

**APPENDIX 11: TEXT OF THE FIXED RECOVERABLE COSTS MEDIATED AGREEMENT IN RESPECT OF  
NOISE INDUCED HEARING LOSS CLAIMS**

**CJC NIHL Working Party**

**Confidential:**

**Agreed points on process and fees with regards to NIHL under a potential fixed recoverable cost regime.**

**Points agreed with respect to pre litigation:**

- A. Single Defendant cases will be in the "new NIHL process", unless the defendant elects to put their name on a list for all their cases to commence within the portal (i.e. all insurers of defendant need to agree, for insurer to place the defendant's name on the list).
- B. Any single defendant claims commenced within the current EL/PL Portal and falling out are outside the new NIHL process and costs will be paid on the standard basis.
- C. Any claims that fall within the below categories will fall outside the new process and cost regime:
  - a. Military claims
  - b. Claims valued at more than £25,000
- D. New NIHL process (and costs which follow) applies pre-litigation to claims up to 3 defendants, unless any defendant in letter of response:
  - a. Argues the occupational loss is de minimis
  - b. Requests a second audiogram
  - c. Requests their own medical evidence
  - d. Treats this as a "Test case" (scope not agreed)

Any argument by any defendant under a to d above removes the whole case from the new process and from fixed costs.
- E. Form of letter of response is now agreed between the parties.
- F. Previous list (bar asterisked items): agreement confirmed on all points, see annex attached.
- G. Stages 2A and 2B are claims where liability is admitted in full by all defendants. 2A is a claim that settles before the Claimant's solicitor has prepared papers to issue proceedings. 2B represents claims that settle after the Claimant's solicitor has prepared papers to issue proceedings.
- H. Stages 3A and 3B are for cases where defendants deny liability. 3A is a claim that settles before the Claimant's solicitor has prepared papers to issue proceedings. 3B represents claims that settle after the Claimant's solicitor has prepared papers to issue proceedings.
- I. 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.
- J. Where a claim is settled against one or more defendants at 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 settled against one or more defendants either at stage 3A

or 3B or post litigation. The claimant will give credit for the costs already recovered if one or more claims settle and others proceed to a later stage.

K. 2B and 3B include £500 for cost of drafting particulars of claim, parties to consider circumstances where that can be recovered e.g. on prior notice or on production of statement of truth. £500 applies whether pleadings drafted by solicitor or counsel.

L. Pre litigation costs figures are agreed as follows:

2A £2,500

2B £3,000

3A £3,500

3B £4,000

(these figures are for one defendant)

M. For each extra defendant successfully pursued, add an additional £500 in each case as highlighted in the below table:

<b>Stage</b>	<b>1 Defendant</b>	<b>2 Defendants</b>	<b>3 Defendants</b>
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

N. All figures exclusive of VAT and reasonable disbursements.

O. Counsel's fees will be permitted post-litigation on a disbursement basis but must be justified be "justified" as reasonable, along the lines envisaged for medical experts in other types of case in CPR 45.29I (see especially at (2C)).

P. Restoration fees will be paid in addition to the above fees. A fee per restored defendant successfully pursued will be paid as follows: (in NIHL cases only):

£1,280 exclusive of VAT, plus reasonably incurred disbursements i.e. Government Legal Department fees, court fees, disc fee, Farrar and co fees where required, any adjournment fee (but not including counsels' fees which are included in the figure of £1,280).

**Points agreed with respect to Post Litigation Costs:**

Q. An FRC regime will apply post litigation to claims up to 3 defendants unless any defendant in their defence:

- a. Argues the occupational loss is de minimis
- b. Requests a second audiogram
- c. Requests their own medical evidence
- d. Treats the case as a "Test case" (scope not agreed)

Any argument by any defendant under a to d above removes the whole case from the new process and from fixed costs.

R. Claims excluded from the new "NIHL Process" are listed below:

- a. Military claims

- b. Claims allocated to the multi-track
  - c. Claims valued at more than £25,000
- S. Claims that have been run under the FRC regime pre litigation and subsequently fall out once litigation is started will attract the fixed fee outlined above for pre litigation; the post litigation costs will be paid on the standard basis.
- T. Costs incurred as a result of interlocutory applications will be paid on the standard basis and in addition to the fixed costs.
- U. Post litigation costs have been agreed as follows for one Defendant claims:

Issued to Allocation	Post Allocation to Listing	Listing to Trial
£ 1,650.00	£ 1,656.00	£ 1,881.00

- V. For each additional defendant successfully pursued a 20% uplift is applied per defendant at each stage.
- W. The above figures are exclusive of VAT and reasonable disbursements and are to be paid in addition to the pre-litigation figures.
- X. Once a claim moves into any of the above stages, the fee relating to that stage will be paid in full.
- Y. With the exception of fast track advocacy fees, Counsel's fees will be recoverable post litigation on a disbursement basis, to be "justified" as above.
- Z. Due to the complexity of NIHL cases, Counsel's fees for fast track trials require an increase. There is no agreement as to what the level of the increase should be. The Claimant Group believes that in order to ensure an equality of arms, the figure of £,2500 (plus VAT) and a £1,500 (plus VAT) refresher is suitable based on the current rates being charged by both Claimant and Defendant Counsel. The Defendant Group believes that a figure of £1,380 (plus VAT) is sufficient, based on the current scale of fast track fixed trial advocacy fees.
- AA. Should a Defendant wish to use Queen's Counsel the Claimant will also be entitled to use a QC and all reasonable QC fees are recoverable for that case. Any defendant wishing to instruct a QC should raise this at Allocation Stage, to be taken into consideration when allocating the claim.
- BB. There is no agreement on whether preliminary trials on limitation should fall within a fixed fee regime. The Claimant Group believes that these add an extra level of complexity which make them unsuitable for a fixed fee regime. The Defendant believes that these can be dealt with under the fixed fee regime.
- CC. Both parties are in agreement that should the Rule Committee agree with the Defendant that preliminary trials on limitation can be included within the regimes then in order for this to work, there should be tighter controls put in place with respect to the criteria applied when ordering such a trial. At present these is an inconsistent approach taken by the judiciary which means that these trials are often ordered without the request of either party or without a hearing. The claimant and defendant group have discussed this point at length and devised the below wording which we believe could help to resolve this point. Please note that the below wording is merely included in this report to reflect the conversations between the parties so as provide assistance to the Rule Committee.

*'Any request for preliminary trials on limitation should be requested 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'.*

- DD. If preliminary issues trials are to be permitted in cases to which this regime applies, the parties would recommend that the same fees would apply to running these cases to trial as are detailed above at V and W. Should the claim continue to run after a preliminary trial, the claim will recommence within the fee structure from allocation stage and the claimant solicitor will receive the fees as outlined above in addition to those received for the preliminary trial and pre litigation.
- EE. 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.
- FF. Counsel's advocacy fees for preliminary trials on limitation should be a disbursement in addition to the Fixed Recoverable Costs.

**Example:**

*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 below table.*

<b>Cost</b>	<b>Defendant 1</b>	<b>Defendant 2</b>
Pre litigation costs (50% of £4,500)	£2,250	£2,250
Preliminary trial cost (100%)	£5,187	-
Post litigation cost (50% of £1,880)	£990	£990
<b>Total cost payable per Defendant</b>	<b>£8,427</b>	<b>£3,240</b>

*\*The above figures exclude VAT, disbursements and advocacy fees which are to be paid in addition.*

- GG. Members of the working party will be invited to assist with the drafting of Civil Procedure Rules relating to the above agreement.
  - HH. An impact assessment will be carried out in respect of these fees at a date deemed appropriate.
- The above points have been agreed by Karen Jackson (on behalf of the Claimant Group) and Ian Harvey (on behalf of the Defendant Group).

## ANNEX

### List of process points previously agreed in September 2016

The following points regarding the pre litigation process were broadly agreed between the parties. Those with an \* require further discussion/formal agreement:

1. *A building blocks approach should be used as the process in these cases.*
2. Medco is not suitable for NIHL cases.
3. Any allegations of contributory negligence will be treated as a denial.
4. The IDWCP NIHL guidelines should be published (requires formal ABI agreement).\*
5. *Each Restoration should incur an additional **agreed** fee per Defendant plus disbursements.*
6. *Each additional Defendant **successfully pursued** should attract an additional fee.*
7. The HMRC process created by the group should be accepted by the HMRC and further work should be done by the HMRC to address the considerable backlog of requests. Additionally, one member of the Claimant Group should be invited to future HMRC/ NIHL meetings to seek to assist and address any issues regarding backlogs or requests. (AP confirmed the latter should not be an issue.)
8. The letter of Claim in the Interim Report is agreed.
9. *The letter of Response in the Claimants Position paper is agreed **subject to modification as above.**\**
10. *Fast track trial advocacy fees for Counsel should be increased and additional amounts paid per additional day at fast track trials.*
11. All pre action applications including pre action disclosure should attract standard costs and fall out of any FRC regime.
12. Pre-med offers should be discouraged and in principle it is agreed that the time period for accepting any Part 36 offer made in this way should not start to run until the medical evidence (full audiologists or ENT report) is served upon the Defendant.
13. *[Points about portal cases in 13 and 14 now addressed separately above.]\**
14. *[See 13].\**
15. *Fees for one Defendant NIHL **claims in the new NIHL process** should be higher than EL/PL accident claims.*
16. *[Points about Counsel's fees now addressed above.]*
17. Any FRC regime figures agreed should be increased automatically in line with the **Consumer Prices Index (CPI)**.
18. A separate group should be set up to consider the creation of an agreed accreditation for Audiologists.

*(Items in italics have been incorporated into the final terms of agreement above.)*