



Fixed Recoverable Costs

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FRCs – New CPR 45 Transitional provisions

- “The amendments made by these Rules will apply to claims where proceedings are issued on or after 1 October 2023, save for personal injury and disease claims.”
- “The new FRC regime will apply to personal injury claims:
 - where the cause of action accrues on or after 1 October 2023;
 - and will only apply to disease claims where the letter of claim has not been sent to the defendant before 1 October 2023.”
- “If, at any point, the amounts of fixed costs specified in the tables in Practice Direction 45 are changed, new rule 45.18 provides that a reference to an amount in those tables is a reference to the amount applicable to a claim on the date that proceedings are issued, notwithstanding that the amount might be subsequently changed.”

Part 45

Section 1

- 45.1 – Scope
 - Excludes Housing cases (whole or part of the claim relates)
 - MoJ will review in 2 years
- 45.3 – London Weighting applies as now (+12.5%)
- 45.5 – multiple claimants
 - General rule is one set of FRCs per claimant [45.5 (1)]
 - Unless court orders otherwise at CMC [45.5 (4)] and [26.7 (7)] – e.g. holiday sickness claims
- 45.6 – Defendant’s costs
 - Calculated as per C, but based on value of the sum claimed
 - But in PI, QOCs usually applies
- 45.7 – Counterclaims
 - Usually two sets of costs

Part 45
Section 1 (continued)

- 45.8 - Fixed costs for pre-action and interim applications (includes band reallocation)
- 45.9 – Exceptionality:
 - Summary or detailed assessment instead
 - But as well as “exceptionality” also need to show costs 20%+ higher than FRCs (45.12)
- 45.10 – Vulnerability
 - By reason of additional work required by reason of the vulnerability costs are 20% higher
- 45.13 – Unreasonable Behaviour
 - Increase or reduce FRCs otherwise payable by 50%
 - “unreasonable behaviour is conduct for which there is no reasonable explanation”

Part 45
Section VII to VIII

- II – Commencement Costs
- III – HMRC Costs
- IV - Pre-Action Protocols for Low Value Personal Injury Claims in Road Traffic Accidents and Low Value Personal Injury (Employers' Liability and Public Liability) Claims
 - The existing rules
- V - The Pre-Action Protocol for Personal Injury Claims Below The Small Claims Limit in Road Traffic Accidents
 - The OIC – the existing rules
- VI – The Fast Track
- VII – The Intermediate Track
- VIII – Noise induced hearing loss claims
- IX – Disbursements
 - Sections IV and VI, only as per existing fixed disbursements
 - Section VII the court may allow any disbursement which has been reasonably incurred, other than a disbursement covering work for which costs are already allowed in Section VII.

- Fixing the ‘costs of the costs’:
 - Costs of **assessment of fixed costs** (e.g., disbursements, disputes, uplifts and penalties)
 - Costs of **Part 8 costs only** proceedings
 - New process – rules awaited
- “The Government’s position is that the costs of **inquest proceedings** should be recoverable, but only to the extent that they would be anyway, outside of FRC.”
- “The Government will amend the extended FRC regime to make the **costs of restoring a company to the Register** recoverable in either the fast track or the intermediate track. This extends the existing provision for Noise Induced Hearing Loss (NIHL) in the fast track, and addresses any inconsistency.”
- **75% of advocacy fee** for intermediate track cases settled **within 5 days of trial**.
- Definition of Clinical Negligence cases falling into Intermediate Track (see below)
- CPR 45.1 (3) revised to clarify that in claims to which Sections IV, VI, VII or VIII of that Part apply, **parties may expressly agree that Part 45 shall not apply**.

Clinical Negligence

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- A separate process sponsored by DHSC rather than MoJ
- Government response to consultation published September 2023
- Low value clinical negligence claims settled pre-proceedings
 - Up to £25k
 - Pre-issue only
 - Amendments to protocol process
 - Costs penalties post proceedings proposed for non-compliance
- Rules and protocol changes to be approved by CPRC
- Slated for 1 April, but it is now the middle of March...
- It has not however gone away forever!

Updated figures (from 1 April 2024)

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- MoJ Response to consultation February 2024
 - Exceptionally, because of high inflation, a further increase on the figures announced in October 2023
 - In line with the services producer price index (SPPI) from January 2023
 - **+3.2%**
 - Usually will be reviewed every 3 years
 - Only one set of FRCs will apply to a single case.
- Further increase to Fast Track advocacy fees (omitted from Jackson).

Section VI

The Fast Track 45.43

- Similar to existing FRC rules
- 45.44 “For so long as the claim is allocated neither to the small claims track, the intermediate track or the multi-track, the only costs allowed in any claim which would normally be or is allocated to the fast track”
- Costs allowed are set out in [CPD 45 Table 12] plus disbursements in Section IX
- Non-monetary relief, notional values [CPR 45.45]
- Specialist legal advice (45.46 bolt ons in [CPD 45 Table 13])
- Stages:
 - A. If Parties reach a settlement prior to the claimant issuing proceedings under Part 7
 - B. If proceedings are issued under Part 7, but the case settles or is discontinued before trial
 - C. If the claim is disposed of at trial
 - D. Trial advocacy fees

Section VII

The Intermediate Track CPR 45.49

- 45.50 “...any claim which would normally be or is allocated to the intermediate track.”
- Costs allowed are set out in [CPD 45 Table 14] plus disbursements in Section IX
- Non-monetary relief, notional values [CPR 45.50]
- Specialist legal advice (45.50 (4) bolt ons in [CPD 45 Table 14])
- 45.51 – Preliminary issues and split trials

Scope of the Intermediate Track

CPR 26.9 (7)

(7) Subject to paragraphs (8), (9) and (10), the intermediate track is the normal track where—

(a) the claim is suitable for neither the small claims track nor the fast track;

(b) the claim includes **a claim for monetary relief**, the value of which is **not more than £100,000**;

(c) the court considers that—

(i) if the case is managed proportionately, the **trial will not last longer than three days**;

(ii) **oral** expert evidence at trial is likely to be limited to **two experts per party**;

(iii) the claim may be **justly and proportionately** managed under the **procedure set out in Section IV of Part 28**;
and

(iv) there are **no additional factors, which would make the claim inappropriate** for the intermediate track; and

(d) the claim is brought by one claimant against either one or two defendants, or is brought by two claimants against one defendant. **[i.e., not multi-party claims]**

(8) Where the relief sought **includes a claim for non-monetary relief**, the claim shall **not be allocated** to the intermediate track **unless** the court also considers it to be **in the interests of justice** to do so.

(9) Subject to paragraph (10) [*i.e. cases that must be allocated to multitrack*], the court **may allocate** a claim to the intermediate track where it considers it to be **in the interests of justice** to do so.

The multi-track

(10) A claim must be allocated to the **multi-track** where that claim is—

(a) a **mesothelioma claim or asbestos** lung disease claim;

(b) one which includes a claim for **clinical negligence, unless—**

(i) the claim is one which would normally be allocated to the intermediate track [*i.e., up to £100k etc*] and

(ii) both **breach of duty and causation have been admitted;**

(c) a claim for damages in relation to harm, **abuse** or neglect of or by **children or vulnerable adults;**

(d) a claim is one the court could order to be **tried by jury** if satisfied that there is in issue a matter set out in section 66(3) of the County Courts Act 1984(3) or section 69(1) of the Senior Courts Act 1981(4); or

(e) a **claim against the police** which includes a claim for—

(i) an intentional or reckless tort; or

(ii) relief or a remedy in relation to a breach of the Human Rights Act 1998(5).

(11) Paragraph (10)(e) does not apply to—

(a) a road accident claim arising from negligent police driving;

(b) an employer's liability claim;

(c) any other claim for an accidental fall on police premises.

(12) The multi-track is the normal track for any claim for which the small claims track or the fast track or the intermediate track is not the normal track.

Staying out of the intermediate track

- The exemptions most likely to be relevant are:-
 - **More than 3 parties**
 - Full value of claim reasonably believed to **exceed £100k**
 - NB offers to split liability
 - **More than 2 expert** disciplines reasonably required to give **oral evidence**
 - Impossible to do justice with **intermediate track directions**
 - **Trial will exceed 3 days** even if case “managed proportionately”
- Intermediate track directions will include the following:-
 - Total length of all a party’s witness statements and summaries must not exceed 30 pages
 - Any expert report must not exceed 20 pages (excluding any photos, plans or papers relied upon)
 - Also, the trial estimate must not exceed 3 days (which is unlikely with the above restrictions)
 - Exempt if you can show that the case cannot be justly and proportionately managed in this way.

More than 2 expert disciplines reasonably required to give oral evidence

- Not easy in cases which aren't obviously worth more than £100k
- Most such cases will be musculoskeletal, but:-
 - Consider other injuries – e.g., rib fractures (chest physician), internal organs (general surgeon), teeth (dental surgeon), scarring (plastics)
 - Psychological symptoms are very common, justifying a psychiatrist
 - Maybe an OT if rehab costs in dispute
 - An accident reconstruction report if required and proportionate
- But always make sure that it is reasonably arguable
- **No exemption if the report addresses a minor issue and is agreed**
- The obvious quantum experts should recommend the further disciplines in their disclosed reports
- Timing of getting a third expert report

Getting assigned to the highest possible complexity band

- Four bands:-
 - Band 1 – Cases that can be tried in a day including PI cases where liability or quantum disputed (i.e., not both)
 - Band 2 – Most PI cases
 - Band 3 – Disease cases
 - Band 4 – PI cases involving serious issues of fact or law
- Not much difference in costs figures for bands 2 and 3
- So, the focus is on keeping out of band 1 and trying to get into band 4

Keeping out of complexity band 1

- Easiest route is to show that more than a day required for trial
- Otherwise, this band is a risk if liability or quantum are agreed. So, unless clearly in the client's interests:-
 - Be wary of agreeing a liability percentage
 - Be wary of agreeing quantum subject to liability
 - **An overall early settlement is likely to be better for lawyer and client**
- An “admission of liability” requires an admission that a breach of duty caused at least some damage
- An “admission of liability subject to causation” is not an admission!
- Beware a late admission putting you in band 1 at the last minute!

Getting into complexity band 4

- “Any claim which would normally be allocated to the intermediate track, but which is unsuitable for assignment to complexity bands 1 to 3”
 - Everyone thinks their specialism falls into this...
 - Judicial decisions awaited!
- In PI cases this requires “serious issues of fact or law”
 - Serious issues of fact
 - Any allegation of fundamental dishonesty (express or implied)?
 - Arguably any major factual dispute??
 - Serious issues of law
 - A pleaded claim for provisional damages?
 - Any other pleaded issue about the law (e.g., secondary victim criteria, remoteness of loss)?

Preparing the ground

- Say in your letter of claim that this is a multi-track case (unless it clearly isn't!)
- If there is any scope for the defendants to argue that the case should be allocated to the intermediate track, ask them to concede that it should in fact go into the multi-track
- If they won't do so or if there is any risk that the Master/DJ may nevertheless allocate to the intermediate track, then prepare for the worst
- The court will make provisional decisions on track and complexity band on the DQs:
 - Although the judge might be persuaded to change their mind at the CMC, this is likely to be an uphill struggle
 - Therefore, essential to set out in full in the DQ why the case should be in the multi-track or the highest arguable complexity band
 - The provided boxes are small, so also use the "Other Information" box in section I 2
 - If your client or a witness is vulnerable, say so
- If there is a risk of being allocated to the intermediate track, deal with the pre-issue work as efficiently as possible to minimise risk of irrecoverable costs.

Getting beyond stage 1

- Under FRCs costs are higher for each stage as the case progresses
- Staying too long within a stage inevitably means more expense for the same costs
- **The economic driver for C is to issue and push cases along as quickly as possible**
- Subject to reasonableness, proportionality, risk of losing and the interests of the client
- So, issue as soon as reasonably possible:
 - **Don't wait** for a final prognosis/all the medical evidence if liability not admitted
 - Any uncertainty may also make it easier to argue that the case may be worth more than £100k
- **Suggested approach for meritorious cases**
 - Disclose the medical report(s) and schedule which you will serve with the proceedings. Maybe make a part 36 offer.
 - Wait 21 days (irrespective of whether part 36 offer made)
 - If defendant hasn't made an acceptable offer, issue
- If a case appears weak, take all reasonable steps to find evidence to support it and if that fails, drop it (or at least stop corresponding about it).
- **The key point is not to faff about pre-issue**

Specialist legal representative stages

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- There are three of these:-
 - Stage 2: drafting statement of case **or** providing post-issue advice for £2,000 to £2,300 (plus London weighting if applicable)
 - Stage 7: advising following filing of defence for £1,400 to £2,900
 - Stage 14: representing claimant at mediation or JSM for £1,400 to £2,300
- In practice stage 2 will be drafting the particulars of claim (and maybe the schedule) as there is no point in advising post-issue and then again post-defence (which is stage 7)
- There is nothing limiting this to work done by external counsel.
- If the work is done by a barrister, the fixed costs for that stage must also cover the solicitors' work in preparing instructions etc
- Work out what your firm's policy will be for this work.

Other stages

- When you get to these stages is outside your control.
- They depend on the dates given by the court for the CMC, various steps in the directions & trial and on whether and when any ADR or child settlement approval takes place
- But note that the end of stages 4 (disclosure) and 5 (exchange) are based on “the date set by the court” for these steps
 - If a party is late, that does not change the date when the amount of fixed costs recoverable moves on to the next stage
 - Arguably this also applies if the parties agree to extend the deadline

Completing each stage as efficiently as possible

- With any fixed costs, profitability depends on doing the work efficiently:
 - With costs to be assessed, the more you do, the more you get paid (as long as it was reasonable & proportionate)
 - With fixed costs, the less you do, the more your profit (as long as you do everything that needs to be done)
 - **Requires a different mindset and a different way of working**
- Key points:-
 - **Don't frontload.** Do work when it needs to be done and not before. E.g., you won't be paid for drafting a list or preparing a formal witness statement if the case doesn't reach the relevant stage. But don't take risks with deadlines.
 - **Do delegate** to cheaper fee earners as long as they have the experience/training to do the work efficiently and well
 - Do use **precedents** where appropriate
 - Case management software/**workflows**

Ways to escape fixed costs – reallocation/reassignment

- The court has the power to re-allocate a claim from the intermediate track to the multi-track
- This may be an option if something unforeseeable happens during the litigation to, for example:-
 - Increase in claim value
 - Require a third expert discipline to give oral evidence
 - Require a fourth party to be joined
- Be alive to this possibility, but generally judges will be reluctant to do this
- Similarly, cases can be reassigned to a higher complexity band
 - E.g., if a defendant alleges fundamental dishonesty having not done so previously or if a novel legal issue arises
- Again, be alive to this possibility, but in practice judges will be reluctant to do this

Ways to escape fixed costs – protected parties

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- **Protected parties** are not subject to fixed costs in the fast or intermediate tracks
- The costs of other parties to the action may be fixed
- Children are given no such protection
- Double check whether you can argue that you client doesn't have capacity (including for reasons unrelated to the claim)

“Exceptional circumstances”

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- ... Don't hold your breath

Ways to escape fixed costs - vulnerability

- The rules say that fixed costs may be exceeded and replaced with a detailed or summary assessment if
 - A party or witness is vulnerable; and
 - This has required additional work to be done; and
 - By reason of that additional work alone, the costs claim is for at least 20% more than the amount of fixed recoverable costs
- There may be some mileage in this with some of the most challenging vulnerable clients
- But may be difficult to prove in practice

Ways to increase (or decrease) fixed costs – unreasonable behaviour

- If the defendant has behaved unreasonably, C can apply for an order that any fixed costs payable by them be increased by 50%
- Quid pro quo for D if alleges unreasonable behaviour by C (50% decrease)
- Unreasonable behaviour is “conduct for which there is no reasonable explanation”
- May be useful in some cases

Ways to increase fixed costs – Part 36

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- Where C beats own Part 36 offer, entitled to a 35% uplift on the difference in fixed costs from the date when the period for accepting the offer expired to the date of late acceptance or judgment
- Therefore, consider making an early realistic part 36 offer in all intermediate track cases

Solicitor & Client retainer

- Check/revise ToBs and CFAs
- Are you looking to keep FRCs irrespective of work done?
- Are you looking to charge the client for any excess cost for work actually done?
 - At what rate?
 - Is there a cap?
- Code of conduct and clear explanations
- Belsner v Cam Legal Services

Questions

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