

Ministry of Justice

**Extending Fixed Recoverable Costs in Civil Cases:
Implementing Sir Rupert Jackson's proposals**



A response by the Association of Personal Injury Lawyers

June 2019

The Association of Personal Injury Lawyers (APIL) is a not-for-profit organisation with a history of over 25 years of working to help injured people gain access to justice they need and deserve. We have over 3,500 members committed to supporting the association's aims and all of which sign up to APIL's code of conduct and consumer charter. Membership comprises mostly solicitors, along with barristers, legal executives and academics.

APIL has a long history of liaison with other stakeholders, consumer representatives, governments and devolved assemblies across the UK with a view to achieving the association's aims, which are:

- To promote full and just compensation for all types of personal injury;
- To promote and develop expertise in the practice of personal injury law;
- To promote wider redress for personal injury in the legal system;
- To campaign for improvements in personal injury law;
- To promote safety and alert the public to hazards wherever they arise;
- To provide a communication network for members.

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Introduction

APIL welcomes the opportunity to respond to the Ministry of Justice's consultation on extending fixed recoverable costs in civil cases. APIL is not opposed to the control of costs in the personal injury claims process, but the rules around costs should act as a leveller between the parties, helping to put them on an equal footing.

While an extension of fixed costs may be suitable for cases such as contract disputes between small to medium enterprises; in personal injury cases, there is already an unlevel playing field between the claimant and the well-resourced defendant, and further fixed costs for the claimant will exacerbate this inequality. As made clear in our response to Jackson's consultation in 2017, APIL would far prefer a system whereby costs above the current fast track level are carefully managed, rather than fixed. We maintain that this would be the best approach. We understand, however, that the MoJ supports Jackson's proposals on the extension of fixed costs. If fixed costs are to be extended, there should be a dedicated intermediate track, with its own procedure, a clear set of criteria for which cases will go in to this track, and clear exclusions. Any attempt to simply extend the fast track will be problematic, and not achieve the government's aims.

We have responded to the questions where we are able, and indicated which question we are responding to in a particular section. We have also, in accordance with question 5 of the consultation, provided comments on sections of the consultation that were not otherwise addressed through the questions. These comments can be found under headings throughout our response.

Overarching comments

Costs control on both sides

APIL believes that costs management and budgeting are a better way of controlling the spend of both claimants and defendants, than simply introducing fixed costs for the claimant in the lower reaches of the multi-track. Costs budgeting and costs management recognise that costs are not a "one size fits all" model and this is a fairer approach.

Costs management allows the spending of both parties to be controlled in a proportionate manner. There is a general feeling currently that defendant firms spend a disproportionate amount defending cases on a matter of principle, for example in the case of *Gavin Edmondson v Haven Insurance*¹, which was defended all the way to the Supreme Court, where the court found in the claimant's favour.

Transparency in spending is currently provided for by costs budgeting, and it is essential that any system that removes budgeting has something similar in place – not least to help the court deal with case management fairly and effectively. If fixed costs are extended for the claimant, defendants should be required to complete a costs estimate relating to the actual costs being incurred, this should be accompanied by a statement of truth. There must be a proper analysis of defendant costs – something which was previously promised by the Government, which has failed to happen².

At present, it is not always easy for the court to control defendant spending, as the spending is not always visible. Sometimes, for example "shadow experts" are used, to review the report obtained from the "on-record" expert. Because the shadow expert does not produce a

¹ [2018] UKSC 21

² During negotiations on introducing fixed costs in the fast track in 2009 and 2010, the MoJ promised to properly analyse defendant costs.

report themselves, and is not questioned in court, the spend will not always be visible to the court. There must therefore be transparency on each party's spending, not just about the potentially recoverable costs, but what costs are actually being incurred

Both claimants and defendants should be under the same costs scrutiny by their clients where they seek to recover solicitor and own client costs. The economics and the risk/reward analysis of litigation must have equal influence on the behaviour of both sides. Neither should be able to outspend the other without it impacting on their client.

As set out in our previous response to Jackson's 2017 fixed costs review, defendant behaviour is one of the biggest causes of disproportionate costs in cases currently in the multi-track. Defendants are not pro-active, and either refuse to make decisions on liability or continue to deny liability, as a delaying tactic. APIL previously suggested that there is no reason why the approach set out in the Serious Injury Guide³ could not be extended to the lower reaches of the multi-track, and we maintain this position. A commitment from both sides to a collaborative approach would ensure early contact, regular dialogue, and help to narrow the issues in the case. Following the guide helps achieve earlier interim payments, and easier access to rehabilitation. This, coupled with judicial scrutiny through costs budgeting, will save costs.

If the reality is that the Government wishes to preserve the ability of the well-resourced party to deploy costs as a weapon, whilst restricting the opportunity for costs to act as a leveller, it is unlikely that these reforms will be successful, at least in a way that furthers the overriding objective and preserves access to justice.

Fixing costs limits the amount of work that can be done

APIL members report that it is not uncommon to see defendants requesting a disproportionate amount of information from the outset, front loading the case. In the current regime, this is not a problem as the lawyer gets paid for the work done at a reasonable rate. If defendants are supportive of further fixed costs being introduced, it must be recognised that the claimant is not be able to go to the same lengths as now and will be limited in what they can provide to the defendant. Ultimately, if costs are fixed, the process must also be fixed. Some have suggested that if claimants do not want to obtain the evidence themselves because it is too costly, the defendants would be willing to obtain records, for example, with the claimant signing a form of authority for them to do so. This is not a viable option. Defendants should not be able to view the claimant's evidence before the claimant has a chance to consider it themselves. From a data protection point of view, it is only correct that claimants should access personal data about themselves before the defendant does. Further, medical records will often contain issues which are irrelevant to the claim but which the claimant may find embarrassing. Defendants are not entitled to view clinical records prior to the issue of proceedings. Many claimants do give their consent to this but this cannot be expected to be given 'blind'.

Further reform cannot take place in isolation

There must also be caution, as there may be adverse consequences as a result of these proposals dovetailing with other reforms. There must be consideration of the other reforms taking place in the personal injury sector – for example, how will the clinical negligence claims falling out of the new fixed process for clinical negligence claims up to £25,000 fit in with the extension of fixed costs in the multi-track? There must also be consideration of how

³ <http://www.seriousinjuryguide.co.uk/files/serious-injury-guide-20190206.pdf>

the new process for small claims road traffic accident cases will operate alongside these proposals.

Clarity of proposals

We state throughout our response whether we are commenting on proposals in relation to fast track cases or intermediate cases. Paragraph 8.1 of chapter 5 indicates that “some specific issue are addressed in respect of fast track cases which would apply equally in intermediate cases”. The consultation is vague and unclear as to which issues relate to both fast track and intermediate cases. Unless otherwise stated, our comments under the heading “fast track proposals” relate only to those cases up to £25,000, and the comments under “intermediate cases” only to those cases between £25,000 and £100,000.

Fast track proposals

Q1) Given the Government’s intention to extend FRC to fast track cases, do you agree with these proposals as set out? We seek your views, including any alternatives, on:

- i) The proposals for allocation of cases to Bands (including package holiday sickness)**

Allocation in the fast track

We assume that Band 2 relating to RTA claims “within the pre-action protocol” means those cases that initially went into the portal, but currently fall out into Part 45 table 6B costs. We assume that Band 3 relates to RTA cases that are excluded from the scope of the RTA low value pre-action protocol from the outset by virtue of paragraph 4.5 of the protocol for low value road traffic accident claims, such as cases where the claimant or defendant acts as personal representative of a deceased person, or where the defendant’s vehicle is registered outside of the UK. We request clarification on this point.

Otherwise, we agree with the bands as set out, but there must be flexibility for cases to move within the different bands as appropriate, and for cases to move to the multi-track if they are sufficiently complex. There should not be any costs penalty if there is a reasonable expectation that the case could be valued at a certain level, and is eventually valued at more or less than this, and the case must move to a different track. It is not always possible to know the value of the case from early on.

Package Travel Claims

We assume that references to “package travel claims” in this section of the consultation are references to holiday gastric illness cases, and not other claims arising from package holidays. We have commented below on the basis of this assumption.

Feedback from members who operate in this area reveals that the introduction of the pre-action protocol has increased the workload on claimants, yet defendants are failing to comply with their obligations as to disclosure under the protocol. Many defendants continue to use their standard denial response letters, as was the case prior to the introduction of the protocol. Claimant representatives report a lack of response to correspondence in some cases, and where they deny liability, few defendants are complying with 10.6 of the protocol to provide details of their version of evidence and documents in their possession material to the issues between the parties. At the same time, claimant representatives are required to obtain more details from claimants in relation to their duty of disclosure, for example social media disclosure for 1 month prior to the start of alleged symptoms up to 1 month after the

claimant's recovery, and medical records are required to be disclosed earlier than previously.

In light of the increased onus on claimants as per the protocol, this has meant further work has to be carried out at the outset of the case. Adequate costs need to be allocated to these cases to ensure that the additional obligations can be met. Holiday illness claims are not comparable to road traffic accident claims in complexity, and consideration must be given to the following additional costs that the claimant representatives must incur:

- 1) Social media discovery
- 2) Translation fees
- 3) The involvement of local agents – even at an early pre-issue stage – in particular for advice on local standards and local laws
- 4) Added cost of obtaining documents from abroad e.g. medical records
- 5) Potential of Part 20 claims when the defendant seeks to add the hotel to the proceedings
- 6) Increased trial costs – again involvement of foreign lay and witnesses, interpreters video-link facilities, increased length of trials caused by the involvement of additional expert witnesses/translation for foreign witnesses

In light of the additional work that is required in these cases, we recommend that gastric illness claims should fall within band 4 of the fixed recoverable costs. At the very least, holiday illness claims should continue to be in the same band as other public liability claims. The Government heard from many stakeholders in this area, and made a decision on the fees based on the evidence received, only a year ago. There is no rationale for decreasing fees here. Holiday illness claims should not fall within band 2. There should be consideration, in light of further evidence following the introduction of the protocol, of the introduction of additional penalties levied against non-compliant parties, to prevent defendants ignoring correspondence/not complying with their duties. An uplift to fixed recoverable costs should also apply if there is no admission within the protocol period.

Fees for the four bands

We are concerned that the trial advocacy fee is the same between bands 1-3, with an increase only taking place at band 4. There is no distinction between the costs for a quantum only trial, and a trial dealing with both liability and quantum. Where liability is in issue, it will be more costly to conduct the case, and the claimant may either struggle to obtain representation, or face losing some of their damages to make up the short fall between the costs recovered and the costs incurred by counsel.

We also disagree with the arbitrary additional amount awarded for each additional defendant in band 4 cases. Disease cases often involve multiple defendants. There is a huge amount of additional work required in employers' liability disease case involving more than one defendant, and a notional increase in the overall fee will not be sufficient, and may lead to claimants being unable to bring a claim as they are unable to find a legal representative who can afford to take on the case. The additional complexities of employers' liability disease claims involving multiple defendants are currently recognised, as only those cases involving a single defendant can begin in the claims Portal⁴.

Interim applications and preliminary issues

⁴ Paragraph 4.3(6) Pre-action protocol for low value personal injury (employers' liability and public liability) claims

We agree that preliminary trials should not usually be required in the fast track. The current drafting of the proposal – paragraph 6.1 – however, indicates that there will be no fees for the work carried out between the preliminary trial and the subsequent trial. There is obviously work to be done between the two trials, and there should be an appropriate fee for this work.

It is unclear whether it is envisaged that the section on interim applications and preliminary issues applies to claims up to £100,000 also. Preliminary trials will be more likely in these cases, and should be catered for in any fixed costs regime.

Uprating for inflation

We answer this question in relation to both fast track and intermediate cases.

The figures in the consultation were first established in 2017. Before being introduced, the figures must be uprated for two year's worth of inflation. A 4 per cent uplift for inflation for the fast track costs is inadequate, and nonsensically based on the Services Producer Provider Index. There must also be a subsequent commitment from the MoJ to keep the figures under a full review (not just in relation to inflation), and to continue to uprate figures in line with the Retail Price Index.

ii) The proposals for multiple claims arising from the same cause of action

Multiple claims arising from the same cause of action

We disagree with the proposal that fees should be set at 10 per cent of that for the principle claimant, where there is more than one claimant and the claims arise from the same set of facts. There will be many different considerations as negligence can affect different claimants in different ways. There is no one size fits all approach, and the same accident does not mean that the claimants have all suffered the same losses or have the same needs. The claimant representative will be required to instruct an appropriate medical expert for each individual claimant. That will require separate sets of instructions detailing the effect the accident has had on the individual. There will be distinct losses to consider for each claimant including possible advice about loss of earnings, subrogated claims, care and rehabilitation needs. All this amounts to more than 10 per cent additional work.

The justification within the consultation paper is flawed, and there is no evidence to support this proposal. The consultation sets out that it is a feature of holiday sickness claims, for example, that the booking details, facts, alleged illness, and resort are usually identical in multiple claims. These issues are only a small part of what must be considered to satisfy the burden of proof in a claim. As above, each claimant is an individual, and the solicitor must help them to obtain the amount of compensation that helps them, as an individual, get back, as closely as possible, to the position they were in before the negligence occurred.

We envisage that many multiple claimant cases will involve families, and therefore involve both children and adults. Children's cases must be handled separately, as not only are they more vulnerable so need additional care and attention throughout the case, there are very different considerations when running cases involving children, for example different expert evidence may be required because the child's losses differ by virtue of their age, and they may have different injuries as they have reacted differently to the accident. Court approval is also required for any award made to the child. There must be separate provision for children's cases.

Those who are vulnerable and protected parties also need extra care and attention in pursuit of their claim, and a fee set at 10 per cent of the fee for the principal claimant, for another

claimant will simply not be sufficient reimbursement for the additional work that the claimant solicitor will carry out.

We also question how the 10 per cent figure was arrived at. Even if a group of claimants do suffer the same injuries and their case is essentially the same, this figure does not in any way recognise the minimum amount of work that must be done for every claimant, to fulfil a solicitor's professional obligations. There are also issues of client confidentiality and potential conflicts of interest, if the proposal is brought in. Solicitors, in order to act in their client's best interests, would be in a position where it would be better to recommend that other family members go to a different solicitor, so that they are able to get the correct time and care dedicated to their case.

iv) Part 36 offers and unreasonable litigation conduct (including, but not limited to, the proposals for an uplift on FRC (35% for the purposes of Part 36, or an unlimited uplift on FRC or indemnity costs for unreasonable litigation conduct), and how to incentivise early settlement

Part 36 and indemnity costs

We answer this question in relation to both fast track and intermediate cases.

Part 36 is generally working well. It drives good behaviour and prevents cases from going to court unnecessarily. There must, however, be a real "carrot and stick" for late acceptance of a claimant's Part 36 offer by the defendant. Whilst the claimant faces largely the same sanction, on late acceptance, as a judgment which is not "more advantageous" than the defendant's offer, there is no parity so far as late acceptance by the defendant of a claimant's Part 36 offer. This problem is particularly acute in fixed costs cases following the Court of Appeal ruling in *Hislop v Perde*⁵.

In a non-fixed costs case the claimant will recover costs from the end of the relevant period until the date of acceptance but following the reforms to the CPR in 2013 those costs are unlikely, certainly if assessed on the standard basis, to meet the costs actually incurred by the claimant, yet those costs have only been incurred because the defendant has failed to accept, in a timely way, a reasonable offer. Furthermore, the claimant may have to pay an irrecoverable success fee on those further costs. These costs, in a personal injury claim, are likely to be met by the claimant out of damages, subject to any cap, hence even when the claimant makes a reasonable, and timely, offer to settle that may not prevent the defendant exploiting superior resources and ability to absorb costs.

In a fixed costs case the claimant, following the ruling in *Hislop*, may not even recover base costs, unless a further stage of fixed costs has been reached if there is late acceptance of an offer by the defendant.

Furthermore, whilst a Part 36 offer is expressly deemed to be inclusive of interest only up to the end of the relevant period no account seems to be given, on late acceptance, of the need to award the claimant interest on the sum accepted from the end of the relevant period down to the date of acceptance.

A solution to this problem would be for the terms of Part 36.17(4) to apply when there is late acceptance of a claimant's Part 36 offer by the defendant, requiring interest on the sum of

⁵ [2018] EWCA Civ 1726

money awarded to the claimant, and an uplift on the award, as well as indemnity costs and interest on those costs. This would incentivise claimants to make offers and defendants to accept, promptly, reasonable offers.

Additionally, since the reforms to funding arrangements mean that many claimants are now required to contribute to irrecoverable costs out of their damages, it is vital that as full a recovery of costs as possible can be made.

We do not accept the argument within the MoJ's consultation document that indemnity costs "undermine the principle of fixed recoverable costs by requiring detailed costs assessment (and the keeping of records to inform an assessment should it arise)". Firms will keep a running tally of costs anyway, as it is a professional obligation for them to do so, and there is also a possibility that any case will move between the tracks and continue outside of the fixed costs regime, so firms will keep a record of costs for this purpose, also. Both claimant and defendant firms are free to agree with their clients to pay more than the fixed costs recovered up the level of indemnity costs.

It is vital that Part 36 retains teeth. An arbitrary 35 per cent uplift on the fixed fees would simply not be a sufficient deterrent to prevent defendants from continuing to accept Part 36 offers late. Claimants behaviour in relation to Part 36 is already tempered by the arrangement that the Part 36 regime trumps qualified one way costs shifting, and as such, if a claimant refuses a defendant's Part 36 offer, but fails to beat it at trial, they lose QOCS protection. There must be a proper mechanism in place to prevent defendants from acting against the intentions of the Part 36 regime. If a percentage uplift is introduced, it should be introduced as well as costs on an indemnity basis, and should apply to the claimant's damages, as well as fixed fee amounts.

If indemnity costs are not awarded for fixed costs cases within the Part 36 regime, at the very least, any percentage uplift must be carefully considered to ensure that it is at a sufficient level to drive the correct behaviours, and act as a credible threat to change defendant attitudes towards late acceptance. The calculation of the uplift must take into account that the claimant will also likely have some of their damages deducted to pay for the costs of the case.

There must also be consideration of the situation whereby a claimant refuses a defendant's Part 36 offer, but fails to beat it at trial. It is often unclear exactly what the claimant must pay to the defendant in terms of costs in these circumstances. Often, the defendant will receive substantially more than the claimant's own representative. In a fixed costs environment, it should be absolutely clear what the claimant is on risk to pay the defendant if they fail to beat the defendant's offer, and it ought not to be such that the defendant can benefit to any greater degree than the claimant's representative.

Unreasonable behaviour

We answer this question in relation to both fast track and intermediate cases.

In relation to unreasonable behaviour more generally, indemnity costs play an important role in controlling defendants' spending. As set out in our introductory comments, it is important that the costs of the defendant, as well as the claimant, are controlled. The consultation recognises that there is a risk that fixed recoverable costs can disadvantage a less well-resourced party against a deep pocketed opponent who, for example, makes repeated vexatious applications. Indemnity costs are an effective measure to control spending, and the threat is likely to give defendants reason to pause before acting in an unreasonable

manner. In relation to unreasonable litigation conduct, therefore, the court should award indemnity costs.

Counsel's fees

We assume that the proposals in relation to counsels' fees at paragraphs 8.11 – 8.13 relate to cases valued up to £25,000 in the current fast track. The areas of advice that specific amounts can be recovered for "counsel or specialist lawyers" in NIHL and Band 4 cases do not reflect the issues on which barristers will be instructed on in fast track cases at present. For example, it is stated that for "post-issue advice or conference", the fee will be £1,000. In reality, a barrister is far more likely to be instructed for advice or a conference **pre**-issue, as claimants would not want to be issuing a claim where prospects are borderline or lower. The specific fees seem only to relate to advice that defendants, and not claimants, would be looking to instruct a barrister on. This cannot be correct. Both items should be amended as follows (amendments in red):

Pre- or post-issue advice or conference

Settling defence Particulars of claim and/or defence and counterclaim

Assessment of costs

We dispute the assertion that in most cases the assessment of recoverable costs will not require judicial input. Fixing costs does not prevent disputes over the actual amount of costs payable. The amount of disbursements is often disagreed upon by the parties.

Noise Induced Hearing Loss

Q2) Given the Government's intention to extend FRC to NIHL cases, do you agree with the proposals as set out?

APIL reiterates that the increase in NIHL claims notified within insurers between 2011 and 2014 should be treated with caution. For cases in the EL/PL Portal, the Claim Notification Form is often sent to one insurer, for it to then be rejected and the claimant representative then has to send it to another insurer. If the same cases are logged several times, this artificially drives up the number of cases going through the Portal. We suspect this is a major factor in the perception that Noise Induced Hearing Loss (NIHL) claims increased between 2011 – 2014, and that this was not necessarily the reality. Double counting is a serious problem with portal claims and the numbers should be viewed with caution. Additionally, even taking the above into account the increase seen in 2013 was the direct result of the LASPO Act deadline and the numbers of claims in 2014 was much lower. Data from the Institute and Faculty of Actuaries UK Deafness Working Party highlights that the number of claims has continued to fall – 61,776 claims were notified in 2014, this fell to 30,310 in 2016 and 23,312 in 2017.

APIL representatives took part in the Civil Justice Council working group, and overall, agrees that the proposals of the NIHL working group are appropriate. We have several comments on the areas of the proposals that require further consideration.

Letter of claim and standard of audiogram

There is unfinished work in this area that must be completed. A minimum standard and accreditation of audiologists must be agreed and put in place prior to implementation of the new system. Not only will this ensure quality reports are produced, it will also remove the risk

of disputes over whether audiograms meet the required standard – which could be fertile ground for satellite litigation. Without this additional work, a fundamental and cost-reducing plank to the new regime is removed.

Paragraph 4.4 – letter of response

We accept that not all defendants running these claims are signed up to the ABI's guidelines, and therefore it is not possible to make the requirement to follow the guidelines mandatory. We recommend, however, that stronger language should be introduced to ensure, as far as possible, that in cases where there are multiple defendants, the defendants make a timely decision on who will lead in the case. This will avoid delay and the costs associated with duplication. We also suggest that the list of those signed up to the agreement is readily available so that claimant lawyers will know when to expect adherence to it.

Preliminary issue trials

The proposal of the MoJ on preliminary issue trials in noise induced hearing loss cases appears to be at odds with the recommendation of the committee. There was no agreement on the CJC working party as to whether fixed recoverable costs should apply if disputed limitation is listed as a preliminary trial issue. A system of fixed costs in NIHL claims must not allow the defendants to argue issues of limitation without substance. For a new protocol with fixed costs to work the defendants must be prepared to reveal their hand as far as the evidence they have, as much as it is expected of the claimant. The committee attempted to dissuade the defendants from empty arguments through potential costs. We accept that preliminary trials on limitation do not save costs and should not be part of the fixed costs suggested. If the defendants want to raise issues of limitation, they must demonstrate the substance of their argument, and be prepared to pay standard costs if they do not succeed. Claimants are required to provide their statement and other evidence early in the new recommended protocol and it was intended that the defendants were to be put on the same footing. While we are generally supportive of the recommendation that split trials should be discouraged, as they do not necessarily save costs in NIHL cases preliminary trials on limitation have no place in a fixed costs system – the rules should not allow the defendant to hide the extent of the evidence that they have.

Costs

Before the proposals come in, the figures must be updated in line with the RPI, and there should be provision for the figures to be reviewed annually in line with inflation.

Exclusions

The Civil Justice Council report on fixed costs for noise induced hearing loss claims set out that all claims valued over £25,000 will fall out of the new process and costs regime. At chapter 4, section 9 of the MoJ's consultation, it states that multi-track claims will be excluded from the FRC regime – with no reference to value. It should be made clear that NIHL cases valued over £25,000 should go into the multi-track and should not go into the extended fast track. As is the case for clinical negligence cases (set out below – page 14), it has clearly been recognised that these cases require a dedicated process and that process

was only designed for cases up to £25,000. Cases valued above this limit are more complex and should go into the multi-track.

Additionally, military claims and claims that involve more than three defendants should not be subject to any fixed costs regime. The CJC group recognised that these claims are too complex for this process. They should not, therefore, simply fall out into arbitrary fast track fixed costs.

Where a claim starts in the portal but falls out, costs should be assessed on the standard basis, as recommended by the Civil Justice Council report. The claim should not fall back in to the fast track fixed costs regime.

There should also be clarification that where the defendant seeks a further audiogram or their own medical evidence – be this an examination of the claimant or otherwise, for example a desktop medical report – the claim will fall out of the fixed costs regime. At present, the MoJ's own proposals state that this exclusion applies where the defendant seeks examination of the claimant, and this goes further than the Civil Justice Council recommendations. The underlying principle is that where the defendant seeks to respond to the claimant's medical evidence, the exclusion should apply.

Intermediate track

Q3) Given the Government's intention to extend FRC to intermediate cases, do you agree with the proposals as set out?

i) The proposed extension of the fast track to cover intermediate cases

We are opposed to the extension of the fast track to cater for intermediate cases. If fixed costs are to be introduced for cases over £25,000, we agree with Lord Justice Jackson that a new track, rather than an extension of the fast track, should be introduced. As Jackson LJ points out, the fast track already works well for a large proportion of contested cases. Shoe-horning ill-suited cases into the fast track regime risks upsetting the current process, and could lead to more cases falling out of the fast track and into the multi-track instead.

Jackson also points out that cases above £25,000 are usually more complex than fast track cases, requiring more elaborate evidence and longer trials. It is too difficult to apply a pared back fixed process for cases over £25,000. The procedural rules for intermediate cases should therefore be different from those in CPR Part 28 (dealing with procedure in the fast track), and should enable flexibility for a greater case management role by the judge – for example provision for there to be a case management conference or pre-trial review if necessary. Cases above £25,000 currently benefit from oral allocation hearings (rarely permitted in the current fast-track) and often need additional interim hearings; there is also provision for interim payments; Part 18 request orders and a pre-trial hearing.

Ultimately, there needs to be the flexibility, discretion and a better quality of judicial intervention in these cases, as seen in the multi-track. Case management in the fast track is not robust at present, and the courts do not seem to routinely manage fast track cases in a proportionate way. An example of this is the Court of Appeal ruling in Phillips -v- Willis [2016] EWCA Civ 401 where Jackson LJ observed:

“28. ... The district judge, however, caused the parties to incur substantial extra costs as a result of the order which he made of his own motion.

29. The costs which the district judge caused the parties to incur were totally disproportionate to the sum at stake. First, the parties would have to pay a further court fee of £335 as a result of the district judge's order. Secondly, the parties would incur the costs of complying with the district judge's elaborate directions. Those directions read as follows...

30. I dread to think what doing all that would have cost, but that was not the end of the matter. Both parties would need to instruct representatives to attend the further hearing. They would also have to write off the costs of the 9 April hearing. At the end of all that, the winning party would recover virtually no costs, because the case was now proceeding on the small claims track."

Simply, if there are going to be fixed fees, there needs to be a new fixed process, and simply shoe-horning certain cases between £25,000 - £100,000 into the fast track is not appropriate. There should be a dedicated intermediate track. The MoJ's justification for not creating an intermediate track is that it will involve costs and complexity (paragraph 1.5 of the consultation). It will not be simpler to just extend the fast track – to do so will have unintended consequences - and if the proposals are to be introduced, they should be introduced in the right way, and not in a way that saves costs. Court fees are already set at a level which is over and above full costs recovery - in 2017, a £602 million surplus was generated in civil court fees. We suggest that the profits generated should be invested to ensure that if these proposals go ahead, they are put in place in the right way.

- ii) **The proposed criteria for allocation as an intermediate case and whether greater certainty is required as to the scope of the track**
- iii) **How to ensure that cases are correctly allocated, and whether there should be a financial penalty for unsuccessful challenges to allocation**

Allocation

Allocation must be carried out in such a way as to ensure certainty for the parties from the outset, so that cases can be run in accordance with the costs that will be received, and the limitations placed on the case as a result of the restricted costs.

Rupert Jackson identified that the intermediate track would only be for a certain limited range of cases, and we agree with this approach. Allocation should not work on the basis of a blanket expectation that all cases between £25,000 and £100,000 are suitable for the intermediate bands.

There should be a clear list of factors which, if satisfied, will mean that a case begins as an intermediate case. Allocation should not take place solely on value, which appears to be the Government's suggestion. We agree that the factors that should all be considered, in order to determine whether a case is suitable for the intermediate track, should be those highlighted by Lord Justice Jackson in his response to his review, and reiterated at Chapter 5, paragraph 2.1 of the consultation.

In relation to paragraph 2.1(iv), it must be borne in mind that the parties will not know at the point of allocation where or not experts will be giving oral evidence and they may not be given permission for oral evidence. The criteria at 2.1(iv) should read "there will be no more than two experts providing evidence to each party." Otherwise there may be more than two experts instructed by the claimant, for example, but the case may end up in the intermediate bands because not all of the experts providing evidence will be doing so orally.

Exclusions

There should be clear exclusions to the process – those that Lord Justice Jackson set out at Chapter 7, paragraphs 3.2 – 3.7 of his 2017 report (further detail on a number of these is set out below), and also cases involving product liability and employers’ liability disease cases. There must also be clarification that the exception for mesothelioma cases specifically includes cases of other asbestos related lung disease. It was clearly the intention of Lord Justice Jackson that other asbestos related lung disease cases should be excluded from the proposals – chapter 7, paragraph 3.3, yet the MoJ’s consultation paper simply states that “mesothelioma cases” should be excluded (Chapter 5, para 2.2 of the MoJ’s consultation).

Clinical negligence cases

Clinical negligence cases should be excluded from this process, even if the case otherwise fits the criteria set out at chapter 5 paragraph 2.1 of the MoJ’s consultation. Even lower value clinical negligence cases require separate consideration due to their nature (as evident from the current work underway for clinical negligence cases valued up to £25,000). Clinical negligence cases are not suitable for the fast track, so will not be suitable for an extended fast track. The clinical negligence claims process is only being fixed for cases up to £25,000, with this limit being set after careful consideration and consultation with stakeholders – cases outside of this scope should not fall out into an extended fast track that has not been designed for the challenges that clinical negligence cases bring. For example, there is no consideration within the MoJ’s paper of the remuneration of experts’ fees in the fixed costs process. If a further extension of fixed costs for clinical negligence cases is to be considered, the lower value cases scheme should be permitted to be introduced and bed down first. After the scheme has been up and running for several years, there could be consideration given to creating a further process for clinical negligence cases valued between £25,000 - £100,000.

Child abuse cases

Lord Justice Jackson also indicates that child abuse cases would “seldom be suitable” for the intermediate track. We believe that all child abuse cases should be excluded from the fixed costs regime, even where they may otherwise fall within the criteria at paragraph 2.1. The exclusion should apply to all cases of child abuse and neglect, and should not be limited to sexual abuse.

This area of litigation is extremely sensitive and complex. It is essential that appropriately trained and experienced lawyers are involved throughout the process, and fixed costs may jeopardise this, leading to a downgrading of expertise and increased commoditisation. Child abuse cases cannot and should not be commoditised – these cases require specialised and experienced representatives, to ensure that the vulnerable claimant can get access to justice.

Child abuse cases are also particularly complex and are not routine. This has been recognised by costs judges historically. These cases are also extremely document heavy. It is necessary to review medical records, education records and any records from social services. It is not uncommon for the contemporaneous evidence to run to up to 30 lever arch files in some cases where a victim may have been part of a family under the care of a Local Authority.

Obtaining disclosure from defendants in these cases can often be extremely difficult. The records are sensitive and may refer to other children in care or other family members. Defendants can therefore be nervous about disclosing documentation without appropriate

court orders. This leads to an extremely protracted disclosure exercise before it is even possible to obtain the necessary documents to plead a case. This process would simply not be possible under a fixed costs regime and would deny claimants access to justice. Many survivors have a good recollection of what happened to them, but lack knowledge and clarity in respect of why certain decisions were made by those responsible for their care, making the gathering of documents and evidence essential.

In order to analyse the impact of abuse experiences and the psychological consequences, lawyers need to consider every aspect of a claimant's life to consider the factors contributing to causation of injury. This makes these cases extremely time consuming. It is not as straightforward an issue as looking at the impact of a physical injury.

The claimants themselves are also extremely vulnerable and can have difficulty trusting professionals, due to their experiences with people in positions of authority in the past. This involves increased time for the lawyers in establishing relationships and taking evidence. Due to their injuries, claimants in this area can also be extremely chaotic and disorganised – in a similar way to those who suffer brain injuries. This requires extra time and care by the legal professional in ensuring that the claimant is fully informed and involved, and is properly organised to attend appointments and assessments where needed.

Often, the victims of child abuse will be litigating when they are under 18. This can mean that there is a need to liaise with those dealing with them in the care system such as social workers and carers, etc. This adds an extra layer of complexity to client contact which cannot be streamlined.

The nature of this type of litigation is also front-loaded. There is significant work to be done in considering a claimant's background and to review historic records. Any fixed costs proposal would introduce an element of lawyers needing to be less thorough in their work or in the worst case, to decline instructions. Given that very often damages in these cases are for psychiatric injury only, it is often the case that damages reach a maximum of £60,000 - £70,000 and often less, fixed costs would impede access to justice for the survivors of child abuse.

There is a wider issue to consider regarding access to justice. Victims of child abuse come forward when they feel ready and able to do so. They require considerable support and to know that their cases will be taken seriously and given the investigation they deserve. Without a civil legal system to support them this is taking away a route to justice for these clients, once again removing their voice and their ability to seek help. Fixed costs in child abuse cases sends a message that our legal system is not prepared to support the victims of child abuse. Often the damages obtained in these cases obtain therapy to enable claimants to avoid later coping strategies such as alcoholism or drug abuse. In the long term, avoiding such maladaptive strategies saves the state money.

Bringing successful litigation is in itself a therapeutic process for the survivors of child abuse, allowing them to feel that they have taken all of the steps they can to secure justice and achieve recognition for what they have been through. Any steps which limit the ability of survivors to do this would be extremely detrimental to some survivors' health and recovery.

Litigation in this area also holds defendants – local authorities, schools, for example - to account, and encourages them to implement measures and processes to ensure non-recurrence.

Defendants in these cases will also have the means to access experienced and well-resourced solicitors. Ensuring equality of arms in such a sensitive area of law is vital for all of the reasons set out above.

Product liability cases

We believe that product liability cases also have features which mean that they are unsuitable to be conducted within the intermediate bands. The majority of product liability cases are complex, regardless of value, mainly due to the amount of investigation required in terms of who the correct defendant is and because liability is always complex. While the number of expert witnesses required may mean that product liability cases will fall out of the track, we recommend that all product liability claims – including group actions, which product liability claims often become- should be listed as a clear exemption outside of the fixed costs regime.

Generally, a large amount of time and money is spent at the pre-issue/investigation stage to identify the correct defendant, the appropriate cause of action, and the evidence relating to the defect. The correct defendant will be more complex to identify than other PI claims due to the complex corporate structures, and the involvement of multiple parties such as the retailer, manufacturer, importer, and the consideration of the correct jurisdiction where the potential defendant is abroad. The appropriate cause of action is complex, as it must be considered whether the claim should be brought under the Consumer Protection Act 1987, negligence, or breach of contract. In medical product liability claims, there can be difficulty untangling whether the correct defendant is the surgeon, the trust as the importer of the product, another importer, the manufacturer, or a mixture of them all. The evidence relating to the defect also involves an enormous amount of time and resource to bottom out. Disclosure in product liability claims can be enormous.

There is already an uneven playing field between claimants and defendants in this area, as the defendant is often a multi-national company. It is arguable that this will lead to product liability claims to be removed from the intermediate bands, as they satisfy the criteria of having “wider factors, such as reputation or public importance”. However, this is something that will emerge once the case has already been allocated, after investigation. If product liability cases are to be included in the intermediate bands (provided that they otherwise meet the criteria at paragraph 2.1), flexibility is vital, although arguments concerning whether the case is covered by the track or not may lead to satellite litigation and increased costs.

The High Court has huge experience in dealing with product liability claims and when a number of similar claims are filed, Masters sometimes identify a wider, group issue. Cases being dealt with around the country will lead to a loss of that experience and position.

Employers’ liability disease cases

Disease cases are by nature complex, and it is impossible to shoe-horn this wide category of cases into a “one size fits all” fixed costs regime. Disease cases are also extremely likely to involve vulnerable claimants, such as those who are elderly, or those who have an ongoing disability. If these cases are to be subject to fixed costs, there must be separate consideration by a cross-industry working group – as was the case for noise induced hearing loss cases – to devise a dedicated process suitable for these cases.

International personal injury cases

Cases involving an accident or injury abroad (outside of the gastric illness protocol) should be excluded from the intermediate track. These claims are often hugely complex, and

involve many additional costs above those claims occurring within the jurisdiction – for example, translation costs for evidence and witness statements, the engagement of agents to investigate the locality, and the engagement of experts to consider foreign legal aspects and provide views on local standards.

Intermediate procedure

We maintain that intermediate cases that fit within the criteria at paragraph 2.1 of chapter 5 should be allocated to a separate intermediate track, and should not be shoe-horned into the fast track.

While we accept that intermediate cases fitting the criteria should be subject to a streamlined procedure, we have a number of concerns in relation to the criteria at paragraph 3.1. The requirements that statements of case should be no longer than 10 pages, and that written witness statements with the party's statements should be no longer than 30 pages appear to be arbitrary, and are likely to result in satellite litigation and arguments about allocation. Any statement that is over the limit will be accused of being so to deliberately take the case out of the intermediate track – yet in the circumstances, the length of the statement may be entirely appropriate, and the case may still be suitable for the intermediate track.

We are also concerned that having an artificial limit on the length of the expert report will be problematic. Experts should be free to say what they need, in a relevant and proportionate way.

The requirement that applications be made at the CMC is also arbitrary and artificial. It may not be relevant to make an application at the CMC, yet if this measure is in place, parties making appropriate applications later on will be doing so to affect the track.

We accept that the court should have a role in preventing procedural “gamesmanship” but are concerned that the arbitrary and artificial nature of the procedural requirements above are open to abuse, where there is no opportunity for abuse at present. There is a risk that these procedural changes will lead to increased gamesmanship, which the court will be tasked with refereeing – leading, overall, to increased costs.

- iv) whether the 4-band structure is appropriate, or whether Bands 2 and 3 should be combined, given the closeness of the proposed figures: if you favour combining the bands, we welcome suggestions as to how this should be done**
- v) Whether greater certainty is required regarding which cases are suitable for each band of intermediate cases.**

The four bands

There must be greater certainty in relation to which cases fall within each band. We foresee that the distinction between bands 2 and 3 will cause issues for parties, and recommend that bands 2 and 3 are amalgamated into one band, with the fees for the band being set at a midpoint between the current bands 2 and 3.

The figures within the table are the same figures used in Lord Justice Jackson's report in 2017. They should be updated for inflation before being introduced, and there should be provision for the fees to be reviewed yearly in line with inflation based on the RPI index.

Part 8

There must be clarity as to how Part 8 claims will tie in with the proposals for multiple claimants.

Also, currently there is a disparity between how child brain injury and adult brain injury cases are dealt with. Child brain injury cases are not subject to costs budgeting, to ensure that the solicitor is able to obtain the exact evidence that they need to prove the case. In adult brain injury cases, although costs budgeting remains, there is a recognition and discretion in the rules to disapply costs budgeting. There is already a disparity between how adult brain injury and child brain injury cases are handled, as the discretion in adult brain injury cases is not used regularly. There will be a further disparity if fixed costs are extended as proposed, as child brain injury cases otherwise fitting the intermediate criteria will be outside the scope of fixed costs as Part 8 claims, whereas adult brain injury cases otherwise fitting the criteria will be restricted by fixed costs. There must be consideration as to how this disparity can be addressed.

Court fees

In order for the reforms to be in any way workable, a separate intermediate track must be developed, and fees should be set somewhere between those for fast track and multi-track levels. If the fast track is extended and court fees for intermediate cases are retained at multi-track levels, these cases should have access to the same level of case management and flexibility as multi-track cases. There is no evidence to suggest that this will be the case in the proposals.

Q7) What do you consider to be the equalities impacts on individuals with protected characteristics of each of the proposed options for reform?

Equalities Statement

If cases are allocated purely by value, this will discriminate against people based on earnings, with those on lower pay less likely to have a case valued in the multi-track, with less access to the flexibility and case management that this track affords. This will also adversely affect part time workers, and as women are more likely to be part time workers, there is an issue with sex discrimination here, too.

If the allocation of cases is set too broadly, and includes cases that solicitors are not able to run for the fees set, then it will have an impact on people being able to access justice – people with justified cases will be unable to access representation. There may be a possible increase in litigants in person.

Solicitors may also be unable to provide tailored care to people. Cutting costs – more likely to carry out by phone etc.

Those who are protected parties, such as those who have learning difficulties, will need extra time and care to pursue their claim, and in a fixed fee system, they may be unable to receive this necessary additional help.

We caution against the introduction of further reform without careful thought about the consequences. Evidence from Fenn & Rickman sets out that since the LASPO reforms, there has been a 17 per cent drop in damages. This clearly indicates that there is an issue, and people are being left- as a result of Government reform – undercompensated.