

A woman with dark hair, wearing a light green sweater, is shown in profile, resting her head on her hand and looking downwards with a thoughtful expression. The background is a solid teal color with white circular cutouts on the left side.

Fixed Recoverable Costs

David Marshall
22 March 2023

- *“It was inevitable that in due course another judge-led review would be set up to develop proposals for fixing the recoverable costs of lower value cases. This is that review.”*
- March 2019 – MoJ Consultation on implementing Jackson’s FRC proposals
- September 2019 – MoJ interim response to consultation saying that they propose to go ahead
- September 2021 – MoJ full response to Consultation published:
 - *“The Government agreed with the principle of extending FRC to all the cases recommended by Sir Rupert for his proposed intermediate track.”*
 - *“The Government does not propose to pursue the extension of the ‘Aarhus’ rules across all JR cases, for the reasons set out in Chapter 6, 2.4 of our consultation paper.”*

THE FAST TRACK (1)

- Jackson
 - *“The time has surely come to complete the introduction of FRCs across the fast track, not to keep kicking the issue into the long grass.”*
 - *“I agree with that view and recommend that all recoverable costs in the fast track should be fixed.”*
- Most Fast Track personal injury accident cases are already subject to FRCs:
 - These FRCs were evidence-based on PI data, but reduced by about £700 on implementation to reflect alleged cost of referral fees
 - These costs will be applied to all non-PI Fast Track cases in Bands 2 & 3, even though not PI cases and not subject to referral fees in the same way (but virtually no data for non-PI FT cases was supplied to Jackson or MoJ...)
 - Only a relatively small volume of non PI cases £10,000 to £25,000.
- February 2023:
 - **MoJ confirmed that Housing cases will not be subject to FRCs for 2 years and pending the imminent civil legal aid review**
 - 2 years is after the next election

THE FAST TRACK (2)

- Current EL and PL grid to be combined into one.
- Two new bands for Fast Track costs to be added.
- Bands (Jackson):
 - Band 1: RTA non-personal injury, defended debt cases.
 - Band 2: RTA personal injury (within Protocol), holiday sickness claims.
 - Band 3: RTA personal injury (outside Protocol), ELA, PL, ~~tracked possession claims, housing disrepair,~~ other money claims.
 - Band 4: ELD claims (other than NIHL), ~~any particularly complex tracked possession claims or housing disrepair claims,~~ property disputes, professional negligence claims and other claims at the top end of the fast track.
- Disbursements not yet fixed – except as currently already provided for IMC
- Noise-induced Hearing Loss
 - Implementing the mediated industry agreement

Fast Track Bands 1-4 (Uprated to Q1 2021)

	Complexity Band			
Stage:	1	2	3	4
Pre-issue £1,001-£5,000		£111 + 20% of damages [Or £609 if higher]	£1,053 + 17.5% of damages	£2,397 + 15% of damages + £469 per extra defendant
Pre-issue £5,001-£10,000		£1,219 + 15% of damages over £5,000	£2,055 + 12.5% of damages over £5,000	
Pre-issue £10,001-£25,000	£533	£2,138 + 10% of damages over £10,000	£2,770 + 10% of damages over £10,000	
Post-issue, pre-allocation	£1,971	£1,285 + 20% of damages	£2,914 + 20% of damages	£2,743 + 40% of damages + £703 per extra defendant
Post-allocation, pre-listing	£2,344	£2,083 + 20% of damages	£3,712 + 25% of damages	£5,886 + 40% of damages + £703 per extra defendant
Post-listing, pre-trial	£3,462	£2,941 + 20% of damages	£4,742 + 30% of damages	£7,244 + 40% of damages + £703 per extra defendant
Trial advocacy fee	a. £533	a. £533	a. £533	a. £1,470
a) >£3000	b. £756	b. £756	b. £756	b. £1,470
b) £3,001-£10,000	c. £1,140	c. £1,140	c. £1,140	c. £1,918
c) £10,001-£15,000	d. £1,816	d. £1,816	d. £1,816	d. £2,663
d) 15,001-£25,000				

Noise Induced Hearing Loss (not yet adjusted for inflation)

Stage:	NIHL claims with value less than £25,000
Pre-issue	£4,000 + £500 per extra defendant (reduced by £1,000 if there is an early admission of liability or by £500 if settled before proceedings drafted)
Post-issue, pre-allocation	£5,650 + £830 uplift per extra defendant
Post-allocation, pre-listing	£7,306 + £1,161 uplift per extra defendant
Post-listing, pre-trial	£9,187 + £1,537 uplift per extra defendant
Trial advocacy fee	£1,380.
Restoring a company to the register	£1,280

- Jackson recommended a new track between the Fast Track and the Multi-Track
- He expressly rejected simply extending the Fast Track
- On consultation, MoJ indicated that intermediate cases would be assigned to an expanded Fast Track (for logistical reasons, including cost and IT)
 - The expanded Fast Track would however operate differently to the current Fast Track and would incorporate Jackson's proposals for Intermediate Track case management
- However, MoJ have subsequently determined that the identified logistical difficulties can be overcome and that there will now be a new separate Intermediate Track as Jackson recommended.
- In practical terms the creation of a new track will make working with the new regime far easier for both practitioners and the judiciary.

“*INTERMEDIATE CASES*”

– *Jackson’s criteria*

- (i) The case is not suitable for the small claims track or the fast track.
- (ii) The claim is for debt, damages or other monetary relief, no higher than **£100,000**.
- (iii) If the case is managed proportionately, the **trial** will not last longer than **three days**.
- (iv) There will be **no more than two expert** witnesses giving oral evidence for each party.
- (v) The case can be justly and proportionately managed under the **expedited procedure** described... below.
- (vi) There are **no wider factors**, such as **reputation or public importance**, which make the case inappropriate for the intermediate track.
- (vii) The claim is **not** for **mesothelioma** or other **asbestos** related lung diseases.
- (viii) Alternatively, even if none of criteria (i)-(vii) are met, there are particular reasons to assign the case to the intermediate track, [e.g. neighbour/family disputes or “to promote access to justice”].

Cases unlikely to be suitable, even below £100,000

- *“Complex personal injury and professional negligence cases”*
- *“Clinical negligence claims above £25,000 will seldom be suitable for the intermediate track, unless both breach of duty and causation have been admitted at an early stage. The multi-track will be the normal track for clinical negligence claims above £25,000.*
 - Note Clinical Negligence low value claims FRC Working Group (and unsuccessful industry mediation)
 - **DHSC have conduct and have consulted on implementation of FRCs for clinical negligence cases up to £25,000 damages (but not in October 2023)**
- *“The intermediate track will seldom be suitable for*
 - (a) some **multi-party** cases;
 - (b) **actions against the police** (as demonstrated by the submissions of the Police Action Lawyers Group);
 - (c) **child sexual abuse claims** (as demonstrated by the submissions of the Association of Child Abuse Lawyers);”
 - (d) Intellectual Property disputes.

- PI Cases

- Straightforward cases, where only one issue (such as quantum) is in dispute, will generally go into Band 1
- Cases where both liability and quantum are in dispute will generally go into Band 2 or Band 3.
- Cases where there are serious issues on breach, causation and quantum (but which still fall within the intermediate track) will go into Band 4.

- Non-PI Cases

- Straightforward cases, where only one issue is in dispute (e.g. proving a debt), will generally go into Band 1
- Most intermediate track cases will go into Band 2 or Band 3
- Complex cases falling within the intermediate track will go into Band 4

- Bands 2 and 3 are based on data from RTA and EL/PL accident claims

“Comparability of personal injury and non-personal injury cases. There is, I suggest, sufficient flexibility in the grid to accommodate the general run of personal injury and non-personal injury cases which fall within the intermediate track. Also, as one of my assessors has pointed out, within the intermediate track we should not be putting a higher price on property and financial claims than on claims about human health.”

Intermediate Track: fixed costs matrix (uprated to Q1 2021)

Stage (S)	Band 1	Band 2	Band 3	Band 4
S1 Pre-issue or pre-defence investigations	£1,492 + 3% of damages	£4,634 + 6% of damages	£5,913 + 6% of damages	£8,523 + 8% of damages
S2 Counsel/ specialist lawyer drafting statements of case and/or advising (if instructed)	£1,864	£1,864	£2,131	£2,131
S3 Up to and including CMC	£3,729 + 10% of damages	£7,085 + 12% of damages	£8,363 + 12% of damages	£11,719 + 14% of damages
S4 Up to the end of disclosure and inspection	£4,261 + 12% of damages	£8,629 + 14% of damages	£9,908 + 14% of damages	£15,128 + 16% of damages
S5 Up to service of witness statements and expert reports	£4,794 + 12% of damages	£10,121 + 16% of damages	£11,399 + 16% of damages	£18,537 + 18% of damages
S6 Up to PTR, alternatively 14 days before trial	£5,433 + 15% of damages	£13,583 + 16% of damages	£14,862 + 16% of damages	£22,426 + 18% of damages
S7 Counsel/ specialist lawyer advising in writing or in conference (if instructed)	£1,332	£1,598	£2,131	£2,663
S8 Up to trial	£6,073 + 15% of damages	£15,980 + 20% of damages	£17,259 + 20% of damages	£26,315 + 22% of damages
S9 Attendance of solicitor at trial per day	£533	£799	£1,065	£1,332
S10 Advocacy fee: day 1	£2,930	£3,196	£3,729	£5,327
S11 Advocacy fee: subsequent days	£1,332	£1,598	£1,864	£2,633
S12 Hand down of judgment and consequential matters	£533	£533	£533	£533
S13 ADR: counsel/specialist lawyer at mediation or JSM (if instructed)	£1,278	£1,598	£1,864	£2,131
S14 ADR: solicitor at JSM or mediation	£1,065	£1,065	£1,065	£1,065
S15 Approval of settlement for child or protected party	£1,065	£1,332	£1,598	£1,864
Total: (a) £30,000 (b) £50,000, (c) £100,000 damages	(a) £20,402 (b) £23,598 (c) £31,588	(a) £35,423 (b) £39,685 (c) £50,339	(a) £42,029 (b) £46,290 (c) £56,944	(a) £56,518 (b) £61,205 (c) £72,924

Intermediate Cases: The Grid, Disbursements and London weighting

- *“The figures in each of stages S1, S3, S4, S5, S6 and S8 are the cumulative totals for costs incurred up to and including that stage”.*
- *“The figures in stages S2, S7 and S9-S15 are separate sums for those items, if carried out.”*
- The above table does **not include disbursements**.
- The principal disbursements will be court fees, expert fees and (where ADR takes the form of mediation) the mediator’s fee. In some cases, translators and/or interpreters are needed.
- *“I recommend that once the new fixed costs regime is in place, work should commence on developing fixed costs for experts. This is essentially what happened in the fast track. Once the fast track fixed costs for personal injury cases had been in place for a year, a scheme of fixed costs for medical reports was introduced: see chapter 15, paragraph 5.22 of my previous report and CPR rule 45.19. It would also be sensible to develop fixed costs for mediators, translators and interpreters.”*
- 12.5% uplift on fixed costs **London weighting as per Fast Track**.

- *“Many submissions make the point that FRC must be uprated for inflation. I agree and recommend that FRC in the fast track be adjusted periodically by reference to the **Services Producer Price Index**. This index is a measure of inflation for the UK services sector. It is constructed from quarterly surveys measuring the price received for selected services.*
- *Annual increases will generate too much complexity and confusion in ongoing cases. I therefore recommend reviews **every three years**. To the extent that technological advances reduce legal costs at a faster rate than those of other services, the triennial review may wish to adjust the uprating accordingly. This uprating will only apply to the ‘lump sum’ elements of fixed costs, not to any percentages of damages which may be added. The level of damages rises over time to take account of inflation, so the ‘percentage’ elements will not need uprating.”*
- <https://www.ons.gov.uk/economy/inflationandpriceindices/bulletins/servicesproducerpriceindices/jantomar2017>.
- *MoJ: “Inflation: The Government will uprate the figures for FRC on which we consulted, which were based on Sir Rupert’s 2017 report, for inflation, in line with the Services Producer Price Index (SPPI).”*
- **The MoJ Impact Assessment contains uprated figures from Q1 2017 to Q1 2021 (+6.5%)**

Part 36 and Broadhurst v Tan, unreasonable behaviour and additional parties

- Broadhurst v Tan[2016] EWCA Civ 94 (application of indemnity costs if Part 36 offer is beaten) will be superseded
- MoJ
 - **Part 36** offers: The Government will implement an uplift of **35%** of FRC; this would apply to the stage during which and those after the relevant period under a Part 36 offer expires.
 - **Unreasonable behaviour**: We have concluded that the appropriate penalty for unreasonable behaviour during litigation is a percentage uplift on FRC of **50%**.
 - **Uplift for additional claimants**: The Government has decided to implement a **25%** FRC uplift for each additional claimant, in claims that arise from the same set of facts.
 - **Vulnerable parties**
 - **25%** uplift for parties who ‘[have] difficulty giving instructions’ as a result of a verified mental impairment
 - additional disbursements may be needed for specific vulnerabilities

- Jackson recommended a streamlined process for the new intermediate track to enable greater predictability of the work required to match the fixed costs
 - Limitations on length of statements of case, witness statements and expert reports
 - Limit to 2 experts each side
 - Limited disclosure
 - Trials not more than 3 days – preferably less
- In the Intermediate Track there will be CMCs, so directions can be tailored, but no budgets.
- Note that under Jackson’s proposals in non-PI cases disclosure would usually be more onerous in the fast track (standard disclosure the norm) than in the intermediate track...
- The CPRC will set out amendments to Part 28 to deal with directions for intermediate track cases.
- Jackson did not recommend changes to the Fast Track as it was working well.

- It is likely that for most cases the appropriate track and band will be obvious. However, to reduce the risk of gaming the system, Jackson recommended fixed costs for applications to change track/band be fixed at £300.
- Jackson’s intention was that parties and lawyers should know where they stand as to which costs regime they are in, so cases should rarely move tracks or bands once allocated or assigned
 - *“The court must have a residual power to take cases out of the intermediate track. It may be necessary to do so if the nature of the case changes fundamentally. The discretion should be strictly limited. Otherwise litigants will not enjoy certainty as to costs, which is one of the principal benefits of the fixed costs regime. I propose that the court should only be permitted to take cases out of the intermediate track after the first CMC “in exceptional circumstances”.*
 - *“...the Government does not consider it appropriate, at present, to give further guidance on band allocation for the fast track and for intermediate cases. Rather, it is for the parties and judges to come to sensible conclusions on banding in light of the criteria set out. Despite general calls from respondents, from both claimant and defendant perspectives, for further detail, neither Sir Rupert nor respondents to the consultation were able to outline what this might constitute. Further clarity will emerge over time in the light of experience.”*

- Civil Procedure Rules Committee
 - CPRC costs sub-committee
- Part 45 will be substantially revised throughout
- Part 26 (allocation to track and assignment to band) will be amended
- Part 28 (case management) will be amended to deal with the new intermediate track
- Part 36 will be revised to deal with offers to settle in the intermediate track
- What about:
 - Should the court retain a discretion in making orders for costs (Part 44) in FRC cases?
 - What about preliminary issues and/or substantive interim relief?
 - Litigants in person?
 - Multiple parties?
 - Additional claims (counterclaims)?

Next steps (1)

- Expected that rules will be approved by CPRC on **31 March 2023**.
- MoJ have indicated that the rules will be published ahead of implementation
- Proposed implementation date: **1 October 2023**
- What will the inflation uplifted FRCs be, and what is the process for the future?
- Transitional Provisions
 - MoJ: “will apply to “those cases where the accident or cause of action arises after the implementation date, or in disease and equivalent cases where no letter of claim has been issued before the implementation date.”
 - What about non-PI cases?
- These are fixed recoverable costs, not solicitor and client costs
 - But remember s74(3) Solicitors Act 1974 and CPR 46.9 (2)
 - Belsner v Cam Legal back before the Court of Appeal in July 2022
 - In any event check and amend client retainer documentation in readiness

“Bear in mind that:

- (i) There will be ‘process’ savings if recoverable costs are fixed.*
- (ii) There will be ‘efficiency’ savings consequent upon the streamlined procedure proposed in chapter 7.*
- (iii) Approved budgets include incurred costs which are likely to be reduced following agreement or assessment at the conclusion of the case.*
- (iv) Approved budgets and many of the costs figures quoted in this chapter include disbursements which are additional to the sums shown in table 7.1.*
- (v) Not all of the cases up to £100,000 in value will go into the new intermediate track – only those which meet the criteria set out in chapter 7. Many of the multi-track cases reviewed in this chapter self-evidently do not meet those criteria.”*

Next Steps (2)

- Only limited non-PI data was submitted by the professions.
 - Firms need to review their own internal data on actual costs of the current regime and
 - how these will be affected by the proposed FRCs and process changes,
 - and develop appropriate internal protocols for cases likely to be subject to the extended FRC regime.
 - Decide who is best placed to do this.
- In principle, fixed recoverable costs can give:
 - Certainty of remuneration;
 - Speed of payment (no assessment);
 - Rewards for efficiency.
- But, on a CFA, unless you win you are paid nothing, so that will inevitably still govern inputs.
- The Intermediate Track is a huge shift in culture for some fairly large cases
 - Some teething issues will be inevitable!