Neutral Citation Number: [2026] EWHC 2083 (KB)

Case No: QB-2021-002484

IN THE HIGH COURT OF JUSTICE
KING'S BENCH DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 07/08/2026

Before:

MR JUSTICE GARNHAM

and

MASTER BROWN (sitting as an assessor)

- -

Between:

DAVID ABBOTT AND OTHERS	**Claimants**
- and –	
MINISTRY OF DEFENCE	**Defendant**

- -
- -

Harry Steinberg KC, and **Erica Bedford** (instructed by **Hugh James**) for the **Claimants**
PJ Kirby KC, David Platt KC, Peter Houghton and **Kate Longson** (instructed by **Keoghs**) for the **Defendant**

Hearing date: 22 July 2026

- -

Approved Judgment

This judgment was handed down remotely at 10.30am on 7 August 2026 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

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MR JUSTICE GARNHAM ON COSTS

Mr Justice Garnham:

Introduction

1. I handed down judgment in this case ("the judgment") on 24 April 2026. The judgment related to a series of generic issues (issues originally identified as Generic Issues 9 - 14) raised in many thousands of claims for damages for noise induced hearing loss ("NIHL") suffered by members of HM armed forces ("the cohort"), and two test claims brought by two former soldiers, Mr Christopher Lambie and Mr Jack Craggs. Both Lead Claimants, along with the majority of the Claimants in the cohort, were represented by Hugh James Solicitors.

2. This case is relisted before me, sitting with Master Brown as an assessor, to determine an application by the Claimants (i) for an order as to costs in respect of the generic issues determined by the judgment, including the two test cases, and (ii) a reasonable payment on account of those costs.

3. In summary, the Claimants invite the Court to order the Defendant to pay 95% of the Claimants' common costs of what are called "the Trial Generic Issues" and the lead cases, to be assessed on the standard basis if not agreed, and to make a payment on account of £6,013,822.09 and interest on costs. The Claimants do not seek the costs referable solely to the three discontinued test claims.

4. The Defendant resists any such order. The Defendant contends that the outcome of the trial was "genuinely mixed", that the Defendant has been the more successful party and that the appropriate order would be no order as to costs.

The History of the Litigation

5. This litigation has a lengthy and complicated history. For present purposes it is sufficient to note that the parties agreed to dispose of issues going to liability by the imposition of an agreed "matrix", pursuant to which the Claimants agreed a discount from the full value of their claim to reflect the potential defences available to the Defendant on the particular facts of their case. The two sides then agreed, with the approval of the Court, that each would identify test cases and reserve test cases which would provide vehicles by which the issues relevant to causation and quantification could be tested before the Court.

6. Of the 20 test claims worked up to trial standard, six settled before the trial began and one settled shortly afterwards. On 8 September 2025, the Defendant made offers in the Lead and Reserve cases nominated by the Claimants starting with the claim of Mr Hambridge. On 25 September 2025, the Defendant accepted the Claimant's counteroffer in Mr Hambridge's claim (£550,000 net). On 19 September 2025, about nine working days before the date the trial was due to start, the Defendant made offers in the claims of Mr Davies (£182,250 net), Mr Hobbs (£587,500 net) and Mr Law (£525,000 net). Mr Hambridge and Mr Davies were Lead Claimants. These Claimants accepted the offers on 25 September 2025. The timing of those settlements meant that Reserve Claimants could not be substituted and a substantial part of the trial preparation in those cases was wasted.

7. On the evening after the "judicial primer" hearing (as it is described in the judgment), by email and then Note dated 8 October 2025, the Defendant conceded causation and quantification in Lambie. Until then, although the Defendant accepted that Mr Lambie had a diagnosis of NIHL, the quantification of the same had been in dispute.

8. Three test claims were discontinued: those of Mr Boswell (a Reserve test case, on 4 June 2024), and Mr Evans and Mr Lloyd (on 23 October 2025, during the trial). All three were Defendant nominations as Lead Cases.

9. A previous Lead Claimant (Mr Barrie), who had been selected by the Defendant, became terminally ill after selection. The Defendant was asked to agree that his claim be stood down on compassionate grounds. It agreed to that course, after the intervention of the Court on 23 July 2025. Mr Barrie died shortly afterwards.

10. The hearing lasted a little over nine weeks, beginning with the Primer session on 6 October 2025. 13 experts were called to give evidence. The Court received written opening and closing submissions from the Claimants (whose closing submissions ran to 429 pages) and from the Defendant (446 pages) and heard oral submissions over 5 days. The judgment was handed down on 24 April 2026.

The Legal Framework

11. The framework governing the power to make a costs order is contained in CPR 44.2

Court's discretion as to costs 44.2

(1) The court has discretion as to –

a. whether costs are payable by one party to another;

b. the amount of those costs; and

c. when they are to be paid.

(2) If the court decides to make an order about costs –

a. the general rule is that the unsuccessful party will be ordered to pay the costs of the successful party; but

b. the court may make a different order.

…

(3) In deciding what order (if any) to make about costs, the court will have regard to all the circumstances, including –

a. the conduct of all the parties;

b. whether a party has succeeded on part of its case, even if that party has not been wholly successful; and

c. any admissible offer to settle made by a party which is drawn to the court's attention, and which is not an offer to which costs consequences under Part 36 apply.

(4) The conduct of the parties includes –

a. conduct before, as well as during, the proceedings and in particular the extent to which the parties followed the Practice Direction – Pre-Action Conduct or any relevant pre-action protocol;

b. whether it was reasonable for a party to raise, pursue or contest a particular allegation or issue;

c. the manner in which a party has pursued or defended its case or a particular allegation or issue; and

d. whether a claimant who has succeeded in the claim, in whole or in part, exaggerated its claim.

12. It follows that the starting point is the general rule that the unsuccessful party will be ordered to pay the costs of the successful party. Accordingly, the Court will seek to identify the 'successful party'. Once that starting point is identified, the Court may then wish to consider whether any factors operate against the usual order so as to meet the justice and realities of the case.

13. The Court has a wide discretion on an application for costs. However, the Court of Appeal provided guidance relating to the question of success in a personal injury context in Fox v Foundation Piling [2011] EWCA Civ 790 at [47-49]. Jackson LJ endorsed the approach taken in Goodwin v Bennetts UK Limited [2008] EWCA Civ 1658 that partial success across issues is not normally a reason for depriving a successful party of its costs within a PI context.

14. CPR 46.6 sets out certain 'special' factors which apply to costs orders made when a GLO has been made. This action proceeded outside a strict GLO, but collective management measures were in place in respect of the cohort from November 2022, including the agreement to the List of Generic Issues that required disposal prior to individual claims.

15. It is therefore instructive to consider CPR 46.6

1) This rule applies where the court has made a Group Litigation Order ('GLO').

2) In this rule –

'individual costs' means costs incurred in relation to an individual claim on the group register;

'common costs' means –

(i) costs incurred in relation to the GLO issues;

(ii) individual costs incurred in a claim while it is proceeding as a test claim, and

(iii) costs incurred by the lead legal representative in administering the group litigation; and

'group litigant' means a claimant or defendant, as the case may be, whose claim is entered on the group register.

3) Unless the court orders otherwise, any order for common costs against group litigants imposes on each group litigant several liability for an equal proportion of those common costs.

4) The general rule is that a group litigant who is the paying party will, in addition to any liability to pay the receiving party, be liable for –

a) the individual costs of that group litigant's claim; and

b) an equal proportion, together with all the other group litigants, of the common costs.

16. The parties had agreed a Common Costs Sharing Agreement. This agreement reflected the parties' agreed position that generic work would be carried out for the benefit of the cohort, in circumstances where such work could not be directly attributed to an individual Claimant. In consequence, the Defendant has previously agreed, in accordance with the terms of the Common Costs Sharing Agreement, to pay the Claimants' common costs of generic issues 1-8 and 15(a)-(d) on the original List of Generic Issues. The costs order now sought relates to the Generic Issues 9-14 which relate to causation of Military NIHL ("MNIHL"), as distinct from general NIHL, and the approach to quantification of such claims.

17. In <u>Kupeli v Atlasjet</u> [2018] 3 Costs LR 555 the Court of Appeal made a number of helpful observations about the proper approach to costs in group proceedings:

> 59. It is uncontroversial that, in assessing costs as between parties, <u>the court must look at the litigation as a whole</u>. The *AL Barnes* line of authorities each relate to a claim for money between two individuals. In such claims, who pays whom may well be a straightforward and easily identified mark of who the unsuccessful party might be for the purposes of CPR rule 44.2(2), even if that party has been successful in respect of some issues which might warrant (say) a percentage reduction in his recoverable costs, the CPR encouraging percentage awards rather [than] issues-based awards on grounds of practicality (see CPR rule 44.2(7)). <u>But in a group claim, looking at the litigation as a whole, there are other material factors</u>…
>
> 61… a group claim is managed so that any trial not only conclusively determines any lead claims. The trial is intended and designed to determine matters, through the vehicle of preliminary issues and/or lead claims, that will determine or assist in the determination of the balance of the claims by agreement or later individual small-scale trials. Consequently, <u>the direction any money travels as a result of a group claim trial may not always properly reflect "success". Looking at the litigation as a whole, whether a party is "successful" is an issue which has to take</u>

> into account both the extent to which a party has been successful in such issues and the consequences of the trial for the balance of claims. These are, quite clearly, material considerations so far as the issue of costs as between the parties is concerned…
>
> 77… although by CPR rule 44.2(2)(a) it is the general rule that an unsuccessful party will be ordered to pay the costs of the successful party, rule 44.2(2)(b) provides that "the court may make a different order". It seems to me that, where the concept of overall "success" may be a necessarily ambivalent concept (as in a complex group claim trial, in which opposing parties each have considerable success), a search for an overall "winner" may be a largely fruitless exercise. In any event, it is clear from CPR rule 44.2 that, in assessing costs as between parties, the court must first determine whether to make a costs order at all. (My emphasis.)

Discussion

The Indemnity Principle and Discontinuance of Claims

18. Issues arose during the course of the present hearing as to the application of the indemnity principle on the facts of this case and as to the consequence of the discontinuance of some of the claims within the cohort. I permitted the parties to put in additional written submissions on the point.

19. I have been shown the CFA agreements in the two test cases and been told about the arrangements between the Claimants and their solicitors in more general terms in the statement of Mr Ellis, the lead solicitor. I am satisfied, in the light of the terms of the CFAs, that, to the extent that I make an order for costs in this case, the Claimants are liable to their solicitors for costs incurred in relation to the generic issues which are determined by the current proceedings.

20. There is no doubt that I can take into account the fact that some of the claims have been discontinued as a factor relevant to the assessment of the Claimants' costs. But, in my view, the effect of the Supreme Court's decision in Ho v Adelekun [2021] UKSC 43 is t hat, in respect of cases issued before 6 April 2023, QOCS applies and, absent proof of fundamental dishonesty, the defendants cannot by way of set-off recover their costs relating to the discontinued proceedings.

21. The possibility that my judgment will cause more Claimants to discontinue their claims is a matter to which I have regard, in the exercise of my discretion on costs.

Conduct

22. There was some criticism in the arguments I heard about the conduct of the parties, their expert witnesses and their counsel. I saw little in similar criticism in the parties' closing submissions; I see little in the current context either. This was a vigorously contested application after a vigorously contested trial. However, except potentially in the case of Mr Evans (in respect of which the Defendant has issued a separate application), I see no impropriety on the part of any person involved.

The Nature of the Proceedings

23. This was not a simple personal injury action with one Claimant and one Defendant with issues relevant only to the claim between them. This was a form of test case designed to determine a considerable number of issues which were relevant across an enormous cohort of Claimants represented by one firm of solicitors. Individual test cases and generic issues had been identified so that their resolution would assist in resolving many other cases. By the time of the hearing only two of the individual test cases remained live and ready for resolution but, as discussed in the judgment, they were valuable nonetheless as exemplars of the types of cases found in the cohort and as cases where the generic issues were all of some relevance.

24. As was perfectly proper, and to be expected, the parties' positions on the generic issues moved to some degree between their opening and closing submissions. They recognised the strengths and weaknesses of the competing arguments and, on occasions, to adopt the observation of Mr Kirby KC for the Defendant, the advocates read "*the judicial writing on the wall*". I make no criticism of that. But, in my judgment, in identifying and measuring success on these issues it is necessary to have regard, not just to a party's closing submission, but also to their opening position (and potentially to their stance even before that). The expenditure of costs was in part dictated by the need to respond to the cases as originally advanced.

25. The judgment provided answers to the generic issues and quantified the damages to be awarded in the two test cases. The costs attributable to both the generic issues and the two test cases were part of the common costs.

Judging Success

26. In order to judge the relative success of the two sides in the hearing it is necessary to consider the following: (i) my conclusions on each of the generic issues; (ii) the significance of each of those conclusions, in other words what Mr Steinberg KC for the Claimants called "*the dispositive impact that success had upon the wider litigation*"; and (iii) the measure of success on the Lead Claims and the relevance of those decisions to the cohort as a whole.

(i) Success on the Generic Issues

27. Chapter 17 of the judgment sets out a summary of my conclusions on the generic issues. It is convenient to set that out here and to set out after each of those quotations my view as to the parties' degree of success on that issue.

28. On the first generic issue, *acoustic engineering evidence*, and the first element of the second issue, *epidemiology*, there was no dispute between the parties and neither party can be considered a winner or a loser. I deal with the remaining issues in turn.

Specificity and Sensitivity

29. At paragraph 729 -730 of the judgment, I said this:

> *In my judgment, little weight should be attached to either specificity or sensitivity figures. They should be considered as no more than 'ballpark' estimates.*
>
> *PPV figures are more helpful than either the sensitivity or specificity figures alone. But that does not mean that decisive weight should be attached to the PPV figures*

either. That that approach is the right one is underlined by the fact that all these statistics depend on audiograms and all the suggested diagnostic methods are expressly intended as guidelines only. All require consideration of the whole clinical picture.

30. In my judgment, neither party can be considered a winner on this issue. The Claimants emphasised the importance of sensitivity, to ensure that no genuine sufferer from NIHL would miss out on compensation; the Defendant emphasised the importance of specificity to ensure that only those genuinely entitled to do so recovered damages. My conclusion was that neither concept was decisive and that the clinical picture was the critical factor.

Military Audiograms

31. At paragraph 731-732 I said:

> *Pure Tone Audiometry (PTA) conducted in compliance with the protocol and standards set by the British Society of Audiology (BSA) is the gold standard of audiometric testing and should be used in medico-legal cases as the best evidence whenever it is available. However, screening audiograms, including military screening audiograms, are ordinarily suitable for screening and triage. Furthermore, when they are part of a consistent pattern they may also be used, as part of the exercise of clinical judgment by clinicians advising in medico-legal cases, for diagnostic and quantification purposes. Audiometry evidence (including BSA compliant PTA) should, wherever possible, be considered in context and as a whole, rather than in isolation.*
>
> *The arrangements operated by the MoD were and are designed to give a good degree of oversight over the hearing capacity of members of the armed forces. The majority of such audiograms are conducted properly and in good faith. This is particularly so once a referral for medical assessment is made. However, there may, on occasions be systemic or operational inadequacies and the Court should be alive to that possibility.*

32. I regard this, in substantial part, as a win for the Defendant. Although by the end of the hearing the Claimants' counsel acknowledged that the Court could place reliance on military screening audiograms when they showed a consistent pattern, at the beginning of the hearing there was substantial reluctance from both their legal team and their experts (notably Prof. Moore and Mr Silva) to the placing of any weight at all on such audiograms. In contrast, I concluded they could properly be used for both diagnostic and quantification purposes when part of a consistent pattern.

The Foundational Concepts

33. At paragraph 733, I said this:

> *(i) For the purposes of both the diagnosis and quantification of NIHL, ISO 7029:2017/2024 should be preferred over ISO7029:1984/2000. (ii) A baseline correction is required in principle. In the generality, a cohort-wide allowance of 2.4 dB across 1–8 kHz should be adopted. (iii) TDH39P earphones are liable to produce variable results at the 6 kHz frequency. However, there should be no*

> *automatic deduction of 6 dB when an HTL at 6 kHz is measured using TDH39P earphones. Whenever the precise 6 kHz measurement could make a difference to the diagnosis or quantification of NIHL, the ENT expert should approach the measurement with caution and assess it in the context of the audiometric series of which it forms part.*

34. On sub issue (i) the Claimants were the clear winners. I accepted their submissions that ISO 7029:2017/2024 should be preferred over ISO7029:1984/2000. On sub issue (ii) the Defendant was successful on the principle of a need for a baseline correction but, as to the amount of that correction, I preferred the Claimants' case. And in my view, the fact that the relevant scale is logarithmic means that the Claimants' success on that point is the more significant for individual cases and for the cohort as a whole. On sub-issue (iii) a similar conclusion follows. I accepted the Defendant's case that TDH39P earphones were liable to produce unreliable results at 6kHz but rejected the need for an automatic deduction. On that matter too, the Claimants had the better end of the argument.

The Diagnostic Method

35. At paragraph 734, I accepted the Claimants' primary case and rejected the Defendant's. I held that the preferable diagnostic method was the rM-NIHL method and found that the Defendant's preferred method, CLB, was not suitable for military cases.

36. It is right to say, however, that in the relevant substantive chapter, Chapter 8, I provided a little more detail about my conclusion on this issue. I said at paragraph 419 that:

> *It follows, first, that the original M-NIHL method and the MLP(18) method should not be relied on in medico-legal work (see [346] above and following); second, that CLB is not generally suitable for military cases and third that the rM-NIHL method is the method to be preferred. A proper diagnosis of NIHL depends on the careful application of each element of the rM-NIHL test.*

37. That qualification is not without significance. Paragraph 419 makes clear that rM-NIHL is the only diagnostic method to be used. It is not open to a Claimant who does not meet rM-NIHL to rely on the original M-NIHL or Prof. Moore's most recent methodology, MLP(18). There were cases, notably that of Mr Lloyd, where that possibility was mooted. It follows that although the Claimants were substantially successful on this very important issue, their success was not total and the Defendant obtained a ruling which, in a small number of cases, may be significant.

Quantification

38. At paragraph 735, I held that on the quantification of NIHL, the Moore, Cox and Lowe method of quantification advanced by the Claimants is to be preferred. I said that:

> *in using that method (i) the choice of the **percentile** in the relevant dataset should be dictated by the clinical judgement of the medicolegal ENT surgeon based on the hearing of the individual ascertained from all the available audiometry; (ii) the conventional 1**, 2, 3 kHz average** should continue to serve as a baseline descriptor. However, it is entirely legitimate to consider supplementary metrics that incorporate 4 kHz, particularly where speech-in-noise difficulty is a prominent*

feature. (iii) NIHL should generally be quantified ***using the 4:1 binaural calculation****. But where the excess loss calculation does not fully reflect the totality of the problems experienced by the Claimant, the clinician, and ultimately the Court, needs to identify and reflect the additional disability.*

39. On this topic too, the Claimants were substantially successful. It was their proposed method of quantification that, in principle, I concluded should be adopted. However, that success too was qualified. I accepted the Defendant's argument that the percentile selected should be based on the hearing of the individual Claimant, that overall hearing disability should ordinarily be calculated by reference to the average hearing thresholds over 1, 2 and 3 kHz and that, absent evidence that the excess loss calculation does not fully reflect the totality of the problems experienced by the Claimant, NIHL should generally be quantified using the 4:1 binaural calculation.

Latency and Acceleration and Cochlear Synaptopathy

40. At paragraph 736, I said that:

The theory that hearing loss may continue to develop after exposure is plausible, intellectually coherent but a very long way from being proven in human beings. The orthodox view that hearing loss does not progress after exposure ceases has not, at least at yet, been displaced. Further, and more fundamentally, there is at present no conceivable mechanism by which the effect of this alleged phenomenon could be identified or quantified in any individual Claimant.

41. At paragraph 737 I said that:

Cochlear Synaptopathy cannot definitively be demonstrated, let alone quantified, in humans before death. 'Proxy measures' of cochlear synaptopathy are less than certain and there is no gold standard test for the condition.

42. These were each successes for the Defendant. The Claimants now contend that these issues were "*largely peripheral*". I do not accept that. It certainly did not appear to me to be so at the beginning of the hearing. Both arguments were advanced with vigour and were supported by detailed expert evidence.

Tinnitus

43. At paragraph 738 I ruled that:

Tinnitus normally begins during exposure to noise or shortly after the cessation of noise. It is not possible to identify an arbitrary time after exposure to noise beyond which a claim should not be considered. The most that can be said is that the closer the onset of tinnitus is in time to the exposure to dangerous noise, the more likely it is to be caused by it. The longer the period between the end of exposure and the onset of tinnitus the greater should be the intensity of the examiner's scrutiny of the circumstances of the case and the veracity of the informant. And the Court, faced with a disputed claim will have to be equally circumspect.

44. The Claimants had suggested that tinnitus could be attributed to military noise exposure without audiometric evidence of hearing loss even when the onset of tinnitus was many years after exposure to noise had ceased. The Defendant had argued that tinnitus which

began more than a year or so after cessation of noise exposure could not be attributed to it. I rejected both those approaches. In my view neither party can claim that they were victorious on this issue.

De Minimis

45. At paragraph 739, I ruled that:

> *a hearing loss of less than 4 dB without other consequences should be regarded as de minimis. It will be a matter to be determined on a case-by-case basis whether exposure to noise which causes loss below that cut off nonetheless causes appreciable damage.*

46. The Claimants had argued that there was no specific measurement of hearing threshold changes which marks the borderline between material and de minimis loss. In their opening, by contrast, the Defendant had argued that individuals generally cannot notice incremental changes in hearing of less than 4 to 5 dB over key frequencies. However, surprisingly, the Defendant did not invite a decision on de minimis in their closing submissions. I regarded this issue of some significance and so made the ruling set out above. However, I cannot say that this was a real success for the Defendant since they did not persist in an argument that it was.

General Damages

47. In paragraph 740, I said that:

> *the JC Guidelines are the appropriate starting point for assessing general damages for PSLA. The judge's task is to consider all the facts of the case in question against those guidelines. The dB measure of NIHL is a highly relevant factor but is not necessarily determinative of the appropriate damages bracket.*

48. Both parties agreed that the Guidelines were the appropriate starting point, and I do not see either as a winner or a loser on this issue.

Hearing Aids

49. At paragraph 741, I said:

> *Depending on the evidence in a particular case, a Claimant may be able to justify the cost of private, high-performance, rechargeable hearing aids with such advanced features as are recommended by a reputable Hearing Aid Expert. The precise costing will have to be determined on a case-by-case basis.*

50. Again, this was not, in substance, controversial.

Loss of Future Earnings

51. Although this was listed as a generic issue, I had evidence and submissions on the subject in relation to only one case, that of Christopher Lambie. In my view, it would not have been sensible to attempt to lay down a rule applicable across the whole cohort on the basis of a single example. I said at paragraph 742:

Such claims are highly fact sensitive, and the relevant principles are best considered in the context of a particular case. I do so in the case of Mr Lambie in the next chapter.

52. That is not to suggest, however, that the issue was not important or of real significance to the whole cohort. I return to that issue below.

(ii) The Dispositive Impact on the Wider Cohort

53. Both parties have made submissions on the likely impact of my judgment on the whole cohort. Mr Ellis, the Claimants' solicitor, has attempted to conduct an audit of a percentage of the remaining cases. I confess I do not find any attempt to quantify the impact very helpful; this inevitably amounts to speculation based on incomplete material and is inevitably conducted by someone with an interest in the result.

54. I approach the issue at a higher level of generality which in my view is as much as the evidence will permit. Ultimately this goes to what, in any event, has to be a somewhat impressionistic assessment.

55. In my view, the greatest impact on the whole cohort will be my conclusions on the foundational concepts, the diagnostic method and the proper approach to quantification. On each of these issues, and subject to some qualifications, the Claimants were successful.

56. The Defendant's success on the use of military audiology will have significant consequences. Given the fact that all, or almost all, armed forces personnel undergo audiograms at the commencement, during the course and at the end of their service, the relevance of these in-service tests to claims for damages for NIHL may well be of some importance.

57. The Defendant was successful on latency, acceleration and cochlear synaptopathy. Each of these would have had a potentially significant effect on the cohort when viewed as a whole had the Claimants been able to make good their arguments. They would have made possible claims which did not qualify as M-NIHL cases on the application of the rM-NIHL diagnostic method.

58. My ruling on de minimis and tinnitus may have a marginal effect on the cohort as a whole. I do not see my findings on hearing aids or general damages as having a significant impact on the cohort.

59. However, although it related to only one Claimant, Mr Lambie, I do regard my ruling on loss of future earnings as important for the cohort and so to the question of costs. I return to that issue below.

(iii) Success on the Lead Claims

60. Both Mr Lambie and Mr Craggs were successful in their claims. They succeeded in obtaining substantial awards of damages. The Defendant could have, but did not, make part 36 payments or *Calderbank* offers. Were these individual cases each would have been entitled to their costs in the ordinary way. Following <u>Fox v Foundation Piling</u>, that is so even though they did not win on every issue (Mr Lambie recovered damages for future loss on the less generous <u>Smith v Manchester</u> basis, not the Ogden tables

multiplier/ multiplicand basis he advanced; Mr Craggs failed to establish any hearing loss but was awarded damages for his tinnitus).

61. I have also to take account, however, of the fact that Lambie and Craggs were Lead Cases, chosen and determined because such determination would be important in other claims in the cohort. In that regard, Mr Craggs' case was of only modest significance. I found him to be an unreliable witness on the central issue of diagnosis, and his case was a good illustration of the importance of the Court's conclusions on a number of the generic issues (notably the utility of military audiograms, and latency and acceleration). But for the purposes of the cohort as a whole, the decision in his case adds little to the weight to be attached for present purposes to the findings on those generic issues in any event.

62. However, Mr Lambie's case is different in this regard. My conclusions on his claim for future loss of earnings are relevant, not just to his case, but to the whole cohort, and that in turn is relevant to the question of costs which I am currently considering.

63. I heard detailed evidence on the issue in Mr Lambie's case and received very detailed submissions. I provided a fully reasoned ruling on the subject. That ruling will stand as a precedent on the point in the same way that any High Court judgment is a precedent. Particular facts may lead a Court to a different conclusion but the analysis in my judgment will warrant consideration. My conclusion on the issue in Mr Lambie's case will also have relevance as a decision in a test case in this litigation.

64. In Mr Lambie's case, the Claimants' primary argument on loss of future earnings, that the correct approach was based on the application of Ogden Tables A – D, was rejected. The Defendant's primary case that Mr Lambie had no claim for loss of future earning at all was also rejected. I adopted what were the parties' secondary cases and made a relatively modest award for loss of earning capacity. So, neither party are able to claim a victory on this particular claim.

65. However, I have little doubt that loss of future earnings would be the single most significant element of the damages claims in a sizable proportion of the cases in the cohort. As a result, in my view, the effect of this ruling was overwhelmingly positive for the Defendant. The consequence for the cohort as a whole, had I upheld the Claimants' approach to loss of future earnings would have been to increase the value of the total claims very substantially indeed.

66. I have also to factor into my assessment the fact that a number of claims have been discontinued. In particular two of the lead cases (Evans and Lloyd) were discontinued during the trial. CPR 38.6(1) provides that, unless the Court orders otherwise, a Claimant who discontinues is liable for the Defendant's costs. Whilst the costs of the lead cases are to be treated as common costs, the normal consequence of discontinuing a claim is a factor to be considered when deciding what order for costs should be made.

67. More difficult is that I have to take into account the possibility that the effect of my judgment may be to encourage others to discontinue. I have no hard evidence on this, and it is dangerous to speculate. But I can see it as possible that a number, out of the tens of thousands who have intimated a claim, may be dissuaded from continuing by my findings about latency, acceleration and cochlear synaptopathy and the application

of the de minimis principle. That does not cause me to make any significant reduction to the percentage of the Claimants' costs I might otherwise allow, but it does prompt me to be a little more cautious than I otherwise might have been.

Conclusion on Costs

68. Viewing this matter in the round, I conclude that the Claimants were very largely successful on the major issues in the case, the issues that attracted most attention and required most work in the trial, namely the foundational concepts, the diagnostic method and the quantification method. In addition, they won damages in the two test cases.

69. The Defendant was largely successful on the utility of military audiometry, latency, acceleration and cochlear synaptopathy and on loss of future earnings, so far as the latter issue was tested.

70. Against that background, the Claimants seek an order that the Defendant pays 95% of their costs. The Defendant says there should be no order as to costs.

71. In my judgment, the appropriate costs award in respect of the trial of the generic issues and the test cases is that the Defendant will pay the Claimants 60% of their costs, after detailed assessment.

Interim Payment of Costs

72. CPR 44.2(8) requires a payment on account where an order is made for detailed assessment, absent some good reason not to do so. There is no such reason here.

73. The Claimants assert that the total common costs are £9,738,983.15. They suggest the court should allow 95% of that (or £9,252,033.99). In paragraph 88 of the 15th statement of Mr Ellis (although not in their skeleton argument), the Claimants deduct £1,355,000 received on account. Using the 95% figure, that would produce £7,897,033.99. They seek 65% of that by way of interim payment which would amount to £5,133,072.09.

74. The Defendant resists any order of costs against them but suggested 36% as an interim payment if the Court was against them on that primary case.

75. A difficulty I and Master Brown have faced in this case, despite our raising the matter during the hearing, is the absence of a signed draft bill or a certified statement of costs or a certified schedule of costs. I have real concerns about the costings we have received generally but particularly as regards the hourly rates claimed, the total number of hours claimed, the seniority of the solicitor engaged on some of the tasks involved, the appropriateness of the levels of delegation adopted and the disbursements.

76. I have to make a broad brush estimate of what is likely to prove recoverable on a detailed assessment and I have to adjust that to allow for a margin of error. In so doing I have to have regard to all the circumstances of the case. I note that these proceedings have been running for a decade; that the trial was lengthy and complex; that the work which went into preparing and presenting the evidence was very considerable; that, on the Claimants' figures, the overall value of the case may run into the billions; that perhaps as many as 100,000 military personnel will be affected.

77. I also bear in mind that this is not a case where there can be any doubt that the Defendant will be good for the money once the final bill is determined and that it will be open to the Claimants to seek a further interim costs certificate if appropriate.

78. In all the circumstances set out, I allow 50% of the appropriate figure by way of interim order.

79. It follows that the appropriate calculation of the interim award of costs is as follows. The figure for the gross common costs, as calculated by the Claimants, is £9,738,983.15. I accept the Defendant's submission that from that there falls to be deducted the payment on account of £1,355,000. That gives a net figure of £8,383,983.15. I allow 60% of that, namely £5,030,389.89 being the costs of the generic issues determined by the judgment, including the two test cases. I make an interim award of costs of 50% of that, namely £2,515,194.95.

80. I invite submissions as to the final form of the order. I am also willing to receive further submissions on the mathematics of the final calculation if the figures set out in the preceding paragraph are not agreed.