# Fixed Costs in Personal Injury and Disease Work

1. This paper focuses on the major change proposed by the Supplemental Report on Fixed Recoverable Costs ('FRC') by Lord Justice Jackson published in July 2017 ('the Supplemental Report')[1]. That major change is the extension of FRC to cover all fast-track matters and matters in the 'lower reaches of the multi-track'. The extension of FRC to matters in the 'lower reaches of the multi-track (e.g. claims with a value of up to £100,000) gives rise to the proposal of a fourth track in civil litigation: the intermediate track. The proposals in relation to the intermediate track will be the main focus of this paper.

The current system

2. The current costs system in PI and disease work is a patchwork quilt of FRC and standard costs (i.e. no fixed recoverability) in fast track matters (i.e. matters were the value is less that £25,000; the trial can be heard in a day; and oral expert evidence will be limited to expert evidence in two expert field: CPR 26.6(4)&(5)), and a system of costs budgeting for multi-track matters (multi-track is currently defined as any claim not in the small claims track or fast-track: CPR 26.6).

The proposed changes and the reasons given

3. In chapter 3 of the Supplemental Report Lord Justice Jackson opined that "*the time has come to finish the task"* and extend FRC to all fast-track matters. The proposals relating to fast-track matters are covered by Emma Corkill. The extension means that all fast-track PI and disease work would now be covered by FRC. The most prominent exceptions, fast-track NIHL claims and holiday sickness claims, would be covered by FRC. NIHL claims, unlike holiday sickness claims, receive special treatment (and their own grid of FRC) to

[1] LJ Jackson's Review of Civil Litigation costs (the original report) can be found here: https://www.judiciary.gov.uk/wp-content/uploads/JCO/Documents/Reports/jackson-final-report-140110.pdf and his Supplemental Report can be found here https://www.judiciary.gov.uk/wp-content/uploads/2017/07/fixed-recoverable-costs-supplemental-report-online-3.pdf

reflect the complexity of the claims and the fact the relevant stakeholders had agreed upon a mediated agreement in relation to what the FRC should be[2].

4. If the extension of FRC to all fast-track costs is labelled as a horizontal extension then the additional extension of FRC to claims with a value of up to £100,000 may be said to be a vertical extension of FRC. The proposed vertical extension to FRC is described in Chapter 7 at section 1.4 of the Supplemental Report as extending to claims of a value of up to £100,000 and to cover cases of "modest complexity". LJ Jackson's proposal for this vertical extension of FRC is to create a new track in civil litigation: The Intermediate track. It is right to note that the Supplemental Report considered whether the vertical extension of FRC could be accommodated by an expansion of the fast track but LJ Jackson preferred a completely new track for fear of changing the character of the fast-track which is intertwined with other procedures and proposed reforms (notably the reforms relating to the 'On-line court').

5. The Supplemental Report proposes the following criteria to determine whether a matter falls within the intermediate track:
    a. Unsuitability for small claims or fast-track;
    b. Claim value of no more than £100,000;
    c. Trial length of no more than 3 days;
    d. No more than two expert witnesses giving oral evidence for each party (*the same restriction currently applies to fast-track matters CPR 26.6(5)(b)*);
    e. Just and proportionate management is possible using the FRC expedited case management procedure;
    f. Wider factors, such as reputation or public importance;
    g. Not an asbestos claim[3]
    h. A residual discretion to allocate matters to the intermediate track even if the above criteria are not met

[2] The grid for NIHL claims can be found at p84 of the Supplement Report and the Civil Justice Council's paper on Fixed costs in NIHL claims can be found via this link: https://www.judiciary.gov.uk/wp-content/uploads/2017/09/fixed-costs-in-noise-induced-hearing-loss-claims-20170906.pdf

[3] The reasons given, for excluding asbestos matters is that the bespoke asbestos list in the QBD and the accompanying practice direction (PD 3D) work well.

6. The Supplemental Report expressly states, *"The criteria… will exclude those complex personal injury and professional negligence cases which the Personal Injuries Bar Association and Professional Negligence Bar Association maintain are unsuitable for FRC"* (Chapter 7 and section 3.4). Further a bespoke procedure is suggested for Clinical Negligence claims worth less than £25,000 and it is suggested that clinical negligence claims above £25,000 *"will seldom be suitable for the intermediate track…"* (discussed by Martyn McLeish in his section). Additionally, the Supplemental Report suggests actions against the police and child sexual abuse claims *"will seldom be suitable"* for the intermediate track. Both of these areas of practice are likely to be covered by some PI barristers.

7. The Supplemental Report does suggest an escape clause to exit the Intermediate Track but suggests the test for exiting the track should be "*exceptional circumstances*". If that test were adopted the threshold for exiting the intermediate track once allocated to it would be so high as to make it extremely limited in its application. That would put greater import on the initial decision whether to allocate the matter to the intermediate track.

8. For cases falling within the intermediate track the Supplemental Report suggests the following procedure:
    a. amendment to the PAPs to require the parties to try to agree the track and band
    b. a new PD for the intermediate track
    c. a streamlined procedure: aka a procedural straight-jacket "unless the court otherwise orders"
    d. Statements of case to be limited to 10 pages
    e. CMC to deal with directions: no change
    f. Standard disclosure to continue in PI cases: no change
    g. Witness statement to be limited to 30 pages per party in total
    h. Oral expert evidence from two experts per party and reports limited to 20 pages
    i. Trial: no significant changes other than perhaps a stricter adherence to the timetable
    j. Applications to be made at the CMC where possible and, any response and reply, kept concise. **Applications to be held without a hearing unless a hearing necessary.** Costs of application in addition to FRC. Costs of applications for

approval hearings to be subject to FRC, but all other applications to be subject to summary assessment. Vexatious applications to be punished in costs.

k. A hearing for handing down judgment and the subsequent order.

9. The proposed level of recoverable costs in the intermediate track

| **Stage (S)** | **Band 1** | **Band 2** | **Band 3** | **Band 4** |
|---|---|---|---|---|
| S1 Pre-issue or pre-defence investigations | £1,400 + 3% of damages | £4,350 + 6% of damages | £5,550 + 6% of damages | £8,000 + 8% of damages |
| S2 Counsel/ specialist lawyer drafting statements of case and/or advising (if instructed) | £1,750 | £1,750 | £2,000 – where counter-claim and defence to counter-claim | £2,000 - where counter-claim and defence to counter-claim |
| S3 Up to and including CMC | £3,500 + 10% of damages | £6,650 + 12% of damages | £7,850 + 12% of damages | £11,000 + 14% of damages |
| S4 Up to the end of disclosure and inspection | £4,000 + 12% of damages | £8,100 + 14% of damages | £9,300 + 14% of damages | £14,200 + 16% of damages |
| S5 Up to service of witness statements and expert reports | £4,500 + 12% of damages | £9,500 + 16% of damages | £10,700 + 16% of damages | £17,400 + 18% of damages |
| S6 Up to PTR, alternatively 14 days before trial | £5,100 + 15% of damages | £12,750 + 16% of damages | £13,950 + 16% of damages | £21,050 + 18% of damages |
| S7 Counsel/ specialist lawyer advising in writing or in conference (if instructed) | £1,250 | £1,500 | £2,000 | £2,500 |
| S8 Up to trial | £5,700 + 15% of damages | £15,000 + 20% of damages | £16,200 + 20% of damages | £24,700 + 22% of damages |
| S9 Attendance of solicitor at trial per day | £500 | £750 | £1,000 | £1,250 |

| | | | | |
|---|---|---|---|---|
| S10 Advocacy fee: day 1 | £2,750 | £3,000 | £3,500 | £5,000 |
| s11 Advocacy fee: subsequent days | £1,250 | £1,500 | £1,750 | £2,500 |
| S12 Hand down of judgment and consequential matters | £500 | £500 | £500 | £500 |
| S13 ADR: counsel/specialist lawyer at mediation or JSM (if instructed) | £1,200 | £1,500 | £1,750 | £2,000 |
| S14 ADR: solicitor at JSM or mediation | £1,000 | £1,000 | £1,000 | £1,000 |
| S15 Approval of settlement for child or protected party | £1,000 | £1,250 | £1,500 | £1,750 |
| Total: (a) £30,000 (b) £50,000, (c) £100,000 damages | (a) £19,150 (b) £22,150 (c) £29,650 | (a) £33,250 (b) £37,250 (c) £47,250 | (a) £39,450 (b) £43,450 (c) £53,450 | (a) £53,050 (b) £57,450 (c) £68,450 |

10. Where a % is used in the above table it applies to the sum recovered when the claimant recovers costs and to the sum pleaded when the defendant recovers costs. For the shaded rows (S1, 3, 4, 5, 6 & 8) the totals are cumulative. S2, 7 and 13 are ring-fence for counsel or a specialist lawyer & the sums in the other sections *"are for division between the solicitors and counsel/specialist lawyer as appropriate…"*. The above table does not included disbursements (court fees, expert fees, mediators' fees, interpreters' fees etc). However, experts should not consider themselves to have avoided the Jackson scythe; he proposes there should be fixed costs for experts in the intermediate track in due course as is the case for experts in PI cases on the fast-track.

11. Other factors which may affect the levels of costs are as follows:
    a. A 12.5% uplift where a party lives in, and instructs, London
    b. Figures should be updated for inflation every three years
    c. 30% to 40% uplift if a defendant fails to beat a claimant part 36 offer.
    d. Ability to order an uplift or indemnity costs for unreasonable litigation conduct

The future

12. It is likely that the Jackson reforms will, in some form, be adopted by the government and/or the Rules Committee. The exact timing for the adoption of the proposal is unclear. Further there are likely to be further consultations with regards to how the second phase of the Jackson Reforms are to be implemented. This is likely to give rise to further arguments about the principle of FRC and arguments about the level of recovery. It remains to be seen whether the ABI or other interested parties will be able to influence the government as to the level of costs. Whilst there must therefore be some doubt as to the form of the horizontal and vertical expansion of FRC's proposed by LJ Jackson it is this author's belief that the current government will largely adopt the proposals in the Supplemental Report.

13. LJ Jackson has not finished with civil justice reforms yet. He suggests that after four years of bedding in there be a review to see whether the intermediate track should be expanded further vertically, and to include claims for non-monetary relief. He also suggests there should be collaboration for serious injury claims between claimant bodies and liability insurers. I interpret this as an appetite to increase FRC in PI claims above the current £100,000 threshold and as an invitation for both sides to get around the table, as they did with NIHL claims, to reach agreement on the level and structure of the bespoke procedure and FRC.

What are some of the potential effects?

14. An important point to make is that the introduction of the intermediate track and FRC for PI cases up to £100,000 is not necessarily bad news. Firstly, and importantly the Supplemental Report ring fences fees for counsel or a specialist lawyer. This is hugely important as it prevents pitting solicitors against counsel and solicitors running down counsel's fees as would, in my view, be inevitable if they had control of the sums to be paid to counsel. There is always the risk that solicitors may undertake the work of counsel themselves, via specialist lawyers, but that risk existed even before the introduction of FRC. The one omission in the grid appears to be in relation to the CMC where there is no sum ring-fenced for counsel. The result will be that counsel will have to negotiate with solicitors the fee for the CMC where counsel is requested to attend. One can only hope this will not result in a race to the bottom where solicitors pit various chambers' clerks against each-other to extract a much-reduced fee. On the other hand the ring-fencing of 'pleadings' for

counsel or another specialist lawyer may encourage solicitors to use counsel for pleadings in matters on the intermediate track as otherwise they will need to be able to show that another 'specialist lawyer' undertook the work if they are to recover the additional costs.

15. The second point is that the fees recoverable in the intermediate track do not seem unreasonable, perhaps except for JSM fees for counsel which do seem rather light. However, there is no room to be complacent in this regard as the issue as to the level of FRC is likely to be 'on the table' once again when the government undertake a consultation in due course if, and (surely) when, it decides to take these reforms forward. In other words, whilst the battle has not ended in defeat for the bar the war is not yet over and one can expect a further fight at the next stage of the process. The implementation stage (if that is what occurs) will also provide the bar with the opportunity to raise some of the issues with the proposal, such as the failure to include a ring-fenced sum for counsel or specialist lawyer to attend the CMC.

16. The third point to note is that LJ Jackson explicitly states that even those costs which are not ring-fenced for counsel can be paid to counsel where counsel's involvement is required or requested by the solicitor. In other words, counsel's fees are not ring-fenced to those costs specifically designated for counsel or another specialist lawyer. However, where counsel is requested to do further work by a solicitor it will be up to counsel and their clerk to agree a fee/ hourly rate for the work to be undertaken bearing in mind the level of FRC for that phase of work. Given the solicitor will hold the purse strings for this 'other work' there is a real risk of counsel's fees being squeezed.

17. If these reforms were to be adopted as envisaged one might expect the following issues to be common place in proceedings:

    a. Arguments about whether a PI case should be allocated to the intermediate track. The comments in the Supplemental Report at chapter 7 section 3.4 that complex personal injury cases are not intended for the intermediate track are likely to be fodder for the arguments as to why any given case is not suitable for the intermediate track. Obvious arguments are likely to arise where there is a need for more than two experts apiece (as is often the case) and the possibility of the experts needing to give oral evidence, and the possibility of a trial lasting more than 3 days.

b. Arguments about which band in the intermediate track the claim should be allocated to are also likely. LJ Jackson anticipates quantum only PI cases may be suitable for band 1, disease cases or cases where breach, causation and quantum are in dispute may be suitable for band 4, and that all other cases will be suitable for band 2 or 3 (Chapter 7 at 3.9). It is suggested in the Supplemental Report that where the need for a CMC relates only to the band allocation in the Intermediate track there should be a costs penalty of £300 (i.e. increased costs liability to the other side) (Chapter 7 at 3.11). I would comment that the £300 risk of arguing about banding is unlikely to disincentivise such arguments where the potential gain/saving from going up/down a band is measured in the thousands. I would also comment that much of these arguments may be avoided by having 3 bands instead of 4.

How should the bar respond?

18. There can be little doubt that whilst LJ Jackson remains at the forefront of Civil Litigation Reform there is likely to be an ever-increasing role for FRC or costs budgeting. This is because he sees the costs of civil litigation as a problem and because he considers *"the only effective way to control the costs of civil litigation…* [is] *… FRC or costs budgeting…"*. Further in case there was any doubt as to the potential to expand FRC vertically one of LJ Jackson's explicit recommendations in the conclusion of the Supplemental Report is that consideration should be given to *"extending the scope of the intermediate track and the range of FRC."*

19. Whilst ultimately it is a matter for individuals and their respective organisations to decide how to respond to the second phase of the Jackson Reforms I am of the opinion that for so long as Jackson remains as the driving force in relation to civil litigation and so long as the government's appetite for reform remains (which is no longer as certain as it used to be and cannot be taken as given if there is a change of government) the best approach is to mitigate the worst elements of the proposed reforms by engaging with the consultations. In my opinion much is to be learned from the NIHL consultation; it is better to reach agreement with an opponent that to expose oneself to the uncertainty entailed when the matter of reform is left to a senior judge and his assessors.

20. When the government decides to implement the second phase of these reforms the bar should once again be ready to speak up to make sure its voice is heard as there are bound

to be further opportunities/risks as the government decides how to implement these proposed reforms. A strong voice is needed to avoid the worst of the risks for the bar and to try to seize such opportunities as fit within the will of those making the decisions.

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