



Fixed Recoverable Costs

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The multi-track (1) CPR 26.9 (10)

(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) there has been an admission of liability in full, which means that the defendant accepts that the claimant has suffered loss, including the injury set out in the letter of claim under the Pre-Action Protocol for the Resolution of Clinical Disputes, caused by the defendant's breach of duty of care; and

(iii) the admission in paragraph (ii) is made in the defendant's letter of response provided in accordance with the Pre-Action Protocol for the Resolution of Clinical Disputes, provided that the defendant has not raised a defence to the claim under the Limitation Act 1980;

The multi-track (2) CPR 26.9 (10)

(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**
 - **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 CV, 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.
 - **“Unless the court orders otherwise”**

April 2024 amendments

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- The costs of **inquest proceedings** recoverable, but only to the extent that they would be anyway, outside of FRC.
- The **costs of restoring a company to the Register** are recoverable in both the fast track and the intermediate track (following the existing provision for Noise Induced Hearing Loss (NIHL) in the fast track).
- **75% of advocacy fee** for intermediate track cases settled **within 5 days of trial**.
- Definition of Clinical Negligence cases falling into Intermediate Track (see above)
- 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**.

Fixed cost 'determinations' (1)

- Although costs are 'fixed' there may still be matters that need to determination of the court
 - New process to determine the outstanding issues (CPR45.63-66 and CPR 23 or 46.14 and Part 8).
 - Not an assessment (summary or detailed) - a '**determination**'
- If the case proceeds to a final hearing, it is expected that the judge will themselves decide these issues (CPR 45.63).
 - Be prepared (draft form)
 - Be prepared (brief the trial advocate)

Fixed cost 'determinations' (2)

- Many intermediate track cases will settle before a final hearing
- Precedent U
- Assessment under:
 - 45.9 (exceptional circumstances),
 - 45.10 (vulnerability) or
 - 45.50 (3)(pre-issue non-PI)“in conjunction with the fixed costs determination” (CPR 45.65)
- Generally, on paper (CPR 45.64 (5) unless hearing requested (20%+ uplift required to get costs)
- For costs purposes, treated as an Interim Application under 45.8 (fixed cost).

Precedent U (Part A)



STATEMENT OF FIXED COSTS
For hearing on [date]/ determination under CPR 45.64

Claim Number:	
In the:	Court
Claimant(s):	
Defendants(s):	

Party claiming: _____ Table(s): _____
 Track: [fast track] [intermediate track] [Claims Portal] **Band** (where appropriate): [1] [2] [3] [4]
 [other]
 Value of claim: Monetary: £ _____
 Non-monetary as per £ _____
 (r45.45 or r45.50(2)): _____
 Total: £0.00

Are you claiming costs under CPR r45.9, r45.10, r45.50(3) and/or r45.13? [Yes] [No]
 If yes, provide an explanation in Section C and complete an N260.

SECTION A

Receiving party to complete:				
Item No.	Stage or rule	Item claimed	Calculation (where appropriate)	Sum claimed
Fixed costs				
1				
2				
3				
4				
Total fixed costs				£0.00
Disbursements (list VAT separately)				
5				
6				
7				
8				
Total disbursements				£0.00
Court fees				
9				
10				
Total court fees				£0.00
Total costs claimed				£0.00

I believe that the costs stated within this statement are correct. The fees of any specialist legal representative and disbursements have been

incurred in the amounts stated above and will be paid to the persons stated.

Signed: _____
 Name of legal representative signing:
 Name of firm:

Dated:

Precedent U (Part B)



SECTION B

Summary of amounts claimed (to be completed by the receiving party)			Paying party's response (to be completed by the paying party pursuant to CPR r45.64 or where the court directs a response):		Court's decision	
Item no.	Sum claimed	Explanation	Sum offered	Explanation (where sum is not agreed)	Amount	Reason(s)
Fixed costs						
1	£0.00		£0.00		£0.00	
2	£0.00		£0.00		£0.00	
3	£0.00		£0.00		£0.00	
4	£0.00		£0.00		£0.00	
Sub-total:	£0.00		£0.00		£0.00	
Disbursements						
5	£0.00		£0.00		£0.00	
6	£0.00		£0.00		£0.00	
7	£0.00		£0.00		£0.00	
8	£0.00		£0.00		£0.00	
Sub-total:	£0.00		£0.00		£0.00	
Court fees						
9	£0.00		£0.00		£0.00	
10	£0.00		£0.00		£0.00	
Sub-total:	£0.00		£0.00		£0.00	
Total:	£0.00		£0.00		£0.00	

Paying party's representative's signature when serving response:

Signed:

Dated:

Name of legal representative signing:

Name of firm:

SECTION C

Claim for costs under CPR 45.9, 45.10, 45.50(3) and/or 45.13 (where appropriate)

Basis for receiving party's claim:

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Paying party's response: *to be provided pursuant to CPR r45.64(4)(b) or where the court directs a response*

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FRCs – Revised 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.”
- Is the issue of Part 8 costs proceedings ‘proceedings’ for the purpose of the transitional provisions

Caselaw on the intermediate track

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Areas for potential judicial clarification

- 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!
- In PI cases - “serious issues of fact or law”
 - Serious issues of fact - fundamental dishonesty (express or implied)?
 - Serious issues of law?
- Exceptional Circumstances
- Vulnerability
- Unreasonable behaviour: “conduct for which there is no reasonable explanation”

- The MoJ have promised to report back to CPRC on ‘emerging issues in February 2025 (CPRC Minutes January 2024)
- CPRC Minutes November 2024 – February 2025 likely to be premature
- When this will now be is likely to be determined after the CPRC Open Meeting in May 2025
- Separate MOJ general post implementation review of FRCs promised 3 years after implementation, namely October 2026
- Potentially to cover:
 - Housing exemption (originally for 2 years)
 - Inflation
 - Operation of the scheme generally, including complexity bands, vulnerability, unreasonable behaviour and exceptional circumstances.

Clinical Negligence

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- A separate process sponsored by DHSC rather than MoJ
- Government response to consultation was 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 were to be approved by CPRC
- Work stopped in June 2024 when the election was called
- The Labour government has not announced what it is going to do
- Has it gone away forever?

CJC review of pre-action protocols

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- Jackson had envisaged a ‘joined up’ system of pre- and post-issue costs, with the protocols dealing with pre-issue information
- The CJC has now completed a lengthy review of the pre-actin protocols
- There is no express recommendation to introduce requirements relating to FRCs
- Still significant issues as to how far the courts want to regulate pre-issue behaviour unless the case is subsequently resolved post-issue
- Even more complicated with digital processes which span pre- and pst-issue
- Not yet ‘joined up’

Nevertheless, advisable to prepare the ground

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- 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 (35% uplift).
 - 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**

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**

Claimant tactics

- Keep out of band 1
 - 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**
 - Beware a late admission putting you in band 1 at the last minute!
- More than 2 experts:
 - 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**

Experience?

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- Generally, costs have been reasonably OK compared to time-based costs
 - But early on, so simpler cases, mostly pre-issue
 - Cannot do a fair comparison until a bigger data set of costs settled/determined later as well
- Costs following an offer:
 - Minimal FRC benefit in negotiating a higher offer rather than taking the first offer
 - Conflict of interest
 - Professionalism/reputation
 - Solicitor and client costs (cp employment settlement agreements)
 - Potential work in finalising consent order
 - Swings and roundabouts?

Defendant tactics?

- Early admissions
- Pre-med offers of exactly £100,000
 - Potential conflict of interest with client
 - Costs/Damages considerations
 - FRCs could be much higher than work done
 - Multi-track may be more beneficial to lawyer?
- Trying to keep rehab in the code and out of the Schedule of Loss
 - To keep the case out of the multi-track by value
 - To reduce the costs if in the intermediate track by reducing the damages
- But generally, not much sign of changes in behaviour
- Little engagement on track in Letters of Response
- Wait and see approach?

Defendant challenges - agency costs

- Maybe pre-emptive work in challenging agency fees again?
- cp *Stringer v Copley* 2002)
 - medical agencies fees recoverable, provided it was demonstrated that charges did not exceed the reasonable costs of the work if it had been done by solicitors.
- Requests for breakdown of agency fees
 - *Aminu-Edu v Esure* [2024] – Saggerson J (Central London County Court)
 - *Northampton General Hospital NHS Trust v Hoskin* [2023] (HHJ Bird)
 - Broadly, if the court is to determine what amount to allow for a report commissioned by an agency, it will want to understand what the latter's fees are.
- *JXX v Archibald* (Master Rowley)
 - Disputed fees = £121,000 (multi-track, not FRCs!)
 - C had a choice: provide a breakdown, or otherwise proceed on the basis of no agency involvement
 - Master Rowley said he would give permission to appeal as higher court guidance would be welcome.

Questions

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