



Institute
and Faculty
of Actuaries

What Next For Noise Induced Hearing Loss Claims?

Brian Gravelsons
Gary Brankin

05 October 2015



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of Actuaries

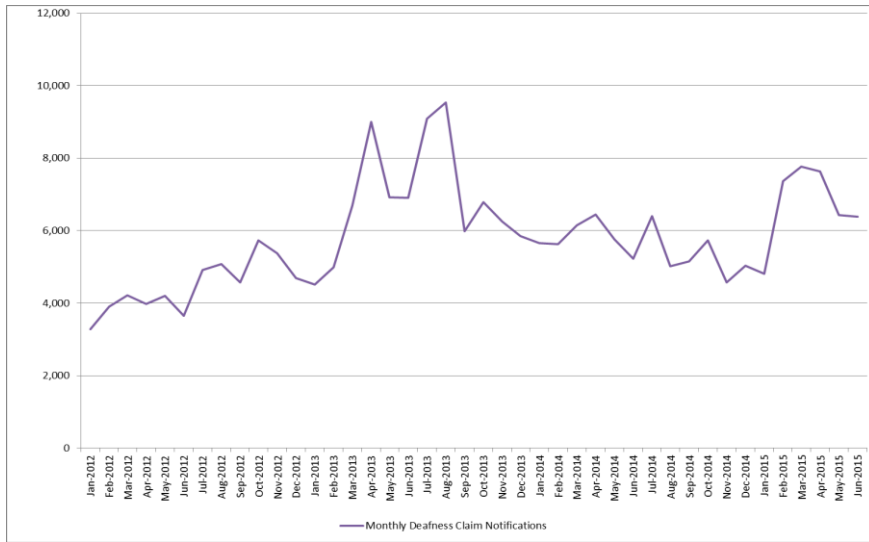
Agenda

- Recent experience
- The future for NIHL claims

05 October 2015



Recent Experience



05 October 2015



The future for NIHL claims



The future for NIHL claims



Current position

Big Players...



The future for NIHL claims



Current position

...are getting bigger!





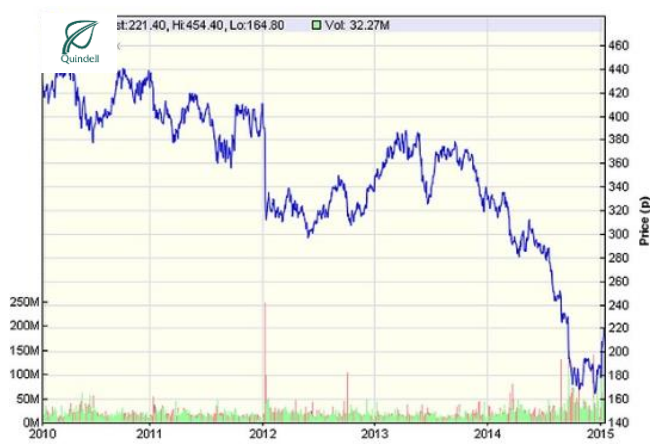
The future for NIHL claims

NIHL are now big business with private investors



The future for NIHL claims

And with this comes exposure to market volatility...



For both Claimant and Defendant advisors...



The future for NIHL claims



Poor quality Audiology in a hotel...



Consultation details

Seen on the 06th July 2013 at The Conference Rooms
The Midland Hotel & Conference Rooms,
Forster Square, Bradford, BD1 4HU.

Instruction details

Instructions received from
Industrial Medical Agency Limited (Reference: 14025)

1. LOCATION OF EXAMINATION AND AUDIOMETRY :

The Claimant Mr Ridley was examined in the Ramada Hotel in Wrexham. A quiet distant room was specially allocated for examination and another room for audiometry.

Consultation details

Seen on the 14th November 2012,
At The Conference Rooms,
Holiday Inn Brentwood,
Brook Street
Brentwood
CM14 5NP



...or in your house



Investigation Solutions



The future for NIHL claims



Real Limitation concerns



*"Just tell the solicitor 18 months,
or he will not take your case on."*

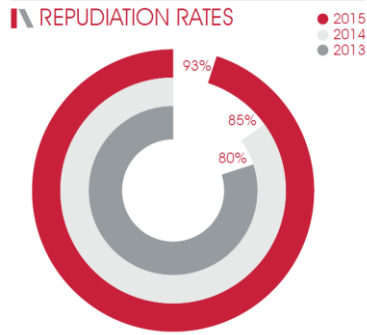


Investigation Solutions



The future for NIHL claims

Repudiation rates are high



BC Legal data



The future for NIHL claims

Claimant costs are high



**The average
claimant legal
costs for an
NIHL claim is
£10,400**



The future for NIHL claims



Key factors which control cost:

1. Volume.
2. Repudiation Rate.
3. Cost Per Case.

Examine how key changes may impact on the key factors



The future for NIHL claims



What changes over the next 12-24 months may impact on those key factors?

- LASPO changes will bite.
- Claimant Settlement Packs and Schemes
- Changes to “the Guidelines.”
- Audiologist only schemes.

The  Association of British Insurers propose the following:

- Medco style reporting in NIHL.
- Extension of MOJ Portal to Multi Defendant claims.
- Fixed fees in NIHL claims.

Need to examine how these might impact on future of NIHL claims market.



The future for NIHL claims



Medco Reporting



MedCo Beset With Criticism

Posted on June 24, 2015

Two months in and the government-driven independent online portal has been beset with technical problems and roundly criticised by many within the industry.

The idea behind the portal isn't necessarily a bad one but its execution has left a lot to be desired with organisations representing all sectors of the industry – defendant and claimant solicitors, insurers and medical reporting organisations – believing that initial teething troubles may well be indicative of more serious problems. Opinions have ranged from the mild 'it's not very good' to a more bold 'MedCo is pushing justice backwards' among the people we've spoken to. Chris Chatterton, our commercial director, has even put on record his view that "MedCo is fundamentally anti-competitive."

MoJ goes public with MedCo registration concerns

11 June 2015 | By John Hyde
Topics: Personal injury & clinical negligence, Government & politics

- Which experts would be on the database and pay the £75,000 or £40,000 fee to be on it?
- Perhaps the same experts we see now?
- Would insurers have access to own audiograms and or medical evidence? If so then why a Medco database?
- Concerned such a move would negatively impact on the repudiation rate.



The future for NIHL claims



Medco Reporting- Current experts

Clin. Otolaryngol. 2000; 25, 264-273

Guidelines on the diagnosis of noise-induced hearing loss for medicolegal purposes

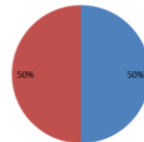
R.R.A. COLES,* M.E. LUTMAN† & J.T. BUFFIN‡

*The MRC Institute of Hearing Research, University Park, Nottingham, †The Institute of Sound and Vibration Research, University of Southampton and the ‡Department of Medical Audiology, Royal Hallamshire Hospital, Sheffield, UK

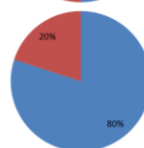
Accepted for publication 12 April 2000

The diagnosis rate for NIHL is increasing

2009
Yes/No



2014
80%/20% Yes/No





The future for NIHL claims

Current Medical experts/Audiologists

Problems with the Guidelines

- What are the Guidelines?

Clin. Otolaryngol. 2000, 25, 264-273

Guidelines on the diagnosis of noise-induced hearing loss for medicolegal purposes

R.R.A. COLES,* M.E. LUTMAN† & J.T. BUFFIN‡

*The MRC Institute of Hearing Research, University Park, Nottingham. †The Institute of Sound and Vibration Research, University of Southampton and the ‡Department of Medical Audiology, Royal Hallamshire Hospital, Sheffield, UK

Accepted for publication 12 April 2000

1. Limited scope

2. SCOPE

2.1. For the most part, the guidelines refer to uncomplicated cases of NIHL; that is, cases of 'typical' NIHL together with presumed 'normal' AAHL.

2. It is 2015, we are no longer seeing the "normal case"

3. They are very simplistically applied by experts

4. 25th, 50th and 75th Centile only

The audiometric configuration has been assessed according to the Guidelines on the Diagnosis of Noise Induced Hearing Loss for Medico-Legal Purposes by Coles Lutman & Buffin (2000):

- R1 is satisfied as in the right ear as at 1 KHz the HTL (5 dB) is at least 10 dB less than the HTL at 3 KHz (15 dB), the HTL at 4 KHz (15 dB) and the HTL at 6 KHz (34 dB).
- R1 is satisfied in the left ear as at 1 KHz the HTL (5 dB) is at least 10 dB less than the HTL at 3 KHz (15 dB), the HTL at 4 KHz (25 dB) and the HTL at 6 KHz (34 dB).
- R2 is the subject of engineering evidence.
- R3 is met in the right ear as there is a significant notch at 6 KHz.
- There is a 9 dB bulge in the left ear. If we refer to note 11 of the Coles et al (2000) guidelines then there is a more likely than not probability of noise deafness.



The future for NIHL claims

Modifying Criteria

10. MODIFYING FACTOR MF2: 'COMPATIBILITY WITH AGE AND NOISE EXPOSURE'

10.1. The hearing impairments measured should be checked for compatibility with the claimant's age, sex and estimated total amount of noise exposure, including military and non-occupational, using the 'NPL Tables' (Robinson and Ship-ton, 1977)⁴ up to the 5th percentile values of susceptibility, or other appropriate source, such as ISO 1999: 1990.⁵ By definition, 5% of the population are even more susceptible than that, but the other evidence for the hearing impairment being due to noise and age alone should be strong for more extreme percentiles of susceptibility to be acceptable.

10.2. However, if the amount of hearing impairment is excessive in relation to the age and noise exposure (occupational, military and non-occupational), this does not necessarily negate a diagnosis of NIHL. The extra hearing impairment may well be due to a third causation, additional to NIHL and AAHL.

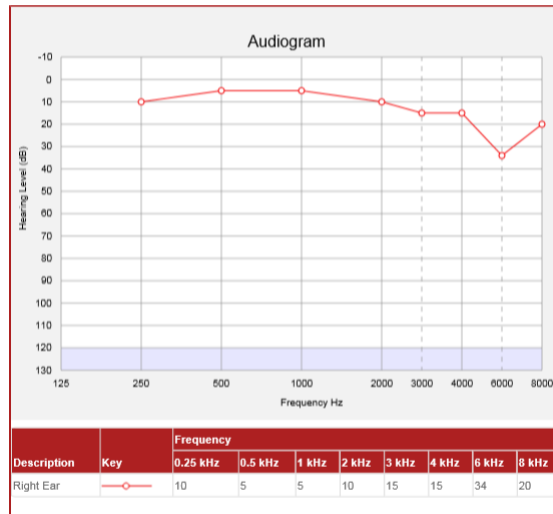




The future for NIHL claims

Audiologist only Scheme?

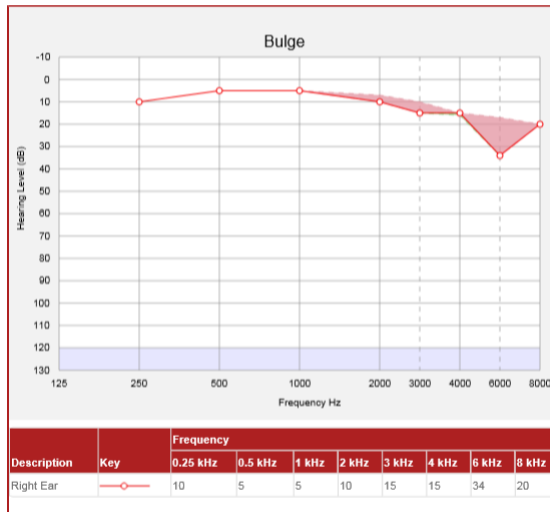
Coles/Lutman Guideline diagnosis?



The future for NIHL claims

Audiologist only Scheme

It certainly is...





The future for NIHL claims



Audiologist only Scheme

...definitely so...

The audiometric configuration has been assessed according to the Guidelines on the Diagnosis of Noise Induced Hearing Loss for Medico-Legal Purposes by Coles Lutman & Buffin (2000):

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- R2 is the subject of engineering evidence.
- R3 is met in the right ear as there is a significant notch at 6 KHz.
- There is a 9 dB bulge in the left ear. If we refer to note 11 of the Coles et al (2000) guidelines then there is a more likely than not probability of noise deafness.

...seems to meet the Guidelines..



The future for NIHL claims



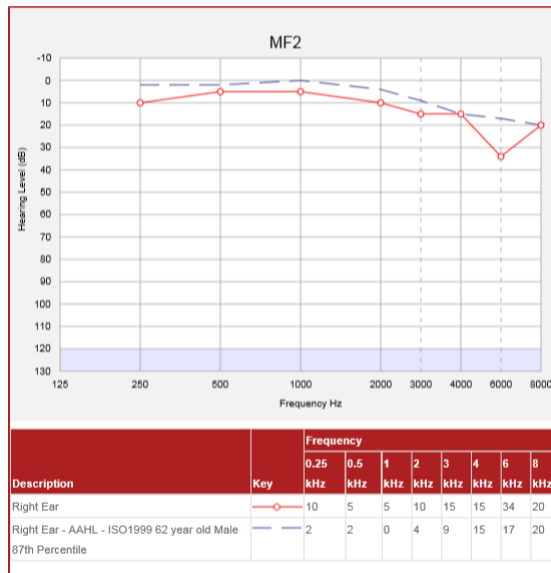
Audiologist only Scheme

...but what about
Modifying Criteria 2 of
the Guidelines?

Blue Line --- Ageing
data 87th Percentile.

4kHz, the most noise
sensitive frequency,
unmoved from age
data exactly matched
at 8kHz.

Only loss at 6kHz see
Pascoe v MOD





The future for NIHL claims



Audiologist only Scheme

Single Audiometry

UNIVERSITY OF SOUTHAMPTON
INSTITUTE OF SOUND AND VIBRATION RESEARCH
ISVR CONSULTING

Variability of the threshold of hearing:
Its importance in cases of Noise-induced Hearing Loss

B.W. Lawton
Associate Principal Consultant

4. RECOMMENDATIONS

For an individual test subject, a single audiogram is an unconfirmed determination of that individual's state-of-hearing in both ears. Put more starkly, **a single audiogram is a guess.**



The future for NIHL claims



Audiologist only scheme/Settlement Packs



6. ANALYSIS

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

Audiometric Test Carried Out By: Jane Gatley

NIHL Assessment Report Prepared By: Professor Mark E Lutman, Clinical Director



The future for NIHL claims



Audiologist only scheme/Settlement packs

- NIHL Diagnosis more than just an audiogram

Dear Dr Heighton

Re:

Diagnosis: Probable Gentamicin induced vestibulopathy

Many thanks for asking me to see this chap. He is quite precise in dating the onset of his balance problems you eluded to in your letter. Thirty-four years ago, he was in the Renal Unit at Guy's Hospital as a result of renal failure, probably induced by septicaemia. At that time, he developed severe vertigo, and was bed bound because of that for a number of days, following which he was extremely unsteady. He underwent various tests at that time, and was told that his balance problems could be due to the medication which he had been given. In the years since, he has been able to manage with his balance problems, which as you say, are more by way of dysequilibrium than true vertigo.



The future for NIHL claims



Audiologist only scheme/Settlement Packs

1. Audiologist not competent to diagnose NIHL
2. Need to be able to rule out other competing causes
3. Need to examine medical history, ototoxic medication, impact of medication on late onset tinnitus
4. The audiogram may be Coles compliant, but so was Hughes, Pascoe and Holloway
5. Not competent to consider disability and the impact of loss at individual frequencies
6. Not competent to recommend hearing aids on NHS. There is a risk of Claimants under compensated
7. How many Audiologists can be agreed? Would this cope with volume?
8. Can a Claimant Solicitor reasonably agree to accept an offer, or reject the claim, without an ENT opinion? Do professional duties require it? Sceptre of professional negligence claims
9. Can all Defendant questions be dealt with by an Audiologist? Issues of symptom onset etc.?
10. The problems with Guidelines identified above and reliance on single audiograms
11. Can they assess tinnitus?



The future for NIHL claims



Audiologist only scheme/Settlement packs

Claims Pack Contents

1. Letter of Claim	[]
2. Schedule of Employment & HMRC	[]
3. Schedule of Insurer & ELTO	[]
4. Schedule of Co-Defendants	[]
5. Review of Medical Records Pro-forma	[]
a. GP Records	[]
b. Hospital Records	[]
6. Medical Report (format to be agreed)	[]
7. Occupational Health & Personnel Form of Authority	[]
8. Schedule of Special Damages	[]

- This would be the first an insurer would see.
- The claims with unsupportive medical evidence, no insurance traced, no employer confirmed on IR or obvious limitation entry in medical notes may never be seen

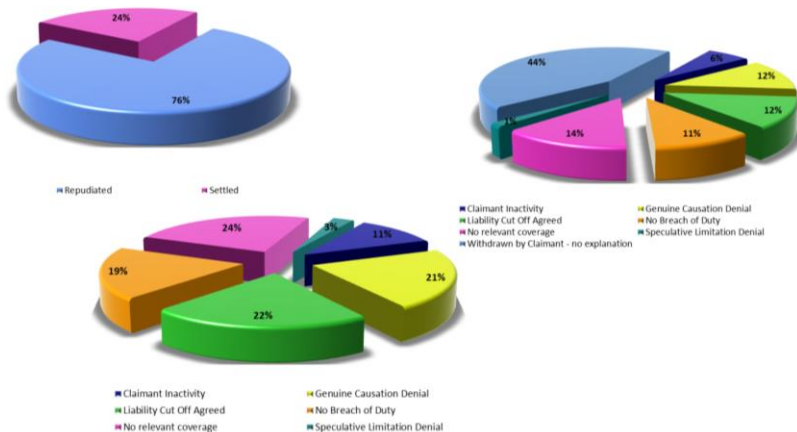


The future for NIHL claims



Settlement Packs

Roberts Jackson



- 44% of claims withdrawn for no real reason. Likely these claims would not be seen.
- Would remove a huge admin burden on insurers.



The future of NIHL claims

Settlement Packs Limits- You have to trust contents



SECTION 2 - Mandatory client questions about any medical and ear-related conditions

The client reported suffering from the following conditions:

2A: EARACHE for more than 7 days within the last 90 days?.....	NO <input checked="" type="checkbox"/> YES** <input type="checkbox"/>
2B: EAR DISCHARGE within last 90 days?.....	NO <input checked="" type="checkbox"/> YES** <input type="checkbox"/>
2C: ROTATORY VERTIGO within last 90 days?.....	NO <input checked="" type="checkbox"/> YES** <input type="checkbox"/>
2D: TINNITUS within last 90 days?.....	NO <input type="checkbox"/> YES** <input checked="" type="checkbox"/>
If 'YES**'; is TINNITUS: Unilateral Left	NO <input checked="" type="checkbox"/> YES** <input type="checkbox"/>
If 'YES**'; is TINNITUS: Unilateral Right	NO <input type="checkbox"/> YES** <input checked="" type="checkbox"/>
Pulsatile?	NO <input checked="" type="checkbox"/> YES** <input type="checkbox"/>
Distressing?	NO <input checked="" type="checkbox"/> YES** <input type="checkbox"/>
TINNITUS was first noticed: 18 months	

- A body of medical opinion that states unilateral tinnitus is not noise related.
- Remember "18 months?"



The future of NIHL claims

Settlement Pack Limits- You have to trust contents



*"Just tell the solicitor 18 months,
or he will not take your case on."*



The future for NIHL claims



Let LASPO bite?

- Claimant lost success fee on profit costs but can take up to 25% of damages.
- Claimant no longer liable for defence cost on lost cases- Qualifying One Way Costs Shifting ("QOCS")
- Applies to post April 2013 cases.
- Impact not fully seen in litigation yet, as cases have 3 years before issue.
- Easy way to make up the shortfall of 62.5% success fee on profit costs?
- Add more onto your Bill.
- Recent North West Judiciary Meeting indicated that District Judges felt profit costs were being presented at 30+% more than they had been on pre LASPO cases.
- These cases do not take any more time to bring.

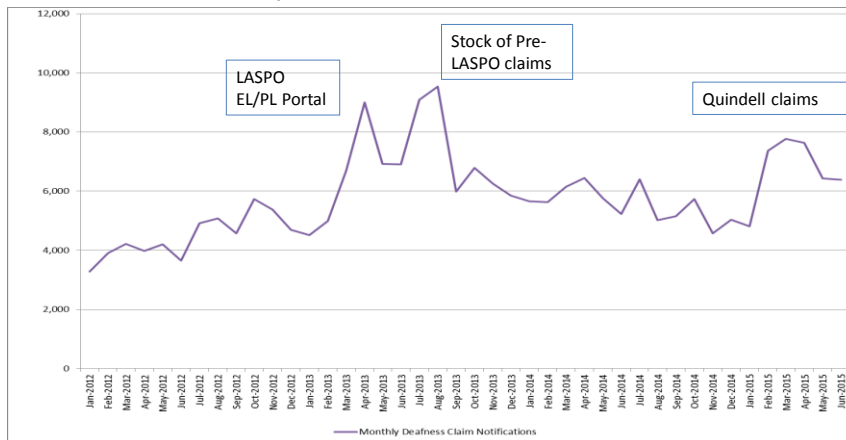


The future for NIHL claims



LASPO - Effect on volume

- What we do know:
- Lower returns have not impacted on volume:





The future for NIHL claims



LASPO- Claimant care free attitude to litigation

- Limited evidence in a more carefree approach to litigation on QOCS cases?

That being said, you have denied the claim based on causation, the Claimant again is within his right to issue and serve proceedings on the Defendant, it is not by any stretch of the imagination, conducive to the process, or indeed in his interest to continue with protracted discussions regarding what may or may not be a constitutional condition in one ear. The Claimant is within his right to seek resolution from the Court, all pre action attempts at resolution have failed.

I will remind you, this claim falls under the new regime, the Claimant is afforded such cost protection that, regardless of any protestations you may make regarding the timing of the proceedings, the Defendant will not be able to recover any costs from him. The Claimant is afforded QOWCS protection for the entirety of this action. In short, for the Claimant, there are no costs implications. Albeit, there are for the Defendant.

Yours faithfully,

| *Head Litigator*

DDI: | Fax: 01625 54 6629
DX: 20807 WILMSLOW | Website: www.robertsjackson.co.uk



The future for NIHL claims



LASPO bite increasing interest in PSLA awards due to an interest in a "a cut of the pie"?

- Not as much of an issue in RTA claims. A minor whiplash injury is worth £2-2,500.
- However NIHL claims are currently settled at much reduced sums for risk:

Settlement amounts

As discussed further in "Section 6 Data Collection and Trends", settlement amounts are thought to be in the range of £12,500 to £15,000.

The majority of claims involve mild cases where settlement amounts for damages average £2,000 to £3,000. In contrast to the relatively low cost of damages, solicitor bills average £14,000 to

Deafness Working Party 2013

Page 30

(d) Partial Hearing Loss or/and Tinnitus

This category covers the bulk of **deafness** cases which usually result from exposure to noise over a prolonged period. The disability is not to be judged simply by the degree of hearing loss; there is often a degree of tinnitus present. Age is particularly relevant because impairment of hearing affects most people in the fullness of time and impacts both upon causation and upon valuation.

(i) Severe tinnitus and hearing loss.	£21,800 to £33,500	£23,980 to £36,850
(ii) Moderate tinnitus and hearing loss or moderate to severe tinnitus or hearing loss alone.	£11,000 to £21,800	£12,100 to £23,980
(iii) Mild tinnitus with some hearing loss.	£9,250 to £11,000	£10,175 to £12,100
(iv) Slight or occasional tinnitus with slight hearing loss	£5,400 to £9,250	£5,940 to £10,175
(v) Slight hearing loss without tinnitus or slight tinnitus without hearing loss.	up to £5,150	up to £5,665

- How better to make up the shortfall of 62.5% on profit costs than by taking 25% of an increased damages sum?



The future for NIHL claims



LASPO- Increasing interest in damages award as risk lowers

- Some evidence of increasing interest in higher PSJA awards where risk on Claimant is less:

Without prejudice

We note that you offer £1,300.00 by way of part 36 offer.

Taking into account the fact that your Client Company has been calculated by the Engineer to be responsible for 35% of the Claimants exposure to noise it would appear that you value the **total claim** as worth £3,714.00.

The Claimant suffers from 11.3db of noise damage at 1 2 and 3 kHz plus moderate tinnitus and the particulars of claim specify the claim for hearing aids.

On a full liability basis General Damages (JC guidelines) are £11,000 to £23,800.00 and special damages as claimed are £7,287.00.

This therefore equates to **on a 100% basis** between £18,287.00 and £31,087.00 and **your client companies** share is between £6,400.00 and £10,880.45.

We have judgment against your client company and in the circumstances we cannot see that the Claimant will be awarded £1,300.00 or less.

- Here Judgment was entered and we received papers too late to set it aside. We had to agree quantum with no risk.
- We ended up paying £12,000.
- QOCs reduces risk and it is potential other changes might reduce the risk on a Claimant further.
- Real potential for damages and litigation rates to go up.



The future for NIHL claims



Extending the MOJ Portal

- Less than 10% of total claims enter the Portal.
- Less than 10% of single Defendant claims in the Portal settle in the Portal.
- Concession of breach of duty in the Portal compromises potential limitation

- Extending it further to Multi Defendant claims will not improve the settlement rate and it works for no party:

- Potentially give Claimants a chance to claim increased fee for a failure of insurer to settle within Portal timescales.

- Some insurers for some risks may be prepared to make apportioned offer and take the risk of full Portal fee.

- Not the answer to problems.

Iain Fraser | 12 September 2014 08:10 am

As a continued user of the online portal for disease cases I must say that I thoroughly disagree with Ms Rothwell's assertion that "it is now becoming almost impossible to get beyond the claimant firms' automated systems and speak to a real person to discuss the claim." If anything I must state that it is incredibly difficult to get hold of anything but an answer machine when attempting to talk to a Defendant.

But I digress; the biggest issue I have found with the Portal has been the Defendant attitude towards it. They either ignore the claim until it 'times out' or insist that there is insufficient information as an HMRC has not been provided (despite no reference in the Protocol to the same being necessary). I think we can all agree that the CNF does not provide the scope to be detailed in any aspect but believe me even when you do try and provide details you will still be met with the same tired old arguments.

The issue here is the Protocol allowing Defendant's to remove a claim if "they believe that there is insufficient information." The Protocol or the Courts will have to narrow this issue as even with a full employment history, a correctly completed CNF and authorities for documents etc, some Defendants still try and claim insufficiency in order to try and restrict Claimants to fixed costs while they still get their Protocol designed 3 months of investigations.

Quite frankly the system is flawed and until the Courts or the Law Society provide clarification as to what is reasonable conduct the Disease Portal will continue to frustrate and delay claims.



The future for NIHL claims



Fixed fees in NIHL claims

EL/PL fixed fees

Pre issue £1000 - £5,000	Pre issue £5,001 - £10,000	Pre issue £10,001 - £25,000	Issued - post issue pre allocation	Issued - post allocation pre listing	Issued - post listing pre trial	Trial advocacy fee
Employers Liability						
£950 + 17.5% of damages	£1,855 + 12.5% of damages	£2,500 + 10% of damages	£2,630 + 20% of damages	£3,350 + 25% of damages	£4,280 + 30% of damages	£500.00 (<£3,000) £710 (£3-10,000) £1,070 (£10-£15,000) £1,705 (>£15,000)

- Insurers accept that the level of fixed fee will be higher than in EL/PL claims for the following reasons:
- Multi Defendant.
- Causation.
- Breach.
- Limitation arguments.
- Insurance histories
- 20 years of exposure to investigate and to defend.
- NIHL claims will be the most lucrative fixed fee in the market place and volumes are unlikely to reduce.



The future for NIHL claims



Fixed fees in NIHL claims

Fixed Fees in NIHL Claims- Established Procedures in place to generate claims that will not be disbanded



- If profit margins reduce, increased volume can maintain income levels.



The future for NIHL claims



Fixed fees in NIHL claims

- Law Society at ABI event indicated that they were not currently prepared to support fixed fees in these complex cases until there is some certainty around how much time each stage takes.

Issues generally with fixed costs

- The work reasonably required is predictable within reasonable parameters
 - Not currently for NIHL
 - The cost of assessing the reasonable costs payable towards the cost of reasonable and proportionate work between the parties is likely to be disproportionate
 - May be the case for NIHL
 - The amount of the fixed costs is fixed empirically to reflect the reasonably necessary inputs in time and experience to produce a reasonable output for the client
 - Not delivered for Portal costs
 - There are sensible escape provisions
 - 'Exceptionality' provides no practical escape
- To deal with this we put together a model that may offer that security and be acceptable to both side.



The future for NIHL claims



Fixed fees in NIHL claims

Damages Agreed: £ 2,500.00

	Pre issue £1000 - £5,000	Pre issue £5,001 - £10,000	Pre issue £10,001 - £25,000	Issued - post issue pre allocation	Issued - post allocation pre listing	Issued - post listing pre trial	Trial advocacy fee
Disease cases							
Damages	£ 2,500.00	£ 5,500.00	£ 12,500.00	£ 2,500.00	£ 2,500.00	£ 2,500.00	£750.00 (<£3,000)
Basic Fee	£ 1,500.00	£ 2,500.00	£ 3,500.00	£ 3,500.00	£ 4,500.00	£ 6,000.00	
Breach premium	£ 250.00	£ 500.00	£ 750.00	£ 750.00	£ 1,000.00	£ 1,250.00	£1,000.00 (£3-10,000)
Causation premium	£ 250.00	£ 500.00	£ 750.00	£ 750.00	£ 1,000.00	£ 1,250.00	
Limitation premium	£ 250.00	£ 500.00	£ 750.00	£ 750.00	£ 1,000.00	£ 1,250.00	£1,250.00 (£10-£15,000)
Success fee %	17.5%	12.5%	10.0%	20.0%	25.0%	30.0%	
Success fee £	£ 437.50	£ 687.50	£ 1,250.00	£ 500.00	£ 625.00	£ 750.00	£1,750 (>£15,000)
TOTAL	£ 5,187.50	£ 10,187.50	£ 19,500.00	£ 8,750.00	£ 10,625.00	£ 13,000.00	

- Also includes a higher return to the Claimant the more points are taken by a Defendant in litigation and the longer that point remains in issue.
- This encourages a Defendant to nail their "colour to the mast".
- More litigation more return- model shows this.
- Coupled with QOCS likely to promote litigation volumes. No risk and improves recovery.
- More damages more return as success fee now comes from damages.
- Fixed fee also encourage Defendants to defend Screenshot Keoghs approach in RTA
- Would we not run many more limitation cases if we knew our maximum costs exposure was £11,000? I would

The future for NIHL claims

Fixed fees in NIHL claims

Damages Agreed: £ 2,500.00

	Pre issue £1000 - £5,000	Pre issue £5,001 - £10,000	Pre issue £10,001 - £25,000	Issued - post issue pre allocation	Issued - post allocation pre listing	Issued - post listing pre trial	Trial advocacy fee
Disease cases							
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Basic Fee	£ 1,500.00	£ 2,500.00	£ 3,500.00	£ 3,500.00	£ 4,500.00	£ 6,000.00	
Breach premium	£ 250.00	£ 500.00	£ 750.00	£ 750.00	£ 1,000.00	£ 1,250.00	£1,000.00 (£3-10,000)
Causation premium	£ 250.00	£ 500.00	£ 750.00	£ 750.00	£ 1,000.00	£ 1,250.00	
Limitation premium	£ 250.00	£ 500.00	£ 750.00	£ 750.00	£ 1,000.00	£ 1,250.00	£1,250.00 (£10-£15,000)
Success fee %	17.5%	12.5%	10.0%	20.0%	25.0%	30.0%	
Success fee £	£ 437.50	£ 687.50	£ 1,250.00	£ 500.00	£ 625.00	£ 750.00	£1,750 (>£15,000)
TOTAL	£ 5,187.50	£ 10,187.50	£ 19,500.00	£ 8,750.00	£ 10,625.00	£ 13,000.00	

- What behaviours does this model drive?
- More return for Claimants for litigation and the longer litigation continues.
- More return the higher the damages award.
- Will it encourage Defendants to defend more cases? £10,000 to run a Limitation only hearing?

The future for NIHL claims

Fixed fees in NIHL claims Care free attitude to litigation from Defendant?

Fundamental dishonesty and litigation in the post-Jackson landscape

Posted by: Keogha
Date: 07/06/2015



Motor Fraud solicitor, George Riley, looks at fundamental dishonesty and litigation in the post-Jackson landscape.

The costs regime post-Jackson has had a lot of mixed press over the past couple of years. However, at a recent trial I had the chance to reminisce about 'hidden times' and was reminded how whilst it can be challenging, the new costs regime can and does work in favour of successful defendants when dealing with fraudulent claimants.

The case I was working on was that of Mark Ryan v Amey PLC. Keogha were asked to investigate and defend the case in which Amey PLC were convicted that their driver had been a victim of a road rage incident where the claimant had deliberately applied his brakes to induce an impact. In this particular case, the claimant had no real claim history and he had attended his GP and physiotherapist. The claimant was not particularly 'over egging the pudding' in regards to his claim and there was insufficient evidence to discredit him.

I have dealt with cases of a similar nature for a number of years, including prior to the dramatic and controversial changes which Jackson introduced. Pre-Jackson, there was a real risk that certain claimant firms would submit an inflated cost schedule with the added concern of a 100% uplift. This meant that more often than not a sensible and commercial decision would be made to settle on best possible terms – even if there were concerns about the claim. Alternatively a protective and tempting Part 36 would be put on the table in order to give the defendant a security blanket should the matter proceed to trial.

However, in this case, a conference was held with the driver of Amey PLC who performed very well while giving evidence. Therefore, we decided to run the case to trial as the fixed costs regime meant the financial risk in proceeding was a risk worth taking. I got the impression that the claimant solicitors expected a 'drop hands' offer at the very least, but we decided not to make any offers.

At Birkenhead County Court, District Judge O'Neill found the claimant to be 'belligerent, incontinent and aggressive'. He found that the claimant had applied his brakes deliberately and therefore dismissed his claim. Contrary to the decision in Ak v O'Hara, the judge found no fault at all with the Amey driver who he described as 'honest, helpful and polite'. A finding of fundamental dishonesty was made and the claimant was ordered to pay costs.

When I first heard of QOCS I was as concerned as many other defendant lawyers. However, this case reminded me that whilst the reforms are not beyond challenge, the new regime can work in the favour of successful defendants who proceed to trial and force a dishonest claimant to in effect 'sins for his supper'.

"In the event that fixed fees are introduced to NIHL claims, might we not run more limitation hearings, safe in the knowledge that even if the Claimant performs well, the cost to the insurer client will be relatively limited and other issues can be taken on another day?"

The future for NIHL claims

What behaviours do the proposed changes promote and what is the potential impact on actuarial predictions?

Obviously if damages stay the same, repudiation rate stays the same and we pay less in costs there is a saving to the insurance industry.

Is this likely?

- QOCS- No cost risk.
- Claimants Solicitors have an interest in damages.
- LASPO loss of income has not reduced claims volumes. Unlikely Fixed Fee in NIHL would impact on volumes either.
- NIHL are drastically under settled.
- Medco- Would this leave us tied to one expert?
- Would there be limits placed on second audiometry by Settlement Packs/Portal or Fixed Fee regime?
- Would there be limits placed on expert evidence by Settlement Packs/Portal or fixed fee regime?
- Will repudiation rates go down?
- Will damages go up?
- Even if fixed costs reduce spend per case, how does this impact on future insurer spend?

What then is the impact of variations in the existing model?

The future for NIHL claims

Impact on insurer cost of various outcomes

(A) Existing position	(B) Volume maintains but repudiation rate falls	(C) Volume maintains, repudiation rate drops and settlement value goes up	(D) Volumes falls, repudiation drops and settlement value goes up	(E) Volumes increase, repudiation drops and settlement value goes up
Repudiation rate: 70%	Repudiation rate: 50%	Repudiation rate: 50%	Repudiation rate: 50%	Repudiation rate: 50%
Settlement rate: 10,000 per annum (for ease of maths)	Settlement rate: 10,000 per annum	Settlement rate: 10,000 per annum	Settlement rate: 7,000 per annum	Settlement rate: 12,000 per annum
Damages paid: £2,500 (GRO DWP 2013 Actuarial data- damages cost between £2-3,000)	Damages paid: £2,500	Damages paid: £3,500	Damages paid: £7,000	Damages paid: £7,000
Costs paid: £7,500 (GRO DWP Actuarial data- costs paid are around £7-8,000)	Costs paid: £3,500	Costs paid: £3,500	Costs paid: £3,500	Costs paid: £3,500
10,000 claims of which 30% paid = 3,000 paid claims	10,000 of which 50% paid = 5,000 paid claims.	10,000 claims of which 50% paid- 5,000 paid claims	7,000 of which 50% paid = 3,500 paid claims	12,000 of which 50% paid = 6,000 paid claims
£10,000 per claim = £30 million paid by insurance industry.	£6,000 per claim = £30 million paid by the insurance industry.	£7,000 per claim = £35 million paid by insurance industry	£10,500 per claim = £36.75 million paid by insurance industry	£10,500 per claim = £63 million paid by insurance industry

The future for NIHL claims

How the various factors interact



The future for NIHL claims

Conclusions

- So what does that mean for Actuaries?
- What can we tell from the claims market and behaviour prediction for future case spend?
- Depends whether fixed fees are adopted. Civil Justice Council have picked up so looks likely.
- Depends on rates agreed but this will always be the most potentially lucrative area of volume work.
- Good basis to believe that litigation rates will go up and damages payments will go up. The extent to which remains to be seen
- The two will be certain if insurers do not retain right to get own expert evidence.
- Fixed fee negotiations will be crucial and it remains to be seen what is given away in negotiations in return for seemingly lower costs.
- How the Guidelines are amended will be important.
- Can you reduce your reserves and reserve projections any time soon? I think not.
- Is NIHL the new whiplash? No, we are dealing with a limited pool and new claims are not created in volume every day.

The day will come!





Questions?



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What Next For Noise Induced Hearing Loss Claims?

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05 October 2015

