# Contents

Introduction: Noise

1. Employer’s Date of knowledge
2. Limitation
3. Insurance coverage & the Portal
4. Damages and the initial reserve
5. CRU
6. Employer’s duty
7. Investigations
8. Expert evidence
9. Making a decision

Appendix 1 – The legal framework of noise claims
Appendix 2 – Age-associated loss
Appendix 3 – Nomogram
Appendix 4 – Schedule of investigations
Appendix 5 – Typical noise levels in industry
Appendix 6 – Portal example correspondence
Appendix 7 – Common definitions
Introduction

Noise

Noise is the term generally used to describe the range of sounds which range from nuisance to harmful. Sound is a mechanical wave, caused when energy is expressed which causes particles to move and collide with each other.

Noise is unwanted sound, and is generally measured in decibels (dB). High levels of sound can have harmful effects of the human ear. There are two key types of damage which can be caused to the ear by sound; the first is instant hearing trauma, for example following an explosion which can result in deafness. The second type of harm is hearing loss caused by prolonged exposure to high levels of noise. This type of loss is referred to as noise induced hearing loss, “NIHL” for short. Exposure to high levels of noise must be for a sufficiently long time per day over a concerted period to be capable of having a permanent impact on a person’s hearing.

Hearing also naturally reduces as you age, this is referred to as ‘age associated loss’ or ‘presbycusis’.

There is also a third type of harm known to be caused by noise which is tinnitus; however, the relationship between the two is not well understood. Tinnitus is a ringing or a ‘whooshing’ sound in the ears; which may be temporary but can become permanent. Noise induced tinnitus may only exist where a person suffers NIHL.

NIHL is a ‘cumulative condition’ which means the severity of loss is related to the dose of noise exposure. It is therefore a ‘divisible disease’ which means that liability for the harm of noise can be apportionment between those individuals which have contributed to the harm.

A useful guide to terminology in noise claims is set out in appendix 7.
1. Employer’s Date of Knowledge

1.1 The date of knowledge in NIHL claims is generally taken as 1 January 1963 – the risk of injury from exposure before this date is not considered foreseeable and so exposure before this date is considered by the courts to not be negligent.

1.2 In June 1963, the Ministry of Labour published Noise and the Worker, a guide which advised employers that if they were aware of any problems with noise then employees’ exposure ought to be reduced and, where possible, hearing protection provided. The guidance suggested that exposure to noise of 90dB(A) over the course of an eight-hour working day was dangerous.

1.3 The year 1963 is generally taken as the date by which the harmful effects of excessive noise were foreseeable – see Thompson v Smiths Shiprepairs (North Shields) Ltd [1984]. However, it is arguable that no single date of knowledge can be applied in NIHL claims. This view is supported by the Supreme Court’s decision in Baker v Quantum Clothing Group Ltd [2011].

1.4 In April 1972 the Department of Employment publication Code of Practice for Reducing the Exposure of Employed Persons to Noise superseded Noise and the Worker. The Code of Practice said that where the noise level was 90dB(A) LEP,d or above, an employer must take steps to reduce the noise, or if this was not practicable, provide hearing protection.

1.5 The Supreme Court’s decision in Baker reasserts the principle that the defendant’s date of knowledge is not fixed across all industries and all employers. Rather, it depends on the actual and constructive knowledge of the individual defendant.

1.6 Baker explained that an employer at common law is entitled to follow established practice, even if there is an identifiable risk. Determining what established practice actually is, is likely to depend on what guidance documents were available to the employer in question. It also depends on whether, given the available guidance, his action (or inaction) was reasonable. Established practice will vary between different industries.

1.7 It is arguable, therefore, that a small/medium sized employer, particularly in an industry not associated with NIHL, and not possessing special knowledge, ought not to be fixed with the same date of knowledge as a larger employer in a heavier industry having access to guidance documents of which the small/medium size employer had no reasonable knowledge.

1.8 Also, it is arguable that small or medium-size employers, particularly in industries not associated with excessive noise, should have a date of knowledge later than 1963. This may be as late as 1972, following publication of the Code of Practice.

1.9 Whatever date of knowledge applies, it is arguable that employers ought to be entitled to have an ‘implementation period’ of two years following such knowledge within which to put in place measures to protect their employees against the foreseeable risk of noise. This would mean that breach would only attach from sometime in 1965 (if constructive knowledge was 1963) or 1974 (if knowledge followed the 1972 Code of Practice).

1.10 In Craven v Tonks Transport [1997] the date of knowledge was held to be 1972 triggered by the Code of Practice. The defendant here was a lorry company and the court considered that Noise and the Worker would not have alerted that defendant to any risk to its employees.
1.11 In the *Nottinghamshire and Derbyshire Textile Deafness Litigation [2007]* the court observed that ‘... in some industries a later “date of knowledge” than 1963 has been arrived at in individual cases, and in others an earlier date.’ The court’s judgment was approved by the majority of the Supreme Court in Baker.

1.12 A variety of factors are relevant in deciding the appropriate date of knowledge such as the industry concerned, the size and the nature of the employer and the extent/circumstances of exposure. The imposition of 1963 as a date of knowledge is not automatic.
2. Limitation

2.1 The question of whether a claim is statute barred is often in issue in NIHL claims because it is often alleged that onset of the symptoms of hearing loss occurs many years after the alleged period of exposure to noise.

2.2 It is important not to admit liability issues if there is a question over limitation, as it will dilute your ability to argue that a fair trial is not possible due to the time which has elapsed. The court will usually consider that if a defendant had sufficient information to make a liability decision, it cannot be sufficiently prejudiced to prevent a fair trial.

2.3 The Limitation Act 1980 at section 11 sets down the cut-off date for bringing a claim for personal injury at 3 years from the date on which the cause of action accrues (i.e. the date the harm is caused) or if later the date of knowledge of the injured person.

2.4 The legislative policy behind limitation suggests that a claim has a life span which enables defendants to calculate and reserve for risk: the legislation militates against the revival of extinguished claims to strike a balance between an individual’s right to claim and a defendant’s right to avoid the risk and costs of a claim hanging over them indefinitely (see Bowden and Whitten v Poor Sisters of Nazareth and Others [2008]). That being said the court has a wide and unfettered discretion and its duty is to do what is fair (see Horton v Sadler [2006]).

2.5 A claim brought outside of the three year window is statute barred. In the event a claim is statute barred the court does not have jurisdiction to hear the case. There is an exception to this, under section 33 of the Limitation Act, which is dealt with below.

2.6 A large proportion of noise claims involve a dispute over whether the claim is outside of the limitation period and the issue in dispute is often ‘when a claimant knew or ought to have known that he suffered hearing loss as a result of noise’ as this affects when the period begins to run.

2.7 Under section 14(1) of the Limitation Act, time starts to run from either:

a. When the cause of action accrues (i.e., when the injury occurred – usually the end point of exposure); or

b. A claimant’s ‘date of knowledge’ (if later) – when they knew (‘actual knowledge’) or ought reasonably to have known (‘constructive knowledge’):

i. that the injury was significant;
ii. that it was attributable to the employment;
iii. the identity of the defendant.

Reservoir of hearing and the low fence threshold

2.8 There is often a delay between exposure to noise and the onset of symptoms, this explained by a ‘reservoir of hearing’ which can be lost before any subjective deafness or disability arises. The point at which hearing loss begins to present as disability is known as the ‘low-fence threshold’. The disability (that is the noticeable loss of hearing) usually begins to be noticed by most people at between 20 and 25dB of hearing loss.

2.9 The reservoir of hearing explains why there is often a ‘latency period’ in NIHL claims between exposure and onset of disability. It is often only when any NIHL is combined with the deterioration in
The onset of disability is gradual and insidious but the greater the loss above the low-fence threshold the greater the disability. The British Society of Audiology grade hearing impairment (loss averaged grades over 0.5, 1, 2 and 4kHz) as:

<table>
<thead>
<tr>
<th>Level of loss</th>
<th>Impairment</th>
</tr>
</thead>
<tbody>
<tr>
<td>21 – 40dB</td>
<td>Mild</td>
</tr>
<tr>
<td>41 – 70dB</td>
<td>Moderate</td>
</tr>
<tr>
<td>71 – 95dB</td>
<td>Severe</td>
</tr>
</tbody>
</table>

It is generally accepted that NIHL is ‘non-progressive’. When exposure ceases then so too does the loss – there is no further deterioration in hearing as a result of the initial noise exposure.

NIHL measured today is the same as NIHL which existed at the time exposure ceased.

If at the time exposure to noise ceased, the claimant’s NIHL combined with predicted age-associated loss would have exceeded the low-fence threshold, then arguably there was subjective disability. If so, consideration should be given to whether limitation is a viable defence?

Knowledge and significance of injury

For the purpose of establishing a claimant’s knowledge Under section 14(2), an injury must be significant. Damage is significant if the claimant in question would reasonably have considered it sufficiently serious to justify bringing a claim. To be significant, a claimant’s injury need not be serious – slight damage is enough. In *Secretary of State v Mackie* [2007] a loss of 9.98dB was ruled to be significant (note there is some overlap on the question of whether hearing loss is *de minimis*, which is dealt with below). It stands to reason that anything which is not insignificant is significant.

For the purposes of establishing a claimant’s date of knowledge under the Limitation Act 1980 there are two types of knowledge, actual knowledge and constructive knowledge.

Actual knowledge: Where the claimant was aware of hearing loss and that it may have been caused by their exposure to noise.

Constructive knowledge: a claimant’s knowledge includes not only what they did in fact know, but also knowledge which a claimant can reasonably be expected to possess.

If the claimant’s hearing loss was significant during exposure, or by the time exposure ceased, then it is arguable that at that time the claimant ought to have made medical or other enquiries about the cause of the hearing loss. In *Johnson v Ministry of Defence* [2012] *EWCA Civ 1505* it was held “there would be an assumption that a person who had suffered a significant injury would be sufficiently curious to seek advice unless there were reasons why a reasonable person in his position would not have done.” This requires active steps on the part of the claimant. This approach was affirmed in *Collins v Secretary of State for Business, Innovation and Skills* [2014] *EWCA Civ 717* where it was held at first instance that the claimant could be fixed with actual knowledge upon seeing an advertisement in a newspaper by his solicitors. On appeal the court fixed the Claimant with constructive knowledge much earlier (2003) as the claimant has held a discussion with his doctor about the possible causes of his lung cancer at that time.
2.19 Section 14(2) is the test for what counts as a significant injury. The material to which that test applies is subjective in the sense that it is applied to what the claimant knows of their injury rather than what the injury actually was. In addition, a claimant’s knowledge is supplemented with imputed ‘objective’ knowledge under section 14(3).

2.20 The test itself is an entirely impersonal standard: not whether the claimant themself would have considered the injury sufficiently serious to justify proceedings but whether a person in the claimant’s position should ‘reasonably’ have done so.

2.21 Lord Hoffman in *A v Hoare* [2008] explained:

i. You ask what the claimant knew about the injury they had suffered

ii. You add any constructive knowledge which may be imputed to him; and

iii. You then ask whether a reasonable person with that knowledge would have considered the injury sufficiently serious to justify his instituting proceedings.

iv. The claimant’s intelligence or character is not relevant.

2.22 One should assume that a person who is aware that they have suffered a personal injury, serious enough to be something about which they would go and see a solicitor if they knew they had a claim, will be sufficiently curious about the causes of the injury to seek whatever expert advice is appropriate (Lord Hoffmann in *Adams v Bracknell Forest Borough Council* [2004], affirmed in *Collins v Secretary of State for Business, Innovation and Skills* [2014] EWCA Civ 717).

2.23 It is not correct that a claimant cannot possess knowledge under section 14 until NIHL is confirmed by a medical expert. In *Platt v BRB (Residuary) Limited* [2014] EWCA Civ 1401 it was held the proviso to s.14(3) made clear that a person was not to be fixed with knowledge of something only ascertainable with expert advice so long as he had taken all reasonable steps to obtain and, where appropriate, to act on that advice.

Attributability

2.24 As well as significance, relevant knowledge includes knowledge that the injury in question was attributable to the act or omission alleged to constitute negligence. The claimant can still have knowledge of attributability even though no helpful evidence is available. It is knowledge of possibilities that matters – not certainty. The claimant need only know that their symptoms could possibly have been caused by exposure to noise (see *Spargo v North Essex District Health Authority* [1997]; *MoD v AB* [2012]).

2.25 It is useful when considering attributability to ask:

- What did the claimant consider was the purpose of hearing protection?
- Are there any entries in the claimant’s medical or occupational health records suggesting the claimant’s awareness of the effects of exposure to excessive noise?
- Was the claimant aware of the employer’s health and safety policy on noise?
- Were there any warnings about noise in the workplace? What risk of harm did the claimant take them to be a precaution against?
- For what purpose did the claimant consider noise assessments were undertaken?
- What training did the claimant receive in relation to noise?
2.26 If the claimant argues that they attributed their symptoms to ageing – is this credible? How old was the claimant when they first experienced symptoms? Do their family or friends of a similar age have any hearing problems?

2.27 As noted above, when it became significant, the claimant ought to have made enquiries about the cause of their symptoms. Arguably, enquiries about the cause would have revealed any NIHL which the claimant ought to have linked to exposure to noise. If the claimant did make enquiries into the cause of their symptoms, what were they told? Consider whether it was reasonable to rely on the advice given, and whether further enquiries should have been made if symptoms continued to worsen or did not resolve.

Knowledge and symptoms

2.28 If evidence shows that the claimant experienced symptoms more than three years before they issued proceedings (such as information in his GP or hospital records, occupational health records or medical report) this can be used as evidence of actual knowledge of a significant injury.

2.29 If the claimant does not admit to symptoms more than three years before they issued proceedings (and perhaps alleges only recent onset), examine whether the claimant’s NIHL at the time exposure ceased was above the low fence threshold. If it was, the claimant was likely to have been aware of it.

Section 33 discretion

2.30 A late claim may still proceed but only if a claimant can persuade the court to exercise its discretion under section 33, if to do so would be “equitable”, no matter how late it is brought.

2.31 The court will assess whether or not it would be equitable to exercise its section 33 discretion by balancing the prejudice to the claimant, if the limitation period is not disapplied, with the prejudice to the defendant if the limitation period is disapplied. When considering whether to exercise this power, the court must have regard to all the circumstances of the case, including:

i. The length of and explanation for the delay;
ii. The extent to which the delay has reduced the cogency of the evidence;
iii. The conduct of the defendant after the delay arose;
iv. The extent to which the claimant acted promptly and reasonably;
v. The steps, if any, taken to obtain medical, legal and other expert advice.

2.32 Where limitation is in issue the Court of Appeal has set out that limitation must be dealt with at a preliminary issue. In *KR v Bryn Alyn Community (Holdings) Ltd (In Liquidation)* [2003] EWCA Civ 85. It was stated:

“Wherever the judge considers it feasible to do so, he should decide the limitation point by a preliminary hearing by reference to the pleadings and written witness statements and, importantly, the extent and content of discovery. In Stubbings v. Webb, for example, the matter was dealt with by the master and the judge as a preliminary issue on affidavit evidence, without cross examination but with the benefit of discovery. As Bingham LJ commented when the matter was before the Court of Appeal, at 202H–203A:

“This produces an unusual situation, since the facts pleaded by the plaintiff cannot for purposes of this proceeding be assumed to be true, and they are not common ground. In particular, and this
must be emphasised, the Webbs deny the allegations against them. We must, it would seem, like the judge, draw such provisional inferences from the evidence before us as appear to be fair."

It may not always be feasible or produce savings in time and cost for the parties to deal with the matter by way of preliminary hearing, but a judge should strain to do so wherever possible.

vii) Where a judge determines the section 33 issue along with the substantive issues in the case, he should take care not to determine the substantive issues, including liability, causation and quantum, before determining the issue of limitation and, in particular, the effect of delay on the cogency of the evidence. Much of such evidence, by reason of the lapse of time, may have been incapable of being adequately tested or contradicted before him. To rely on his findings on those issues to assess the cogency of the evidence for the purpose of the limitation exercise would put the cart before the horse. Put another way, it would effectively require a defendant to prove a negative, namely, that the judge could not have found against him on one or more of the substantive issues if he had tried the matter earlier and without the evidential disadvantages resulting from delay."

2.33 In MOD v AB [2010] 117 BMLR 101, Smith LJ said:

“The judge began this section of his judgment by observing, correctly in our view, that the burden of proof under section 33 lies on the claimant (see Thompson v Brown [1981] 1 WLR 744,742) recognising that the suggestion made in KR v Bryn Alyn Community Holdings Limited [2003] QB 1441 that it is a heavy burden is no longer good law. The discretion to disapply section 11 is unfettered and the court’s duty is to do what is fair: see Horton v Sadler [2007] 1 AC 307 and A v Hoare.”

2.34 The Court of Appeal in Sayers v Chelwood and another [2012] EWCA Civ 1715 held the general approach to the test to be applied under the Limitation Act 1980 s.33 was that the burden was on the claimant. It was not helpful to discuss in the abstract whether that burden was a heavy one or a light one, because the extent of the burden would vary from case to case. The court affirmed what was said in KR that under section 33 a claimant is seeking the indulgence of the court and that such indulgence is exceptional, in the sense that the claimant is seeking an exemption from the normal consequences of failing to commence proceedings within the limitation period.

2.35 The court has a wide and unfettered discretion and its duty is to do what is fair (see Horton v Sadler [2006]). Depending on the issues and the nature of the evidence, the longer the delay the more likely and the greater the prejudice to a defendant KR v Bryn Alyn Community. Relevant delay includes delay caused by the claimant’s solicitor (see Horton v Sadler [2006], McDonnell, Hinchliffe v Corus UK Ltd (2010)).

2.36 That a fair trial is still possible is not in itself determinative in the claimant’s favour. The effect of delay on the cogency of evidence is relevant notwithstanding that a fair trial remains possible B v Ministry of Defence [2013] 1 A.C. 78.

The strength of the claimant’s case is relevant when the court determines whether to disapply limitation. It would be inappropriate for the court to allow an expensive and resource-consuming trial to take place if the prospects for the claimant’s success are slight, AB v Nugent Care Society, MoD v AB).

2.37 The House of Lords in Donovan v Gwentos Limited [1990] 1 W L R 472 decided that relevant delay on the part of the claimant and any prejudice which may flows from, includes not only delay after expiry of the limitation period but also delay within the three years before. Just because three years are allowed to bring the claim, this does not mean that prejudice cannot occur during the limitation
period; it does mean that account cannot be taken of it unless the claim is brought late McDonnell v Walker [2009] EWCA Civ 1257.

2.38 It is arguable that because the court must consider all the circumstances of the case, it must also take account of the effect on the ability to have a fair trial caused by the passage of time between:

1. Accrual of the cause of action (usually when exposure to noise ceased); and
2. The claimant’s date of knowledge (the date from which the three year limitation period runs).

2.39 Proportionality and the size of the claim are factors to be taken into consideration: the court is unlikely to apply its discretion if the costs of defending the claim are disproportionate to its value (Robinson v St Helens Metropolitan Borough Council [2002], McGhie, Smith v Hampshire County Council [2007], and AB v Nugent Care).

2.40 Public policy is relevant and militates against exercise of the section 33 discretion. The primary purpose of the limitation period is to protect defendants from the injustice of having to face stale claims which they are less able to defend (Donovan v Gwentoys, Beattie v British Steel Plc and Monk v British Steel Plc Unreported, Court of Appeal, 6 March 1997).

2.41 It is not open to a claimant to submit that, because defendants or their insurers have settled other claims, they are thereby not prejudiced by the delay (Beattie v British Steel Plc).

2.42 A defendant is always likely to be prejudiced by a claimant’s dilatoriness in pursuing his claim. A long delay on its own is relevant (see Donovan v Gwentoys). The mere fact of being asked to deal with a stale claim is itself prejudice, and the staler the claim the greater the prejudice (see T v Boys and Girls Welfare Service [2004]). Where there is delay the quality of justice diminishes (Bowden).

2.43 In Malone v Relyon Heating Engineering Ltd [2014] EWCA Civ 904 Mr Malone was employed by Relyon Heating Engineering Ltd for 27 years from 1977 to 2004 where his work required him to use noisy power tools. He brought a claim for noise induced deafness alleging that he was not provided with hearing protection by his employer. The parties jointly instructed an engineer who was of the opinion that there had been a breach of duty on the part of Relyon.

2.44 One of the key issues was limitation and Mr Malone’s knowledge. Mr Malone was found to constructive knowledge of his hearing loss in 2001 but did not bring a claim until 2009 with formal proceedings being issued in 2011.

2.45 There were a number of important points made in this case:

- There can be two limitation periods for the same injury, one to run from the date of constructive knowledge on the part of a claimant, and a second period for any continuing exposure.

- When running a limitation defence it is important to highlight the prejudice suffered by the defendant as a consequence of loss of relevant records and unavailability of key witnesses due to the passage of time. In other words, to demonstrate how the defence has been prejudiced by a delay.

- If, as in Malone, there are found to be two distinct periods of exposure to be considered in relation to the application of the Limitation Act 1980, the issue of proportionality should be considered, should either period be relatively short lived and thus of low value.
The trial judge raised the issue of the delays on the part of Relyon and its representatives (insurers) in the initial investigation of the claim and weighed this against the prejudice caused by the claimant's delay in making the claim. While it was not relevant to the Court of Appeal's considerations in this case, insurers and claims handlers need to be aware of the risk of contributing to their own prejudice by delays in claims handling.
3. Insurance coverage and the portal

3.1 In accordance with the ABI Industrial Disease Claims Working Party (“IDCWP”) Guidelines the following handling guidelines apply:

i. NIHL claims are ‘long tail’ which means they are categorised as being gradual in operation, usually arising from cumulative exposure, and where there is insidious manifestation of symptoms.

ii. In NIHL Claims you will have to establish the insurer(s) on risk during the period of alleged exposure.

3.2 In a case where there is a single defendant but that defendant has multiple insurers, the last insurer ‘on risk’ (that is the last one to provide cover to the named defendant during the period of alleged exposure) during culpable exposure co-ordinates (runs the case while reporting to the other insurers) but with an option for an insurer with a greater interest to take over this role. This insurer becomes the handling insurer.

3.3 Where there are multiple defendants, the last insurer on risk during the culpable period for each, should handle the claim for that defendant, but the co-ordinating role should be taken over by the handling insurer for the defendant with the greatest exposure (if appropriate). The overall handling insurer should become the co-ordinating insurer.

3.4 The convention between insurers is to apportion damages and contribute on a time-on-risk basis with no ‘weighting’ for dose of exposure. (Remember, the courts will not necessarily follow such a simplistic approach.)

3.5 Any period of culpable exposure with a single employer of less than three months and also less than 5% of total overall exposure with all defendants, should be ignored for the purposes of apportionment.

3.6 The onus is on any insurer to demonstrate a cut-off date of culpable exposure during their period of risk, i.e. a date after which its policyholder was not liable, thereby reducing its time-on-risk period. If the handling insurer can demonstrate that there was no culpable exposure during their time on risk, the claim can be passed back to the relevant previous insurer.

3.7 Where there is continuing culpable exposure, the ultimate cut-off date for the purposes of apportionment, should be the date of the letter of claim to the last culpable defendant, or if later the date of examination for medical evidence.

The Portal

3.8 The Portal is a website through which certain claims must be run. The following is key information about the portal for NIHL claims:

- The portal applies to NIHL claims where there is one defendant and the claim has a value up to £25,000. (for claims made after 31 July 2013).
- An ‘admission of liability’ means admitting breach of duty, that there is no limitation defence, contributory negligence cannot be raised and that the defendant accepts they caused some loss (to be quantified).
- The CNF should be sent to the insurer identified as the insurer last on risk for the employer at the material period of employment (if the insurer’s identity is known). Note the insured will be
unaware of the existence of the claim until the insurer or their representative tells them. The CNF can be sent to the defendant's registered office albeit the claimant must make a reasonable attempt to identify the insurer and must have carried out an ELTO search.

- If a reasonable attempt has not been made, invite the claimant’s solicitor to register the CNF on the Portal (this has the effect of starting the timetable again).
- The CNF can be accompanied by a more detailed letter of claim and evidence such as the HMRC Schedule, completed forms of authorities, medical report and an audiogram.
- The CNF should be acknowledged within 24 hours (usually by the insurer). If by post the insured/insurer should acknowledge as soon as possible. Note if the insurer intends to instruct solicitors or any representative they must assign the case to them upon instruction.
- Applies to claims involving more than one insurer. If you are the lead insurer, ensure that all insurers are notified of their interest.
- The defendant (insurer) has 30 business days to make an admission to obtain the benefit of Stage 1 and 2 costs. Diarise 30 business days.
- It is likely you will require the consent of any active insured to make any admission.
- In some circumstances the CNF may not contain what you judge to be sufficient in the mandatory sections. We can decide if this is a valid reason for the claim to exit the process (if the court agrees that there was insufficient information there are costs sanctions that can be imposed on the claimant).
- On receipt of a CNF that does not contain sufficient information we will give the claimant solicitors three days to serve a more detailed CNF.
- If we still do not receive sufficient information you can notify the claimant, if they do not rectify the issue the matter will exit the portal.
- Exiting the process will then be governed by the disease and illness PAP, the CNF serving as a letter of claim unless where the CNF did not contain adequate information.
- Claims that exit the process will not have a Fixed Recoverable Costs (“FRC”) regime.
- Claims that exit the Portal where investigations have been hampered by insufficient information on the CNF are still subject to the portal costs in accordance with paragraph 6.8 of the Protocol and CPR Rule 45.24.
- If a claim is submitted that should have been notified via the Portal ensure that the claimant solicitors are put on notice of this. They may then register the claim via the Portal. If so follow guidelines below.
- If an admission is made but we are not satisfied with the medical evidence, (or if any other or particular new evidence comes to light) when served, we can allow the claim to exit the Portal but the normal rules on resiling from an admission applies. (CPR Part 14 applies). Please note that it is possible to resile from the “causation admission” leaving breach of duty and the limitation admission in place by doing so within 15 days (the consideration period) of receipt of the settlement pack. See Section 7.36 (b) of the Protocol.
- Register with CRU as usual (and potentially NHS charges).
- If a decision is made on receipt, or very early on, that this is not a case where it is appropriate to make a stage 1 admission, contact the CS straight away. You can either deny in the portal or allow the claim to exit.
- If a decision cannot be made to admit or deny ensure contact is made with the CS outside the portal (post/email) to confirm that going forward the case will be dealt with in accordance with the D and I PAP before the 30 business days expires.

**First claim (or previous claims but not paid):**
This could be a first claim for the insurer but there may be other claims paid or live with other insurers for the same policyholder —check. Be clear that this is a first claim with potential for more claims before treating as a first claim.
Active insured —> Can we investigate? —> Evidence of employment/records —> Instruct a CI or carry out own investigations/review any report within 30 days —> limitation/contributory negligence/causation a potential issue? Can we admit or appropriate to deny?

Non-active insured —> Unlikely to be able to investigate —> Evidence of employment? Likely to require information under the Disease and Illness PAP —> deny —> Exit the Portal.

Previous claims (paid)

Active insured —> previous claims paid —> Evidence of employment/records? Do we have sufficient information/are previous claims relevant? Can we investigate further? Limitation/contributory negligence/causation a potential issue? Can we admit or appropriate to deny?

Non-active insured —> previous claims paid —> Evidence of Employment? Unlikely that we can investigate but do we have sufficient information that previous paid claims are relevant? Limitation/contributory negligence/causation a potential issue? Can we admit or appropriate to deny?

Limitation

- Some insurers will immediately reject the claim if exposure ends more than a certain number of years ago. Agreeing a consistent approach on this may be tricky and can depend on a number of contingencies.

Lead or follow? IDCWP and ABI NIHL Guidelines

- Follow the IDCWP guidelines and/or the NIHL guidelines (January 2014) and for claims received by the insurer after 1 March 2015 follow the ABI NIHL guidelines (if a signatory or consider it a sensible approach) and agree to contribute subject to the claimant proving employment, breach of duty, limitation and causation.

- The last insurer on risk will continue to be the Handling Insurer (Point 11/page 4 of the ABI NIHL guidelines). The CNF is likely to have been sent to the last insurers for the material period who may not have an interest/or may not have a 50% interest (NIHL). Subject to point 11, if a CNF is sent to an earlier insurer that happens to have a greater/majority interest then common sense should dictate that that insurer should handle. (If this is not agreed you will need to reallocate or re-assign. Check the Claims Portal BS2 reject claim and/or B3 re-assignment. Note if reassigned the timetable still starts from the original date the CNF was registered)

- First claim for all insurers unless it is possible to investigate the claim preferable to deny, advise the lead insurer accordingly.

- Consider whether previous claims paid/who handled.

Evidence of employment (HMRC Schedule)

- It is usually fundamental that we have evidence of employment. We can seek that information if it has not been registered on the portal. This request should not cause the claim to exit the portal. The key issue is that it may well be an admission could be made but there is still no evidence of employment. Any admission in these circumstances will be conditional upon disclosure of evidence of employment before settlement.

Personnel file and occupational health records — the Data Protection Act 1998
• Under the D and I PAP if these records exist it is unlikely that any decision can be made without access to these records. If there is an active insured they can be advised that they can disclose these records to you or your representatives in accordance with the DPA. Refer them to Section 35 of the DPA re. the exemption where disclosure of material is necessary for the purpose of obtaining legal advice or is otherwise necessary for the purpose of in connection with any legal proceedings — including prospective legal proceedings.

Policyholders
• Permission of an active insured will be needed to make any admission in the portal. Where the insured is not only active but, say, a current policyholder or they will cover any gaps in insurance, it is crucial that they are involved in any decision to admit or deny.

Stage 3
• Please note that arguments on quantum at Stage 3 of the portal can only be made if those arguments had been submitted into the portal at Stage 2.
• Section 7.38 of the Protocol explains what happens if parties cannot reach agreement on damages to be paid. See Sections 7.49 and 7.38 of the Protocol to ensure you are aware of how to protect the position at Stage 3 on quantum arguments. Also note PD86 which sets out the procedure. It’s sensible to ask the claimant’s solicitors to register the case on the Portal to obtain the benefit of FRC.

Funding/costs
• Stage 1 claims £1,000 — £25,000 FRC £300 (all claims) (Note to be paid 10 days after receipt of Stage 2 settlement pack);
• Stage 2 Claims £1,000 — £10,000 FRC £600
• Stage 2 Claims £10,001 — £25,000 FRC £1,300
Plus disbursements allowed in accordance with rule 45.19 and if funding pre-dates 1 April 2013 plus any success fee. The rules are unclear but it is likely if funding pre-dates April 2013 disbursements will also include the ATE premium.
4. Damages and the initial reserve

4.1 General damages for PSLA are determined by the extent of bilateral hearing loss, presence and severity of tinnitus and claimant’s age.

4.2 The following table gives broad figures to be used where there is no medical evidence available and for initial reserve purposes only. Reference, however, should be made to the JC Guidelines and case law once medical evidence is available. Further guidance can be found in the BLM NIHL quantum mini guide (number 1A in this series).

<table>
<thead>
<tr>
<th>Extent of average binaural hearing loss</th>
<th>Level of general damages PSLA (factoring in 10% uplift)</th>
</tr>
</thead>
<tbody>
<tr>
<td>Up to 10dB</td>
<td>£5,500</td>
</tr>
<tr>
<td>10 – 19dB</td>
<td>£8,800</td>
</tr>
<tr>
<td>20 – 29dB</td>
<td>£12,100</td>
</tr>
<tr>
<td>30 – 39dB</td>
<td>£14,300</td>
</tr>
<tr>
<td>40+ dB</td>
<td>£17,600</td>
</tr>
</tbody>
</table>

Be aware that Tinnitus is compensable as a loss in its own right:

<table>
<thead>
<tr>
<th>Extent of tinnitus</th>
<th>Level of general damages PSLA (factoring in 10% uplift)</th>
</tr>
</thead>
<tbody>
<tr>
<td>Severe tinnitus and NIHL</td>
<td>£24,860 to £38,060</td>
</tr>
<tr>
<td>Moderate tinnitus and NIHL or moderate to severe tinnitus or NIHL alone</td>
<td>£12,430 to £24,860</td>
</tr>
<tr>
<td>Mild tinnitus with some NIHL</td>
<td>£10,530 to £12,430</td>
</tr>
<tr>
<td>Slight or occasional tinnitus with slight NIHL</td>
<td>£6,160 to £10,530</td>
</tr>
<tr>
<td>Slight NIHL without tinnitus or slight tinnitus without NIHL</td>
<td>Up to £5,860</td>
</tr>
</tbody>
</table>

Apportionment.

4.3 Remember to reduce the general damages PSLA award to reflect:
- Other noisy employments
- Pre-1963 or non-negligent exposure
- Recreational exposure (DIY, motorbike riding, shooting)
- Firearms exposure during National Service
- Age-associated hearing loss (presbycusis)
- Other causes of hearing loss.

Special damages and future loss.

4.4 These usually relate to hearing aids. The defendant should determine:
- Whether there is a clinical need for hearing aid(s) – if so, from when and what type?
- If the claimant has sought medical assistance regarding the hearing loss.
- Is the claimant already using an NHS aid or being referred to an NHS hearing centre? Will he really incur private expenditure on aids?
- What is the initial purchase cost?
- How often aids need to be replaced? What are the maintenance, servicing and battery costs?
-Over what period would the aids be required? –
When would the claimant have required aids in any event as a result of ageing or other causes of hearing loss?

**Smith v Manchester awards**

4.5 Claimant for Smith v. Manchester award are rare in NIHL cases.

4.6 Following the decision in *Smith v Manchester Corporation (1974) 17 KIR 1* a claimant may have a claim for handicap on the open labour market, if as a result of hearing loss they have to avoid hearing-critical jobs.

4.7 Bear in mind the two requirements for a claimant to be eligible for a Smith award:

   - There must be a substantial risk that at some point in the Claimant’s working life they will find them self on the labour market;
   - The Claimant’s disability would place them at a disadvantage by comparison with an able-bodied contemporary.

4.8 There is no straight forward formulae for calculating a Smith v. Manchester award. In fact Lord Justice Browne in *Moeliker v Reyrolle & Co [1977] 1 WRL 132* stated

   “It is impossible to suggest any formula for solving the extremely difficult problems involved in the assessment. A judge must look at all the factors which are relevant in a particular case and do the best he can”.

4.9 In *Foster v Tyne & Wear CC (1986) 1 ALL ER 567* the judge took the number of years of the Claimant’s pre-injury earnings as the basis for the calculation and awarded 5 times the Claimant’s salary.

4.10 Typically when taking this approach the number of years has been much lower. In *Moeliker* the multiplier was 6 months. That being said it is within the court’s discretion and the aim is to negate any prejudice the claimant may face. As such the court can award much higher sums if it chooses.
5. CRU

5.1 Where a defendant is responsible in whole or in part for the Hearing loss, the DWP’s Compensation Recovery Unit (CRU) will seek to recover any benefits paid to the claimant from the defendant (insurers). The Defendant can offset IIDB and IB from a loss of earnings claim and other benefits against other aspects of loss; see the link below.

5.2 CRU registration is not necessary unless the claimant’s average bilateral hearing loss (over 1, 2, 3kHz) exceeds 50dB. While it is not a requirement of the Social Security Contributions and Benefits Act 1992 it is standard practice to register the claim with the CRU if the claimant has tinnitus.

5.3 When you receive notification of the claim you must register the claim with the CRU, the usual time to do this is once the letter of claim is received. Upon registering the claim you will be provided with a CRU certificate showing what money has been paid to the claimant, under what bracket of compensation and for how long. These are the sums which the defendant will be expected to reimburse. Note that when the certificate expires you must ask for an up to date certificate in order to be sure you are reserving the correct amount for the benefits should they not be encompassed by the loss of earnings claim, which you are able to offset the benefits against when making settlement offers.

5.4 Be aware that the CRU does not take a nuanced view of the causation of occupational diseases. Their standard practice is to seek recovery of the full sums paid to the claimant without regard to the circumstances surrounding the claimant’s development of their condition.

5.5 Bear in mind that once settlement is reached you will be required to repay the sums on the certificate up until the date the damages are paid to the claimant.

5.6 If it’s the defendant’s case that it did not cause all or part of the claimant’s condition it is open to the defendant to challenge the certificate of benefits. This is done in two ways;

5.7 The first is to seek a ‘review’ of the certificate. This can be done throughout the proceedings and is a request for the CRU to consider whether the sums paid to the claimant were done so in respect of the injury which is the subject matter of the claim.

5.8 Once the matter is concluded, if you want to challenge the certificate you must first request a mandatory reconsideration, setting out why you say the certificate contains benefits which the defendant should not be responsible for paying. This occasionally results in a reduction to the sums on the certificate. Having taken that step, if the reconsideration is rejected, you must prepare a formal appeal which should be a detailed written submission, in which you will focus on the medical evidence and set out why all or part of the benefits were not caused or contributed to by the defendant. This is especially important if there is medical evidence of a pre-existing condition that has only been aggravated for a discrete period of time.

There is one very important thing to bear in mind about CRU, if you settle the claim you will need to specify whether it is inclusive (“gross”) of the benefits or after the deduction of benefits (“net”). If you settle gross of benefits, upon a successful appeal, the benefits reimbursed should be sent to the claimant. If you settle net of CRU and appeal successfully the reimbursement will come to you. For this reason when you make your offer and/or sign a consent order you need to ensure it is clear who shall benefit from a successful CRU review. See guidance at www.gov.uk.
6. The employer’s duty of care

6.1 The daily noise dose (LEP,d) is a product of the levels and duration of exposure to noise. The following table shows the combination of noise levels and duration required to give a dose of 90dB(A) (LEP,d) over the course of an eight-hour day.

<table>
<thead>
<tr>
<th>Exposure time (hrs per day)</th>
<th>Level of exposure dB(A)</th>
<th>Daily dose (LEP,d)</th>
</tr>
</thead>
<tbody>
<tr>
<td>8</td>
<td>90</td>
<td></td>
</tr>
<tr>
<td>4</td>
<td>93</td>
<td></td>
</tr>
<tr>
<td>2</td>
<td>96</td>
<td>90dB(A) (LEP,d) 8 hours</td>
</tr>
<tr>
<td>1</td>
<td>99</td>
<td></td>
</tr>
<tr>
<td>0.5</td>
<td>102</td>
<td></td>
</tr>
<tr>
<td>0.25</td>
<td>105</td>
<td></td>
</tr>
</tbody>
</table>

6.2 A simple way to calculate the noise dose is to use the nomogram in Appendix 3 which is from the HSE publication Reducing Noise at Work.

Common-law negligence

6.3 The Supreme Court in *Baker v Quantum Clothing Group* [2011] UKSC 17 confirmed that prior to 1 January 1990, the average employer owed a common-law duty of care to protect employees where their daily noise dose exceeded the ‘negligent threshold’ of 90dB(A) over eight hours. Some employers are burdened with more than standard precautions if they had actual knowledge of risk to hearing from exposures below this threshold. In *Harris v BRB (Residuary) Ltd* [2005] EWCA Civ 900, the Court of Appeal fixed the defendant with a negligent threshold of 85dB(A) LEP,d from 1973 onwards.

6.4 The duties of care are essentially the same as those required under statutory regulations when the 2nd Action Level or Upper Exposure Action Value is reached (see below).

Noise at Work Regulations (NWR) 1989

6.5 Post 1 January 1990, the Noise at Work Regulations (NWR) 1989 apply and the employer’s duties are defined in relation to three ‘action levels’, as follows:

<table>
<thead>
<tr>
<th>Action required</th>
<th>Daily exposure &lt;85dB(A)</th>
<th>1st Action Level 85dB to 90dB(A)</th>
<th>2nd Action Level &gt;90dB(A)</th>
</tr>
</thead>
<tbody>
<tr>
<td>General duty on employer to reduce risk</td>
<td>*</td>
<td>*</td>
<td>*</td>
</tr>
<tr>
<td>Carry out noise assessments and maintain records</td>
<td>*</td>
<td>*</td>
<td>*</td>
</tr>
<tr>
<td>Reduce noise levels as far as possible by engineering means</td>
<td></td>
<td></td>
<td>*</td>
</tr>
</tbody>
</table>
Provide information, instruction and training about risks to hearing

Mark ear protection zones.
Ear protection – provided to those who ask for it
– provide to all exposed personnel
– maintain and repair

Ensure all noise control/protection equipment is used and maintained.
Employees required to wear ear protection. Machine manufacturers required to provide information on equipment noise levels

<table>
<thead>
<tr>
<th>Noise at Work Regulations 1989</th>
<th>Noise at Work Regulations 2005</th>
</tr>
</thead>
<tbody>
<tr>
<td>Exposure Limit Value (ELV)</td>
<td>NA</td>
</tr>
<tr>
<td>Second Action Level – replaced by Upper Exposure Action Value (UEAV)</td>
<td>LEP,d of 90dB(A)</td>
</tr>
<tr>
<td>First Action Level – replaced by Lower Exposure Action Value (LEAV)</td>
<td>LEP,d of 85dB(A)</td>
</tr>
</tbody>
</table>

The Factories Act (FA) 1961

6.8 *Baker v Quantum* confirmed that the Factories Act applies to NIHL claims. The average employer will not be in breach of duty under section 29 (the duty to keep the workplace safe) in respect of noise exposure below 90dB(A) LEP,d prior to 1 January 1990.
7. Investigations

Pre-action:

7.1 The Disease and Illness Pre-action Protocol applies to NIHL claims.

7.2 Unlike the rules the protocols are less prescriptive. The point of the protocols is to guide handlers in dealing with matters pre-action. That does not mean that you can't use them to your advantage.

7.3 Always be ready to highlight the protocols and which parts you say you are complying with.

7.4 Whenever you get the opportunity, whether in a letter or on the telephone, make clear to your opponent that you and your client are working to comply with the Pre-action Protocol for Disease and Illness. It's in your and your clients' interest to deal with things fairly and swiftly, because when things go awry you will have ammunition to put before the court of how you have been working to comply, even if you have fallen short in some way, and those contemporaneous documents do work to persuade judges.

7.5 The key parts of the protocols:

- The Aims (1.2): more contact between potential parties, better exchange of information, better investigations (ON BOTH SIDES), ability to settle fairly and sooner;

- Timetable and arrangements for disclosure (2.6): this should been seen as flexible, if the circumstances of the case require the deadlines to be varied seek alterations, but remember to be collaborative: explain the circumstances (what steps you have taken, why the deadline is not achievable, what further steps need taking, why and how long you estimate it will take). Remember the more open and detailed your correspondence with your opposite number the more ammunition there is before a court to show your reasonable conduct. This cuts both ways, seek explanations from your opposite number, "why do you need that" is a useful question to ask:

- Litigation is a last resort (2A.1): there’s mention of alternative dispute resolution in the PAP, but the key point here is:

  "The Courts take the view that litigation should be a last resort, and that claims should not be issued prematurely when a settlement is still actively being explored. Parties are warned that if the protocol is not followed (including this paragraph) then the Court must have regard to such conduct when determining costs."

  That is a useful thing to point out when claimants' solicitors are threatening to issue proceedings and also when they threaten to issue Pre-action disclosure applications (also bear in mind the General Aims of the Protocol 3.1: to resolve as many disputes without litigation as possible).

- In the General Objectives 3.2: it’s expressly set out, one of the aims of the protocols is:

  "to discourage the prolonged pursuit of unmeritorious claims and the prolonged defence of meritorious claims"

- Make sure to point out, if a claim does not have good merits, that in discouraging unmeritorious cases you are complying with the protocol.
Understanding the claim 4.2: Claimant’s must provide sufficient information: so you need clear details of:

- Who the claimant is;
- Who the alleged defendant is;
- What the claimant’s symptoms/condition is;
- When the claimant first became aware of the symptoms;
- Whether the claimant alleges employment;
- What is the claimant’s allegation(s) on transference of employment;
- Where the claimant worked when;
- What the allegations are in relations to breach;
- What the claimant alleges is the basis of his cause of action;
- What documents/records the claimant intends to rely on;
- What the claimant’s position is on causation.

If the Claimant hasn’t given you sufficient information to investigate they have not complied with the protocol. If they haven’t complied with the protocol, you should use this opportunity to point out that the claimant has not complied with the protocol and how: also point out the court is unlikely to consider the protocol period has begun to run (if not protocol compliant), and that any applications which followed would be flawed.

Deadlines:

i. 4.3: If a request is made for occupational records by the claimant to the defendant, you have 40 days from the date the letter is sent to comply:

ii. 7.1: If a letter of claim is sent you have 21 days from the day it is posted to acknowledge it; within 30 days the acknowledgement you must identify any other relevant insurers. Within 90 days of the acknowledgement you should provide a position on liability, if you are denying liability or any part of the claim you should provide documents in your position which are relevant to the material issues.

iii. If the initial letter of claim is defective, request the necessary information. Time does not start to run.

Disclosure & documents:

i. Disclosure: Parties pre-action are entitled to seek disclosure and inspection of documents to aid in determining the strengths and weaknesses of their cases. The protocol sets out that occupational records include health records (Annex B):

ii.

iii. There are lists of what are considered standardised disclosure for personal injury matters, those lists are found in Annex C in the pre-action protocol for personal injury claims. Note that just because the documents appear in those lists does not make it reasonable or proper in every case. Claimant’s often cut and paste those lists into their letters of claim without a second thought.

iv. The test for what will constitute disclosure is under C.P.R. 31.6 (standard disclosure):

"what documents are to be disclosed
Standard disclosure requires a party to disclose only—
(a) the documents on which he relies; and
(b) the documents which—
   (i) adversely affect his own case;
   (ii) adversely affect another party’s case; or
   (iii) support another party’s case; and
(c) the documents which he is required to disclose by a relevant practice direction."

It’s a fairly broad test. But it will often be a useful exercise to ask whether the documents that are requested will fall to be disclosed under standard disclosure. Bear in mind that broad requests for documents relating to other employees or ‘similar incidents’ are likely to be considered inappropriate ‘fishing expeditions’.

If there are document or are likely to be documents notify your opponent and let them know what steps you are taking to get hold of the documents.

i. Bear in mind 3.2 of the protocol: Parties are required “to communicate promptly where any of the requested information is not available or does not exist”.

- Extensions:
  i. If further time is required, the protocol allows for this: but reasons must be given.

  ii. If there is a dispute on whether the time for complying the protocol has begun to run, be careful. Don’t deny the time has begun to run and then seek an extension. Instead, hold to your position that the protocol has yet begun to run but make clear that you are investigating but are hindered by the lack of information or cooperation on the part of your opponent.

  iii. Bear in mind that the court does not look favourably on failures to comply with extensions. If you cannot comply with an extension explain why that is and seek another extension, ideally this will be done in plenty of time before the expiry of the extension.

Typical disclosure documents and the matters to be covered by lay evidence are set out below.

**Disclosure documents**

(From the claimant)

- Request disclosure of GP, hospital and occupational health records (including audiometric testing) and
- Inland Revenue employment schedule.
- Claimant’s full personnel file.
- Insured’s general health and safety policy on noise.
- Noise assessments/surveys.
- Steps taken to reduce noise exposure (engineering; changes to systems of work).
- Ear protection (type, make, when issued, training).
- Warnings and disciplinary procedures for enforcement of wearing of ear protection.
- Health and safety training/warning and instructions to employees regarding dangers of noise and how to protect hearing.
- Complaints.
- Health and safety meeting minutes dealing with noise awareness and hearing conservation policy.

**Lay evidence**

- Where there is a significant claims history, is there a risk control file which can assist?
- Is complete reinvestigation necessary?
- Obtain lay statements of evidence from health and safety officers/managers/supervisors/occupational
- health advisors and key employees.
- The lay evidence should deal with the claimant’s full work duties, all noise sources (levels, duration,
- frequency, proximity and periods of exposure), the insured’s awareness of noise and its hearing conservation policy.
- Please refer to Schedule of investigations at Appendix 4.
8. Expert evidence

Medical evidence

Audiometry

8.1 The ear is divided into three parts – the outer (external) ear, the middle ear, and the inner ear. The middle ear is an air filled cavity. Three tiny bones (ossicles) – the malleus, incus and stapes (also known as the hammer, anvil and stirrup) – link across this air-filled cavity. The inner ear includes the cochlea and semicircular canals.

8.2 Sound waves come into the outer (external) ear and hit the eardrum causing it to vibrate. The eardrum is attached to the ossicles which transmit the vibrations to the cochlea in the inner ear. The cochlea is a fluid filled ‘snail shell’ shaped structure, the inside of which is lined with thousands of tiny hairs. These hairs are the end of nerves which converge to form the auditory nerve. The sound vibrations pass through the fluid of the cochlea and over the hair cells exciting the auditory nerve which passes to the brain which converts the vibrations to sound signals, allowing us to hear.

8.3 There are two types of hearing loss. Sensori-neural loss which affects the inner ear and conductive loss which arises from problems in the sound conducting mechanisms in the outer and middle ears. NIHL is a form of sensori-neural loss. Excessive noise can damage the hair cells inside the cochlea.

8.4 Other causes of sensori-neural loss include:
- ‘ototoxic’ drugs, including certain antibiotics
- genetic damage
- German measles in pregnancy
- premature birth
- high cholesterol levels
- diabetes
- rheumatoid arthritis/MS
- heart disease
- trauma
- ageing (see Appendix 2).
8.5 Conductive loss can arise from:
- a perforated ear drum
- otosclerosis
- outer middle ear infections
- head injury.

Audiometry

8.6 The extent of hearing loss is assessed by audiometry and the results plotted on a graph called an audiogram.

![Figure 1: Normal hearing](image)

8.7 Normal hearing is shown by a relatively flat line with up to 20dB loss over all test frequencies. Regular noise exposure at 85dB(A) LEP,d and above is considered to be potentially injurious but not everyone exposed to noise develops NIHL. After 10 years of exposure to 85dB(A) for 40 hours per week about 15% of the population develop measurable NIHL.

8.8 NIHL is usually bilateral and characterised by high frequency hearing loss which usually occurs first at 4kHz and then progresses into adjacent frequencies. The loss at 4kHz progresses over the first 10 years and then tends to stabilise. NIHL is usually maximal at 4kHz and so there may be a characteristic dip or ‘notch’ usually at this frequency but which can alternatively occur at 3 or 6kHz – but notching is not unique to NIHL nor has it to be present for a diagnosis of NIHL to be made.

8.9 Although NIHL is maximal at between 3 and 6kHz it probably affects all frequencies between 1 and 8kHz given sufficient dose/duration of exposure. Once exposure to noise ceases the NIHL does not progress further.

![Figure 2: Noise-induced Hearing Loss](image)

8.10 Any low frequency loss below around 1kHz is generally not related to noise.
8.11 Age-related hearing loss starts from around age 20 and accelerates with age generally affecting all frequencies causing maximal losses above 6kHz.

8.12 Conductive hearing loss is demonstrated on the audiogram by an ‘air-bone gap’, i.e. loss arising from a defect in the sound conducting mechanism in outer/middle ear. See Figure 4 diagram below.

8.13 A diagnosis of NIHL may be relatively straightforward where there is a history of exposure to excessive noise, a typical audiometric notch between 3 and 6kHz and no complicating factors/diagnostic competitors.

8.14 In many cases diagnosis is far more difficult and the audiometric presence of NIHL may be obscured by age related hearing loss and/or other causes of hearing loss. Many experts now follow the Coles Guidelines in determining diagnosis. (Guidelines on the diagnosis of NIHL for medicolegal purposes see Clin. Otolaryngol, 2000, 25, 264-273, R Coles et al.)

Diagnosis of NIHL – The Coles Guidelines 2000

8.15 The majority of medico-legal experts in the UK now approve the use of what are commonly referred to as the ‘Coles Guidelines’ to determine diagnosis / causation in NIHL claims.

8.16 The Coles Guidelines were first judicially considered by HHJ Inglis in the ‘Nottingham Textile Litigation’. HHJ Inglis referred to these as ‘robust diagnostic criteria’.

8.17 HHJ Inglis’ findings on causation were approved by the CA (albeit his findings on breach were disturbed) and his judgement as a whole by the Supreme Court in Baker v Quantum Group and Others [2011] UKSC 17.

8.18 The Guidelines set 3 Main Requirements for a diagnosis of NIHL, summarised as follows:
3 Main Requirements

- **R1** - high frequency hearing impairment
- **R2** - potentially hazardous exposure to noise
- **R3** – high frequency audiometric notch/bulge

**Requirement 3 – calculating the audiometric bulge**

8.19 Appendix B in the Guidelines contains a worked example of how to calculate the audiometric bulge, the formula can be briefly summarised as follows:

<table>
<thead>
<tr>
<th></th>
<th>0.2kHz</th>
<th>0.5kHz</th>
<th>1kHz</th>
<th>2kHz</th>
<th>3kHz</th>
<th>4kHz</th>
<th>6kHz</th>
<th>8KHz</th>
</tr>
</thead>
<tbody>
<tr>
<td>a. HTL Measured on the claimant’s audiogram</td>
<td>•</td>
<td>•</td>
<td>•</td>
<td>•</td>
<td>•</td>
<td>•</td>
<td>•</td>
<td>•</td>
</tr>
<tr>
<td>b. HTL at selected Anchor points (commonly 1 and 8kHz)</td>
<td>•</td>
<td>•</td>
<td>•</td>
<td>•</td>
<td>•</td>
<td>•</td>
<td>•</td>
<td>•</td>
</tr>
<tr>
<td>c. Selected AAHL Statistic</td>
<td>•</td>
<td>•</td>
<td>•</td>
<td>•</td>
<td>•</td>
<td>•</td>
<td>•</td>
<td>•</td>
</tr>
<tr>
<td>d. Misfit values at anchor points (line b minus line c)</td>
<td>•</td>
<td>•</td>
<td>•</td>
<td>•</td>
<td>•</td>
<td>•</td>
<td>•</td>
<td>•</td>
</tr>
<tr>
<td>e. Interpolated misfit values</td>
<td>•</td>
<td>•</td>
<td>•</td>
<td>•</td>
<td>•</td>
<td>•</td>
<td>•</td>
<td>•</td>
</tr>
<tr>
<td>f. Adjusted AAHL values (line c plus lines d &amp; e)</td>
<td>•</td>
<td>•</td>
<td>•</td>
<td>•</td>
<td>•</td>
<td>•</td>
<td>•</td>
<td>•</td>
</tr>
<tr>
<td>g. Audiometric Bulge (line a minus line f)</td>
<td>•</td>
<td>•</td>
<td>•</td>
<td>•</td>
<td>•</td>
<td>•</td>
<td>•</td>
<td>•</td>
</tr>
</tbody>
</table>

8.20 You must subtract 6 dB from the measured HTL values at 6 kHz (♣) if the audiogram or medical report confirms TDH-39 headphones were used. This is to take account of the calibration artefact associated with use of those earphones.

**Comparison values of age associated loss – datasets**

8.21 One essential aspect of calculating the extent of a claimant’s NIHL is comparing their hearing thresholds against the national average of those not exposed to noise. The Coles Guidelines rely on the Modified International Standard ISO 7029 (1984) tables.

8.22 However Modifying Factor 2 (M2) allows you to compare the claimant’s loss against other datasets. Datasets commonly referred to by medicolegal experts are:

- ISO7029 1984 – Black Book Table A1
- Modified ISO7029 1984 – Tables 2 and 3 in the Coles Guidelines
29

- ISO 1999:1990
- MRC Data - these statistics show more objectively representative thresholds than ISO7029, which artificially excluded people with normal hearing problems from the dataset. As a result some medical experts accept that ISO7029 generally overestimates NIHL.

Modifying factors

8.23 Upon meeting these above three Requirements, diagnosis is either strengthened or weakened according to how 4 Modifying Factors apply to the claimant:

- M1 – Clinical Picture
- M2 – Compatibility with age / noise exposure
- M3 – Robinsons Criteria - the criteria relates to the degree of conformity of the measured audiometric configuration with the Burns & Robinsons model of NIHL, the degree of left/right asymmetry both in amount of hearing impairment and in audiometric configuration, and the calculated degree of noise susceptibility.
- M4 – Complicated Cases

Complicated cases

8.24 Asymmetrical loss - Air conduction thresholds which differ by > 10dB between the ears particularly in the higher frequencies signify asymmetry, which is not typical of NIHL.

8.25 If there is a high frequency bulge present in the better ear, but little or none in the worse ear, then there is still a more-likely than-not probability of NIHL. However if only the worse ear shows a significant notch or bulge, and there is little or no trace of NIHL in the better ear, then there is only a possibility of NIHL, not a probability.

8.26 The BSA guidelines for the calculation of the better ear, takes the readings at 250Hz, 500Hz, 1kHz, 2kHz and 4kHz. If the ears are “matched” at the lower frequencies, then the higher frequencies 6kHz and 8kHz are also considered.

8.27 Conductive Hearing Loss - This is likely to affect the assessment of effective noise damage and/or estimation of the amount of sensorineural hearing loss

8.28 Averaging two audiograms – Note 3 of the Guidelines allows you average two, several or many hearing threshold measurements in different audiograms and the ‘at least 10 dB or greater’ audiometric bulge guideline may be reduced slightly, by up to about 3dB. Experts differ on how close in time or how similar in pattern the audiograms to be averaged have to be.

8.29 Changing Anchor Points – Note 10 of the Guidelines allows you change certain anchor points subject to the HTL of 1 and 8Khz against their neighboring frequencies. You can change the lower anchor point to 0.5 or 2kHz if one of these frequencies is at least 5dB better than 1kHz. You can also change the upper anchor point from 8 to 6Khz if there is a precipitous fall off.

Non-Organic Hearing loss

8.30 Non organic hearing loss (NOHL) is used to describe conditions where audiological tests give rise to doubt regarding the presence of an organic hearing loss. NOHL may be a form of psychogenic hearing loss or arise from deliberate feigning.
Various studies have shown the incidence of NOHL (exaggerated or feigned) in NIHL claims as ranging between 9% - 30%.

There are a number of ‘indicators’ of NOHL:

- where the thresholds at 500Hz are 25dB or greater - in one or both ears;
- where the thresholds at 500Hz are outside a range of 'normal hearing' in those not exposed to noise;
- where there is significant asymmetry between the ears;
- where there is less than 10 years overall exposure to noise (such loss less likely to give rise to measurable NIHL).

The single and best indicator for NOHL is probably the hearing thresholds levels at 500 Hz being 25dB+ and outside the range of 'normal hearing'.

Identifying indicators of NOHL will be particularly relevant in those cases where there is a minimal hearing loss at the high frequencies (less than 10dB) and / or short durations of noise exposure (less than 10 years). These simple ‘filters’ can be used to identify those cases where a further audiogram should be obtained as a matter of course.

Repeat audiometry

Audiometry is not a precise science and HHJ Inglis in Notts Textile stated that: “Audiograms are taken in steps of 5dB at each frequency... variation may reasonably be averaged if the difference is not more than 10dB”. The ‘Black Book’ also confirms variability within the same test (intra-test variability) may be within +/-10 dB.

If you have any doubt as to the reliability of the claimant’s audiogram, it is recommended to obtain a repeat independent audiogram. This is the most cost effective and swiftest way of narrowing down issues on causation.

Where an objective assessment of the extent of hearing loss is required, then Cortical Evoked Response Audiometry (CERA) should be considered.

Appendix 6 is an example letter you can use to support arguments for a repeat audiogram

The Disease and Illness Protocol is less prescriptive regarding use of experts. Single/joint instruction may not be appropriate. Once the claimant’s medical evidence is available and investigations complete, then consider whether your own medical evidence is required or whether written questions can be put to the claimant’s expert. Paragraph 9.4 of the Protocol states, “There will be very many occasions where the claimant will need to obtain a medical report before writing the letter of claim. In such cases the defendant will be entitled to obtain their own medical report”.

The medical expert should consider not only issues of diagnosis and causation but also apportionment.

Quantifying NIHL
8.41 The traditionally used method of assessing disability is to use the frequencies 1, 2 and 3kHz. HHJ Inglis refers to the DSS formula to assess an individual’s NIHL component, summarised as follows:

\[
\text{Overall Hearing Loss} = \frac{\text{x4 better ear averaged over 1, 2 & 3kHz} + \text{x1 worse ear averaged over 1, 2 & 3kHz}}{\text{Total overall hearing loss} \div 5} = \text{Overall Hearing Loss (impairment)}
\]

8.42 Any alternative method of diagnosing and quantifying the level of NIHL will still need to be tested rigorously by the courts.

LCB Guidelines 2015

8.43 Despite the original guidelines playing such a crucial role in helping to diagnose noise-induced hearing loss, they did have a major shortcoming which was the fact that they did not present a method for quantification of NIHL. The new ‘Guidelines for quantification of noise-induced hearing loss in a medicolegal context’ look to overcome that problem.

Why are the new guidelines necessary?

8.44 To date, there has been no generally accepted method of quantifying the noise-induced and age-related elements of an overall loss in a claimant. Several different methods have been utilised and have become a feature of cases coming before the courts.

8.45 Since the original CLB 2000 guidelines, questions for practitioners have included:
- Should the frequencies 1, 2 and 3 kHz or 1, 2 and 4 kHz be utilised;
- Which dataset should be used as a baseline for age-related loss, ISO 7029, its modified version or data from the MRC National Study of Hearing;
- With whom should the claimant be compared - someone on the median for his age or to the best fit percentile.
8.46 All of these issues lead to uncertainty when dealing with claims of noise induced hearing loss. The new LCB guidelines look to cut through that confusion and propose a method that can be used in the vast majority of claims.

8.47 The rationale behind the guidelines is an assumption, based on published research, that the thresholds of the common ‘anchor points’ of 1 kHz and 8 kHz are affected by noise to some extent and these guidelines offer a method to estimate the degree to which those frequencies are affected in order to give a more accurate picture of a claimant’s hearing thresholds.

How do the new guidelines work?

8.48 Under the new guidelines it will be a requirement that a bulge calculation is carried out on all audiograms as per the original CLB Guidelines. Previously this was not necessary in audiograms that demonstrated a notch at the higher frequencies. An audiogram which fulfils the bulge criteria qualifies under what is referred to as ‘Pass One’ and if the audiogram fails to pass this then it is not necessary to continue with what is known as ‘Pass Two.’

8.49 Pass Two then quantifies NIHL recognising that the anchor points contain a degree of NIHL and fit a modified AAHL contour. This is likely to be required in most cases as well as the full method.

Quantifying NIHL – LCB 2015

8.50 The 2015 Guidelines are Lutman, Coles and Buffin’s extension to the 2000 Diagnosis Guidelines. They were Published in October 2015 and Peer Reviewed on 16 February 2016 these clarify the Logarithmic Method more appropriate when calculating interpolated misfit values.

The Short Cut Method

8.51 This is suitable when you want a quick calculation and the aim is restricted to quantifying NIHL by conventional 1-2-3-kHz average.

8.52 The method used is the average of Pass One (aka R3) bulge row values at 1, 2 and 3 kHz (after setting any negative values to zero)

The Full Method

8.53 It’s good practice to use this method all the time and it’s recommended to use when there’s a deep notch at 4kHz or where maximum NIHL is at 3kHz. This is also recommended where 4 and/or 6kHz are affected.

Method: Pass One:

a. R3 calculation (do this even if there is a qualifying notch rather than bulge).

Method Pass Two:

b. estimating a more accurate AAHL by modifying the anchor points;
c. average of bulge row values at 1, 2 and 3 kHz (after setting any negative values to zero).

**LCB Guidelines 2015: Formula Summary**

**Pass 1:** (aka R3 Bulge analysis (CLB 2000))

<table>
<thead>
<tr>
<th>Pass 1</th>
<th>0.2kHz</th>
<th>0.5kHz</th>
<th>1kHz</th>
<th>2kHz</th>
<th>3kHz</th>
<th>4kHz</th>
<th>6kHz</th>
<th>8kHz</th>
</tr>
</thead>
<tbody>
<tr>
<td>a</td>
<td>C's HTL</td>
<td>X</td>
<td>X</td>
<td>X</td>
<td>X</td>
<td>X</td>
<td>X</td>
<td>X</td>
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<tr>
<td>b</td>
<td>A.Point</td>
<td>●</td>
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<tr>
<td>c</td>
<td>AAHL statistic</td>
<td>X</td>
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<td>X</td>
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<td>d</td>
<td>Misfit (b - c)</td>
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<td>f</td>
<td>Adjusted AAHL (c + d + e)</td>
<td>X</td>
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<td>X</td>
<td>X</td>
<td>X</td>
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<td>g</td>
<td>Bulge (a - f)</td>
<td>X</td>
<td>X</td>
<td>X</td>
<td>♥</td>
<td>X</td>
<td>X</td>
<td></td>
</tr>
</tbody>
</table>

**Pass 2:** Quantifying NIHL

Modify anchor points (C’s Actual HTL) @ Pass One using formula)

\[1kHz = ● - (\heartsuit \times 0.15) = \Omega\]

\[8kHz = \Diamond - (\heartsuit \times 0.4) = \spadesuit\]

<table>
<thead>
<tr>
<th>Pass 2</th>
<th>0.2kHz</th>
<th>0.5kHz</th>
<th>1kHz</th>
<th>2kHz</th>
<th>3kHz</th>
<th>4kHz</th>
<th>6kHz</th>
<th>8kHz</th>
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<tbody>
<tr>
<td>a</td>
<td>C's HTL</td>
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<td>X</td>
<td>X</td>
<td>X</td>
<td>X</td>
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<td>b</td>
<td>Modified A. Point</td>
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<td>c</td>
<td>AAHL statistic</td>
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<td>Misfit (b - c)</td>
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<td>Modified A'd AAHL (c + d + e)</td>
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<td>X</td>
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<td>g</td>
<td>Modified Bulge (a - f)</td>
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<td>X</td>
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</tbody>
</table>

**NIHL:** Calculate C’s NIHL over 1, 2 & 3kHz using ♦ results @ Pass 2

\[x4 \text{ better ear + worse ear } = \text{ summed NIHL } ÷ 5 = \text{ NIHL}\]

**De Minimis loss**

8.54 Many cases can be defended on the basis that the claimant’s excess hearing loss is so limited that it presents no appreciable worsening to the claimant in terms of their ability to hear.

8.55 De minimis is the shorthand version of the principle “*de minimis non curat lex*” which means ‘the law does not concern itself with trivial matters’. This is a principle which pervades the legal system and seeks to avoid the waste of time and resources on matters which are so trivial as to be unimportant. The question of what is considered trivial in the context of noise induced hearing loss claims is not clear cut. There have been several first instance cases which have sought to address what is an actionable level of hearing loss. Those cases were decided as follows:

- A principle which was expounded in both *Hughes v Rhondda Cynon Taff* and *Holloway v Tynes Thames Technology (2015)* was that disability should only be measured over 1, 2 and 3kHz. In
Professor Homer stated the Claimant had either a 6 dB (binaural 1, 2, 3 kHz average) or 9 dB (binaural 1, 2, 4 kHz average) noise loss, by using statistics for age 60 from the Modified ISO 7029 (1984) tables. Professor Lutman was of the opinion that the noise loss was 1.3 dB (binaural 1, 2, 3 kHz average) using age 70 (the Claimant was aged 68 yrs 5 months at time of examination) and did not consider this loss to be significant or have a material impact on the Claimant. If Professor Lutman’s approach was preferred, Professor Homer agreed the Claimant’s loss over 1, 2, 3 kHz would not be noticeably different over those frequencies. HHJ Freedman was persuaded by Professor Lutman’s evidence on this point. In his judgment the circuit judge also stated he was not satisfied that even a noise loss of 3 dB was an appreciable loss. In Hughes the court found that the 11 decibel hearing loss in the claimant’s right ear and the 16 decibel loss in his left ear at a frequency of 4 kHz, represented no more than minimal loss and did not constitute an appreciable injury. In Holloway it was therefore the defendant’s expert evidence of Mr P H Jones that was favoured over the claimant’s evidence (from Mr Alun Tomkinson).

- **Moorhouse v Continental Sports Ltd** (Middlesbrough County Court, July 2014). The evidence of the claimant’s medical expert, Mr Webber, was accepted by the Court; that being, based on the notch at 4kHz there was a high probability of NIHL although no more than 5dB. The defendant did not have permission for its own expert evidence. The court found for the claimant.

- **Hinchcliffe v Six Continents and Cadbury Ltd** (Leeds County Court, April 2015). The court dismissed the claim as causation was not made out, having made comments in obiter in respect of de minimis. In this case there was only a 1.7dB loss over 1, 2 and 3kHz in the better right but a loss at 4kHz of between 10-15dB. While the claimant was unable to prove causation (due to earlier audiometric evidence), His Honour Judge Gosnell indicated that he would not have found this to be de minimis and as such favoured Mr Zeitoun’s evidence (instructed by the claimant) over Mr P H Jones’ evidence (instructed by the defendant).

- **Lomas v London Electric Wire Company & Smiths** (Manchester County Court, June 2015). The evidence accepted by the court was that the claimant had 3dB hearing loss over 1, 2 and 3kHz. In this case Mr Lloyd reported for the claimant and Professor Lutman for the defendant. The comments made by Recorder Hinchcliffe QC were that a 3dB diminution in hearing is so small that it would make no material difference to him. However, as the claimant was also suffering with tinnitus which was found to be attributable to the claimant’s noise exposure (and awarded £3,000 for PSLA for the tinnitus alone).

- **Briggs v RHM Frozen Food Ltd** (Sheffield County Court, July 2015). Professor Homer was instructed as the medical expert on behalf of the claimant. The defendant obtained permission to rely on evidence from Mr P H Jones. Professor Homer agreed that the claimant’s hearing loss over 1, 2 and 3kHz was only age induced loss but contended that there was a 15dB loss at 4kHz which was due to noise. He considered this was significant and correlate with the hearing difficulties the claimant described. Mr Jones for the defendant did not agree that a 15dB loss at 4kHz would result in a significant disability and suggested that a loss of a few decibels at 4kHz is of no great importance particularly with good hearing at 3kHz. However, Mr Jones conceded that the claimant’s ability to hear speech in noise is affected by hearing loss at 3 and 4kHz and that a more detailed analysis of hearing disability would be entering into the realm of sensory
psychology. His Honour Judge Coe QC ultimately preferred the evidence of Professor Homer and made a judgment for the claimant in the sum of £2,000.

- **Roberts v Prysmian Cables and Systems Ltd** (October 2015 Wrexham Country Court). In that case the Claimant did not establish that the level of hearing loss at 1, 2 and 3kHz was either perceptible or functionally significant. However, the trial judge accepted the claimant’s expert medical evidence of Mr Tomkinson (he was the only expert before the court and had not been called for cross-examination) that the presence of noise induced hearing loss at 4 and 6kHz was likely to contribute to hearing difficulties in the presence of background noise.

- **Childs v Brass & Allot Pressings (Detritend) Ltd** (Birmingham County Court, December 2015). The claimant relied on the expert evidence of Mr Manjaly, who, in his report, concluded that the claimant’s average hearing loss over 1, 2 and 3kHz was 15.32dB, with 13.3dB of that loss attributable to the ageing process and therefore concluded that the element of noise induced hearing loss was in the order of 2.02dB. He also considered later in his report that the claimant had a noise induced hearing loss of a moderate severity. The claimant did not complain of tinnitus. Mr Manjaly’s evidence was essentially unchallenged by the defendant. For reasons which are not clear from the judgment (i) no part 35 questions had been raised of Mr Manjaly by the defendant (ii) there appears to be no request for the defendant to obtain its own expert evidence nor (iii) any request by the defendant to call Mr Manjaly to court for the purpose of cross-examination. It is not surprising therefore that District Judge Emma Kelly probably found her hands tied. Whilst she accepted arguments raised by the defendant that Mr Manjaly had erred in his use of the word ‘moderate’, she did accept that the claimant was appreciably worse off, given the (unchallenged) evidence of Mr Manjaly that the claimant’s need for aiding had been advanced by five years. In failing to adduce its own evidence or ask questions, the defendant was not able to provide the Judge with any evidence in order for her to properly reject Mr Manjaly’s conclusions. The Court therefore did not accept the defendant’s *de minimis* arguments and awarded a figure of £4,000 for general damages on a gross basis.

**Expert acoustic evidence**

8.56 Where a breach of duty is in issue then a report from an acoustic expert may be required to determine the claimant’s daily noise dose and assist on apportionment issues.

8.57 For less complex cases where there is disclosure and lay evidence available to determine sources, level and duration of exposures, a simple way to calculate the employee’s noise dose is to use the HSE nomogram at Appendix 3.

8.58 Generic information on likely noise levels in key industry sectors is widely available, and the HSE website contains some useful material. This information can be used to take an early view on whether the employee’s daily noise dose is likely to have reached/exceeded the relevant threshold(s) in place at the time. This is particularly important where expert acoustic (engineering) evidence may be of limited benefit, for example, where the premises no longer exist and only limited investigations will be possible.
8.59 An early assessment of likely daily noise dose, with reference to relevant generic information, will be particularly important in cases where causation is likely to be established and the decision is whether to settle the claim at the pre-litigation stage or look to defend the claim on breach or limitation, particularly if QOCS applies.

8.60 Some examples of typical noise levels are shown in the diagram below. It shows, for example, that a quiet office may range from 40-50 dB, while a road drill can produce 100-110 dB.

8.61 Detailed information on the likely noise levels in particular industries is set out in Appendix 5.
9. QOCS

9.1 Civil Procedure Rules Part 44.13 CPR introduced a new costs regime in matters involving personal injury and fatal accidents called Qualified One-way Costs Shifting (“QOCS”).

9.2 QOCS applies to claims for:

- Damages for personal injury;
- Damages pursuant to the Fatal Accidents Act 1976;
- Damages arising out of death or personal injury which survive for the benefit of an estate by virtue of section 1(1) of the Law Reform (Miscellaneous Provisions) Act 1934.

9.3 QOCS does not apply to:

- Claims with funding arrangements entered into before 1 April 2013 (CPR 44.17). This will be the date of the CFA agreement, or work undertaken upon the claim under a CCFA agreement, or the taking out of an ATE insurance policy (as defined in CPR 48.2);
- Claims which do not involve a claim for Personal Injury;
- Pre-action disclosure applications;
- Part 20 additional claims between Defendants (Wagenaar v Weekend Travel Ltd t/a Ski Weekend [2014] EWCA Civ 1105). Whilst QOCS may apply in respect of the claimant’s claim, it will not apply to a claim against another party for an indemnity or contribution to the claim, as that will not be a claim for personal injury. As a result, care must be taken when deciding to join other parties into an action. The main claim may fail, as here, with the claimant enjoying costs protection, but the defendant having to pay the costs of the third party defendant.

9.4 If QOCS applies, whilst costs orders may be obtained against a claimant, the order may not be enforced against the claimant aside from by way of offset against any damages and interest ordered payable to the claimant, unless the qualifications set out in CPR 44.15 & 44.16 apply.

9.5 Impacts on reserves and strategy from the outset.

9.6 Check whether funding post-dates LASPO: Conditional Fee Agreement (CFA) was entered into after 1 April 2013

9.7 If the funding postdates LASPO we cannot recover costs even if we successfully defend to trial apart from in a narrow set of circumstances.

9.8 Consider potential for trial claims/whether generic information gathered assists in making an early decision on breach. Is this a claim to settle at an early stage, bearing in mind lack of potential costs recovery if successfully defended.
The claimant can lose QOCS protection for a number of reasons. Under CPR 44.15, orders for costs made against the claimant may be enforced to the full extent of such orders without the permission of the court where the proceedings have been struck out on the grounds that:

(a) The claimant has disclosed no reasonable grounds for bringing the proceedings;

In Wall v British Canoe Union [2015], the court struck out a claim under the Fatal Accidents Act for no reasonable cause of action, and ordered the claimant to pay the defendant’s costs, with a finding that QOCS did not apply. The claimant’s husband was killed in a weir whilst canoeing. An action was brought claiming that the defendant was negligent in that a published guide gave a recommended route down the weir, whereas earlier guides had recommended carrying canoes around it. The defendant successfully applied to strike out the claim and obtain summary judgment on the grounds that there was no duty of care in law and no reasonably arguable claim on causation.

(b) the proceedings are an abuse of the court’s process;

In Kite v The Phoenix Pub Group [2015], the claimant issued proceedings for injuries suffered from a fall in the car park of a pub. The defendant denied that it owned the pub at the relevant time. However, the claimant served proceedings at the pub’s address, and, after receiving no reply, entered default judgment. The defendant successfully applied to set aside default judgment. An application to strike out the claim on the basis there were no reasonable grounds was adjourned to allow the claimant time to prepare for it. Before the hearing, the claimant discontinued to prevent the claim being struck out, which would have meant that QOCS was disapplied. The court allowed the defendant’s application to set aside the notice of discontinuance and struck out the claim, entitling the defendant to costs without the application of QOCS. The judge noted it would not be in the interests of justice to allow the claimant to benefit from their opportunistic conduct. Claimants could not be encouraged to pursue poor claims, suffer costs orders, and then avoid them by discontinuing once it became clear that the case would be struck out.

(c) the conduct of the claimant, or a person acting on the claimant’s behalf and with the claimant’s knowledge of such conduct, is likely to obstruct the just disposal of the proceedings.

The BLM case of Brahiika v Allianz Insurance Plc [2015] was the first case on the CPR 44.15(c) exception. The claimant failed to attend a trial of an RTA claim that the defendant argued was fraudulent. His claim was struck out and the defendant was granted costs. It was ordered that QOCS should not apply. The failure to attend trial was "conduct likely to obstruct the just disposal of the proceedings". Just disposal meant being able to dispose of the proceedings in a way which was fair to all parties. That included enabling the defendant to test the claimant’s evidence to see if it was possible to establish a case on fundamental dishonesty. This is an important decision in cases where a defendant wishes to put a claimant to proof and is not given the opportunity to test the claimant’s evidence at trial.

Under CPR 44.16, orders for costs made against the claimant may be enforced to the full extent of such orders with the permission of the court where:

a) the claim is found on the balance of probabilities to be fundamentally dishonest. This issue will be covered in more detail in this paper under the section on Fundamental Dishonesty.
b) to the extent that the court considers it just, where the proceedings include a claim which is made for the financial benefit of a person other than the claimant or a dependant within the meaning of section 1(3) of the Fatal Accidents Act 1976 (other than a claim in respect of the gratuitous provision of care, earnings paid by an employer or medical expenses); or a claim is made for the benefit of the claimant other than a claim to which this section applies. Where this exception applies, the court may, subject to rule 46.2, make an order for costs against a person, other than the claimant, for whose financial benefit the whole or part of the claim was made.

9.11 In the first instance decision of James v. Diamanttek (2016) the principle of fundamental dishonesty was applied in a claim for NIHL where the claimant denied the provision of hearing protection but later changed his evidence under cross examination to state that hearing protect was provided. The useful point in that case was the issue on provision of hearing protection; in the claimant’s pleaded case he denied the provision of hearing protect and that he was ever trained on the use of the hearing protection. At trial under cross examination the claimant confirmed he had been provided with hearing protection he claimed to have used. The just found that the claimant had told an untruth about a matter which was fundamental to his case. As such the claimant lost both his case and the protection of QOCs and was required to pay the defendant’s costs.

Other important case law on QOCS:

9.12 The following are useful cases to consider in the context of noise claims where QOCS applies:

- **Casseldine v The Diocese of Llandaff Board for Social Responsibility [2015]**

  A claimant was protected from paying the defendant's costs by QOCS despite having entered into a pre-1 April 2013 CFA. That CFA had been terminated by her first solicitors on 30 January 2013, before proceedings had been issued, and the claimant entered into a second CFA with her new solicitors in August 2013. Proceedings were issued in December 2013 and her personal injury claim was dismissed in December 2014. The defendant argued that, as the claimant had entered into a pre-commencement funding arrangement the QOCS regime did not apply therefore, the claimant should pay the defendant’s costs of the claim.

  It was found that “proceedings” had not been commenced under the first CFA and, since the solicitors terminated it, they were never entitled to payment of any success fee or costs. As the claimant only issued proceedings under the second CFA, which was entered into after 1 April 2013, the court was never in a position to order the defendant to pay the claimant’s additional liabilities (given the removal of recoverability of success fees in CFAs entered into from 1 April 2013). The purpose of the rules was to achieve a quid pro quo, so that QOCS protection only applied after 1 April 2013 when the defendant was no longer faced with any additional liability. It was held that there was no pre-commencement funding arrangement and the claimant was protected by QOCS.

  This is not a helpful decision (though it is important to know about it), but was not appealed due to the claimant having no funds or ATE insurance. It is only a county court level decision and a robust approach should be taken to any similar situation.

- **Price v Egbert H Taylor & Company Ltd [2016]**

  The claimant was unsuccessful in an appeal for an extension of time to serve its proceedings in a personal injury claim. The claimant contended that QOCS applied as there was in fact no pre-1
April 2013 CFA agreement. However, the claimant’s solicitors had mistakenly stated that there was a CFA agreement within the letter of claim. The court held that the defendant’s reliance on the representation estopped the claimant from asserting that QOCS applied.

**Parker v Butler [2016] EWHC 1251 (QB)**

The court considered the application of the QOCS regime to appeals. It was held that any appeal concerned with the outcome of a personal injuries damages claim (or the procedure determining it) is part of the “proceedings” for the purposes of CPR 44.13. Therefore, it will be subject to QOCS which limits a claimant’s adverse costs risk to the value of sums recovered by way of damages, save in limited circumstances.

**Howe v Motor Insurers’ Bureau [2016] EWHC 884 (QB)**

The claimant’s claim for damages for personal injury failed owing to limitation and he was ordered to pay 85% of the defendant’s costs. The central point for the judge to consider was the wording of CPR 44.13(1):

> 44.13
> (1) **This Section applies to proceedings which include a claim for damages** –
> (a) **for personal injuries,“**

MIB argued that the claim brought against it by the claimant was not a claim for damages for personal injury but rather a civil debt recoverable by statute and therefore MIB’s liability did not come within the QOCS provisions. It was held that the matter was one of construction. The claimant’s claim against the MIB was not one for damages for personal injuries. The claimant did not therefore have protection under the QOCS regime and orders for costs made against him could be enforced in the usual way.

It is understood that the case is being appealed. The decision has potential ramifications in terms of other direct actions against insurers and potentially opens up a risk of adverse unintended consequences, but those issues are beyond the scope of this paper.

**Fundamental Dishonesty**

9.13 Section 57 of the Criminal Justice and Courts Act 2015 applies to personal injury claims, allowing a judge to strike out a claim where the claimant, is found on the balance of probabilities, to have been fundamentally dishonest. This will apply in every instance unless the claimant would be seen to suffer “substantial injustice” as a result of a claim being struck out.

9.14 The Act came into force on 13 April 2015 and applies to all claims issued from this date onwards. In order to have a finding under section 57 of the Act there needs to be the following:-

i. an application by the defendant;
ii. a finding on the balance of probabilities that the claimant was fundamentally dishonest;
iii. a determination that dismissal would not result in substantial injustice, since this will inevitably be raised by the claimant;
iv. a recording as to the amount of damages the claimant would otherwise have received.

9.15 This application is determined on an all or nothing basis and to date there have been few examples of litigation specifically concerning section 57 in comparison to where fundamental dishonesty has been considered under CPR 44.16 in relation to exceptions to QOCS.
Section 57 CJCA vs CPR 44.16

9.16 The differences between section 57 of the Criminal Justice and Courts Act 2015 and CPR 44.16 are:

Section 57

- The court must find the “claimant” to be fundamentally dishonest.
- The court assesses the claimant’s genuine damages and deducts that figure from the claimant’s costs.
- The claimant would be entitled to damages in respect of the claim if they were not found fundamentally dishonest.

CPR 44.16

- The “claim” (not the “claimant”) must be found fundamentally dishonest.
- The defendant is permitted to recover all of its costs, not just the balance following the claimant’s damage being deducted from the costs claimed.
- There is no requirement for the claimant to be entitled to damages in respect of the claim if they were not found fundamentally dishonest.

Other avenues to pursue – strike out for abuse of process

9.17 Regardless of the liability position, and where the evidence is sufficiently compelling an application can be made at any time to strike out a claimant’s claim for abuse of process under CPR 3.4(2)(b).

9.18 The timing and content of any application will depend on the evidence and it may not be until disclosure and/or exchange of witness evidence has occurred that the decision to make the application can be made.

9.19 The application must be made on notice, with witness evidence in support from the solicitor with conduct of the case along with any other relevant person, if appropriate. Also reference must be made to documentary evidence which sets out the exaggeration/abuse, such as the medical reports, witness evidence, DWP records and surveillance evidence.

9.20 For example, in the case of Victoria Admans v Two Saints Limited (2016) the defendant applied to strike out the claimant’s statement of case prior to trial as an abuse of process pursuant to CPR 3.4(2)(b) on the ground of fundamental dishonesty. In particular, the defendant submitted that the claim had been fundamentally advanced on the basis that the injury was a serious one with lasting effects but there were significant inconsistencies with the claimant’s evidence compared to the history provided to the medical experts. Also in this case the defendant’s medical experts had concluded, following a review of the surveillance evidence, that the claimant had deliberately exaggerated her disability.

9.21 It should be noted that Admans v Two Saints Limited was issued prior to the coming into force of section 57 of the Criminal Justice and Courts Act 2015. However, it shows that an application pursuant to CPR 3.4(2)(b) for abuse of process can be made on the grounds of fundamental dishonesty prior to trial. In comparison, allegations of fundamental dishonesty under section 57 should be made at the earliest possible stage, ideally when serving and filing the defence, although an application to strike out the claim would not be made until the case is heard at trial. As a result, there could potentially be greater costs implications for unsuccessful defendants who lose at trial in
comparison with unsuccessful defendants who make an earlier application for abuse of process on
the grounds of fundamental dishonesty.

9.22 However, there appears to be a higher burden on defendants’ seeking to strike out a claim for
abuse of process at an earlier stage in proceedings because if allowed the claimant will be
prevented from continuing their claim and having it heard at trial. As a result, in cases where the
defendant alleges abuse of process on the grounds of fundamental dishonesty, the abuse must be
so serious that it would be an affront to the court to permit the claimant to continue with their claim
enabling it to be struck out in order to prevent the further waste of the courts valuable resources.

Part 36

9.23 A claimant who refuses a defendant’s Part 36 offer but fails to do better at trial is at risk of payment
of the defendant’s costs from the end of the relevant offer period. However, the claimant’s liability
for the defendant’s costs in these circumstances in a case subject to QOCS is capped at the level of
damages and interest recovered by the claimant.

9.24 E.g. The defendant offers £20,000. The claimant rejects the offer and at trial, is awarded £19,000
damages. The defendant’s costs between expiry of offer and trial are £10,000. That £10,000 is
offset against the damages and the claimant gets the reduced sum of £9,000.

9.25 We are also of the view (there is not an authority as yet) that common law set off of costs apply as
well. If in the above example, the defendant’s costs were £25,000, but the claimant’s costs were say
£6,000 before the offer, £19,000 defendant costs could be used to extinguish the damages, with the
remaining defendant costs of £6,000 used to extinguish the claimant’s costs as well.

Interim applications.

9.26 On interim applications, our costs can be offset against claimant damages. E.g. if the case is worth
£2,000 and we get interim application costs of £2,000, the claim is then essentially worthless to the
claimant.
10. Making a decision

10.1 Having considered the employer’s duties (whether under statute or common law negligence), the evidence (both documentary and lay witness) of the defendant’s practices, plus any medical/ liability evidence it’s time for you to decide on the defendant’s prospects of defending breach of duty, alleging contributory negligence and/or denying medical causation. Bear in mind the following questions:

- Is the case one to be dealt with as a short tail or long-tail case and are the insurers involved signatories to the IDCWP? Is the insurance position resolved?
- Are there any other insurers who need to be notified of the claim? They will need to be notified before you can enter into any settlement discussions.
- Does the claim need to be registered with the CRU and, if so, do you have an up to date certificate?
- Is limitation an issue and does it need to be taken as a preliminary point before settlement is considered?
- Do you have all of the disclosure and lay evidence you need? If not what’s missing?
- Did the claimant’s daily noise dose exceed the ‘negligent threshold’ of 90dB(A), LEP,d between 1 January 1963 and 1 January 1990?
- Is there a potential defence on foreseeability for early exposures?
- Did exposure exceed the ‘action levels’ under the NWR 1989/2005 thereafter? If so, what duties of care did the insured owe?
- Is there a breach? It goes without saying that if there is not you will need to resist, and if pursued, defend the claim.
- Is medical evidence required?
- Have medical records been obtained?
- Are there other potential causes of hearing loss?
- If there is insufficient evidence of NIHL and/or tinnitus you will likely have to defend the claim.
- If NIHL is confirmed, was the insured’s breach causative? If not, defend the claim.
- Are there issues of apportionment?
- Does there need to be co-ordination with other employers? Are there ‘tail claims’ which need to be considered?
- Assess any schedule of loss and request documentation and evidence in support. Does the medical expert need to consider and comment on the schedule and claims for loss of earnings, medication, care, disability on open labour market and capability for work generally?
- Will you repudiate or settle the claim.

10.2 If there is no basis on which to defend the claim and you have carried out a valuation of the likely general and special damages consider your strategy to settle the claim.
10.3 Make sure, if you intend to make a Part 36 offer, that your offer complies with the rules in Part 36.

10.4 Is your offer gross or net of CRU?

**Appendix 1 - The legal framework of noise claims**

As a result of millions of workers being exposed to harmful levels of noise, resulting in the deafening of a large part of the population, several pieces of legislation have been introduced over the years to reduce the harm caused by employers.

The Factories Act 1961 “FA” came into force on 01 April 1962; it was introduced to consolidate the Factories Acts 1937 to 1959 and certain other enactments relating to the safety, health and welfare of employed persons. For the purpose of noise claims the relevant provision of FA is s. 29. While this does not expressly address the issue of noise, it is widely accepted that as noise has the potential to be harmful it can be said that the presence of noise can make a workplace unsafe. It must be noted that it is sufficient for an employer to show that it was not ‘reasonably practicable’ to eliminate any risk. Section 29 remains in force.

In 1972 the Industrial Health Advisory Committee published a document called Code of Practice for reducing the exposure of employed persons to noise. This document formed the basis of the framework which employers were encouraged to adhere to in order to protect the hearing of their employees.

In 1982 the Council of the European Union made a Directive titled “PROPOSAL FOR A COUNCIL DIRECTIVE ON THE PROTECTION OF WORKERS FROM THE RISKS RELATED TO EXPOSURE TO CHEMICAL, PHYSICAL AND BIOLOGICAL AGENTS AT WORK: NOISE 86/188/EEC (OJ No. L137, 24.5.86, p.28)” requiring the member states of the EU to implement legislation to protect the hearing of employees at work. This Directive spawned the Noise at Work Regulations 1989 “NaW”. These regulations came into force on 01 January 1990 and introduced a number of mandatory requirements that employers comply with in order to protect the hearing of employees. The key provision of these regulations were for employers to generally reduce the noise which employees were exposed to; those employers who expose employees to noise levels of 85 dB(A) which is referred to as ‘the first action level’ were required to identify the employees, warn the employee of the risks of noise and provide them with hearing protection on the employee’s request. Those employers who expose employees to noise levels of 90 dB(A) which is referred to as ‘the second or peak action level’ were required to reduce the level of noise and provide hearing protection to its employees and make the wearing of the hearing protection mandatory.

Control of Noise at Work Regulations 2005 “CoNaW” came into force on 06 April 2006 and repealed the 1989 regulations. CoNaW altered the action levels both by 5 dB(A), so that the first action level is 80dB(A) and the second is 85dB(A), it also introduced of a new ‘Exposure Limit Value’ of 87dB(A), with the effect that employers may not expose their employees to noise levels higher that that figure even with hearing protection.

The Legal Aid, Sentencing and Punishment of Offenders Act 2012 altered the fundamental principles of costs in litigation, removing the recovery of success fees in conditional fee agreements, Coupled with the Civil Procedure (Amendment) Rules 2013 [SI 2013/262] which implemented the rule for qualified one-way costs shifting QOCS. If QOCS applies then a costs order against a Claimant can only be enforced by a Defendant if the total does not exceed the amount of damages which a Defendant has to pay out.
However, costs against a claimant can be enforced in full without the Court’s permission if the claim was struck-out because:

(a) the claim disclosed no reasonable grounds for bringing the proceedings;
(b) the proceedings are/were an abuse of the court’s process; or
(c) the conduct of –
   (i) the claimant; or
   (ii) a person acting on the claimant’s behalf and with the claimant’s knowledge of such conduct, is likely to obstruct the just disposal of the proceedings.

Section 69 of the Enterprise and Regulatory Reform Act 2013 “ERRA” revises the Health and Safety at Work act 1974 with the effect that no cause of action post April 2013 can be founded on a breach of duty imposed by a statutory instrument containing (whether alone or with other provision) health and safety regulations except to the extent that ERRA provides.

As a result of ERRA a claimant may no longer found a cause of action on breach of health and safety regulations. A claim in noise where the breach is said to have occurred post April 2013 can only be pleaded in common law negligence. However, breaches of statutory duties, while no longer a cause of action can be relied upon as evidence of negligence on the part of an employer.

The test in negligence was restated by the Supreme Court in Baker v Quantum Clothing Group which confirmed that prior to 1 January 1990, the average employer owed a common-law duty of care to protect employees where their daily noise dose exceeded the ‘negligent threshold’ of 90 dB(A) over eight hours. Some employers are burdened with more than standard precautions if they had actual knowledge of risk to hearing from exposures below this threshold. In Harris v BRB (Residuary) Ltd [2005] EWCA Civ 900, the CA fixed the defendant with a negligent threshold of 85dB(A) $L_{EP_d}$ from 1973 onwards.
### Appendix 2 – Age-associated hearing loss (average over frequencies 1, 2, 3 kHz based on ISO 7029)

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Appendix 3 – Nomogram

For each exposure, draw a line connecting the noise level (either SPL or L_{EP,d}) to the exposure duration, t;
Read the corresponding fractional exposure value from the centre line;
Add together all the fractional exposures for a days work to give a total fractional exposure value;
Use the centre scale to convert the total fractional exposure value to a daily noise exposure (L_{EP,d}).
Appendix 4 – Schedule of investigations

Statements of evidence
Witness statements are the best opportunity to set out the case as fully as possible. Taking the time to be slow and methodical when taking information from witnesses will pay dividends in the long term as witness will have more time to think remember and develop their evidence: whereas a rushed proof will almost certainly be lacking in key information.

When taking statements try to plan out step-by-step what information you need from the witness. Evidence you take needs to be as detailed as possible: focus on the stages of the claimant’s employment.

As a starting point check that your statements deal with the following:

Defendant’s staff
Were there any:
Health and safety officers
Management/supervisors
Employees
Occupational health advisors

Work duties
Full and detailed description of the claimant’s duties to include:
Precise dates of employment, location(s) of work and periods worked in different locations.
Days and hours worked per week, shift patterns and overtime.
11. Frequency and duration of breaks, both formal and informal, and whether these are taken in noisy/non-noisy areas.
Breakdown of the frequency, duration and location of all duties including distances/proximity to sources of noise.

Noise sources
An estimate of the proportion of the working day spent in noisy and non-noisy environments.
Details of the source(s) of noise. For machinery/tools, identify the manufacturer’s make and model numbers.
Details of the likely noise levels in every area worked by the claimant.
Details of each step taken to reduce noise levels/noise exposure to employees including the approximate dates when such steps were taken. This could include:

a. Changes to systems of work to reduce employee proximity to noise/duration of exposure.
b. Controlling noise from machinery by engineering means such as damping and/or silencers, reducing noise levels by better machine maintenance.
c. Substitution of noisy machinery by modern less noisy plant and equipment.
d. Modification of the routes by which noise reaches a workplace.
e. Use of sound-absorbing material to control noise reflections within the workplace, e.g. acoustic-ceilings.
f. Use of mufflers to reduce noise transmitted along pipes and ducts.
g. Anti-vibration mountings under machines.
h. Enclosure of noisy machines and partial covers around noisy parts of machinery.
i. Enclosure of the workplace by provision of a cabin or ‘noise refuge’.
j. Screens faced with sound-absorbing material placed between working areas and local noise sources.
k. Increasing distance between an employee and noise sources reduces noise exposure.
l. Use remote-control or automatic equipment to avoid the need for workers to spend long periods near machines.

**Information, instruction and training**
Details of information, instruction and training given to employees so that they are aware of:
- the risk of damage to hearing from noise exposure
- methods of working to minimise this risk
- how to obtain personal ear protectors and how to wear them correctly and safely

**Noise assessments, ear protection zones and hearing protection**
When, where and who carried out noise assessments/surveys? Were they a ‘competent person’ under the regulations? How were the assessments carried out?
Which areas of an employer’s premises are designated Ear Protection Zones (any area where an employee is likely to be exposed to the second action level/UEAV or above, whether such areas are identified by proper signs showing them to be such zones, and the need to wear personal ear protectors whilst in such zones).
Whether wearing ear protection amongst employees in such zones is enforced.
The type of ear protection provided, from what date.
Whether training has been provided on where, when and how to use (and maintain/replace) protectors.
Whether the protection is readily available to employees who request it (where their exposure is likely to be at the first action level/LEAV, and whether an employer positively enforces wearing ear protection where employees’ exposure is likely to be at the second action level/UEAV or above).

**Documentation**
The following documentation should be obtained:
- Claimant’s full personnel file.
- Insured’s general health and safety policy on noise.
- Any relevant health and safety meetings or safety committee minutes which deal with noise awareness and hearing conservation policy.
- Noise assessments/surveys.
- Health and safety training/instruction to employees regarding risk of noise, ways to minimise the effects and records of such training being received and understood by employees.
- Documentation showing steps taken to reduce noise levels/employees’ exposure to noise by means other than provision of ear protection. This could include regular maintenance of machinery or design criteria and all relevant details of noise-reduction measures such as enclosures and documentation to and from suppliers regarding both noise control and the availability, or otherwise, of less noisy plant and equipment.
- Documentation in relation to ear protection (what type and when issued), manufacturers’ technical literature, records of issue and receipt of ear protection to employees.
- Complaints (written and oral) by employees in relation to noise.
- Disciplinary proceedings/warnings regarding failure/refusal to wear hearing protection amongst employees.

**Information/documentation to be sought from claimant**
- Inland Revenue employment schedule
- GP, hospital and occupational health records
- Full employment history including:
  - name of employer
  - dates of employment
iii. capacity of employment
iv. what plant, machinery and work processes are in operation at each place of work
v. whether there is exposure to noise and if so, from what source(s) plus periods and levels of exposure and whether hearing protection was provided/worn.

d Claimant's service, if any, in the Armed Forces including:
i. dates of service and in which unit
ii. whether any weapons were fired and if so with what frequency/over what period of time
iii. ammunitions fired and how many rounds
iv. whether any weapons were fired in his vicinity and if so what type, number of rounds and the ammunition type/size etc.

e Whether the claimant has previously made a claim for compensation in respect of exposure to noise and if so, when, and with what outcome.

f Whether the claimant has engaged in shooting, motorcycle riding, motor racing, playing and/or listening to loud music or other noisy activity and if so, when, over what period and what was the frequency.

g Is limitation an issue? Then the following information may assist in determining the date of knowledge:
i. When did the claimant first notice his hearing loss and in what circumstances?
ii. To what did the claimant first attribute his hearing loss?
iii. Did the claimant seek any medical advice/treatment? If so, when, from whom, and what advice/treatment was provided.
iv. When did the claimant first believe that he was working in a noisy environment?
v. When was the claimant first aware that working in a noisy environment would give rise to hearing loss?
vi. When, if at all, did the claimant receive any instruction/warning about noise and its dangers?
vii. When, if at all, was the claimant first provided with hearing protection? Did he wear it and if so in what circumstances. What did he think the hearing protection was for?
viii. When did the claimant first become aware that he could seek compensation in respect of any hearing loss caused by his employment? How did he acquire such knowledge?
ix. When did the claimant first seek legal advice in respect of his claim?
x. Has the claimant ever been a member of a trade union? If so, over what period? What advice, if any, has he received from that union in respect to noise and its dangers?
Appendix 5 – Typical noise levels in industry

Textiles

A significant volume of NIHL have historically related to employment within the textile industry, particularly in geographical areas where textiles were commonly manufactured. The textiles industry involves a variety of processing techniques, resulting in various levels of noise, with some processes typically being far noisier than others, but typical noise levels for key processes are:

- Carding machines: 84 dB(A);
- Combing machines: 90 dB(A);
- Twisting and texturing rooms: 101 dB(A);
- Ring spinning rooms: 92 dB(A);
- Open end spinning: 93 dB(A);
- Automatic cone winding rooks: 93 dB(A);
- Weaving (including beaming, warp sizing and fabric/carpet weaving);
- Shuttle loom weaving rooms: 100 dB(A);
- Gripper shuttle loom weaving rooms: 95 dB(A);
- Rapier looms 92 dB(A);
- Warp knitting room (compound needles) 92 dB(A);
- Adhesive bonding: 83 dB(A);
- Needle punching: about 85 to 86 dB(A);
- Opening – blending and cleaning: 78 to 87 dB(A);
- Fibre dyeing machines: 75 to 80 dB(A). For a bulk dyeing machine the noise level rose to 98 dB(A) towards the end of each cycle. After dyeing, drying of the fabric resulted in levels: 78 to 85 dB(A);
- Non-woven processes (including needle punching): 78 to 86 dB(A);
- Carding: depending on position of measurement and whether machine was screened or not: 76 dB(A) to 95 dB(A);
- Drawing – synthetic fibres: 90 to 95 dB(A); woollen fibres: 82 dB(A); cotton fibres: 84 to 88 dB(A);
- Combing: 90 dB(A);
- Roving: 92.5 to 94.5 dB(A); older machine: 98 to 102 dB(A).
- Cotton spinning: 87 to 92 dB(A); woollen spinning: 96 dB(A);
- Texturing: levels as high as 114 dB(A) have been reported, but levels for newer machines are lower. One machine showed a level of 100 dB(A).
- Winding: 84 to 92 dB(A)
- Doubling and twisting – single wool fibre twisting: 90 dB(A); twisting-doubling machines: 88.5 to 97.5 dB(A); older machine – 96 to 101.5 dB(A).
- Weaving – shuttle looms: 93 to 102 dB(A); sulzer/gripper shuttle loom: 99 dB(A); rapier looms 87 to 95 dB(A);
- Knitting – circular knitting machines: 77 to 85 dB(A); flat frame knitting machines: 81 to 94 dB(A);
- Dyeing, bleaching and finishing – fabric dyeing: 88dB(A); milling: 81 to 86 dB(A); Carbonising: 83 dB(A); Tentering: 83 dB(A); Raising: 79 dB(A); Decatising: 83 to 88 dB(A); Making up – sewing: 82 dB(A);

Motor vehicle manufacturing

Motor vehicle manufacturing involves a variety of processes which can result in noise exposure but, given the nature of the work, tool or machine use is often intermittent and in relatively short bursts, so it will be crucial to gather as much evidence as possible to clarify how long the individual spent carrying out different processes/close to relevant tools and machinery during a typical working day.
A variety of evidence and generic research suggests noise levels for the most common processes are:

- **Pressing** - press shops often considered the noisiest part of the production process with noise levels often in excess of 90dB(A) Leq. Depending on the type of press, may exceed 100dB(A) Leq. Presses without air ejection: 90 to 100 dB(A) Leq; with air ejection, in excess of 100 dB(A) Leq. Large presses 95 dB(A) Leq, small presses 95-105 dB(A) Leq. Hammering and grinding 101 to 102 dB(A).
- **Fabrication** - this process likely to have used a variety of tools, often using compressed air such as drills, wrenches and hammers. Background noise often around mid-80s dB(A) Leq. Noise from certain processes considerably higher. Some processes could result in daily exposure of 90 dB(A) to over 100 dB(A) Leq,d.
- **Final assembly and testing** - low 70s to low 80s dB(A) Leq.
- **Removing and repairing body panels using pneumatic tools e.g. air saws and chisels** can typically produce levels as high as 107 dB(A); Grinders and orbital sanders 97 dB(A); Noise from work with sheet metal often around 93 dB(A); Paint spraying has been measured at 93 dB(A).

### Construction

Again, tool use is likely to be intermittent/in short bursts but noise generated by others working nearby/ambient background noise levels will need to be considered.

HSE reported examples of noise at the operator’s position in dB(A) for commonly used construction tools are:-

- Electric hand tools: 95
- Hammer drill: 102
- Dumper: 103
- Circular saw bench: 107
- Excavator: 109
- Ready mix lorry: 112
- Batching plant: 116
- Compressors and compactors: 120
- Diesel hammer: sheet piles: 136

The HSE has also reported typical noise levels for construction-related processes:-

<table>
<thead>
<tr>
<th>Process</th>
<th>Noise level</th>
</tr>
</thead>
<tbody>
<tr>
<td>Working with concrete: chipping, drilling, floor finishing, grinding etc.</td>
<td>Typical 85-90 dB</td>
</tr>
<tr>
<td>Labouring</td>
<td>General work 84 dB</td>
</tr>
<tr>
<td></td>
<td>Shuttering 91 dB</td>
</tr>
</tbody>
</table>
Shovelling hardcore  94 dB
Concrete pour  97 dB
Digging/scabbling  100 dB

Driving machines or vehicles  Typical  85–90 dB
Carpentry  Typical  92 dB
Angle grinding/cutting  Typical  90–110 dB

Piling  Machine operator  85 dB
Piling worker  100 dB

The HSE’s ‘Noise in Construction: Further guidance on the Noise at Work Regulations 1989, HSE, C200 10/96’ also contains information on the likely average noise exposure for key roles on site such as bricklayers, carpenters, concrete workers and drivers specifically.

**Concrete products industry**

The HSE noted examples of noise sources in the concrete products industry as including vibrating tables or conveyors for compacting concrete in flat products such as paving slabs, vibrating presses for producing blocks and tiles, and impacts between pallets or moulds on conveyors or impacts due to falling waste material.

The table below shows noise levels measured at worker positions in the concrete products industry:

<table>
<thead>
<tr>
<th>Product</th>
<th>Task</th>
<th>Machine or process</th>
<th>Noise levels. dB</th>
</tr>
</thead>
<tbody>
<tr>
<td>Flat products using vibrating tables or conveyors</td>
<td>Mould filling</td>
<td>Steel tables</td>
<td>97 – 102</td>
</tr>
<tr>
<td></td>
<td></td>
<td>Rubber-covered tables or conveyors</td>
<td>87 - 93</td>
</tr>
<tr>
<td></td>
<td>De-moulding and</td>
<td>Vibrating steel tables</td>
<td>97 - 99</td>
</tr>
<tr>
<td>Component Type</td>
<td>Activity</td>
<td>Noise Levels</td>
<td></td>
</tr>
<tr>
<td>---------------------------------------</td>
<td>-----------------------------------------------</td>
<td>--------------</td>
<td></td>
</tr>
<tr>
<td>Concrete blocks, tiles and slabs</td>
<td>Stacking</td>
<td>86 - 89</td>
<td></td>
</tr>
<tr>
<td></td>
<td>Operating vibratory presses</td>
<td>96 - 110</td>
<td></td>
</tr>
<tr>
<td></td>
<td>Vibratory presses (inside enclosure)</td>
<td>84 - 93</td>
<td></td>
</tr>
<tr>
<td></td>
<td>Vibratory presses (outside enclosure)</td>
<td></td>
<td></td>
</tr>
<tr>
<td></td>
<td>Unloading stations</td>
<td>86 - 88</td>
<td></td>
</tr>
<tr>
<td></td>
<td>Inside control rooms</td>
<td>71 - 79</td>
<td></td>
</tr>
<tr>
<td></td>
<td>Strapping machines, cubers, shrinkwrap, etc.</td>
<td>76 - 89</td>
<td></td>
</tr>
<tr>
<td></td>
<td>Operating hydraulic presses</td>
<td>86 - 97</td>
<td></td>
</tr>
<tr>
<td></td>
<td>Production of 'Heritage' blocks</td>
<td>84 - 95</td>
<td></td>
</tr>
<tr>
<td></td>
<td>Operating block splitters</td>
<td>86</td>
<td></td>
</tr>
<tr>
<td></td>
<td>Operating saws</td>
<td>81 - 96</td>
<td></td>
</tr>
<tr>
<td>Reinforced Concrete products</td>
<td>Operating vibrating tables</td>
<td>85 - 105</td>
<td></td>
</tr>
<tr>
<td></td>
<td>Pattern makers</td>
<td>85 - 99</td>
<td></td>
</tr>
<tr>
<td>Extruded Tiles</td>
<td>Operating tile extrusion lines</td>
<td>86 - 93</td>
<td></td>
</tr>
<tr>
<td></td>
<td>Quality control inspection</td>
<td>85 - 86</td>
<td></td>
</tr>
<tr>
<td></td>
<td>Quality control inspection</td>
<td></td>
<td></td>
</tr>
</tbody>
</table>
De-palleting and racking | Manual handling tasks  | 84 – 91  
Operating secondary processing plant | Packing machines | 82

**Noise in engineering**
The HSE noted that noisy processes in engineering are many and varied, ranging from individual machines, such as metal cutting saws, to whole factories or departments such as press shops, drop forges and some machine shops. Portable, power-operated tools and hand tools can sometimes produce as much noise as fixed machines. Those at risk may include those operating machines, and also those working nearby, for example, maintenance staff, cleaners, fork lift truck drivers and shop floor supervisors.

Examples of typical minimum noise levels where no steps have been taken to reduce noise are:

<table>
<thead>
<tr>
<th>Process</th>
<th>Noise level dB(A)</th>
</tr>
</thead>
<tbody>
<tr>
<td>Grinding on a pedestal grinder</td>
<td>90-95</td>
</tr>
<tr>
<td>Discharging metal objects into metal bins</td>
<td>85-95</td>
</tr>
<tr>
<td>General noise level in fabrication shop</td>
<td>85-95</td>
</tr>
<tr>
<td>Hammering steel</td>
<td>95-100</td>
</tr>
<tr>
<td>Guillotining</td>
<td>95-100</td>
</tr>
<tr>
<td>Multi-spindle automatic turning</td>
<td>95-105</td>
</tr>
<tr>
<td>Circular sawing metal</td>
<td>95-105</td>
</tr>
<tr>
<td>Pressing - blanking</td>
<td>95-110</td>
</tr>
<tr>
<td>Pressing – punch pressing</td>
<td>110-120</td>
</tr>
<tr>
<td>Riveting</td>
<td>100-110</td>
</tr>
<tr>
<td>Hammering on metal objects</td>
<td>115 – 120</td>
</tr>
<tr>
<td>Punch press</td>
<td>102 – 107</td>
</tr>
<tr>
<td>9 inch angle grinder</td>
<td>97-106</td>
</tr>
<tr>
<td>Gouging</td>
<td>97-99</td>
</tr>
</tbody>
</table>

**Woodworking industry**
Noise levels can vary considerably between machines depending on conditions of use, particularly products being worked on. The table below shows typical examples:

<table>
<thead>
<tr>
<th>Machine</th>
<th>Typical noise data for machines with no noise reduction measures (noise level (dB))</th>
</tr>
</thead>
<tbody>
<tr>
<td>Beam panel saws and sanding machines</td>
<td>97</td>
</tr>
<tr>
<td>Boring machines</td>
<td>98</td>
</tr>
<tr>
<td>Band resaws, panel planers and vertical spindle moulders</td>
<td>100</td>
</tr>
<tr>
<td>Portable woodworking tools</td>
<td>101</td>
</tr>
<tr>
<td>Bench saws and multiple ripsaws</td>
<td>102</td>
</tr>
<tr>
<td>Highspeed routers and moulders</td>
<td>103</td>
</tr>
</tbody>
</table>
### Thicknessers
- 104

### Edge banders and multi-cutter moulding machines
- 105

### Double-end tenoners
- 107

---

**Food and drinks industry**

Allegations of exposure are likely to focus on a specific processes and may involve bespoke machinery, manufactured for the particular insured/industry. Noise surveys carried out by the insured are likely to be crucial, if the insured is still in existence.

The HSE considered that typical noise levels (measured in dB(A)) which have been recorded in food/drink industries include:

<table>
<thead>
<tr>
<th>Drinks</th>
<th>Bottling halls</th>
<th>85-95</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>Bottle filling/labelling</td>
<td>85-95</td>
</tr>
<tr>
<td></td>
<td>De-crating/washing</td>
<td>85-96</td>
</tr>
<tr>
<td></td>
<td>Cooperage machines</td>
<td>&gt;95</td>
</tr>
<tr>
<td><strong>Milling</strong></td>
<td>Mill areas</td>
<td>85-95</td>
</tr>
<tr>
<td></td>
<td>Hammer mills</td>
<td>95-100</td>
</tr>
<tr>
<td></td>
<td>Grinders</td>
<td>85-95</td>
</tr>
<tr>
<td></td>
<td>Seed graders</td>
<td>90</td>
</tr>
<tr>
<td></td>
<td>Bagging lines</td>
<td>85-90</td>
</tr>
<tr>
<td><strong>Bakery</strong></td>
<td>Dough-mixing room</td>
<td>85</td>
</tr>
<tr>
<td></td>
<td>Baking plant</td>
<td>85</td>
</tr>
<tr>
<td></td>
<td>De-panning</td>
<td>90</td>
</tr>
<tr>
<td></td>
<td>Bread slicing</td>
<td>85-90</td>
</tr>
<tr>
<td></td>
<td>Fruit washing</td>
<td>92</td>
</tr>
<tr>
<td><strong>Dairy</strong></td>
<td>Production areas</td>
<td>85</td>
</tr>
<tr>
<td></td>
<td>Homogenisers</td>
<td>90-95</td>
</tr>
<tr>
<td></td>
<td>Bottling lines</td>
<td>90-95</td>
</tr>
<tr>
<td></td>
<td>Blast-chillers</td>
<td>87-95</td>
</tr>
<tr>
<td></td>
<td>Pneumatics</td>
<td>85-95</td>
</tr>
<tr>
<td><strong>Meat</strong></td>
<td>Animals in lairage</td>
<td>80-110</td>
</tr>
<tr>
<td></td>
<td>Powered saws</td>
<td>Up to 100</td>
</tr>
<tr>
<td></td>
<td>Blast-freezers/chillers</td>
<td>85-107</td>
</tr>
<tr>
<td></td>
<td>Bowl-choppers</td>
<td>&gt;90</td>
</tr>
<tr>
<td></td>
<td>Packing machinery</td>
<td>85-95</td>
</tr>
<tr>
<td><strong>Confectionery</strong></td>
<td>Hopper feed</td>
<td>95</td>
</tr>
<tr>
<td></td>
<td>Mould-shakers</td>
<td>90-95</td>
</tr>
<tr>
<td></td>
<td>Wrap/shakers</td>
<td>85-95</td>
</tr>
<tr>
<td></td>
<td>High boiling</td>
<td>85</td>
</tr>
</tbody>
</table>
Appendix 6 – Portal example correspondence

Portal Disease 1

Contact:
Email:
Direct Line:

Our ref:
Your ref:

Date

Dear Sirs

Re:

We refer to your client’s Claims Notification Form received by us on [insert date].

The information that you have provided is completely inadequate to enable us to investigate the claim and provide you with a response on liability.

We consider that your Claims Notification Form fails to comply with the provisions of the Pre-Action Protocol for Low Value Personal Injury (Employers Liability and Public Liability) Claims and as a result, we would be entitled to remove this claim from the portal in accordance with paragraph 6.7.

Nonetheless, in an effort to keep costs to a minimum and to achieve an amicable resolution of this claim, we are prepared to allow you to resubmit the Claims Notification Form with adequate information pertaining to your client’s claim. We can confirm that if you do so, we shall take no issue with you having submitted the claim on two occasions.

Should you not resubmit a Claims Notification Form with sufficient information in respect of your client’s allegations, we reserve the right to remove this claim from the portal in accordance with paragraph 6.7 of the Protocol and will aver that your costs will be restricted in accordance with paragraph 6.8 and CPR Rule 45.24.

For the sake of clarity, we confirm that we are not removing this claim from the portal at this stage. We shall make our appropriate response to you via the portal in due course.

We look forward to receiving your client’s resubmitted Claims Notification Form.

Yours faithfully
Dear Sirs

Re:

This claim has now left the portal process in accordance with paragraph 6.7 of the Protocol due to your failure to provide sufficient information for us to consider liability. We put you on notice that regardless of the procedural steps taken in this claim, you will be restricted to portal costs in accordance with paragraph 6.8 of the Protocol and CPR Rule 45.24.

This matter now proceeds in the Disease & Illness Pre-Action Protocol. In accordance with paragraph 6.10A of the Disease & Illness Pre-Action Protocol, the Claims Notification Form is insufficient to act as the letter of claim, and therefore you must submit to us a new letter of claim. In accordance with paragraph 6.2 of the Disease & Illness Pre-Action Protocol, this must include sufficient information for us to investigate liability.

We look forward to receiving your client’s letter of claim.

Yours faithfully
Dear Sirs

Re:

Now that we have received sufficient details from you of your client’s allegations in respect of liability in this matter, we have been able to investigate liability. We are now in a position to advise that liability is not in dispute.

We reiterate that this matter left the portal due to your failure to provide sufficient information in the Claims Notification Form in relation to liability in accordance with paragraph 6.7 of the Protocol. We remind you that your costs will be limited to portal costs in accordance with paragraph 6.8 of the Protocol and CPR Rule 45.24.

We look forward to receiving details of your client’s medical evidence and schedule of loss.

Yours faithfully
Appendix 7 – Common definitions and terms

**Acoustic trauma**
The term used to refer to damage to the inner ear, usually from noise exposure.

**Auditory brainstem response (ABR) audiometry**
Also known as brainstem evoked response audiometry (BSERA) or brainstem auditory evoked potentials (BAEP), this is an objective test of hearing usually over the frequency range of 2-4 kHz. The threshold over this range is identifiable, but not the threshold at specific frequencies.

**Auditory nerve**
Also known as the cochlear nerve or part of the VIII cranial nerve, this links the cochlea to the brainstem in which are located the cochlear nuclei.

**Audiometry**
The science of hearing assessment.

**Air conduction levels**
The result from measurement of hearing with headphones.

**Bone conduction levels**
The result from hearing measurement using a bone conductor.

**Cochlea**
The part of the inner ear containing the organ of hearing.

**Cortical evoked response audiometry (CERA)**
Objective test of hearing allowing identification of thresholds at specific frequencies.

**Decibel (dB)**
Unit of measurement of hearing. When used on pure tone audiograms the scale is in dBHL.

**Free field speech audiometry**
The testing of subjects to speech (usually spoken words) in the free field environment.

**Hair cells**
The sensory component at the beginning of the neural auditory pathway. These are located in the Organ of Corti, found in the cochlea.

**Headphone pure tone audiometry** (or pure tone audiometry)
The testing of hearing with the presentation of pure tones through headphones.

**Hearing aids**
Amplification devices, using either the older analogue technology, or the more modern digital technology.

**Hertz (Hz)**
Unit of measurement of frequency. One thousand hertz is a kilohertz (kHz).

**Nonorganic hearing loss**
A hearing loss that is not present, or in excess of, a genuine hearing loss.

**Obscure auditory dysfunction**
A term used to describe the condition where hearing is within clinical range of normality, but the subject presents with difficulties discriminating sounds, usually in noisy conditions.

**Oto-acoustic emissions**
The response arising from outer hair cells of the cochlea following click stimulation which can be measured and displayed.

**Ototoxicity**
Damage to the inner ear as a result of drug ingestion.

**Presbyacusis**
Hearing loss related to the ageing process.

**Pure tone audiogram**
The graph used to represent hearing.

**Rinne test**
A clinical test of hearing with a tuning fork. Best used for identification of a conductive hearing loss.

**Tympanometry**
The procedure in which the middle ear function is assessed objectively.

**Vestibular system**
The part of the inner ear dealing with balance.

**Weber test**
A clinical test of hearing with a tuning fork used for identifying the better functioning of the two inner ears.
## Contacts

<table>
<thead>
<tr>
<th>HEAD OF DISEASE PRACTICE</th>
<th>Nick Pargeter</th>
<th>020 7865 3361</th>
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<tbody>
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<tr>
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<td>London</td>
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</tr>
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<td></td>
<td>Nigel Lock</td>
<td>020 7865 3352</td>
<td><a href="mailto:Nigel.Lock@blmlaw.com">Nigel.Lock@blmlaw.com</a></td>
</tr>
<tr>
<td>Manchester</td>
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</tr>
</tbody>
</table>

For full details of all BLM offices, please visit our website blmlaw.com