

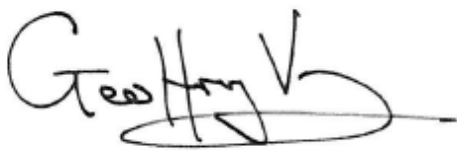
## PRE-ACTION PROTOCOL UPDATE

The Master of the Rolls as Head of Civil Justice approves the amendments to the following Pre-Action Protocols.

The Pre-Action Protocol for Personal Injury Claims
The Pre-Action Protocol for Disease and Illness Claims
The Pre-Action Protocol for Low Value Personal Injury Claims in Road Traffic Accidents
The Pre-Action Protocol for Low Value Personal Injury (Employers' Liability and Public Liability) Claims
The Pre-Action Protocol for Resolution of Package Travel Claims

Subject to the transitional provisions at the end of this instrument, the amendments to these Pre-Action Protocols come into force on 1<sup>st</sup> October 2023.

Signed by:

A handwritten signature in black ink, appearing to read 'Geoffrey Vos'. The signature is stylized with a large 'G' and a long horizontal stroke at the end.

The Right Honourable Sir Geoffrey Vos

Master of the Rolls

Date: 9<sup>th</sup> May 2023

## **THE PRE-ACTION PROTOCOL FOR PERSONAL INJURY CLAIMS**

- 1) In paragraph 1.1.2, after “could potentially be allocated” insert “to the intermediate track or”.

## **THE PRE-ACTION PROTOCOL FOR DISEASE AND ILLNESS CLAIMS**

- 1) After paragraph 2.2, insert—

“2.2A Claims for noise-induced hearing loss (NIHL) are more likely to be considered suitable for the fast track and are also covered by this protocol. Annex E applies to NIHL claims where the first letter of claim is sent on or after 1st October 2023.”.

- 2) In paragraph 6.7, for the words “relevant” to and including “Tracing Service”, substitute “relevant search result from the Employers’ Liability Tracing Office (“ELTO”)”.
- 3) After Annex D insert Annex E as set out in the Schedule to this instrument.

## **THE PRE-ACTION PROTOCOL FOR LOW VALUE PERSONAL INJURY CLAIMS IN ROAD TRAFFIC ACCIDENTS**

- 1) In paragraph 1.1—
  - a) in sub-paragraph (4), for “36.22(1)(e)(i)” substitute “36.20(1)(e)(i)”;
  - b) in sub-paragraph (9), for “36.22(1)(d)” substitute “36.20(1)(d)”;
  - and
  - c) in sub-paragraph (17), for “45.18(2)” substitute “45.29(1)”.
- 2) In paragraph 4.1, in the second set of parentheses which immediately follow sub-paragraph (4)—
  - a) for “26.6” substitute “26.9”;
  - b) for “26.6B” substitute “26.11”; and

- c) for “26.6A” substitute “26.10”.
- 3) In paragraph 4.6, for “45.18” substitute “45.28”.
- 4) In paragraph 6.9, for “45.24(2) and (2A)” substitute “45.35(2) and (3)”.
- 5) In paragraph 6.18—
  - a) for “rule 45.18” substitute “Table 10 of Practice Direction 45”; and
  - b) for “45.19(2A)” substitute “45.62(2)”.
- 6) In paragraph 7.44—
  - a) in sub-paragraph (1), for “rule 45.18” substitute “Table 10 in Practice Direction 45”;
  - b) in sub-paragraph (3), for “45.19” substitute “45.58”; and
  - c) in sub-paragraph (3A), for “45.19(2A)(a)” substitute “45.62(2)(a)”.
- 7) In paragraph 7.45
  - a) for “45.29” substitute “45.40”; and
  - b) in the words in parentheses which immediately follow, for “45.29” substitute “45.40”.
- 8) In paragraph 7.47—
  - a) in sub-paragraphs (2) and (3), for “rule 45.18”, in both places it appears, substitute “Table 10 in Practice Direction 45”; and
  - b) in sub-paragraph (5)—
    - i) for “45.19” substitute “45.58”; and
    - ii) for “45.19(2A)” substitute “45.62(2)”.
- 9) In paragraph 7.48(2), for “45.23A” substitute “45.33”.
- 10) In paragraph 7.56(2), for “45.23A” substitute “45.33”.
- 11) In paragraph 7.62—
  - a) in sub-paragraphs (2) and (3), for “rule 45.18”, in both places it appears, substitute “Table 10 in Practice Direction 45”; and
  - b) in sub-paragraph (5)—
    - i) for “45.19” substitute “45.58”; and
    - ii) for “45.19(2A)” substitute “45.62(2)”.
- 12) In paragraph 7.70—
  - a) in sub-paragraphs (2) and (3), for “rule 45.18”, in both places it appears, substitute “Table 10 in Practice Direction 45”; and
  - b) in sub-paragraph (4)—
    - i) for “45.19(2)” substitute “45.58(a) to (d) and (f)”.

ii) for “45.19(2A)” substitute “45.62(2)”.

13) In paragraph 7.59, for “45.18” substitute “45.28”.

## **THE PRE-ACTION PROTOCOL FOR LOW VALUE PERSONAL INJURY (EMPLOYERS’ LIABILITY AND PUBLIC LIABILITY) CLAIMS**

1) In paragraph 1.1—

- a) in sub-paragraph (4), for “36.22(1)(e)(i)” substitute “36.20(1)(e)(i)”;
- b) in sub-paragraph (10), for “36.22(1)(d)” substitute “36.20(1)(d)”;
- and
- c) in sub-paragraph (19), for “45.18(2)” substitute “45.29(1)”.

2) In paragraph 4.1, after sub-paragraph (4), in the words in parentheses, for “26.6” substitute “26.9”.

3) In paragraph 4.4, for “45.18” substitute “45.28”.

4) In paragraph 4.3, after sub-paragraph (6), insert—

“(6A) in the case of a disease claim against one employer defendant, any claim for noise induced hearing loss unless the defendant appears on the list maintained by Claims Portal Ltd for the purposes of this paragraph;”.

5) In paragraph 6.8, for “45.24(2)” substitute “45.35(2)”.

6) In paragraph 6.16, for “rule 45.18” substitute “Table 11 of Practice Direction 45”.

7) In paragraph 7.41—

- a) in sub-paragraph (1), for “rule 45.18”, substitute “Table 11 of Practice Direction 45”; and
- b) in sub-paragraph (2), for “45.19” substitute “45.58”.

8) In paragraph 7.44—

- a) in sub-paragraphs (2) and (3), for “rule 45.18”, in both places it appears, substitute “Table 11 in Practice Direction 45”; and
- b) in sub-paragraph (5), for “45.19” substitute “45.58”.

9) In paragraph 7.45(2), for “45.23A” substitute “45.33”.

10) In paragraph 7.53—

- a) in sub-paragraphs (2) and (3), for “rule 45.18”, in both places it appears, substitute “Table 11 in Practice Direction 45”; and

- b) in sub-paragraph (5), for “45.19(2)” substitute “45.58”.
- 11) In paragraph 7.59, for “45.18” substitute “45.28”.

## **THE PRE-ACTION PROTOCOL FOR RESOLUTION OF PACKAGE TRAVEL CLAIMS**

- 1) In paragraph 1.1(4), for “36.22(1)(e)(i)” substitute “36.20(1)(e)(i)”.
- 2) In paragraph 4.1, after (5), in the words in parentheses which follow, for “26.6” substitute “26.9”.
- 3) In paragraph 4.2, after “multi-track” insert “or the intermediate track”.
- 4) Omit paragraph 6.3.

## **TRANSITIONAL PROVISION**

- 1) Subject to paragraph 2), in so far as any amendment made by this instrument applies to—

- a) allocation; or
- b) costs,

that amendment only applies to a claim where proceedings are issued on or after 1st October 2023.

- 2) The amendments referred to in paragraph 1) only apply—

- a) to a claim which includes a claim for personal injuries, other than a disease claim, where the cause of action accrues on or after 1st October 2023; or
- b) to a claim for personal injuries, which includes a disease claim, in respect of which no letter of claim has been sent before 1st October 2023.

## SCHEDULE

### “Annex E

#### **NOISE INDUCED HEARING LOSS CLAIMS MADE ON OR AFTER 1ST OCTOBER 2023**

##### **General**

**E1.** This Annex sets out the procedure to be adopted for those claims for noise induced hearing loss (NIHL) which are likely to be suitable for allocation to the fast track. The procedure is intended to support the regime for fixed recoverable costs for such claims set out in Section VIII of Part 45.

**E2.** This Annex supplements the general provisions of this Protocol and applies to NIHL claims where the first letter of claim is sent on or after 1st October 2023. Where there is a difference between the general provisions and the contents of this Annex, the provisions in this Annex take precedence.

**E3.** Annex E has been created following the final report of the CJC working party in 2017 (<https://www.judiciary.uk/wp-content/uploads/2017/09/fixed-costs-in-noise-induced-hearing-loss-claims-20170906.pdf>). Practitioners may find the discussion in that report provides helpful background, although it should not be used as an aid to interpretation of this Annex.

##### **Exclusions**

**E4.** The following types of NIHL claim are excluded from the fixed recoverable costs regime—

- (a) military claims, i.e. claims by members of the armed forces in respect of their service career;
- (b) claims valued at more than £25,000;
- (c) claims allocated to or likely to be suitable for the intermediate track or the multi-track;
- (d) claims properly brought against 4 or more defendants, each of which is either still trading or has identified insurance cover for the material period;

- (e) claims where any defendant in their letter of response—
  - (i) alleges that the claimant's occupational hearing loss is de minimis;
  - (ii) requests a second audiogram;
  - (iii) requests their own medical evidence;
- (f) any claim considered to be a test case on issues of breach of duty in respect of any defendant;
- (g) claims against sole defendants as set out in paragraphs E5 to E7 below.

### **Claims against sole defendants**

**E5.** The Pre-Action Protocol for Low Value Personal Injury (Employers' Liability and Public Liability) Claims ("the EL/PL Protocol") applies to a disease claim brought against a sole defendant, where that defendant appears on the list maintained by Claims Portal Ltd. ("the NIHL List") for the purposes of this paragraph.

**E6.** A defendant may be entered by Claims Portal Ltd on the NIHL List—

- (a) where the defendant is still trading; or
- (b) where the defendant is no longer trading, all relevant insurers have agreed to the defendant's name being entered on the list.

**E7.** The effect of the defendant's name being entered on the NIHL List is that all claims against that defendant as sole defendant must start in the EL/PL Protocol rather than under this Annex of this Protocol.

**E8.** Where the defendant's name has not been entered on the NIHL List at the date when the letter of claim is sent, a claim against that defendant as sole defendant must be started in accordance with this Annex of this Protocol.

### **NIHL letter of claim**

**E9.** The claimant must use the new format of the letter of claim at appendix 1, which is intended to provide more meaningful and relevant information. Proper use of this template should avoid the need for defendants to make requests for further

information and should enable defendants to make early decisions on breach and to consider limitation and causation. This in turn should lead to costs savings and early filtering of and settlement of meritorious claims.

**E10.** The NIHL letter of claim must be accompanied by—

- (a) an audiogram produced by a suitably experienced and approved provider;
- (b) a schedule of the claimant's employment from HMRC;
- (c) the search results from ELTO.

**E11.** The audiogram should be from an acceptable UK “quality standard” audiologist and from tests conducted in acceptable conditions. Provision of a sufficiently robust independent audiogram with the letter of claim is essential, as it enables the defendants to have some certainty that there is a diagnosis of NIHL which merits detailed investigation.

**E12.** Production of the HMRC schedule with the letter of claim should ensure that the claimant provides a more accurate working history, as well as offering independent validation of the claimant's employment by the defendants.

**E13.** Where compliance with the procedure in this Annex is not possible before the expiry of the limitation period the claimant may start proceedings and apply to the court for an order to stay the proceedings while the parties take steps to follow this Annex.

### **NIHL letter of response**

**E14.** The defendants must use the new format of the letter of response in Appendix 2, which is intended to encourage defendants to make early admissions of breach of duty where they can do so and to narrow the areas of dispute. Use of the NIHL letter of claim, to include a better working history and disclosure of a suitable audiogram, should make it easier for defendants to conduct meaningful investigations and form a reasoned position on the issues in the claim.



**E15.** The NIHL letter of response should address the issues fully, including identifying whether delegated authority applies (if relevant) under the ABI's Claims Handling Guidelines and the name and reference for the coordinating insurer. Where there are multiple defendants, they should try to coordinate their positions at an early stage and to provide a coordinated response to the claimant where possible.

**E16.** Where breach is denied, the defendants must disclose any noise surveys and other relevant documents with the letter of response. The defendants should also state whether their records reveal any previous claims brought by the claimant.

**E17.** Use of requests for further information is discouraged. Defendants should consider all information provided in the NIHL letter of claim and only make a request if there is any material information missing.

**E18.** The information provided in the NIHL letter of claim should allow defendants to make decisions on breach of duty and to consider limitation and causation, prior to receiving any further medical evidence. Defendants are therefore discouraged from making any offer of settlement prior to receipt of full medical evidence, save that they may respond to any offer of settlement made by the claimant prior to the letter of response.

**E19.** Where the claimant indicates in the letter of claim an intention to obtain full medical evidence, i.e. a full audiologist's report or a report from an ENT surgeon, the defendants should normally agree that the time period for accepting any pre-medical offer should not start to run until that medical evidence is sent to the defendant.

### **Medical evidence**

**E20.** The provisions of this Protocol apply to medical evidence obtained under paragraphs E21 to E22 below. For the avoidance of doubt, the medical evidence contemplated in these paragraphs is in addition to the audiogram to be disclosed with the NIHL letter of claim.

**E21.** Where liability is disputed, it is expected that the claimant will obtain and disclose medical evidence from an ENT specialist doctor.

**E22.** Where liability is not in dispute, the claimant should obtain and disclose a medical report from an independent audiologist. In such cases a report from an ENT specialist will not normally be necessary. Any request by a defendant for a second audiogram in such cases is strongly discouraged.

### **Costs stages**

**E23.** The pre-issue stages identified for the purposes of the fixed recoverable costs regime in Section VIII of Part 45 are as follows—

Stage 1 – up to and including sending the NIHL letter of claim and accompanying documents;

Stage 2A – cases where liability is admitted in the NIHL letter of response;

Stage 3A – cases where liability is not admitted in the NIHL letter of response;

Stage 2B/3B – as for 2A/3A above, plus an additional allowance for the cost of preparing papers to issue where incurred, whether by solicitors or counsel.

### **Appendix 1**

**NIHL Letter of Claim** (To be completed by claimant's Solicitors with sign off by claimant)

#### **Part A**

We are instructed by xxxx in respect of a Noise Induced Hearing Loss claim against YYYY

To enable Defendants to fully investigate the matter, we attach the following information (tick to confirm attached):

- ELTO Search(es)
- HMRC
- Completed questionnaire
- Completed Part B for each proposed Defendant
- Audiogram
- GP and hospital records
- Anticipated valuation
- Provisional Schedule of Special Damages with supporting evidence
- Personnel/OH file or signed authority from claimant to obtain copy from insured
- Declaration of previous claims

#### **1. Claimant's Details:**

1.1 Full Name:

1.2 Address:

1.3 Date of birth:

1.4 National Insurance Number:

1.5 Solicitor's reference:

2. Employment History

2.1 The following table details our client's full working in both noisy and non-noisy environments:

Defendant	Employer	Employment dates	Exposure to noise? (Yes/No)	Hearing protection? (Yes/No)	Pursued? (Yes/No)	Lead Insurer details	FSCS Interest? (Yes/No)

3. Other exposure to noise

3.1 Has the Claimant served in H.M Armed Forces? If so please identify the service and unit, the period and exposure to noise such as weaponry:

3.2 Has the claimant been exposed to noise in any non-occupational activity such as, but not limited to shooting, motor sport, playing a musical instrument in a group, attending night clubs, prolonged listening to a personal music device? If so, please state the activity(ies) and the duration:

4. Claimant's symptoms

4.1 When did the claimant first notice significant hearing loss?:

4.2 Does the claimant suffer from tinnitus? If so, when did he/she first notice the onset and when did they first contact their GP?

4.3 When did the claimant first receive medical/occupational health advice about these symptoms?:

4.4 When did the Claimant first attribute his symptoms (including any Tinnitus) to exposure to noise in his employment?:

4.5 When, and in what circumstances, did the Claimant first learn that he might claim against the Defendant?:

**Part B** – to be completed for each proposed Defendant

5. Claimant's employment with the Defendant :

5.1 Company Name:

5.2 Company Address:

5.3 Business description:

5.4 Dates of Employment with proposed Defendant:

5.5 Which department(s) did the Claimant work in?

5.6 Job title(s):

5.7 Works or employee number:

5.8 Location(s) of work or site worked at:

5.9 Name of the Claimant's supervisor(s) or colleagues:

5.10 Contracted working hours:

5.11 Average overtime worked:

5.12 Number and duration of rest breaks:

5.13 Detailed description of each of the Claimant's main duties:

5.14 All sources of loud noise complained of:

a) The make and model of machinery or tools:

b) How long did the Claimant spend on each machine?

c) Period(s), frequency and duration of exposure to noise:

d) Claimant's proximity to source(s) of noise:

5.15 Please comments on changes in ambient noise levels throughout the period of employment.

## 6. Claimant's hearing protection and training

6.1 Was hearing protection provided?:

6.2 What type of hearing protection was provided?:

6.3 If appropriate, when was hearing protection first made available?

6.4 Did the Claimant wear hearing protection at any time?

6.5 If hearing protection was available but not worn, why not?

6.6 Was hearing protection enforced? If so, from when?:

6.7 Was noise awareness training conducted? If so, what advice or information was given?:

6.8 Are any allegations made regarding the efficacy of the hearing protection provided?

6.9 When was the Claimant last exposed to excessive noise levels without wearing hearing protection?

6.10 If Hearing Protection was provided or hearing tested, what did the Claimant think the purpose of them were?

6.11 Please advise whether any works audiograms were taken at the proposed Defendant or any other companies in which the Claimant was employed:

6.12 Please comment on any complaints made by the Claimant, or other employees in relation to noise:

## 7. Claimant's allegations of breach of duty

## 8. Claimant's Request for Disclosure

8.1 In accordance with the Pre Action Protocol for Disease and Illness Claims, please provide the following records at this stage:

- a. Occupational health records
- b. Personnel records

8.2 Please note your insurers may require you to advise them of this request. We enclose a request form and expect to receive the records within 40 days. If you are not able to comply with this request within this time, please advise us of the reason.

8.3 If you are denying liability, please provide the following information:

- a. Records of any previous complaints and/or claims
- b. Risk assessments including noise measurements for the different equipment referred to
- c. Records of hearing protection provided together with attenuation details
- d. Records of information provided, instruction and training given.
- e. Health surveillance records.
- f. Records of any preventative steps taken to reduce exposure to noise.

- g. Noise Surveys
- h. Health & Safety Minutes
- i. Any documents leading up to the obtaining of noise surveys.
- j. Any documents relating to the consideration of any noise surveys
- k. Any other relevant documents specified by the claimant

**SOLICITOR'S DECLARATION**

- We confirm that we are satisfied as to our client's identity and understand that this will enable Defendants to make any payment to the claimant in the event of settlement.
- (Either), we attach our client's signed authority to enable any payments to be made to this firm.
- (Or) We can confirm that any agreed damages should be made payable to the claimant.

Signed:

Dated:

**CLAIMANT'S DECLARATION**

I,.....(name of claimant)  
of .....(address)

hereby confirm that:-

1. I have not at any time previously made any other claim for hearing loss of any description (regardless of whether any compensation was paid or not), to include Industrial Deafness and/or tinnitus against any party.
2. I have not made any claim through any scheme (Government, Trade Union or otherwise).
3. I have not previously instructed any solicitors with regard to a claim for Noise Induced Hearing Loss.

**APPLICATION ON BEHALF OF CLAIMANT FOR OCCUPATIONAL HEALTH RECORDS & PERSONNEL FILE**

Statement of Claimant

I, \_\_\_\_\_ authorise you to disclose all of my records relating to me to my solicitor and to your legal and insurance representatives.

Signature of claimant:

Date:

## Appendix 2

### NIHL Defendant's Letter of Response

Claimant ref:

Insurer ref:

Exception to FRC	Please tick the box that applies
Own expert evidence	
De-Minimis defence	
Four defendants or more	
Test case	

**If own medical evidence requested please provide detailed reasons as to why requested below including details of Audiologist / Expert to be instructed:**

#### 1. Offer

- a) The Claimant's Part 36 offer is accepted;
- b) The Defendants Part 36 offer in the sum of £
- c) Settlement cannot be agreed at this stage. Please set out reasons as why settlement cannot be agreed:

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#### 2. Apportionment Schedule

	Insurer	Policy number	Dates on cover	Coordinator*	Holtby discount	FSCS interest %
D1						
D2						
D3						

<b>Are all defendants within the IDCWP?</b>	<b>Who will coordinate together with contact details of Insurer / Solicitor?</b>

\*Identify the Handling insurer (H) for each Defendant, and the overall Coordinating insurer (C)

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**3. Liability**

	Admitted	Neither admitted / denied	Denied*
Breach			
Causation			
Limitation			

**4. Breach:**

Where Breach cannot be admitted, details of Allegations which are denied must be provided together with any supporting documentation:

Allegation	Admitted	Neither admitted / denied	Explanation	Denied*	Explanation

- For each allegation denied supporting documentation must be provided.
- How many lay witnesses do you seek to rely upon:

**5. Disclosure:**

- Itemised list of relevant documents attached: Y/N , if N please provide an explanation:
- Provide details the searches carried out to locate all relevant disclosure:



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- Confirm any ongoing searches and a deadline for when these are to be concluded:

Search	Deadline

- Have all documents that you are required to supply under the pre action protocol being provided: **Y/N**
- Have all documents which adversely affect the Claimant's claim or support the Defendant's claim been provided: **Y/N**
- If the answer to any of the above are N then please provide an explanation below:

**6. Limitation:**

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- Is limitation being raised as a Defence: Y/N
- If limitation is being raised a Defence then give detailed reasons for this with reference to all relevant disclosure.

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**7. Other comments".**