

Keoghs Client Briefing

01 August 2017

Lord Justice Jackson's review into Fixed Recoverable Costs (FRC)

On 31 July 2017, Lord Justice Jackson published his long-awaited "Review of Civil Litigation Costs: Supplemental Report on Fixed Recoverable Costs". He has sought to balance the many competing interests in terms of access to justice and proportionality of costs and has made recommendations as to what he considers to be reasonable costs and proposals.

It now falls to the Government to consider the report and submit their own proposals for reform for public consultation. It is likely that we shall see:

- Government consultation [Autumn 2017](#)
- Government consultation response [Winter 2017 / Spring 2018](#)
- Civil Procedure Rule Committee review [Spring 2018 / Summer 2018](#)
- Reform implementation [Autumn 2018](#)

In this client briefing, we highlight some of the key points. To view the full report, [click here](#).

Fast Track

The fast track limit stays the same at £25,000 and it is proposed that all fast track claims are subject to a new table (see next page). It has the same stages as the current fast track personal injury tables set out in CPR 45.29, but contains four new complexity bands, with Band 1 being the least complex and Band 4 the most.

Low value protocols

With low value cases, it should be noted that the fast track table only applies to cases that have exited the portal process (because liability was not admitted).

Who decides the complexity band and when?

Jackson proposes the following complexity bands:

- 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), EL accident, PL, tracked possession claims, housing disrepair, other money claims.
- Band 4: EL disease 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.

This will require amendment of the pre-action protocols to allow the parties to agree the appropriate case track and the appropriate complexity band.

We already see some difficulties in the proposed complexity bandings.

Fast Track

Complexity band				
Stage	Band 1	Band 2	Band 3	Band 4
Pre-issue £1,001 - £5,000		£104 + 20% of damages	£988 + 17.5% of damages	£2,250 + 15% of damages + £440 per extra defendant
Pre-issue £5,001 - £10,000		£1,144 + 15% of damages over £5,000	£1,929 + 12.5% of damages over £5,000	
Pre-issue £10,001 - £25,000	£500	£2,007 + 10% of damages over £10,000	£2,600 + 10% of damages over £10,000	
Post-issue, pre-allocation	£1,850	£1,206 + 20% of damages	£2,735 + 20% of damages	£2,575 + 40% of damages + £660 per extra defendant
Post-allocation, pre-listing	£2,200	£1,955 + 20% of damages	£3,484 + 25% of damages	£5,525 + 40% of damages + £660 per extra defendant
Post-listing, pre-trial	£3,250	£2,761 + 20% of damages	£4,451 + 30% of damages	£6,800 + 40% of damages + £660 per extra defendant
Trial advocacy fee				
<i>a. Claim value up to £3,000</i>	£500	£500	£500	£1,380
<i>b. Claim value £3,001 to £10,000</i>	£710	£710	£710	£1,380
<i>c. Claim value £10,001 to £15,000</i>	£1,070	£1,070	£1,070	£1,800
<i>d. Claim value £15,001 to £25,000</i>	£1,705	£1,705	£1,705	£2,500

What about interim applications?

The costs of any applications is recovered separately at the same amounts (£250) prescribed by CPR 45.29H save for complexity band 4 and NIHL cases, where the amount proposed is £333.33.

Noise Induced Hearing Loss

The claimant and defendant representatives on the CJC working group have agreed a prescriptive process for dealing with NIHL claims and an accompanying grid of FRC. Jackson has endorsed the agreement reached and the agreed table of fixed recoverable costs.

In addition to the below, a fee of £1,280 is recoverable for restoring a company to the register.

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	The trial advocacy fee has not been agreed by the CJC working group. Jackson has proposed:
(a) Claim value up to £3,000	Trial advocacy fee £1,380
(b) Claim value £3,001 to £10,000	Trial advocacy fee £1,380
(c) Claim value £10,001 to £15,000	Trial advocacy fee £1,380
(d) Claim value £15,001 to £25,000	Trial advocacy fee £2,500

Assessment of costs

A short form of detailed assessment procedure is proposed with a provisional assessment fee cap of say £500. The fee needs to be fixed to avoid detailed assessment becoming an alternative revenue stream.

Clinical negligence

The only clinical negligence claims which will fall within the fast track fixed costs scheme are those where:

- (a) Breach and causation are admitted in the pre-action protocol letter of response and
- (b) The value is less than £25,000.

The report recognised that clinical negligence claims are more demanding and require more complex pre-issue investigation.

Jackson has recommended that the stakeholders embark upon a collaborative exercise, to develop the bespoke process and a grid of FRC in tandem.

Intermediate Track and Fixed Recoverable Costs

Lord Justice Jackson has proposed a new intermediate track for cases up to a value of £100,000. The table must be read subject to a number of rules which are as follows:

- (i) In the grid the word 'damages' is used as shorthand for damages, debt, liquidated sum or other monetary relief.
- (ii) If the claimant succeeds, the specified percentage applies to the sum recovered. If the defendant succeeds, the specified percentage applies to the claim defeated, as valued in the particulars of claim.
- (iii) 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. We have shaded these cumulative boxes for ease of use.
- (iv) The figures in stages S2, S7 and S9-S15 are separate sums for those items, if carried out.
- (v) The figures in stages S2, S7 and S13 are ring-fenced for counsel or a specialist lawyer. The sums in the other boxes are for division between the solicitors and counsel/specialist lawyer as appropriate in the individual case.
- (vi) For non-personal injury cases which are settled before issue, the figures in stage S1 are capped costs, rather than FRC

The table recognises that certain items of work are suited to counsel or a specialist solicitor and may provide substantial benefits in terms of focus on the issues and early settlement.

How does it apply to personal injury cases?

- Straightforward cases, where only one issue (such as quantum) is in dispute, will generally go into Band 1. This provides a significant financial incentive to admit liability.
- 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.
- We can already see that there are layers of complexity based upon case type and the number of key issues in dispute.

Intermediate Track

Lord Justice Jackson has recommended the following grid of Fixed Recoverable Costs:

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 advising	£1,750	£1,750	£2,000 <i>(£3,000 if there is a counterclaim and defence to counterclaim)</i>	£2,000 <i>(£3,000 if there is a counterclaim and defence to counterclaim)</i>
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 end of disclosure/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/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	£1,250	£1,500	£2,000	£2,500
S8 Up to trial <i>If the receiving party did not prepare the bundle, subtract:</i> <i>(a) £500 for a Band 1</i> <i>(b) £750 for a Band 2</i> <i>(c) £1,000 for a Band 3</i> <i>(d) £1,250 for a Band 4</i>	£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

Trial, ADR and Approval FRC

There is a further table which sets out the trial costs in stages S9 to S12 and ADR at S13 and S14 with approval at S15 as set out below:

Stage (S)	Band 1	Band 2	Band 3	Band 4
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	£5,100 + 15% of damages	£12,750 + 16% of damages	£13,950 + 16% of damages	£21,050 + 18% of damages
Total				
(a) £30,000	£19,150	£33,250	£39,450	£53,050
(b) £50,000	£22,150	£37,250	£43,450	£57,450
(c) £100,000	£29,650	£47,250	£53,450	£68,450

The amounts in the Total column for each band (S2 + S8 to S14) are based upon there being no conference / advice (S7) and no approval (S15).

The table of FRC for fast track claims (applies to both claimant and defendant recoverable costs).

Whilst it is hidden within the section on the “low value protocols,” Jackson confirmed the Fast Track FRC table above does not apply to cases that settle within the portal process. It only applies to a portal case when it has exited the portal say where liability has not been admitted.

Keoghs comment

For cases that have exited the portal, proposed FT FRC table provides for an average 2% FRC for RTA cases and an average 23.5% FRC reduction for EL/PL cases that have exited the portal process.

The inflationary rise in RTA FRC appears reasonable and the reduction in FRC for EL/PL cases brings them into line with RTA cases.

At first blush the proposed FRC intermediate cases appear to be lower than current average actual profit costs. We shall report further once we have completed our analysis and comparison.

We expect the claimant lobby to push back on the implementation and amount of FRC.

Jackson has ducked the “Bird v Acorn” issue, of post listing /pre-trial stage fixed fees applying to cases listed for a disposal hearing leaving, it to the Civil Procedure Rules Committee to resolve.

However, he has addressed the Broadhurst v Tan issue of indemnity costs applying where a defendant fails to better the claimant’s part 36 offer at trial. Jackson favours replacing indemnity costs with a percentage uplift of FRC of 30% to 40%. This will need careful consideration in any consultation as we consider its application should be limited to FRC that apply after the Part 36 offer is made.

In *Tucker v Griffiths and Hampshire Hospitals NHS Trust* (Keoghs acted for the second defendant) the incurred costs element of the budget had been exaggerated above the claimant's liability to pay them. Much reliance has been placed upon budgets in arriving at the FRC for the intermediate track.

Jackson has quite rightly raised the issue that the incurred costs in the report may be overstated and by implication the FRC derived may also be overstated.

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