

## Caroline Wood discusses fixed Costs in noise induced hearing loss claims

Noise induced hearing loss claims make up the vast majority of occupational disease claims in the fast track. The last decade has seen a significant rise in noise induced hearing loss claims. In 2010 there were more than 24,000 cases and in 2015 there were 87,000. Since 2015 the numbers of claims are reducing.

Costs for noise claims which fall out of the EL claims portal due to liability being in dispute or, which never enter the portal due to there being more than one defendant, are currently assessed on the standard basis.

The CJC were asked to look into how the handling of NIHL claims could be improved, with a view to cases being resolved more quickly and with costs reduced and how a fixed costs regime for these cases might work.

The CJC report does not include any current figures for costs being claimed or awarded in noise claims but notes that they exceed the average award of damages. It would be interesting, and perhaps informative, to compare the fixed costs proposed in the report with the amounts currently being claimed or awarded on assessment. It may be that a comparison was not considered helpful as the costs figures in the report should be considered in the context of the scope of the fixed costs regime and the behavioural changes proposed, discussed below. Of particular note, a claim will fall out of the fixed costs regime if a single defendant, even in a multiple defendant case, requests a repeat audiogram or their own medical evidence.

## What are the fixed fees proposed?

Stage of settlement	1 Defendant	2 Defendants	3 Defendants
Pre – litigation			
Stage 1 (up to and including letter of claim)	no separate fee	no separate fee	no separate fee
2A (liability admitted, case settles pre – issue.)	£2500	£3000	£3500
2B (Liability admitted, case settles pre-issue, additional £500 for papers being prepared to issue)	£3000	£3500	£4000
3A (liability not admitted, case settles before issue)	£3500	£4000	£4500
3B (liability not admitted, case settles before issue, additional £500 for papers being prepared to issue)	£4000	£4500	£5000
Post-litigation			
L1 (issue to allocation)	£1650	£1980	£2310
L2 (post – allocation to listing)	£1656	£1987	£2318
L3 (Listing to trial)	£1881	£2257	£2633
Max possible. (3B + L1 + L2 + L3)	£9187	£10,724	£12,261

The costs are exclusive of VAT and disbursements.

The costs in the table post-litigation are additional costs per stage to be added to the pre-litigation costs.

There is a 20% increase in costs per additional defendant. The scheme will not apply to a claim involving more than 3 defendants.

The pre-litigation costs are inclusive of counsel/solicitor advocate fees.

Post issue, counsels' fees will be permitted where "justified". This wording being based upon an amended version of the wording of CPR 45.29I (2c). An attempt was made to agree trial figures but it was not possible to reach agreement, with claimants suggesting £2500 plus VAT per day plus a £1500 refresher and defendants suggesting £1380.

Costs of restoring the defendant to the register are fixed at an additional £1,280 inc. counsel's fees plus reasonably incurred disbursements. The working party expressed disappointment that the Third Parties (Rights Against Insurers) Act 2010 did nothing to remove the requirement for restoration to the register which serves only as a formality.

Costs of Interlocutory applications and pre - action disclosure applications are in addition to the fixed costs and the costs of those applications have not been fixed.

Claims which have been within the fixed fee regime pre-litigation and then fall out post-litigation will attract the fixed fee outlined for pre-litigation and the post-litigation costs will be paid on the standard basis.

The costs will increase by reference to an agreed index, probably the Consumer Prices Index. The report does not say how often but presumably annually.

Limitation hearings.

The working party were unable to reach agreement as to whether a trial on a preliminary issue of limitation takes the claim out of the FCR.

If included in the FCR, the fees for running the case to a preliminary trial on liability are the same as for a full trial. If the claim is not disposed of at the limitation hearing the claim will recommence within the fee structure at the post - allocation stage. Counsel's fees would be in addition.

If only some of the defendants take the limitation point the claim against the other defendants will be stayed. The costs would operate as follows: -

Cost	Defendant 1	Defendant 2
Pre litigation costs of £4500 50% of £4500	£2250	£2250
Preliminary trial cost	£1650 + £1656 + £1881 = £5,187	Stayed.
Post - litigation cost £1980 50% of £1980	£990	£990
total	£8,427	£3,240

The example above is given in the final report and is described as an example of a case where D1 but not D2 seeks a preliminary trial on the issue of limitation which the court allows. The claim against D2 is stayed. The claimant succeeds on the limitation issue and the claim then returns to the post-allocation stage and settles against both defendants.

I was expecting the post-litigation cost of £1980 to appear above the preliminary trial cost in the table as, presumably, the post-litigation cost of £1980 from issue to allocation came chronologically before the preliminary trial on limitation. I also do not follow why D1 is paying £1650 which is an issue to allocation cost for a single defendant when the claimant will receive £1980 for the issue to allocation stage and the figure of £1650 in addition would appear to represent double recovery. If the claim settles after the limitation hearing why is there not an additional amount payable of £1987 split between both defendants when the claim returns to the post-allocation stage following the limitation hearing at which point the claim is settled?

Behavioural Changes: Pre - issue changes to claims handling.

It is proposed that the audiology will be more reliable by virtue of a scheme of accreditation. The idea of a Medco equivalent was rejected because its effectiveness is untested due to being a recent innovation. The claimant group (perhaps surprisingly, not the defendant group) have prepared a document on how to ensure the audiologist is suitably qualified which can be found in the appendices. Where liability (breach and causation) is admitted and limitation is not in dispute 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. No ENT report will be necessary in those cases.

Repeat audiometry should be unnecessary unless it is identified as being required by the audiologist. For example, if the claimant gives inconsistent responses. The defendant group wanted to reserve the option of a re - test if the findings of NIHL are "borderline". This was opposed by the claimant group as the issue could be resolved by reference to other factors such as duration and level of noise exposure.

There is no discussion of which guidelines will be used for determining AAHL or assessing quantification of NIHL, the Coles, Lutman and Buffin Guidelines 2000 or the more recent Lutman, Coles, Buffin Guidelines 2015.

The letter of claim will be standardised in a form specific to noise cases which can be found at appendix B. The letter of claim will be accompanied by: -

- An audiogram
- Schedule of employment from HMRC, whose response rate is now 40 days, due to solicitors agreeing to defer the request until the audiology is received.
- ELTO search results.

The reply to the letter of claim should identify the co - ordinating insurer by name and reference so as to avoid delay causing additional correspondence. Defendants should not make pre - medical offers. Where breach is denied noise surveys and documents should be disclosed with the reply.

The ABI have agreed to publication of their guidelines on interaction between defendants and handling insurers. (Found at appendix D)

It is hoped that the need for Part 18 questions will be reduced by virtue of the standard letter.

#### Post-issue

The aim is for standard fast - track directions and for the courts to be aware of any behavioural changes undermining the effectiveness of the FCR, such as applications for re - allocation.

Defendants should be encouraged to put questions rather than obtain their own evidence.

#### Exceptions to the fixed costs regime

- The scheme will not apply to claims where ANY defendant requests their own audiogram or medical evidence or makes an allegation of de minimis. One defendant raising any of those issues will take the entire claim out of the fixed costs process. (De minimis is defined in the ABI guidelines as, "Any period of culpable exposure by a single defendant of less than three months and also less than 5% of the total overall exposure by all defendants should be ignored for the purposes of apportionment")
- Claims valued at more than £25,000
- Military claims
- In single defendant cases, defendants or their insurers can pre - elect to commence in the current Claims Portal for low value personal injury claims. If there are multiple insurers of a single defendant all the insurers must have made that election. The lower fixed costs in the current claims portal for EL claims would then apply to the claim where liability is admitted during the portal process.
- Test cases

A defendant in a multiple defendant case might want to pay close attention to the likely defence of the co - defendants and balance the risk of the claim coming out of the FCR as a consequence of another defendant's request for audiogram/medical evidence/de minimis point against the prospects of successfully defending the claim.

The exclusion from fixed costs applies to a defendant who **requests** their own audiogram or medical evidence. I anticipate arguments from defendants the claim would only leave the fixed costs regime if the request for medical evidence is granted by the court.

Will claimants include a 4th defendant to take the claim out of the process or borderline de minimis defendants in the hope the point will be taken by that defendant thereby taking the claim out of the FCR?

The report of the working party can be found by clicking this link: [REPORT OF THE WORKING PARTY](#) and the appendices can be found by clicking this link: [APPENDICES](#).

The next stage is a consultation and suggested consultation questions can be found at the final page of the appendices document.

Caroline Wood is a personal injury practitioner with considerable experience of noise induced hearing loss claims from drafting pleadings and attending CMC's to appearing at trials and limitation hearings.