most common and cheapest method of testing. This is accurate to +/- 5 db. The test relies on genuine responses from the claimant for accuracy and on the competence of the audiologist. An audiologist will usually repeat the test at certain frequencies to ensure consistency of response.

5.6 An Ear, Nose and Throat (ENT) Consultant may be instructed to prepare a medical report based on the results of the audiogram. The results are averaged across both ears according to accepted formulae and the Consultant will advise what overall level of hearing loss has been suffered, how much is age related and how much related to NIHL.

Early disclosure of audiograms

5.7 In the section on pre-action conduct (see 4.10 and 4.11 above) we have outlined the concept that the claimant will disclose an audiogram from a suitably qualified audiologist with the letter of claim. The agreement of all sides of the working party to this is a significant breakthrough in the handling of NIHL claims generally and the use of medical testing and evidence in particular.

5.8 The claimant group has helpfully prepared a document (see Appendix F) on how to ensure that audiologists preparing these initial audiograms are suitably qualified, with input from the British Society of Audiology (BSA) and the British Academy of Audiology (BAA) and from Professor Mark Lutman, Professor Emeritus of Audiology at the University of Southampton and past president of the BAA.

5.9 The claimant group is also concerned that early disclosure of audiograms should not lead to inappropriate behaviours such as pre-medical offers, or direct offers to settle from the insurer to the claimant. As indicated at paragraph 4.31 above, there must be suitable safeguards built into the system to prevent this.

5.10 The members of the working party agreed that the issue of the quality of the audiologist and of the testing facilities is of paramount importance, as a robust system would largely eliminate the need for retesting. Some parallel work has been carried out by individual working party members on both sides, to see whether retesting can be avoided. There has been good progress on this aspect to date and a general agreement that something can be achieved, but the proposals would need to be discussed further with the relevant professional bodies before they could be formally approved and adopted.

The choice of expert

5.11 The working party spent some time discussing this aspect. There are perfectly valid reasons why the evidence of an ENT consultant would be commissioned in cases which are likely to lead to litigation – see the claimant group flowchart at Appendix F. Both groups accept that where liability is in dispute an ENT report is likely to be required. However the claimant group acknowledged that in a case where liability is not in dispute and where there are no other unusual factors, the evidence of a suitably qualified audiologist would be sufficient to validate the level of NIHL and evidence of tinnitus, as well as whether or not hearing aids would be necessary.

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 settlement negotiations rather than incurring the additional cost of an ENT surgeon's report.

Objective medical evidence

5.13 Concerns have been raised as to the quality and objectivity of some medical reporting in NIHL claims. The working party has not investigated such concerns but agrees that a system in which medical evidence is objective and from suitably qualified experts is very much to be preferred.

5.14 Reference has been made in the legal press to the idea of extending the MedCo system to NIHL experts.

5.15 MedCo is the Government initiated system to facilitate the sourcing of medical reports in soft tissue injury claims brought under the Pre-Action Protocol for Low Value Personal Injury Claims in Road Traffic Accidents. Since 6 April 2015, medical experts, medical reporting organisations and solicitors commissioning medical reports must register via the MedCo website in order to be able to provide or commission medico-legal reports in such claims.

5.16 The difficulty is in part that MedCo only introduced its accreditation process for individual experts on 1 June 2016, just over a year ago. The quality controls such as peer review and audit come into play at the point of renewal – i.e. at or after 12 months of operation – and so its effectiveness is essentially untested. Whilst the members of the working party entirely agree that an accreditation model or agreed minimum standards should be adopted for NIHL claims, the machinery of MedCo is unlikely to be the right way of doing this at least at present.

5.17 Appendix F shows the work done by the claimant group with the BAA and BSA and with Professor Lutman to identify a “minimum quality standard”. Further work would be needed on the detail, including the method of auditing both the audiograms themselves and the processes and equipment used by the audiologists. Ultimately any system of accreditation would need the buy-in of relevant professional bodies and is therefore beyond the scope of this report.

Retesting/defendant evidence

5.18 The approach of the claimant group to validating audiograms to be sent with the letter of claim has been to avoid the need for requests for retesting if at all possible. The need for a repeat test should be identified by the audiologist and can be carried out within a relatively short period of time after the first test in the majority of cases. Retests can be required for example as a result of inconsistencies in the responses by the claimant.

5.19 The defendant group on the other hand wishes to reserve the ability to retest if the findings of NIHL are “borderline”. The claimant group is concerned that in a process focused on reducing costs, retesting will instead increase costs but will not have the desired effect of clarifying “borderline” cases. They contend that the medical interpretation of an audiogram is one of several factors (others include age and exposure) to be considered by the medical expert in making a NIHL diagnosis; and that a retest does not resolve any doubt.

5.20 Two key points were agreed by both sides. First, an audiogram of adequate quality would largely eliminate the need for retesting. Secondly, the issue of the need for retesting should be a matter for the properly qualified audiologist who administered the hearing test, provided that appropriate criteria are set.

5.21 As a further refinement to the fixed costs regime, the parties agreed during negotiations in Phase 2 that cases where any defendant seeks their own medical evidence (i.e. an examination of the claimant), or even where a defendant requires a second audiogram, are likely to be ones involving greater complexity and so will be removed from the fixed costs regime.

5.22 In the next section on litigation we comment on the use by courts of standard directions, designed to keep cases within the fast track and which include a preference for defendants putting questions to the claimant's expert under CPR Part 35 rather than obtaining their own evidence. These considerations are of course for the court in each individual case. We would hope however that if measures can be agreed for improving the quality and objectivity of the medical evidence

commissioned on behalf of claimants, the need for defendants to obtain their own expert evidence will be considerably reduced.

6. LITIGATION PROCESS AND POST-ISSUE BEHAVIOURS

6.1 This chapter considers the current litigation process for NIHL claims and makes proposals for standard directions and other changes. It considers the treatment of arguments on limitation and whether these should be listed for separate trial. On this issue the working party was not able to reach agreement and the positions of the claimant and defendant groups respectively are summarised. The chapter also considers costs relating to pre-action disclosure applications and for restoring dissolved companies to the Companies Register.

Overview

6.2 The volume of claims presented for NIHL during recent years has had a knock-on effect on the volume of litigation. Litigation volumes are higher now than prior to LASPO and increased significantly in 2015 and 2016: this might be no more than a consequence of the increase in cases taken on in early 2013 prior to the Jackson reforms and the fall in numbers since mid-2016 tends to confirm this, though current patterns suggest the drop-off has plateaued.

6.3 The concentration of such volumes on certain courts may have driven some variation in the approach to case management from court to court and there may be some scope for standardising the approach. It is also hoped that improved pre-issue handling will reduce the number of cases going into litigation, or at least better define the parties' cases to improve the efficiency of the litigation process.

6.4 The value of a NIHL claim will typically be well within the fast track limit of £25,000. However, if a case involves multiple experts or more than one day of court time, that would take the case outside the procedural requirements of the fast track. Obviously those claims which exceed £25,000 in value should be allocated to the multi-track.

6.5 Delay in acquiring evidence from engineering experts has also been reported as being a problem across England and Wales. Our District Judge representative reported that the current approach of the parties, who often fail to identify and book their engineering experts prior to directions being set, can add up to 12 months to a case's timetable.

6.6 Litigation may be defended on breach of duty, on causation or on limitation. Quantum is usually in issue but it is rare for cases to go to trial on quantum alone. Arguments on breach of duty alone are less common and may result from cases set up to test the liability of a particular defendant. Test cases by their nature tend to be more complex and would not be suitable for a fixed recoverable costs regime.

6.7 There have been arguments in some cases that the occupational element of any hearing loss is de minimis; alternatively that very low levels of NIHL should be actionable. Such arguments are by their nature intended to involve the development of case law in this area and are unsuitable for any fixed costs regime: they will usually involve multiple experts giving contested oral evidence. The parties have agreed that any case where the defendant argues that the alleged loss is de minimis or not actionable will be removed from the fixed costs regime.

Case management

6.8 There is variation across all courts on making case management directions. Several courts have developed a more standard approach, designed to bring cases within the fast track by narrowing the issues, limiting the use of experts (or at least oral evidence from experts) and generally controlling the

case so as to ensure that it fits within the constraints of the fast track where possible, to improve the consistency of decision-making. Some examples of such directions, taken from courts which are used to handling NIHL claims in significant numbers, can be found at Appendix G1.

6.9 The working party endorses the idea of standard directions for cases within the fast track, as part of a more streamlined approach. We would encourage the adoption of a standard approach across all courts rather than creating a situation in which the approach differs from court to court. There is an advantage in such certainty: we have seen a similar situation with the specialist mesothelioma procedure in Practice Direction 3D, which is now adopted consistently in most courts handling such claims.

6.10 The recommendations in this report for a fixed costs regime define the type of case which it is expected will fall naturally into the fast track in any event and where a case management conference would not be envisaged. The availability of a standard directions template for district judges to use in such cases would help the parties and the courts manage such cases efficiently.

6.11 The working party debated the possible content of such standard directions but did not reach any firm conclusions. It is in any event recognised that the issue of standard directions is one for the judiciary. It is hoped that the judiciary will in due course consider the appropriate approach to standard directions for NIHL claims, using this report and the examples at Appendix G1 as a starting point.

6.12 The approach referred to above pays particular attention to the use of engineering and medical experts. In those cases where engineering evidence is considered necessary, the appointment of a single joint expert is a common approach. We have referred above to the difficulties caused by long waiting lists and their impact on the court timetable, which will need to be taken into account when standard directions are being considered.

6.13 It is also typical in cases of disputed causation for the defendants to be permitted to obtain their own medical report, but only after Part 35 questions have been put to the claimant's expert. For cross reference purposes, it should be noted here that the working party ultimately agreed that cases where the defendant seeks its own medical evidence should be excluded from the fixed costs regime.

6.14 The working party has paid particular attention to the need for disputed expert evidence in the work done on pre-action procedure. It is hoped that the production of an audiogram with the letter of claim and the commitment to more comprehensive letters of claim and letters of response will help to narrow the areas of dispute before proceedings are commenced.

6.15 Part 18 requests are also common in NIHL claims, usually because it is perceived that the information provided in the letter of claim and particulars of claim as to the claimant's work history is not sufficiently detailed. It is likewise hoped that the new letter of claim and letter of response will go a long way to addressing such matters pre-issue, so that the litigation procedure can be more focused.

6.16 In general terms, the proposed approach should result in the majority of routine NIHL claims being allocated to the fast track, as long as both sides are prepared to adhere to the proposed changes in pre-litigation conduct. This is important to the success of these proposals, as allocation to multi-track will result in a case being removed from the fixed costs regime.

6.17 We do recognise that allocation remains a matter for the court's discretion under Part 26, but the application of fixed costs to the majority of NIHL cases will probably lead to behavioural changes and the courts must be alive to any steps which might undermine the effective operation of the fixed costs

regime. Certainly contested applications for re-allocation will need to be strictly controlled and the courts will need to consider carefully whether allocation to multi-track is properly required.

6.18 Particularly, we agree that the standard directions should be used to control the number of experts. Defendants should be encouraged to put questions to the claimant's expert as an alternative to instructing their own expert. The parties should generally be encouraged to agree an early position on the use of experts.

6.19 Overall we consider that the most effective way of addressing many of the post-litigation issues remains to improve the efficiency of pre-issue process through the use of better communication and disclosure of information between the parties. The result should be twofold: first, that more claims are likely to be disposed of pre-litigation than is currently the case; secondly, that where it is necessary to issue proceedings, the issues between the parties are more clearly defined.

6.20 Our District Judge representative also reported a number of instances of defendants taking unrealistic positions on breach of duty and of a lack of coordination between different firms instructed to represent the same defendant company. We hope that the recommendations made to improve pre-action behaviour, especially the wide adoption of the ABI Guidelines, will reduce such instances and will generally limit the issues being taken in cases which do litigate.

Test cases

6.21 There is a recognition on both sides that test cases need to be dealt with differently and are unsuitable for a fixed costs regime. We would expect most cases where the issues constitute a test case to be allocated naturally to the multi-track, in that the issues would involve more than a day of court time or evidence from multiple experts. The working party was not able to agree a definition but has to some extent catered for the point by excluding multi-track cases from the fixed costs proposals and by proposing further exceptions around the use of Queen's Counsel. Whilst a definition of "test case" would be desirable, it would need to be carefully considered to cover the range of relevant cases. Ultimately, it is for the parties to argue, usually on allocation, whether their case is a test case and for the court to decide which track is most appropriate on the facts.

Other recommendations

6.22 The working party does not recommend any further changes to litigation procedure. It is expected that the proposals for improving pre-action conduct on both sides will largely deliver the improvements needed.

Limitation

6.23 Limitation is often a live issue in litigated NIHL claims. The condition complained of typically develops over a period of years and usually results from exposure many years ago. It is common for the claimant's date of knowledge to be disputed and for issues to arise as to the discretion of the court under section 33 of the Limitation Act 1980 to disapply the limitation period. Where such issues arise, they depend very much on the factual evidence.

6.24 It will be noted from the example directions in Appendix G2 that some courts have directed in such cases that limitation be tried separately as a preliminary issue. We believe that the rationale for such approach from the courts has been to test the resolve of the parties as to whether limitation is a real issue; but the risk is that by ordering a preliminary issue trial, the court is creating a process which

may ultimately involve more work and higher costs.

6.25 The working party has been unable to agree on whether a preliminary issue trial on limitation takes a claim out of the fixed cost regime and acknowledges that the Civil Procedure Rule Committee may ultimately need to consider this point. The views of the claimant and defendant groups are set out below.

6.26 The claimant group considers that ordering a preliminary trial adds a degree of complexity that means that the case should be removed from fixed costs altogether. They are also concerned that allowing limitation to continue to be considered in isolation, with no consideration of breach of duty or causation, will not save costs. For these reasons they also discourage the ordering of separate trials on limitation in cases allocated to fast track (the working party did not consider the appropriate directions to be made in cases allocated to multi-track). It is fully recognised that this question must remain within the discretion of the court.

6.27 The defendant group, in contrast, contends that what usually happens in such cases is that limitation becomes the central issue, such that the case is either dismissed on that issue or, if the claimant is successful, settles shortly afterwards; and that such arguments are entirely capable of being resolved within the fast track procedure. They point to the number of cases which do involve arguments on limitation, given the background of gradual loss over time and presentation of claims many years after exposure (see 3.6 above). They therefore consider that such cases could and should be accommodated within the fixed costs regime by creation of separate allowances.

6.28 Our District Judge representative was also supportive of the use of preliminary issue trials in claims allocated to the fast track, which she found to be an effective use of court resources in practice.

6.29 Despite the lack of overall agreement, the working party has made progress on this point. Both groups are in agreement that if preliminary trials on limitation are included within the fixed costs regime then in order for this to work, there should be tighter controls on the criteria applied when ordering such a trial. At present there is an inconsistent approach taken by the judiciary which means that these trials may be ordered without the request of either party or without a hearing. The claimant and defendant groups have discussed this point at length and devised a wording which could help to resolve this point and which is included below for assistance:

'Any request for a preliminary trial on limitation should be made within the Allocation Questionnaire. The defendant must identify the evidence and legal argument that give the defendant a real prospect of success on the issue of limitation and must demonstrate that there is a prima facie case for a trial of any preliminary issue'

6.30 There is further agreement that if preliminary issues trials are included within the fixed costs regime, the regime outlined in Chapter 9 at 9.12 to 9.15 should be followed.

ADR

6.31 The working party supports the use of ADR in all types of case and NIHL claims are no different, save that their relatively low value means that any ADR solution has to be cost effective.

Disclosure

6.32 We have emphasised the need for open exchange of information between the parties in order to

improve handling and behaviour. The Disease Protocol contains obligations on defendants to disclose personnel and occupational health records within 40 days where requested and to disclose documents relevant to liability with any protocol response containing a denial.

6.33 Where those obligations are relevant and are not met (and there is no explanation for the delay), there is an obvious effect on efficient handling of claims and claimants and their representatives will be put at a disadvantage. Of course many defendants to NIHL claims either no longer trade or will not have any relevant documents to produce, but those situations can be managed by making that position plain at an early stage.

6.34 There are procedures in the CPR (rule 31.16) specifically designed to deal with disclosure in such circumstances. Under section 52 of the County Courts Act 1984, prospective parties to litigation have a free-standing right to make an application to the court for pre-action disclosure. Whilst costs in such claims remain in the discretion of the court, the courts do have the power to make an award of costs in the event of unreasonable delay or failure to produce relevant records and a number of courts routinely make such awards.

6.35 Generally parties are encouraged to act in the spirit of the protocol and to cooperate, not take minor technical points. To that extent, whilst adherence to protocol deadlines is obviously strongly encouraged, a rigid approach to time limits may not be appropriate. However the courts are used to dealing with such issues within their overall discretion and we do not consider that any further steps are needed to control behaviour on either side in this respect.

6.36 We have assumed that for all relevant purposes, it is the defendant who will have documents to disclose but it is worth noting that claimants will also sometimes hold relevant documents which should be disclosed. The existing provisions are adequate in this respect and the remedy of pre-action disclosure is also available to defendants (where it is proportionate to use such a remedy).

6.37 Technically such an application is not an NIHL claim at all, as it arises from the separate and distinct right to disclosure and once an order has been made to deal with disclosure, that court action is at an end. The working party was not able to agree a level of fixed costs for such applications and recommends that standard basis costs should continue to apply. It is believed that in practice the courts are already well-equipped to make suitable and proportionate orders for costs in such applications: an order will almost always be made at a court hearing and costs will then be summarily assessed.

6.38 Although the ruling of the Court of Appeal in *Sharp v Leeds City Council*¹¹ post-dated the working party's discussions, it may provide further clarity on the point.

Other issues

6.39 A further problem is presented in litigated cases where the defendant company has been dissolved. The bringing of proceedings against such a company is technically a nullity, in that the company is no longer a legal entity which can be sued. At present it is necessary to restore such a company to the Companies Register to enable proceedings to be issued against it. This is a time-consuming process which involves the claimant's solicitors incurring costs themselves and having to pay the costs incurred by the Government Legal Department.

6.40 The cost of these steps can be substantial and would have to be catered for separately. That

¹¹ [2017] EWCA Civ 33

said, the steps involved are fairly standard. For this reason, the working party was able to agree a set of fixed costs for each such application without difficulty. These details are contained at 8.19 and include a list of the usual items of disbursements which are payable in addition to the fixed recoverable costs.

6.41 The need to maintain dissolved companies on the Companies Register also creates an unnecessary burden for Companies House, as well as causing confusion by including dissolved companies on the Register.

6.42 It was originally thought that the process should largely be rendered unnecessary by the Third Parties (Rights Against Insurers) Act 2010 (the 2010 Act). This Act was passed by Parliament in early 2010, following the recommendations of the Law Commission and permits a claimant to proceed direct against the insurer of a dissolved company, without having to restore the company to the Register of Companies. Its provisions were not contentious and indeed it was the first Act to be passed using the accelerated procedure for Law Commission recommendations under the Law Commission Act 2009.

6.43 For whatever reason the 2010 Act was not brought into force in the last weeks of the then Government. Some minor changes were made to the 2010 Act by the Insurance Act 2015 and it was then finally brought into force with effect from 1 August 2016.

6.44 The 2010 Act will not cover most NIHL claims because of the transitional provisions, which limit the application of the 2010 Act to cases where either the cause of action arises on or after 1 August 2016 or the company became insolvent on or after that date. Unfortunately in NIHL claims, as with all other "long-tail" disease claims, the relevant events occurred years ago and employers which have gone out of business tend to have done so many years before August 2016.

6.45 The working party agreed that this position was unsatisfactory. The restoration of the defendant company serves little practical purpose other than to validate steps taken in its name and to result in further costs being incurred. If a solution could be found by which the 2010 Act could be applied to all claims first notified on or after 1 August 2016, that would be welcomed. Ultimately this would require a change to the transitional provisions in the 2010 Act and so is beyond the scope of this report; however it is a serious anomaly that an obvious benefit of the 2010 Act will be of no application to NIHL claims and long-tail disease claims generally for some years, possibly decades.

7. THE OPTIONS FOR FIXED COSTS AND THE POSITION OF THE PARTIES

7.1 In this section we summarise the arguments for and against the introduction of fixed recoverable costs; we identify the models currently in use in the Civil Procedure Rules; and we summarise the position of the parties on the applicable model. The structures finally agreed for both pre-litigation and post-litigation costs are set out in chapters 8 and 9.

7.2 Our terms of reference from the Ministry of Justice asked how a fixed costs regime for NIHL cases (and perhaps other similar cases) might work. It is not therefore for us to establish the need for fixed costs or to justify taking this step. Nonetheless, it is convenient to summarise the arguments for and against fixing costs as this helps to inform the discussion about the options. For some cases, fixed costs may not be suitable. Costs must also be fixed or capped for defendants, as well as claimants, to create an equality of arms.

Arguments for

7.3 Where claims are suitable to be dealt with in the fast track, the argument in favour of fixed recoverable costs has been established for some time. Fixed costs were part of Lord Woolf's original fast track concept and the failure to implement fixed costs in 1999 with the rest of the Woolf reforms took away an element of control of costs in lower value cases. This point was reinforced by Lord Justice Jackson in his Review of Civil Litigation Costs in January 2010, where he strongly recommended the adoption of fixed recoverable costs throughout the fast track.

7.4 Following Lord Justice Jackson's 2010 report, the Government consulted on and introduced fixed recoverable costs for both Road Traffic Accident and Employers' Liability/Public Liability claims in 2013. The scheme for Employers' Liability costs provided for fixed recoverable costs both pre- and post-litigation for all accidents occurring on or after 31st July 2013. The pre-action regime also extended to occupational disease claims involving a single defendant, but only as long as liability was admitted within the constraints of the relevant protocol. Although this regime applies to any occupational disease claim where the letter of claim is sent on or after 31st July 2013, in practice few occupational disease claims have been the subject of this limited fixed costs regime to date.

7.5 Lord Justice Jackson is currently undertaking a further Review into introducing fixed costs across a broader spectrum of civil cases. Whilst this report is being produced in parallel with his review, we are hopeful that we can feed this work into his report. To that end, Lord Justice Jackson has already been made aware of the fixed costs and other terms agreed by the working party.

7.6 There is some evidence that costs are being incurred in NIHL cases which are often much more than the value of the claim in dispute and so potentially disproportionate. That is not necessarily to blame or absolve either side, but wherever costs are incurred which can exceed the value of the amount in dispute (anecdotally by 3 to 1) that is something that should be addressed if possible.

7.7 Although these claims are individual disputes involving individual claimants, the claims are broadly of a similar type and giving rise to similar issues. Those firms handling such claims will tend to handle significant numbers of claims at one time. A system of fixed recoverable costs should therefore be achievable which strikes an appropriate balance between the interests of the parties.

Arguments against

7.8 The arguments against introducing fixed recoverable costs include the regular need for expert

evidence, the likelihood of multiple defendants in most cases and the general complexity of such claims compared with, say, a simple road accident or accident at work. It has been suggested that fixed costs could severely affect claimants' access to justice, though the evidence for this is unclear provided that the amount allowed for the work required to be done is fair and reasonable. Other arguments, such as the need for a review mechanism for any fixed costs figures, have been levelled at all fixed recoverable costs regimes and are not of themselves a reason for preventing an extension of fixed recoverable costs to this area.

7.9 Any fixed costs regime would need to account for the fact that there will be cases for which a streamlined, fixed costs process will simply not be appropriate and that there must be provision for certain cases to fall out of the fixed costs process. Whilst there will need to be exceptions and provisions for individual cases to escape, these do need to be carefully controlled.

7.10 Proportionality is about more than the value of the case and the costs incurred and involves a number of factors including complexity. Each claim has to be investigated and the issues can be complex. Not all claimants instruct firms handling claims "in bulk" and the claimant is entitled to choose their own lawyer.

Systems currently in use

7.11 There are two types of fixed recoverable costs regime currently in operation in the Civil Procedure Rules. The system in use for personal injury claims includes fixed figures for liability admitted cases handled within the relevant protocol, progressing to a "sliding scale" for cases where liability is not admitted and for cases which litigate. Under this sliding scale mechanism, the fixed costs are in fact made up of two elements:

1. A set base figure irrespective of value;
2. An additional element calculated as a percentage of the settlement value of the claim.

7.12 The base figure increases as a case moves to later stages (reflecting in part the cumulative costs incurred); the percentage is just a device for linking the amount of costs to the damages outcome, usually derived along with the base figure from underlying data. The percentage may decrease alongside an increase in the base figure (all PI pre-issue models), or it can remain fixed (RTA claims) or increase in later stages (EL and PL claims).

7.13 The bulk of NIHL claims are relatively low value, with damages typically settling under £5,000. A model tied in part to a percentage of settlement value, which in other work areas has the effect promoting a common interest between client and lawyer in maximising damages, might not have the same effect in NIHL claims.

7.14 The second model, which we have termed a "building blocks" model, operates in the Intellectual Property and Enterprise Court (IPEC). In such cases, the fixed recoverable costs are built up from various "blocks" corresponding to steps in the process. The costs applicable for each "block" are capped and the overall costs are then subject to an overall cap, such that the total costs cannot exceed a set sum (£50,000 for IPEC cases) whatever steps are taken.

7.15 The proposal in chapters 8 and 9 is a simplified adaptation of the "building blocks" model.

7.16 A feature of current regimes of fixed costs is that the figures, once set, are often not reviewed for some time. The working party agreed we should recommend that fixed costs both pre- and post-

litigation should be adjusted automatically in line with an appropriate index, probably the Consumer Prices Index (CPI).

The regime for NIHL claims

7.17 Fixed costs should be set at a level which reflects the steps reasonably required for a claimant solicitor to present and run a successful claim. This would ensure that costs are contained and are proportionate and would introduce efficiencies into the system whilst removing the additional costs involved in negotiating costs at the end of a claim.

7.18 Such considerations cannot operate in a vacuum. Claims for NIHL are largely paid in respect of risks underwritten by insurers many years ago and their cost will in general be borne by those businesses now requiring Employers' Liability Insurance. It is therefore important that costs are controlled and that they remain proportionate for what are essentially lower value fast track claims.

7.19 It is accepted that NIHL claims do present particular issues and are more complex than accident claims. Each claim is likely to involve multiple defendants and multiple insurers and although there is pressure for those defendants to coordinate their response through a single coordinating insurer, that will not always be possible at an early stage. The position of each defendant may also involve multiple issues, including causation, breach of duty and limitation. Any fixed recoverable costs regime needs to take account of this variable matrix whilst incentivising good behaviour on the part of defendants.

Costs in litigation

7.20 Our terms of reference did not restrict any consideration of fixed costs to pre-issue stages only. It is accepted that if the pre-issue process changes succeed in reducing the number of litigated cases, which all sides hope will be the case, then the type of case going into litigation may change and there may be a greater number of more complex cases.

7.21 The following paragraphs consider high level options for post-litigation costs. The assumption is that litigation will be on issues other than solely quantum. A more detailed explanation of the post-litigation costs agreed upon by the working group follows in chapter 9.

7.22 In broad terms the case is made out by Lord Justice Jackson in his 2010 Report that cases which remain in the fast track should be subject to fixed recoverable costs if this can be achieved. These costs are likely to be greater than in employers' liability and public liability accident cases. It is also important that there is a built in incentive for settlement pre-issue.

7.23 Where a claim proceeds to litigation, there is again a choice of systems between the base figure plus percentage of damages model and the "building blocks" model as described above. As damages tend to be in a relatively narrow value range, it may be that the "base figure plus" model could simply become a set base figure for each stage of the case.

7.24 The existing fixed recoverable costs for injury claims which leave the Claims Portal (Section IIIA of CPR Part 45) consist of 3 stages pre-trial, plus the fixed fast track trial advocacy costs:

1. from issue up to allocation;
2. from allocation up to listing;
3. from listing up to trial.

7.25 If the claim settles pre-trial, the costs for the stage in which the case settled are applied. There are special rules for dealing with Part 36 offers and for defendants' recoverable costs, which are also fixed (or more accurately capped). This system was introduced in 2013 but with phased transitional provisions, so it has had limited practical application so far although we are not aware of any major problems with it.

7.26 Importantly the fixed recoverable costs set out in Part 45, Section IIIA incorporate the pre-litigation costs. The end result is that whenever the case settles, the calculation of recoverable costs is essentially a mechanical exercise of applying the costs applicable to that stage including all previous stages.

7.27 Once a case passes into the relevant stage (i.e. is issued, is allocated or is listed), the relevant costs for that stage apply. This is expected to operate broadly on a "swings and roundabouts" basis for any firm handling a number of claims, but provides all parties with certainty as to the figure applicable at each stage and exactly when the stage applies. An additional advantage is that the timing of allocation and listing is largely in the control of the court and there can therefore be no accusations of "gaming" the process so as to increase or reduce the applicable costs.

7.28 As with pre-litigation costs, the current regime provides for a set base figure plus an additional element linked to a percentage of damages paid. The same caveat at 7.13 above applies: with damages at a relatively set level for most NIHL claims, such variation may not be of real benefit to either party.

7.29 The "building blocks" model used in IPEC is better suited to more complex cases and where the procedure adopted is likely to vary significantly from case to case. The main variable in litigated NIHL claims is likely to be the number of defendants still separately represented and disputing liability. For any claim remaining in the fast track, the procedural route followed will be fairly standard.

7.30 As with costs incurred pre-litigation, it is expected that the involvement of more than one defendant would lead to some additional costs being incurred, although there will also be a "core" element of common costs.

Position of the parties

7.31 Discussion about how the concept of fixed recoverable costs could be applied in practice occupied much of phase 2 of the working party's deliberations. As well as the position of the claimant group and of the defendant group, we were assisted by representatives from the Bar. It was helpful to have this further perspective, especially as the claimant and defendant groups broadly agreed that there was a benefit in the involvement of specialist counsel in NIHL cases notwithstanding the relatively low value of such claims.

A. Claimant group

7.32 Many of the concerns of the claimant group are reflected above in the arguments against the application of fixed recoverable costs. There were concerns in particular as to the appropriate allowance for the complexity of NIHL claims whilst acknowledging the effect of proportionality. It was also felt by the claimant group that there was a real risk that the fixed costs regime could lead to inequality of arms and that costs might be fixed at a level that did not reflect the amount of work reasonably required to handle such claims competently in practice.

B. Defendant group

7.33 The defendant group on the other hand were generally in favour of the application of fixed costs to a wide range of cases but were concerned that this should not undermine the benefits anticipated from improvements in the letter of claim and accompanying evidence. Any fixed costs regime agreed would have to be on the basis that there would be an improvement in the quality of claims presented and that unmeritorious claims would be discouraged. The new process had to provide a realistic opportunity for early settlement in claims which merited it.

7.34 Ultimately the original proposal of agreeing fixed costs for all NIHL claims which remained within the fast track was narrowed down, with the agreement of the parties, to exclude those cases where the nature of the issues rendered the case more complex or where the conduct of the defendant led to more issues being left in dispute. On the latter point for example, there was an initial difference of opinion over the effect of defendants seeking their own medical evidence in such cases and ultimately we agreed to exclude any case in which a defendant requested their own medical evidence or a second audiogram.

C. The Bar

7.35 The Bar's representative made a number of general comments about the application of fixed costs and their effect on the Bar. In their experience of fast track personal injury litigation where fixed costs apply, there has been a substantial negative impact on the junior Bar since the cessation of the disbursement basis for counsels' fees.

7.36 Particularly with instructions on behalf of claimants, counsel are now rarely instructed to draft pleadings, or advices on evidence, liability or quantum, or to undertake any other interlocutory work. When junior counsel are instructed on such matters, the fees offered tend to be very low. This can result in instruction of inadequately experienced counsel.

7.37 As a result, such cases can be poorly analysed, prepared and pleaded, and cases are more likely to be under-settled or pursued inappropriately to trial.

7.38 In relation to fast track NIHL cases, the Bar expressed the firm view that the benefits from involvement of counsel in such cases can only be maintained if the working party agrees to recommend a system whereby counsels' fees are ring fenced as disbursements; set at a level which is not only reasonable, but also commensurate with the relative complexity and needs of industrial disease litigation; and reviewed periodically, in order to account for matters such as inflation.

7.39 Ultimately the working party agreed that post-litigation, counsel's fees would largely be treated as a disbursement. Pre-litigation there would be no separate allowance for counsel, save for the additional allowance within stage 2B/3B for the work required in preparing papers for proceedings including the particulars of claim and the claim form.

7.40 Whilst the expectation of the working party is that such work would normally be done by counsel, it is acknowledged that such work could also be done by a solicitor advocate who is intended to present the case at trial. The separate allowance is therefore not specifically "ring fenced" for counsel.

7.41 In contrast the acknowledgement that counsel's fees should be treated as a disbursement post-litigation necessarily restricts their application to counsel alone. The working party recognised the risk

that solicitors might routinely outsource significant parts of their own work to counsel as a means of working round the confines of the fixed costs regime. Whilst it was not possible to agree a list of items which counsel would routinely be expected to undertake, it was agreed that the wording of CPR 45.29I (2C), which currently applies only to medical experts in certain types of case, could be adapted to allow for separate recovery of counsel's fees only where "justified".

8. AGREED PRE-LITIGATION COSTS

8.1 In this chapter we set out the structure for fixed costs pre-issue and the figures agreed by the working party, together with all other relevant considerations for pre-issue fixed costs.

Description of stages

8.2 The broad concept is that costs pre-issue are split into 3 stages:

Stage 1 (up to and including the letter of claim)

Stage 2 (cases where liability is admitted)

Stage 3 (liability not admitted)

Stage 2A/3A represent cases where papers have not been prepared to issue proceedings

Stage 2B/3B contain an additional allowance for the cost of preparing papers to issue where incurred.

Stage 1

8.3 These costs will be broadly common to all multiple defendant claims, although separate consideration may need to be given to single defendant claims, including those which currently remain in the EL Claims Portal. It is accepted that there may be some variation related to the number of defendants in multiple defendant cases, although it is not a simple multiplicative effect. The costs should in either event allow for the claimant solicitor to carry out the necessary work to prepare the letter of claim.

8.4 Some of the allowance for multiple defendants may relate more to engaging with insurers and considering responses once the letter of claim has been sent, which may sit more comfortably in stage 2 / stage 3 costs for this reason. In the event the parties have agreed a structure in which the common costs involved in stage 1 are subsumed into the agreed costs for cases which settle at either stage 2 or stage 3.

Stage 2

8.5 These costs deal with the costs of agreeing quantum in cases where there is an admission of breach of duty. This is felt to be the key issue at the stage of the letter of response, although further clarity may subsequently be needed on whether causation and limitation will remain in issue – see further under stage 3 costs below.

8.6 Stage 2A represents a claim that settles before the claimant's solicitor has prepared papers for issue of proceedings. Stage 2B represents claims that settle after the claimant's solicitor has prepared such papers, by including an additional £500 for the cost of preparing the papers whether incurred by solicitors or by counsel.

8.7 The costs of agreeing quantum will be largely common to all claims. The parties agreed though that there would still be an element of variation according to the number of defendants, in line with other aspects of the pre-litigation process. The only exception to this would be if the defendants all agreed by the time liability was admitted (by all of them) that one defendant's insurer would coordinate settlement and in effect engage with the claimant on behalf of all defendants, in accordance with the ABI guidelines.

8.8 It is anticipated that in the majority of cases where a defendant admits breach, they would also

subsequently be admitting causation and limitation. Any admission of causation at this stage would only be subject to the production of suitable medical evidence. Where limitation or causation is subsequently denied, the case should logically move into stage 3.

8.9 Where multiple defendants have admitted breach and are coordinating settlement between them in accordance with the ABI guidelines, only one set of stage 2 costs would normally be allowed.

8.10 Where it is reasonable for proceedings to be prepared before settlement is agreed, a set allowance of £500 for preparing those papers is incorporated into the matrix for the figures at stage 2B. Consideration will need to be given to the way in which the claimant can demonstrate that papers have been prepared appropriately, to avoid disputes over the extra allowance.

Stage 3 (liability not admitted)

8.11 These costs deal with considering liability responses and preparing for litigation in cases where there is no admission of breach or where causation or limitation is disputed. Here a standard cost of preparation is expected, but this will again vary depending on the number of defendants who have not admitted breach and are to be sued.

8.12 Stage 3A represents a claim that settles before the claimant's solicitor has prepared papers for issue of proceedings. Stage 3B represents claims that settle after the claimant's solicitor has prepared such papers, by including an additional £500 for the cost of preparing the papers whether incurred by solicitors or by counsel.

8.13 Proposed Costs:

2A £2,500

2B £3,000

3A £3,500

3B £4,000

(These figures are for one defendant)

8.14 Where at least one defendant admits liability and settles pre-litigation and at least one defendant denies liability, stage 2A or 2B as appropriate will apply to any defendant which admits and settles pre-litigation. The claim against the remaining defendants will proceed under stage 3, subject to the claimant giving credit for the costs already recovered.

8.15 Where a claim is settled against one or more defendants pursuant to stage 2A or 2B, then the claimant will be entitled to 100% of stage 2A or 2B costs as against the defendant(s) under such settlement. The same applies where the claim is initially settled against one or more defendants whether at stage 3A or 3B or post-litigation. For the avoidance of doubt there will be no double recovery: the claimant's maximum total entitlement is for the applicable stage costs, inclusive of any allowance for additional defendants successfully pursued.

8.16 Any issues of eventual apportionment of such costs will need to be dealt with between defendants. A simple and effective mechanism will need to be devised for handling such apportionment issues: provision may need to be made in any procedural rules to avoid protracted disputes and to protect rights of recovery.

8.17 Additional defendants successfully pursued add an additional £500 (exclusive of VAT and reasonable disbursements) in each case as highlighted in Table 2:

Table 2

Stage	1 Defendant	2 Defendants	3 Defendants
2A	£2,500	£3,000	£3,500
2B	£3,000	£3,500	£4,000
3A	£3,500	£4,000	£4,500
3B	£4,000	£4,500	£5,000

8.18 Save for the allowance of £500 for drafting proceedings (see 8.8 and 8.12 above) in stage 2B or 3B, there is no separate allowance for counsel’s fees for any work carried out pre-litigation. Counsel’s fees will only be treated as a disbursement when incurred post-litigation (see 9.6 below).

Costs of restoring companies

8.19 The parties have agreed that where a defendant company which is then successfully pursued has to be restored to the Register of Companies, restoration costs will be paid in addition to the above costs. The agreed fee per restored defendant successfully pursued in a NIHL claim subject to fixed recoverable costs will be £1,280 inclusive of counsel’s fees. Reasonable disbursements apart from counsel’s fees are payable in addition: these tend to be standard items i.e.:

- Government Legal Department fees
- court fees
- disc fee
- Farrer and Co fees where required¹²
- any adjournment fee

8.20 Restoration of a company should only be necessary in preparation for issue of proceedings, although it will normally take some weeks to go through the various steps in the process. We recommend that a claimant who is planning to restore a company should give advance notice to the relevant insurers of their intention to incur such costs.

Exceptions

8.21 All military claims and claims valued at more than £25,000 will automatically fall outside the new process and cost regime.

8.22 Additionally, in single defendant claims, defendants or their insurers can pre-elect to put their name on a list for all their cases to commence within the Portal. Where that defendant is no longer trading and is represented by insurers only, all insurers of that defendant must have pre-elected for this to apply. This would exclude all their claims from the fixed costs scheme, in favour of the current Claims Portal and the lower fixed costs applicable to cases in which liability is admitted during the Portal process.

8.23 Any claim which is commenced within the Claims Portal as a consequence of the process described in 8.22 is outside the scope of the fixed costs agreed by the working party in this report. If the claim then falls out of the Claims Portal (e.g. because liability is not admitted in the time limit),

¹² These are incurred where the registered office of the company to be restored was in the Duchy of Lancaster or Cornwall.

costs will be assessed on the standard basis.

8.24 The new NIHL process and the costs which follow apply pre-litigation to claims properly brought against up to 3 defendants, unless any of the following conditions apply whether raised in a letter of response or otherwise:

- a. Any defendant alleges that the claimant's occupational hearing loss is de minimis
- b. Any defendant requests a second audiogram
- c. Any defendant requests their own medical evidence
- d. The case is considered by either party to be a "test case" (scope not agreed)

(For the sake of clarity, any argument by any defendant under a to d above removes the whole case from the new process and from fixed costs.)

8.25 The 3 defendant limit applies to defendants actively pursued and which are either active companies or have insurance to meet a claim.

8.26 The working party was not able to agree a figure for the costs of a pre-action disclosure application where such application is merited. The working party therefore recommends that any order for costs following such application should be for costs to be assessed on the standard basis and not part of the fixed costs regime. These costs would normally be summarily assessed when the application is determined.

8.27 All figures quoted in this Chapter are exclusive of VAT and of disbursements unless otherwise stated. Counsel's fees are dealt with at 8.18 above. The working party also recommends that fixed costs should be adjusted automatically for inflation in line with an appropriate index: see 7.16 above.

9. AGREED POST-LITIGATION COSTS

9.1 In this chapter we set out the figures agreed for post-litigation costs. The information set out includes how counsel's fees should be dealt with and provisions to deal with limitation, plus exceptions to the fixed recoverable costs regime.

Costs:

9.2 Post-litigation costs have been agreed as set out in Table 3 for single defendant claims:

Table 3

Stage	1 Defendant	2 Defendants	3 Defendants
L1: Issue to Allocation	£1,650	£1,980	£2,310
L2: Post-Allocation to Listing	£1,656	£1,987	£2,318
L3: Listing to Trial	£1,881	£2,257	£2,633

9.3 Once a claim moves into one of the above stages, the fee relating to that stage will be paid in full.

9.4 For each additional defendant successfully pursued, a 20% uplift is applied per defendant at each stage.

9.5 These figures exclude costs incurred as a result of any interlocutory application. Such costs where ordered will be on the standard basis in addition to the fixed costs: the court will normally assess such application costs summarily where they cannot be agreed.

Counsel's fees generally

9.6 Counsel's fees will be recoverable post-litigation on a disbursement basis where the work done by counsel has been reasonably incurred. The working party agreed that any involvement of counsel must be "justified" as reasonable, along the lines envisaged for medical experts in other types of case in CPR 45.29I (see especially at (2C))¹³.

Trial advocacy fees

9.7 NIHL claims typically settle for between £3,000 and £5,000. The standard applicable trial advocacy fee under CPR 45 would therefore typically be either £500 (where damages are not more than £3,000) or £710 for damages of more than £3,000 but not more than £10,000. Such fees are intended to cover one day of trial time, although members of the working party reported that it was not uncommon for NIHL fast track trials to run into a second day, with no additional advocacy fee being allowed on assessment.

9.8 The working party agreed that trial advocacy fees for NIHL claims should be higher than these figures, to reflect the relative complexity of such cases and the benefit brought by use of specialist counsel or solicitor advocates. No agreement could be reached as to what the appropriate level should be.

¹³ 'The cost of obtaining a further report from an expert not listed in paragraph (2A)(b) is not fixed, but the use of that expert and the cost must be justified.'

9.9 The claimant group believe that a trial advocacy fee of £2,500, plus a £1,500 refresher for any case which runs into a second day, is suitable based on the current rates being charged by both claimant and defendant counsel. Their position is broadly supported by the Bar. The defendant group in contrast believes that a figure of £1,380 is sufficient, as in effect an uplift on the fixed advocacy fee applicable to cases worth in excess of £10,000.

9.10 The parties also agreed an exception for those cases where a defendant instructs Queen's Counsel (QC). Ultimately such cases are likely to fit any definition of test cases or be allocated to multi-track and therefore be excluded from the fixed costs regime in any event. However if a rare case stays in the fast track with a QC instructed, the claimant may exceptionally recover the reasonable fees of instructing their own QC (including the relevant brief fee for trial) if so advised.

9.11 If any defendant wishes to instruct a QC this must be raised in the Directions Questionnaire and taken into consideration at Allocation Stage.

Limitation

9.12 At 6.26 to 6.27 above we record the respective positions of the claimant and defendant groups as to whether the listing of trials on limitation alone as a preliminary issue can be accommodated within the fixed costs regime at all. The working party was unable to reach agreement on this point.

9.13 The working party was however able to agree that if the Ministry of Justice decides that such cases should stay within the fixed costs regime, this would work in the following way:

- The same fees would apply to preparing the case to a preliminary issue trial as are applied to a full trial. Should the claim continue to run after a preliminary trial, the claim will recommence within the fee structure from the allocation stage (i.e. without the stage from issue to allocation) and the claimant if successful will receive the fixed costs for the further litigation stages in addition to those for the preliminary trial and pre-litigation.
- Counsel's advocacy fees for preliminary trials on limitation are payable in addition to the fixed costs.

9.14 If not all defendants seek to run a preliminary trial then the matter should be stayed against all other defendants until the preliminary trial has been heard or the case settled.

Example of costs where there is a limitation trial

9.15 An example may assist in explaining how this would work in practice:

2 defendant case where defendant 1 (D1) seeks a preliminary trial on limitation, and this is ordered by the court.

The matter is stayed against defendant 2 (D2) whilst the claimant prepares for a limitation trial. The claimant is successful at the limitation trial, and D1 is ordered to pay costs of the preliminary trial plus disbursements. D2 does not contribute towards these costs. The claim then proceeds back to the allocation stage and settles against both defendants. Both defendants would then be liable to pay the claimant's post litigation costs plus the relevant pre litigation costs and disbursements.

The costs would be split as outlined in the Table 4 below.

Table 4

Cost	Defendant 1	Defendant 2
Pre-litigation costs (50% of £4500)	£2,250	£2,250
Preliminary trial cost (100%)	£5,187	•
Post-litigation cost (50% of £1880)	£990	£990
Total cost payable by each Defendant	£8,427	£3,240

The above figures exclude counsel's fees where justified and trial advocacy fees which are to be paid in addition.

Multiple defendants and unilateral settlements

9.16 In chapter 8 (see especially 8.15 and 8.16 above) we highlighted the problem of multiple defendants settling at different stages. This is especially so if one defendant settles pre-litigation and the claimant then litigates successfully against other defendants. It is important that claimants receive the appropriate costs entitlement at the stage at which the claim against an individual defendant settles.

9.17 The first defendant to settle in such circumstances must meet 100% of the costs incurred up to that particular stage (in respect of that defendant, without enhancement for additional defendants). If the claimant is ultimately successful against other defendants as well, the full costs entitlement will need to be calculated and an apportionment exercise conducted subsequently between defendants. For the avoidance of doubt there will be no double recovery: the claimant's maximum total entitlement is for the applicable stage costs to the point at which the case is eventually concluded, inclusive of any allowance for additional defendants successfully pursued.

9.18 We refer in 8.16 to the need for a simple and effective mechanism to be devised for handling apportionment issues between defendants.

9.19 Where a claimant settles against one or more defendant and proceeds to trial against one or more defendants but loses (or where they discontinue at a later stage), fixed costs are only payable for those stages in which the claimant incurred costs against the defendants who settle. The subsequent trial has no effect on the liability of the settling defendants, which is fixed at the point of settlement subject to any need to reapportion as above.

Exceptions to fixed costs post-issue

9.20 The same exceptions as specified above at 8.21 to 8.25 apply post-litigation:

- military claims
- claims valued at over £25,000
- claims allocated to the multi-track
- claims involving more than 3 active defendants
- any case considered to be a test case (scope not agreed)
- any other case where any defendant:
 - alleges the occupational hearing loss was de minimis
 - requests their own medical evidence
 - requests a second audiogram

9.21 As with pre-litigation, any argument by any defendant under the points above removes the whole case from the new process and from fixed costs.

9.22 Claims that have been within the fixed costs regime pre-litigation and then fall out post-litigation will attract the fixed fee outlined above for pre-litigation and the post-litigation costs will be paid on the standard basis. Immediately upon any settlement of such a claim, any applicable pre-litigation fixed costs should be payable within 14 days.

9.23 All figures quoted in this Chapter are exclusive of VAT and of disbursements unless otherwise stated. Counsel's fees are treated as a disbursement post-issue. The working party also recommends that fixed costs should be adjusted automatically for inflation in line with an appropriate index: see 7.16 above.

10. CONCLUSION AND RECOMMENDATIONS

10.1 This chapter summarises the recommendations of the working party as to fixed recoverable costs and process improvements. It considers other recommendations which arise from the matters covered in the report and the application of the recommendations to other types of disease claim.

10.2 The terms of reference for this Working Party are to make recommendations to the Government on:

1. How a fixed costs regime for NIHL cases (and perhaps other similar cases) might work; and
2. How the handling of NIHL claims might be improved by both claimant and defendant representatives (including how evidence is obtained and presented).

Recommendations

Fixed recoverable costs

10.3 The working party recommends the introduction of fixed recoverable costs as set out in Table 2 in chapter 8 (pre-litigation costs) and Table 3 in chapter 9 (post-litigation costs). Those figures were arrived at by agreement within the working party, concluded via formal mediation, but with specific provisos and exceptions which should be implemented with the proposed grid as a package.

10.4 The working party further agreed that fixed fast track trial advocacy fees applicable to such cases were too low and should be increased. The working party was not able to agree on a suitable increase. The arguments of the claimant and defendant groups on this point are set out at 9.9 above and will need to be considered either by Lord Justice Jackson's fixed recoverable costs review or by the Ministry of Justice.

10.5 The working party was unable to agree on whether a preliminary issue trial on limitation would take the case outside fixed recoverable costs or could be accommodated within the fixed costs regime. Further detail of the views expressed by the working party is set out in the section on limitation at 6.24 to 6.29 above. In the event that preliminary issues trials are to be included, an agreed mechanism for doing so is set out at 9.12 to 9.15 above.

Pre-litigation process improvements

10.6 The proposed fixed costs build on the constructive work of the claimant and defendant groups represented on the working party on improvements in the way in which such cases can be handled pre-litigation. These improvements are explained in more detail in chapter 4, but in summary we recommend:

- Better information exchange in the early stages, to narrow the issues;
- An improved letter of claim to contain all information of value to defendants;
- The letter of claim to be sent only after the claimant has obtained an audiogram and ELTO search results, both of which should be disclosed with the letter;
- Ideally an HMRC schedule should also be obtained first and disclosed with the letter of claim;
- The letter is designed to avoid the need for further information requests from defendants;
- Defendants are encouraged to coordinate their position in accordance with ABI Guidelines;

- The letter of response from each defendant should address their position on breach of duty and contain meaningful information as to their position generally;
- A system of accreditation/approval for audiologists, such that both parties can have confidence in the audiogram produced with the letter of claim;
- An ENT Consultant's report is likely to be required where liability is in dispute and litigation is anticipated;
- In cases where liability is not disputed, the claimant will instead obtain an audiologist's report for settlement purposes.

10.7 The proposed improvements to pre-litigation process will need to be contained in some form of agreement/protocol. We do not advocate the production of a new protocol devoted solely to NIHL claims. Instead the necessary changes could be incorporated into an annexe to the Occupational Disease and Illness Protocol.

10.8 At the same time, further thought will need to be given to how the proper use of the new letter of claim and letter of response (and especially the disclosure of the claimant's audiogram) can be properly enforced. Such early exchange of information is critical to the success of the new process.

10.9 The agreement on fixed costs recognises that these are applicable to cases which do not proceed under the current Claims Portal. The Portal is restricted to single defendant cases (which excludes the majority of NIHL claims). A mechanism needs to be created for defendants to elect to handle all single defendant cases against them via the Portal as recommended at paragraph 8.22.

Post-litigation process improvements

10.10 The proposals for the fixed costs regime are limited to cases which remain in the fast track. The agreed exclusions from the regime, such as the exclusion of any cases where defendants seek to obtain their own medical evidence or argue that the claimant's condition is de minimis, should mean that most cases not excluded should remain within the fast track. With this in mind, the working party proposes the following measures for post-litigation:

- a largely agreed template for standard directions;
- tighter controls on the criteria applied when listing such cases for separate trial of preliminary issues such as limitation (as currently occurs in some court centres).

10.11 It is recognised that issues such as allocation, directions and listing of preliminary issues remain within the discretion of the court, but the working party urges the courts and the Civil Procedure Rule Committee to take note of these concerns.

10.12 The fixed costs regime is limited to cases which remain in the fast track, as are the proposals for process improvements.

10.13 "Test cases" are amongst the categories of case excluded from the fixed costs regime. It was not possible to agree on a definition of a test case, although both the claimant and defendant groups felt they could easily identify such cases in practice. Further work may be needed on a suitable definition.

Other recommendations

10.14 The working party recommends that further work is carried out to agree a system of accreditation/approval for audiologists, such that both parties can have confidence in the production of an audiogram with the letter of claim.

10.15 The working party recognises that some form of ADR has a place in NIHL claims, given the relative level of costs incurred in such claims compared to damages. Any form of ADR applied has to be relatively low cost in order to be effective in such cases. We were not able to develop such thinking any further.

10.16 In the initial phase of the working party's deliberations, the time taken to obtain HMRC schedules was a significant concern, with delays of up to a year reported. The working party recognises the difficulties facing HMRC in this respect and is pleased to note that HMRC report that their backlog has now been eliminated, such that requests are normally answered within the statutory period of 40 days.

10.17 HMRC report that they have benefited from solicitors only presenting requests for an HMRC schedule in a claim where the solicitors state they have obtained an audiogram which demonstrates possible NIHL. This approach was recommended in APIL's article last year (see Appendix E) and is to be commended.

10.18 The working party records its disappointment that the ongoing problem of dissolved companies as defendants has not been remedied by the eventual implementation of the Third Parties (Rights Against Insurers) Act 2010 (the 2010 Act) on 1 August 2016. The 2010 Act does not apply where both the cause of action and the insolvency occurred before that date, meaning that in most NIHL claims, the provisions of the Act could not apply for many years, probably decades. This problem could be remedied by allowing the 2010 Act to be used for all cases where the claim is first notified on or after 1 August 2016.

Other disease claims

10.19 As explained at 2.9 above, our focus has been solely on NIHL claims, which make up the vast majority of occupational disease claims in the fast track.

10.20 The fixed costs structure and other recommendations might be at least partly suitable for other types of disease claim but we have not been able to consider this. Our recommendation is that the fixed costs and process improvements outlined in this report should only be considered suitable for NIHL claims.

Consultation

10.21 The Ministry of Justice has indicated that it intends to consult on any fixed costs proposed or other recommendations made. We have suggested some consultation questions arising from the report and our recommendations, which can be found at Appendix H.