



Association of British Insurers

TACKLING THE COMPENSATION CULTURE

NOISE INDUCED HEARING LOSS CLAIMS

Improving the claims system
for everyone

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Foreword

In recent years there has been progress in tackling the UK's compensation culture. Improvements have been made to help crack down on frivolous and exaggerated personal injury claims, especially for whiplash, and unnecessary costs, which impact on premium paying consumers, have been removed from parts of the claims process.

The job is far from complete though. Most of the attention to date has been focused on tackling the compensation culture resulting from road traffic accident claims (RTAs). As claimant lawyers have turned their attention to more profitable types of claim, compensators, including public sector bodies, have been experiencing a significant increase in the number of claims for Noise Induced Hearing Loss (NIHL) which have remained largely unaffected by the recent reforms.

Claimant lawyers and claims management companies (CMCs) looking to replace revenue lost from pursuing RTA claims, mainly for whiplash, have been driving the huge increase in NIHL claims being notified. Between 2011 and 2014 NIHL claims notified with insurers increased by 189%. Insurers are committed to ensuring that genuine NIHL claimants are compensated fairly, quickly and at proportionate cost but this increase has been driven by spurious and frivolous claims. Around 70% of NIHL claims are unsuccessful.

These claims come at a cost not just to insurers but businesses and the taxpayer. Those claims that do succeed attract legal costs that are totally disproportionate to the level of damages paid to the claimant and to the work by the claimant lawyer.

Further action is required to tackle the compensation culture. In order to stem the increase in the number of NIHL claims and tackle disproportionate legal costs, the Government should extend the fixed costs regime to disease claims, amend the Claims Portal to enable multi-defendant disease claims to be submitted through it and extend MedCo to cover claims for NIHL.

These reforms will ensure that genuine claimants receive fair compensation in a timely and efficient manner whilst cracking down on those claimant lawyers and CMCs looking to make excessive profits from NIHL claims.

This publication is the first in our series of "Tackling the Compensation Culture". We will publish the second in our series later this year which will focus on the further reforms required to address the compensation culture that continues around whiplash claims.



James Dalton
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Understanding the problem

In the past few years, insurers and other compensators, including large corporate and public bodies, have experienced a significant rise in the number of claims being submitted for NIHL, sometimes referred to as industrial deafness.

NIHL is a condition that is caused by exposure to high intensity sound, measured in decibels (dB). Hearing loss is usually broken down into four main categories of disability according to the degree or severity of the hearing loss. It is measured on a scale of dB of hearing loss as compared to a person with 'normal' hearing:

- Mild Hearing Loss is defined as a loss of 20-39dB, so an individual may experience some difficulty in keeping up with conversations, especially in a noisy environment;
- Moderate Hearing Loss is defined as a loss of 40-69dB, so an individual will experience difficulty in keeping up with conversations without a hearing aid;
- Severe Hearing Loss is defined as a loss of 70-90 dB, so an individual will need a powerful hearing aid;
- Profound Hearing Loss is defined as a loss of greater than 90dB, so an individual will need to rely on lip reading or sign language.

When looking at a person's total hearing loss, a distinction needs to be made between what is noise induced and what is due to age. The average total hearing loss levels for claimants in successful claims is 30.2dB¹ (i.e. mild hearing loss), of which the NIHL element is on average 14.3dB, and age associated hearing loss is on average 15.9dB, with the average age of the claimant being 63 years old.

Historic issues

Despite the increase in claims being submitted in recent years, NIHL claims are not a new phenomenon. Indeed, they have been around for a number of years but many current claims are generated from exposure to noise in the workplace in the 1960s and 1970s when the understanding of the impact of noisy work environments on hearing was poor and precautions were only just starting to be put in place.

Regulation timeframes

- 1963 - The Ministry of Labour published "Noise and the Worker", which introduced the concept that excessive noise in the workplace could lead to hearing loss. It was recommended that employees should not be exposed to a noise level of over 90dB over an eight hour working day. Later case law held that from 1963 onwards, employers should have been aware of the risk of exposure to loud noise at work. This effectively set the date of knowledge for many employers at 1963 and meant that claims brought for NIHL before that date were unlikely to be compensated.
- 1972 - The "Code of Practice for Reducing Noise" was introduced. This also referred to an average noise level exposure of 90 dB.
- 1990 - The "Noise at Work Regulations 1989" came into effect and determined the measures employers needed to take to protect employees exposed to varying noise levels. This set two action levels at: 85dB and 90dB.
- 1992 - The "Personal Protective Equipment at Work Regulations" required employers to provide employees with suitable protective equipment if exposed to a risk to their health at work.
- 2006 - The "Control of Noise at Work Regulations 2005" gave protection against lower levels of noise exposure of 80 and 85dB.

The Iron Trades Deafness Scheme

The majority of historic NIHL claims stemmed from those working in Britain's heavy industries. This led to an agreement (the Scheme) between Iron Trades Insurance and the General, Municipal, Boilermakers and Allied Trades Union, many of whose members worked in heavy industry, which took effect in 1984. The Scheme was adopted by other unions and insurers and was the basis upon which most claims for NIHL were settled throughout the 1980s and 1990s.

Compensation payments under the Scheme were calculated against a simple matrix of loss of dB against age. Younger claimants with a higher dB loss attracted higher payments. A mutually beneficial agreement was reached by both sides where damages were awarded below the usual levels awarded by the courts but, in return, Iron Trades would not raise arguments concerning limitation and pre-1963 exposure. In addition, costs were fixed at £350 + VAT and disbursements.

¹ ABI analysis of NIHL claims data from 2013

A significant number of claims were processed through the Scheme, driven by unions who represented many of the workers who had been exposed to a noisy working environment. Throughout the 1990s the settlements became less attractive for unions as there were far fewer cases where limitation or pre-1963 exposure was an issue. The Scheme finally ended in 1998 with no new claims accepted after 1997. During the operation of the Scheme, NIHL claims reached a peak in annual claims notifications of 67,054 in 1993, before gradually tailing off to a low of 7,346 in 2001² after the Scheme came to a close.

Better understanding and increased safety regulation, including the Control of Noise and the Worker Regulations 2005, improved the UK's workplace safety record and placed greater emphasis on protecting workers from exposure to noise in all workplaces since the mid-1970s. In turn, the number of new cases for NIHL has declined over time.

Campaigning to increase awareness of the effect of noise on hearing

The public awareness of NIHL as a potential issue has become increasingly well-known over the years. Unions have campaigned heavily on the effects of exposure to noise in the workplace. In 1999, the Trades Union Congress (TUC) ran a campaign entitled "Indecent Exposure" together with the Royal National Institute for Deaf People (RNID) aimed at drawing attention to the problem of work related hearing loss.

As well as publicity for the campaign by the TUC and RNID, the campaign was covered by the BBC and was referred to in Parliament. The TUC and RNID have continued their campaigns on exposure to noise throughout the 2000s when the issue became less widespread. As a result of this and other similar campaigns, the effect of exposure to noise in the workplace is now very widely understood and better managed.

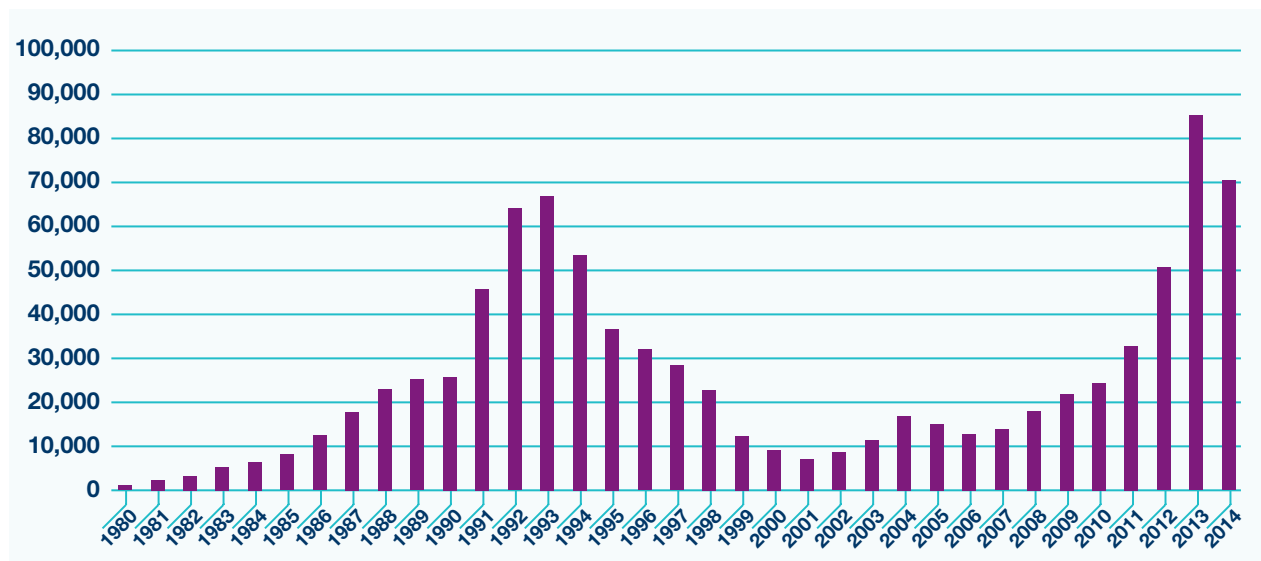
² Institute and Faculty of Actuaries UK Deafness Working Party

The scale and cost of the problem

Increasing NIHL claims numbers

Despite the improvements in health and safety measures and better regulation, insurers and compensators have experienced a sharp increase in NIHL claims in recent years resulting from the UK’s compensation culture. In 2010, there were 24,352 NIHL claims notified. This increased to 85,155 notified claims in 2013, which represents an increase of almost 250% and these claims had a total estimated cost of over £400 million³. Whilst claims notified reached a peak in 2013 following the introduction of the civil justice reforms, claims have remained high with the estimated number of claims notified in 2014 39% higher than in 2012⁴.

Total number of NIHL claims notified by year



(Source: Institute and Faculty of Actuaries UK deafness working party)

This increase in NIHL claims can also be seen in the significant increase in the number of searches made on the Employers Liability Tracing Office (ELTO)⁵ for NIHL. In 2014, there were 134,283 NIHL searches on ELTO, an increase of 40% from the year before when 95,673 NIHL searches were made.

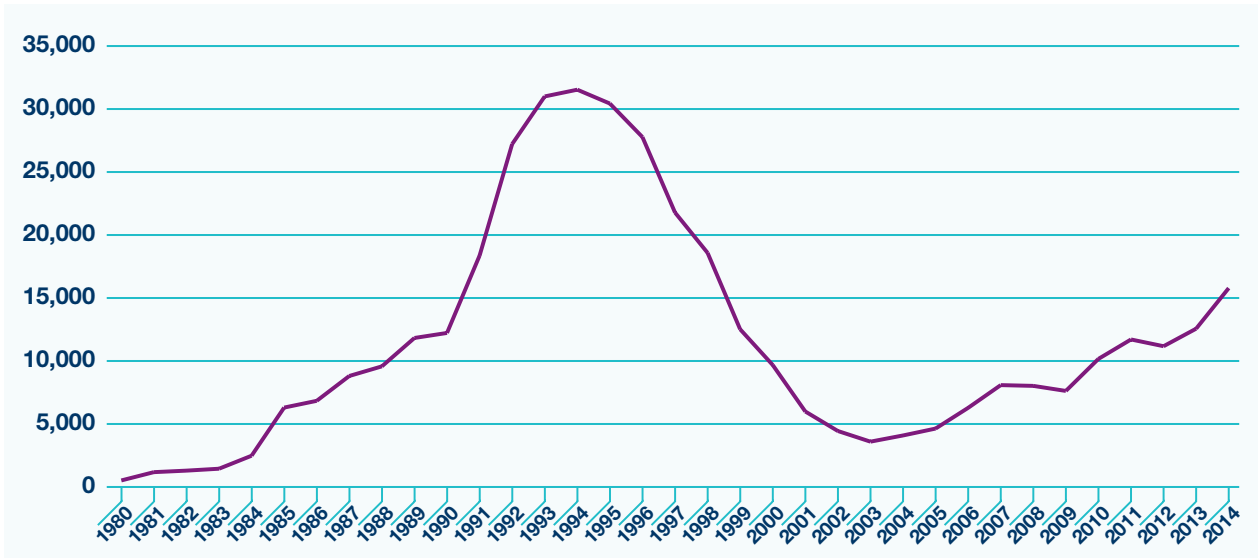
NIHL claims notified increased 250% between 2010 and 2013

³ Institute and Faculty of Actuaries UK Deafness Working Party

⁴ Institute and Faculty of Actuaries UK Deafness Working Party

⁵ Employers Liability Tracing Office (ELTO) has been introduced by the insurance industry to make it easier to search for EL insurance policies using a central database - containing all new and renewed EL insurance policies from April 2011, policies from before April 2011 that have new claims made against them and policies that were identified through the previous tracing service

Total number of NIHL claims settled for non-nil by year

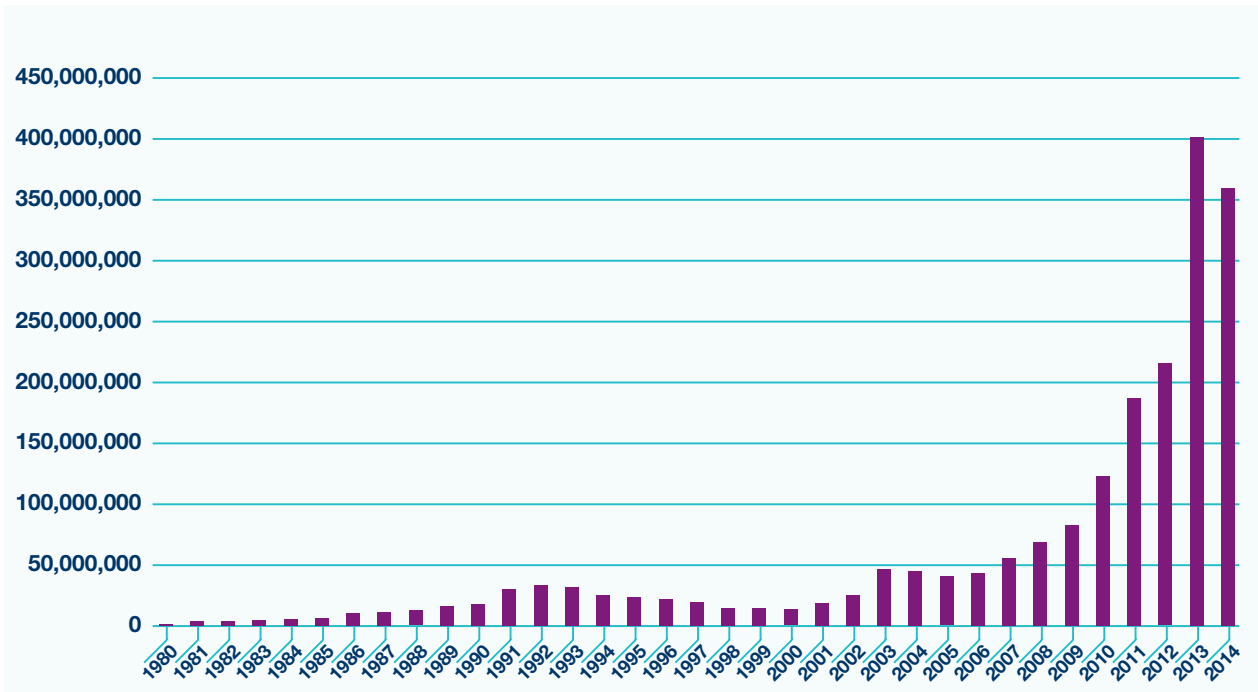


(Source: Institute and Faculty of Actuaries UK deafness working party)

Despite the dramatic increase in the number of notified NIHL claims in recent years, the number of claims settled for non-nil - i.e. where there has been compensation awarded to the claimant, has not increased at the same rate.

In 2010, there were just over 10,000 claims settled where compensation was awarded, which increased to 15,632 in 2014, an increase of 56%. The disparity between the claims notified and the claims settled for non-nil helps to demonstrate the high number of unmeritorious claims that insurers are required to process.

Total NIHL costs incurred by notification year



(Source: Institute and Faculty of Actuaries UK deafness working party)

This increase in claims has come at a significant cost to the industry. The above graph demonstrates that the estimated overall cost of NIHL claims to insurers has risen from just under £83 million in 2010 to over £360 million in 2014.

The increase in the number and costs of NIHL claims is a direct result of the UK's compensation culture rather than a genuine increase in people experiencing NIHL. The increase in claims volume cannot be explained by any change in the law, new regulations or medical practices.

NIHL claims effect businesses and taxpayers alike

The cost burden of NIHL claims goes beyond that borne by insurers. Small businesses, large corporate and public sector bodies have also been negatively affected through an increase in the number of NIHL claims. According to data from the Compensation Recovery Unit (CRU), the number of NIHL claims made against a Government body rose from 1,096 in 2011/12 to 2,371 in 2013/14; an increase of 116%.

Only claims with a total hearing loss of over 50dB (moderate hearing loss) are required to be registered with CRU. ABI data demonstrates that only 6% of settled claims have a NIHL element of over 28dB. As such, only a very limited number of Government NIHL claims will be registered with the CRU.

The type and profile of claims made against Government bodies is likely to be the same as those experienced by insurers, so the increase in claims between 2011/12 and 2013/14 is likely to reflect less than 6% of claims made for NIHL against Government bodies.

NIHL claims have significantly disproportionate legal fees

A significant proportion of the cost of NIHL claims is made up by disproportionate claimant lawyer legal fees. In 2013 the average compensation payment for a NIHL claim was £3,100, while average claimant legal costs were £10,400⁶. This means that for every £1 paid to the claimant over £3 was paid to their lawyer.

The majority of NIHL claims are not successful

Whilst insurers and compensators are experiencing a significant increase in the number of NIHL claims being reported, these claims are often not successful. The industry average claims failure rate i.e. the number of claims that do not result in payment to the claimant for a range of reasons, was 65% in 2013⁷. This rate is now on the increase, with one insurer reporting a claims failure rate of 85% in 2014⁸.

NIHL claims fail for a variety of reasons, including the total absence of any NIHL element at all, a lack of proof that the hearing loss was due to exposure to noise in the claimant's workplace or because the claim falls outside the limitation period for making a claim. Many are just not progressed by the claimant or their lawyer and fall away. The high failure rate highlights two key issues:

Firstly, a significant number of NIHL claims that are submitted are of poor quality and are farmed by claimant lawyers and CMCs without any real prospect of success;

Secondly, insurers and compensators are being forced to incur costs in terms of employing additional staff to consider the significant increase in the volume of claims, the vast majority of which fail. Time spent considering a claim that will eventually fail is time taken away from settling a genuine claim.

NIHL claims cost an estimated £360 million in 2014

⁶ ABI analysis of NIHL claims data from 2013

⁷ ABI analysis of NIHL claims data from 2013

⁸ www.aviva.com/media/news/item/uk-aviva-calls-for-clampdown-pn-spurious-industrial-deafness-claims

The drivers behind NIHL claims

Reforms to the civil justice system

In an attempt to tackle the UK's compensation culture, there has been significant reform to the civil justice system in England and Wales in recent years. Lord Justice Jackson carried out a review of the cost of civil litigation in 2009 and a number of his proposals were implemented as an interlocking package of reforms through the Legal Aid, Sentencing and Punishment of Offenders Act 2012 (LASPO). The reforms were aimed at delivering access to justice in an efficient and proportionate way.

Jackson reforms

Part 2 of LASPO came into force from 1 April 2013. It had the effect of:

- Removing the recoverability of success fees
- Removing the recoverability of After the Event (ATE) insurance premiums
- Introducing damages based agreements (DBAs)

Amendment to the Civil Procedure Rules and Pre-Action Protocols:

- Introduction of qualified one way costs shifting (QOCS) in Civil Procedure Rule 44.13 in cases where no after the event premium can be recovered.
- Horizontal and vertical extension of the Claims Portal and accompanying extension and reduction in fixed recoverable costs.
- Introduction of fixed costs outside the Claims Portal for single defendant RTA/EL/PL claims up to £25k⁹.

As a result of these reforms, low value RTA claims became less attractive for claimant lawyers and CMCs due to the reduction in the legal fees they could make from these claims, with the legal fees reduced by around 60%.

The previous Government took a decision to reduce these fees as part of their initiative to help tackle the compensation culture and reduce car insurance premiums for honest motorists. The insurance industry committed to pass on savings to motorists following these reforms and, to date, the industry has passed on savings of nearly £1 billion¹⁰ to consumers through lower motor insurance premiums.

The reforms have, however, meant that claimant lawyers and CMCs have turned their attention to those claims, namely NIHL, where guideline hourly rates, rather than fixed fees, are recoverable. Without fixed fees, claimant lawyers are able to drive up unnecessary legal costs to help ensure higher profit margins.

What is claims farming?

Claims farming is the process by which potential claims are actively sought out by CMCs and claimant lawyers. Many claimants would not actively seek to bring claims but do so only after encouragement from claims farmers and where the car accident or exposure to noise has happened many years earlier. Claims farming involves:

- Spam texting
- Cold calling
- Radio and television advertising
- Targeted advertising in areas that have traditionally been centres for heavy industry
- Advertising for claims in shopping centres and public hospitals

The Claims Portal

The electronic RTA Claims Portal and accompanying Pre-Action Protocol (the Protocol), the rules that underpin the RTA Claims Portal, were established in 2010 as an efficient and cost effective way of settling RTA personal injury claims with a value of up to £10,000. The Portal allows for the swift and secure electronic exchange of documents and the Protocol set out a structured three stage process with clearly defined timescales. In 2013, the Portal and Protocol were extended to include EL and PL claims, and claims with a value of up to £25,000, and was renamed the Claims Portal.

The problem with the current rules

The Claims Portal should be an appropriate vehicle for handling all NIHL claims. However, there are a number of features of both NIHL claims and the Pre-Action Protocol for low value Personal Injury (Employers Liability and Public Liability) claims, which mean that the vast majority of NIHL claims are not settled through the Claims Portal. These include:

- The majority of NIHL claims are multi-defendant (i.e. exposure to noise occurred with more than one employer). The current protocol excludes multi-defendant claims meaning that they cannot be submitted through the Claims Portal.
- Claimant lawyers will often provide insufficient information on the Claims Notification Form (CNF) when submitting an NIHL claim through the Claims Portal. Specifically, there is no requirement within the current rules to provide a copy of the HMRC schedule which contains the employment history of the claimant. Where the HMRC schedule is not provided, then given the passage of time since exposure, there is frequently no evidence of the claimant's employment, which prolongs necessary investigations by the insurer. This problem is compounded by the significant backlog that HMRC have for dealing with requests for schedules.

⁹ RTA = Road Traffic Act claim; EL = Employers Liability claim; and PL = Public Liability claim

¹⁰ <https://www.abi.org.uk/News/News-releases/2015/04/ABIs-latest-motor-premium-tracker-fall-in-premiums-UK-motorists-continue-competitive-deals>

- The protocol does not currently allow sufficient time for insurers to make investigations into potential liability. The protocol requires a response on liability within 30 days, the same period for EL accident claims, even though the statement of claim in an NIHL case often goes back many years and as such, are more difficult to investigate. In NIHL claims there are frequently issues with both causation and limitation which, unlike in RTA claims, will only become apparent on disclosure of medical evidence which is not provided at stage one of the process. It is therefore unusual for the compensator to be in a position to admit liability within the 30 working days required by stage one to keep the claim within the Portal process.

Taken together, the above issues mean that only a small number of NIHL claims are ever submitted through the Claims Portal and, of those submitted, very few actually settle in it. The majority of NIHL claims are settled outside the Claims Portal where guideline hourly rates, rather than fixed costs, apply for disease claims. While data does not exist for the number of NIHL claims settled in the Claims Portal, since the Claims Portal was extended to cover EL disease claims in July 2013, there have been 28,379 EL disease claims (which will include all NIHL claims submitted through the Portal), of which only 3.6% were actually settled at stage 2 in the Portal¹¹.

When the fact that only a small minority of NIHL claims currently enter the Claims Portal because most are multi-defendant is combined with the fact that when they do enter the Portal, under 4% of EL disease claims settle at stage 2, the result is that it is likely that only around 1% of all NIHL claims are settled within the Portal. Such a limited “success rate” for the Portal process in relation to NIHL claims is stark, and is much lower than the corresponding success rates for settlements within the Portal for other claims. For example, 28% of RTA claims are settled at stage 2 in the Portal¹².

The difference in the potential claimant legal costs is significant. While claimant legal costs in the Portal are fixed at £900+VAT for EL claims with a value up to £10k and £1600+VAT for EL claims between £10k and £25k, average claimant legal costs for a successful NIHL claim in 2013 were £10,400. This includes claims that were never submitted through the Claims Portal or exited the Claims Portal.

The ability for claimant lawyers to drive up excessive legal costs has led to many new entrants into the NIHL claims market including law firms that have traditionally handled RTA claims. This, together with increased claims farming, has driven the significant increase in NIHL claims that all compensators are now experiencing.

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

¹¹ <http://www.claimsportal.org.uk/en/about/executive-dashboard/>

¹² <http://www.claimsportal.org.uk/en/about/executive-dashboard/>

The challenges of NIHL claims

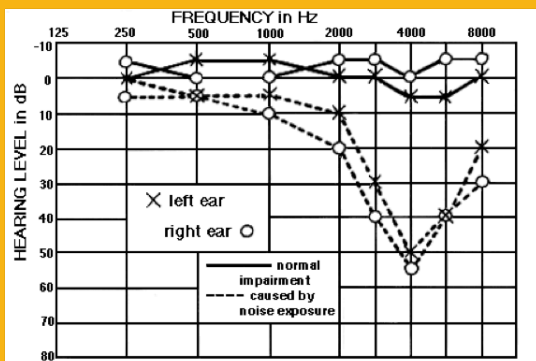
NIHL claims feature a number of distinct issues which leave them open to abuse for financial gain by claimant lawyers and CMCs. These features are:

- poor quality medical evidence
- unmerited claims for tinnitus
- claims outside the limitation period.

NIHL medical evidence explained

In order to make a claim, a claimant who believes they may have suffered NIHL will be required to obtain medical evidence to show the extent of their NIHL.

- The claimant will be sent to an audiologist, usually arranged by either the CMC or claimant lawyer, to conduct a hearing test. The audiologist should test the claimant's hearing in clinical surroundings and produce the results in the form of an audiogram. However, the results can be distorted where hearing tests are conducted in non-British Society of Audiology compliant conditions, e.g. hotel rooms or other noisy environments.



- An audiogram is a graph that plots hearing levels across various sound frequencies for the left and right ear. The result is compared against the standard expected hearing levels according to the claimant's age and gender.
- An audiogram based on pure tone audiometry is by far the most common and cheapest method of testing. It is a subjective test that relies on genuine responses from the claimant for accuracy. An audiologist will usually repeat the test at certain frequencies to ensure consistency of response. However, accurate assessment of hearing loss through pure tone audiometry can only be truly achieved through re-testing.
- An Ear, Nose and Throat (ENT) Consultant may be instructed to prepare a medical report based on the results of the audiogram. The results are averaged across both ears and the Consultant will advise what overall level of hearing loss has been suffered, how much is age related and how much related to NIHL.

Poor quality medical evidence

As is the case with whiplash claims, the quality of the medical evidence used to support NIHL claims is a source of significant concern. The problem of securing high quality, independent medical evidence for low value, high volume claims, particularly for whiplash, became so acute that the previous Government took the decision to introduce MedCo. This is a new cross stakeholder body tasked with running an IT platform which allocates independent medical experts in soft tissue injury RTA claims on a random basis and has responsibility for accrediting them.

There are a number of similarities in the nature of the concerns between NIHL and whiplash in terms of the medical evidence:

- the lack of independence between those commissioning the audiogram and the audiologists carrying out the audiogram;
- audiologists being insufficiently qualified;
- the audiogram being carried out in unsuitable non-clinical surroundings; and
- lack of objectivity being applied by the reporting Consultants.

The insurer has no control over the type of test used to carry out the audiogram. Where possible, only an objective audiogram test should be carried out when supplying medical evidence for a NIHL claim, however this often does not happen.

Unmerited claims for tinnitus

In addition to a claim for NIHL, a number of claimants also allege that they suffer from tinnitus. Tinnitus is a term that describes any sound a person can hear within their body rather than from an outside source and is often described as 'ringing in the ears'. ABI data demonstrates that some 58% of successful NIHL claims include a claim for tinnitus, which increases the average damages paid by over 20%.¹³

Like whiplash, there is no objective test for tinnitus, making it susceptible to exploitation for financial gain. Also like whiplash, the diagnosis of tinnitus is solely dependent on the history supplied by the claimant. Medico-legal reports rarely go beyond recording the history of symptoms given by the claimant making it very challenging to dispute a claim for tinnitus.

Claims outside the limitation period

The current limitation period for making a NIHL claim is three years from when the claimant became aware, or ought to have been aware, that exposure to noise in the work place has led to NIHL.

¹³ ABI analysis of NIHL claims data from 2013

Many NIHL claims are supported by medical evidence that describes hearing loss which has “presented over time” with no clear indication as to when a claimant first became aware of their symptoms. Furthermore, given the average age of a claimant in a NIHL claim is 63 years old at the date of settlement of the claim¹⁴, the more significant element of their hearing loss will often be age related with a smaller element related to noise exposure.

Insurers and compensators often face arguments from claimant lawyers that their clients have only recently been made aware that their hearing loss is noise induced and that the limitation period only runs from the date that their client sought legal advice on this issue. However, due to heavy campaigning by the unions over the past couple of decades, and with dramatically increased advertising by claimant lawyers and CMCs since the early 2000s, there is now a very high awareness among the general public of the impact of noise on hearing loss and the ability to make a claim as a result. The arguments used by claimant lawyers about lack of knowledge and/or awareness are little more than an attempt to circumvent the limitation period for financial gain.

Myth Busting

- ***“I wasn’t aware my hearing loss was linked to noise until I was approached by a CMC/claimant solicitor”***

The effect of exposure to noise on hearing is now far more widely understood than in the late 1980s/early 1990s when there was a peak in NIHL claims. Many of the noisier working environments were traditionally unionised. On behalf of their members, unions brought many claims in the 1980s and 1990s and since then they have continued to campaign widely, along with other campaigners like RNID, on the effects of noise exposure in the workplace helping to ensure the issue and the ability to make a claim, is widely understood.

- ***“An audiogram showing noise induced hearing loss means that the employer must have exposed their employees to noise”***

It is important to understand the nature of any exposure to noise that occurred in the workplace. Often, the claimant may have been exposed to other non-work related sources of noise. Unless there is evidence of prolonged exposure to excessive noise in the workplace, the claim will not be valid as the NIHL will likely be due to non-work related factors.

- ***“If an audiogram shows that there is NIHL, the claimant will automatically be entitled to compensation”.***

If a claimant has incurred some form of NIHL, they will not automatically be entitled to compensation. The claimant must bring their claim within the prescribed limitation period of three years and must be able to prove that their employer breached a duty of care which caused the hearing loss. These rules are in place to help ensure as much as possible that only claims where NIHL has genuinely occurred due to exposure in the workplace are paid out.

- ***“Exposure to noise is a current issue”***

Whilst the number of claims presented has increased dramatically, many genuine claims result from historic exposure, which is why the average age of a claimant is 63 years old. The understanding of the impact of noise in the workplace, and measures to mitigate the potential risk that this poses, have improved significantly in the past couple of decades and the UK now has one of the best workplace safety records in the EU.

¹⁴ ABI analysis of NIHL claims data from 2013

The solutions to the problem

The current compensation system is failing claimants and compensators. The UK's compensation culture is driving the increase in the number of unmeritorious NIHL claims, with claimant lawyers and CMCs chasing excessive profits from disproportionately high legal fees. The high volume of claims being submitted and the high legal costs both impact on compensators, businesses and public sector bodies alike. Consumers suffer as the additional costs feed through to higher insurance premiums, the price of goods and services and impacts on taxation.

Genuine claimants also lose out as the current Claims Portal cannot be used for the vast majority of NIHL claims slowing down the process. NIHL claimants are therefore not enjoying the same fast and efficient process for handling their claim as those with other injury claims.

To help tackle the problem the Government should:

- **Extend the fixed costs regime outside the Claims Portal to disease claims**
- **Amend the Pre-Action Protocol to enable multi-defendant disease claims to be settled through the Claims Portal**
- **Consider extending MedCo to cover claims for NIHL**

Extend the fixed costs regime outside the Claims Portal to disease claims

In his review of civil litigation costs, Lord Justice Jackson recommended that “the recoverable costs of cases in the fast track should be fixed”¹⁵. He has repeated this view since publishing his report and recommendations – a view which has also been publicly supported by the Master of the Rolls, Lord Dyson.

However, this is yet to happen and disease claims are one of the last forms of fast track claims where legal costs are yet to be fixed, instead attracting guideline hourly rates. As a result, compensators are experiencing an increase in the number of claims from non-specialist law firms who are moving into this area due to the ability to make excessive profits but do not have the necessary skills and knowledge to process these claims efficiently.

Fixed costs have already been applied across motor, EL accident and PL accident claims outside the Portal and, as such they should also be introduced for disease claims as Lord Justice Jackson recommended in his report. These fixed costs should be set at a level which reflects the steps required by a claimant solicitor to present and run a successful claim. This would ensure that costs are contained and are proportionate, and would introduce efficiencies into the system whilst removing the additional costs involved in negotiating costs at the end of a claim.

Amend the Pre-Action Protocol to enable multi-defendant disease claims to be settled through the Claims Portal

The Claims Portal has introduced benefits to the claims process for all stakeholders given that it provides a streamlined and more efficient process for settling claims which means that claimants recover their compensation more quickly.

These benefits should be applied more widely to low value multi-defendant disease claims. To achieve this, amendments to the existing Pre-Action Protocol for Low Value Personal Injury (Employers Liability and Public Liability) claims should be made so that it can accommodate multi-defendant claims and is better suited for low value disease claims generally. Alternatively, a separate Pre-Action Protocol for low value EL disease claims could be created. Reform to the Pre-Action Protocol should be delivered through an amended Claims Portal which has a proven track record in adapting to change, e.g. from the original RTA Portal to the current Claims Portal which now includes EL/PL claims and has an increased claims limit to £25,000.

The industry would welcome the opportunity to work with Government and other interested stakeholders to produce a workable timetable for handling low value disease claims that could be incorporated into a Pre-Action Protocol. This would streamline the processes for dealing with these claims, drive efficiencies and enable fixed costs to be applied, thereby reducing costs overall and reducing the incentives for unmeritorious claims. However, this needs leadership from Government to drive forward reform.

The Pre-Action Protocol should, as a minimum:

- Have a timetable appropriate for low value EL disease claims;
- Require disclosure of evidence of employment, specifically a HMRC schedule;
- Allow for multi-defendant claims; and
- Allow for liability to be admitted subject to causation.

A streamlined process with fixed costs will serve to reduce the drivers behind the compensation culture which has penetrated NIHL claims so that insurers and other compensators can focus their efforts on ensuring that genuinely injured claimants receive compensation without undue delay.

¹⁵ <https://www.judiciary.gov.uk/wp-content/uploads/JCO/Documents/Reports/jackson-final-report-140110.pdf>

Consider extending MedCo to cover medical evidence for NIHL claims

As previously discussed, MedCo was established by the previous Government to help address the issues within medico-legal reporting for soft tissue RTA claims. MedCo is also tasked with the delivery of an accreditation framework for medical experts by January 2016. The intention behind MedCo is twofold: firstly, to sever the inappropriate financial links between medical experts and those instructing them; and secondly, to improve the quality of medical reporting.

MedCo has been operational since April 2015 and, although its success remains to be measured, the underlying ethos of independence in medical reporting should be capable of extension to all low value claims.

There are significant concerns around the quality and independence of medico-legal reporting for NIHL claims, specifically around the provision of audiograms. The audiograms that medico-legal reports rely on are frequently considered unfit for purpose by insurers, who will request that claimants are re-tested, adding stress and unnecessary inconvenience to genuine claimants. Without accurate audiology reports, claimant solicitors are not in a position to adequately assess the strength of the claims presented to them in the first place.

To address this issue, the MedCo system should be extended to cover NIHL claims to help remove the financial links between the commissioners and providers of audiogram reports, and improve the quality of the audiograms overall. This would be beneficial to claimants and compensators alike and has the potential to drive down the volume of unmeritorious claims presented. Access to justice would be preserved as genuine claims based on independent medical evidence of hearing loss attributable to noise exposure at work would be able to proceed quickly and efficiently; whilst those not capable of being substantiated independently would be identified at an early stage and would not proceed.

Notes



Association of British Insurers

For more information

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