



RPC



General liability newsletter

September 2023

Welcome to the latest edition of our general liability newsletter. In this edition we look at changes to the fixed recoverable costs (FRC) regime. We hope you enjoy the latest edition, if you have any queries, please contact our experts.

Key takeaways

- a) FRC will be extended across the Fast Track (for claims with a value up to £25,000) and to a new Intermediate Track for less complex cases with a value of up to £100,000.
 - b) There are significant changes to CPR Part 45 for fixed costs and a new PD 45, which sets out new tables of fixed costs.
 - c) The rules introduce four complexity bands in the Fast and Intermediate Tracks. The bands determine the level of FRC that can be claimed. The higher the complexity level, the higher the fixed costs that can be recovered.
 - d) The changes apply to most claims up to £100k, where proceedings are issued on or after 1 October 2023 except for:
 - o Personal injury claims (the changes apply where the cause of actions accrues on or after 1 October 2023); and
 - o Disease cases (the changes only apply to cases where a Letter of Claim has not been sent to the Defendant before 1 October 2023).
 - e) The following classes of claims are also excluded from the regime:
 - o Housing claims
 - o Asbestos claims
 - o Clinical negligence unless both liability and causation are admitted
 - o A claim for damages in relation to harm, abuse or neglect of or by children or vulnerable adults;
 - o A claim that the court could order to be tried by jury if satisfied there is in issue, a matter set out in section 66(3) of the County Courts Act 1984 or section 69(1) of the Senior Courts Act 1981;
 - o Where a party is a protected party
 - o Claims against the police involving an intentional or reckless tort, or relief or remedy in relation to the Human Rights Act 1998.
 - f) There are also changes to:
 - o CPR Part 26 (Case Management – Preliminary Stage) and PD 26;
 - o CPR Part 28 (The Fast Track) and PD 28; and;
 - o Part 36 (Offers to Settle).
- 1. FRC in the Fast Track and Intermediate Track**
- 1.1** The extension of FRC to the new Intermediate Track means that it will apply to most civil litigation claims up to a maximum value of £100,000. The Court will act in its discretion to allocate cases to the Fast, Intermediate or Multi Tracks.
- 1.2** [CPR Rule 26.9](#) states that:
- 1.2.1** the Fast Track is the appropriate track for claims:
- (a) valued between £10,000 to £25,000;
 - (b) where the trial is likely to last no longer than one day; and
 - (c) where oral expert evidence at trial would likely be limited to one expert per party and expert evidence in only two disciplines.
- 1.2.2** the Intermediate Track is the appropriate track for claims:
- (a) with a value up to £100,000;

- (b) where the court considers that the trial will not last longer than three days and oral expert evidence will likely be limited to two experts per party; and
 - (c) which have been brought by one claimant against one or two defendants or brought by two claimants against one defendant.
- 1.3 The Court retains its discretion to allocate complex cases with a total value of less than £100,000 to the Multi Track should it consider this to be appropriate.
- 1.4 For claims which include non-monetary relief, they will not be allocated to the Intermediate Track unless the Court considers that it is in the interest of justice to do so.

Comments/Analysis

Will we see a proliferation of expert evidence from claimants, such as psych or pain management, with a view to escaping the fixed costs regime?

2. Complexity Bands

- 2.1 [CPR Rule 26.14](#) states that when a claim is allocated to either the Fast Track or Intermediate Track, the Court must also assign the claim to a complexity band.
- 2.2 The complexity bands for fast track and intermediate track are entirely different.
- 2.3 Parties should attempt to agree a complexity band and state this on the Directions Questionnaire. If the band is not agreed, parties should provide evidence to support a view as to which band the case should fall under.
- 2.4 The general rule is that the Court will give brief reasons for its decision on allocation and assignment (r.9 (5) PD26).
- 2.5 An allocation/assignment hearing may be ordered where necessary and parties will be given at least 7 days' notice of the hearing (r.13 PD26).

- 2.6 The Court may reallocate/reassign but where the claim has been allocated to the intermediate track and directions given, it will only be reallocated if there are exceptional reasons for doing so. Reassignment may only occur where there has been a change in circumstances that justifies reassignment (r26.18).
- 2.7 The costs of an application to reallocate/reassign is limited to the fixed costs for interim applications (£250/333) plus the Court Fee (CPR 45.14).

Comment/Analysis

- 2.8 *Allocation is likely to be a major battleground with significant impact on potential costs.*
- 2.9 *In some circumstances, it may be unclear whether a claim should fall under the Intermediate or Multi-Track. For example, if a claim appears to be particularly complex but has a value of £50,000, in which track should it fall? What constitutes a "complex" case? Until this is tested, it will likely remain a grey area.*
- 2.10 *If admissions/concessions are made, justifying reassignment to a lower band, does this have retrospective effect for earlier phases? CPR 45.14 suggests it will. This will be a major concern to claimants.*
- 2.11 *The rules suggest reassignment is only permitted when there is change of circumstances and the exceptionality test only relates to reallocation to track. But where re-allocation occurs, reassignment would have to follow?*
- 2.12 *The costs of making an unsuccessful application are limited and there are significant gains if either party is successful in reallocating/reassigning up or down. Can we expect significant satellite litigation on this issue from both sides?*

2.13 Assignment of Claims in the Fast Track:

Complexity band 1	Complexity band 2	Complexity band 3	Complexity band 4
(a) road traffic accident related, non-personal injury claims	(a) road traffic accident related, <u>personal injury claims which are or should have been started under the RTA Protocol</u>	(a) road traffic accident related, <u>personal injury claims to which the RTA Protocol does not apply;</u>	(a) <u>employer's liability disease claims (other than a claim for noise induced hearing loss);</u>
(b) defended debt claims	(b) personal injury claims to which the Pre-action Protocol for Resolution of Package Travel Claims apply	(b) <u>employer's liability (accident) and public liability personal injury claims</u> (c) possession claims (d) housing disrepair claims (e) other money claim	(b) complex possession and housing disrepair claims; (c) property and building disputes; (d) professional negligence claims; and (e) <u>any claim which would normally be allocated to the fast track, but is nonetheless complex</u>

2.14 *Most PI claims will fall under band 3 or band 4. Will the catch all provision of band 4 (e) lead to disputes over assignment?*

2.15 Assignment of Claims in the Intermediate Track:

Complexity band 1	Complexity band 2	Complexity band 3	Complexity band 4
Any claim where: (a) only one issue is in dispute; and (b) the trial is not expected to last longer than one day, including— (i) <u>personal injury claims where liability or quantum is in dispute</u> ; (ii) non-personal injury road traffic claims; and (iii) defended debt claims	Any less complex claim where more than one issue is in dispute, <u>including personal injury accident claims where liability and quantum are in dispute</u>	Any more complex claim where <u>more than one issue is in dispute</u> , but which is unsuitable for assignment to complexity band 2, including noise induced hearing loss and other <u>employer's liability disease claims</u>	Any claim which would normally be allocated to the intermediate track, but which is unsuitable for assignment to complexity bands 1 to 3, <u>including any personal injury claim where there are serious issues of fact or law</u>

2.16 *There is no current guidance on what is "more" or "less" complex. Whilst serious issues of law justifying band 4 would be relatively straightforward, it is less clear what would constitute serious issues of fact. Would allegations of fundamental dishonesty justify assignment to band 4?*

3. New FRC Tables

3.1 The FRC tables have been updated and adjusted for inflation. They can be found in new [PD 45](#). Table 12 in PD 45 sets out the amount of fixed costs to be recovered in the Fast Track and Table 14 sets out the amount of fixed costs to be recovered in the Intermediate Track. The fixed costs increase with the assigned complexity of the claim.

3.2 There are fixed costs tables for pre-action and interim applications.

3.3 Whilst in the Fast Track there is a separate stage for the pre-action phase, in the Intermediate Track the first stage includes all pre-action work and up to the date for service of the Defence.

3.4 There is no longer a delineation between the types of claims affecting the amount of fixed costs as there was for EL/PL cases under the current fixed costs regime. The only exception is noise induced hearing loss claims.

3.5 There is a separate Table for Noise Induced Hearing Loss claims (Table 15) so long as they are of Fast Track value and there are no more than 3 Defendants. Claims where a defendant seeks a second audiogram, its own medical evidence or alleges that the level of hearing loss is *de minimis* are also excluded.

3.6 12.5% uplift is applied where the Claimant either lives, works or carries out business

in London or instructs solicitors who practise in London (CPR 45.3).

3.7 Where a Defendant is entitled to costs the value of the claim for calculating fixed costs is to be based on the pleaded value (CPR 45.6 (2)).

3.8 Additional sums can be claimed for "specialist legal advice" for providing post-issue advice and drafting a statement of case in band 4 Fast Track claims and at various stages in Intermediate Track cases. In Fast Track cases, only one advice is permitted "unless justified" (CPR 45.46).

Comment/Analysis

3.9 *Whilst concern has been raised by claimant representatives that the lack of a pre-issue phase in Intermediate Track claims will lead to defendants inviting fully pleaded claims before considering settlement, this doesn't take account of the provision for specialist legal advice uplifts and the increased disbursements that would be payable.*

3.10 *A potentially more justified concern is that cases will be fought on all fronts prior to allocation, requiring significant work, only for most issues to be conceded in order to obtain a lower complexity band.*

3.11 *It is unclear whether "specialist legal advice" only refers to counsel or whether these are additional sums that can be claimed by solicitors and if so, what constitutes "specialist expertise".*

3.12 *With the costs of interim applications and counsel restricted, will we see claimant's being represented by solicitors rather than counsel at these hearings?*

4. Worked examples:

Fast Track: Claim settled for £15,000 after the date of issue but prior to date of allocation	
Current CPR Part 45 FRC	New PD 45 FRC
<p><u>RTA</u></p> <p>Table 6B applies: "The total of— (a) £1,160; and (b) 20% of the damages."</p> <p><u>£4,160 in FRC</u></p>	<p>Table 12 applies, and it depends on the complexity band.</p> <p>Complexity band 1: <u>£2,100 in FRC</u></p> <p>Complexity band 2: <u>£4,400 in FRC</u></p> <p>Complexity band 3: <u>£6,200 in FRC</u></p>
<p><u>Employers' Liability</u></p> <p>Table 6C applies: "The total of— (a) £2,630; and (b) 20% of the damages."</p> <p><u>£5,630 in FRC</u></p>	<p>Complexity band 4: <u>£9,000 in FRC</u> (+ £760 if extra defendant)</p> <p><i>As most EL/PL claims will fall under band 3/4, this is an increase in recoverable costs.</i></p>
<p><u>Public Liability</u></p> <p>Table 6D applies: "The total of— (a) £2,450; and (b) 17.5% of the damages."</p> <p><u>£5,075 in FRC</u></p>	<p><i>These sums are also exclusive of London uplift, any specialist legal advice claims or interim applications.</i></p>
Intermediate Track: public liability claim – claim settled for £50,000 prior to service of defence	
New PD 45 FRC	
<p>Table 14, Stage 1 applies, and it depends on the complexity band.</p> <p>Complexity band 1: <u>£3,100 in FRC + £2,000 specialist legal advice/counsel Particulars</u></p> <p>Complexity band 2: <u>£8,000 in FRC + £2,000 specialist legal advice/counsel Particulars</u></p> <p>Complexity band 3: <u>£9,400 in FRC + £2,300 specialist legal advice/counsel Particulars</u></p> <p>Complexity band 4: <u>£13,300 in FRC + £2,300 specialist legal advice/counsel Particulars</u></p> <p><i>These sums are exclusive of London uplift.</i></p>	

Fast Track – Maximum Recovery - £25,000 awarded at trial, Band 4**New PD 45 FRC – Table 12**

FRC - £7,900 plus 40% damages = £17,900

Trial Advocacy fee = £2,900

Specialist Legal Advice (post-issue advice) = £1,000

Specialist Legal Advice (drafting statement of case) = £500

Total = £21,400

This excludes London weighting or any interim applications.

Intermediate Track: Maximum Recovery - £100,000 awarded at trial, Band 4**New PD 45 FRC – Table 14**

FRC - £29,000 + 22% of damages = £51,000

Specialist legal advice post issue = £2,300

Specialist legal advice post defence = £2,900

Attendance of legal representative at trial - £1,400 X 3 = £4,200

Advocacy Fee - £5,800 + £2,900 + £2,900 = £11,600

Handing down reserved judgment = £580

Total = £73,780

These sums are exclusive of London uplift, interim applications and presumes no JSM/mediation took place.

5. Disbursements

5.1 There is a new section for disbursements in [CPR 45 \(section IX\)](#). For the Fast Track, it provides more detail about which disbursements are recoverable.

5.2 On the Intermediate Track, the rules state that "the Court may allow any disbursement which has been reasonably incurred" unless it has been recovered elsewhere. The lack of detail leaves this open for interpretation and perhaps makes disbursements easier to recover on the Intermediate Track than on the Fast Track.

Comment/Analysis

5.3 *Counsel's fees appear covered by fixed costs in the provisions for Specialist Legal Advice. These fees are limited to trial, ADR and advice provided at the outset of litigation. There appears to be no scope for further counsel advice unless it is permitted in the catch all provision for any other disbursement reasonably incurred. In the case of Aldred v Cham it was held that if an item of work is deemed (or can be said implicitly) to be within the fixed recoverable costs, then it will not be separately recoverable as a disbursement.*

5.4 *No additional guidance has been provided on recoverability of agency fees, which has been subject to a number of recent disputes.*

6. Part 36

6.1 Under the existing FRC regime, if a claimant is awarded the same or more than their own Part 36 offer at a trial, a defendant will usually pay indemnity costs from the date of expiry of the offer.

6.2 This no longer applies, and defendants will generally now have to pay an additional 35% uplift on the claim stages incurred since the date of expiry of the offer. Where an award at trial exceeds the Part 36 offer, a defendant would also have to pay interest on the fixed costs at a rate not

exceeding 10% above base rate. These additional sums are only payable where the Claimant obtains judgment at trial and so where a Defendant accepts an offer outside the relevant period, the Defendant will usually only be liable for costs up to the stage of claim at the time of acceptance.

6.3 Where a Claimant accepts a Defendant's offer outside the relevant period the Defendant is entitled to the fixed costs at the stage applicable at the date of acceptance, less the fixed costs the Claimant is entitled to had it been accepted at the end of the relevant period. Where the stage at the end of the relevant period and date of acceptance is the same, the Defendant is not entitled to the costs of that stage.

6.4 In a soft tissue injury claim, if the defendant makes a Part 36 offer before the defendant receives a fixed cost medical report, paragraphs (3) and (4) will only have effect if the claimant accepts the offer more than 21 days after the defendant received the report (rule 36.23(5)).

Comment/Analysis

6.5 *Where a Claimant accepts an offer out of time a Defendant is unable to offset costs from expiry unless the claim has progressed to the next stage. In Fast Track cases there are only 3 stages plus trial, limiting avenues of cost recovery.*

6.6 *On the Intermediate Track there are several more stages, but the relevant period of Defendant offers may in effect be much longer than the standard 21 days. The timing of offers is likely of great importance to provide maximum costs protection.*

7. Other points to note

- 7.1 Claims can be made in excess of fixed costs, but a Claimant will need to establish "exceptional circumstances" to justify this, which is a very high bar.
- 7.2 Where a party or witness is "vulnerable" the Court may allow a claim greater than fixed costs where the vulnerability has required additional work and due to that additional work the claim is for a sum greater than 20% of the fixed recoverable (CPR 45.10). This is quite a high bar and the Court is not guaranteed to approve the additional sum.
- 7.3 On the Intermediate Track there is additional fixed costs for infant approval hearings. In Fast Track cases there is a limited allowance of £150 for advice on quantum from a "specialist legal representative".
- 7.4 There is an "unreasonable behaviour" provision (CPR 45.13) whereby a paying party can apply to the Court for an order that the costs payable be reduced by an amount equivalent to 50% of the FRC if it is found that the receiving party behaved unreasonably. This would equate to conduct for which there is no reasonable explanation. A similar provision may be ordered to increase costs payable. Unreasonable behaviour is defined as "conduct for which there is no reasonable explanation".
- 7.5 The current rules (45.29B/45.29) that cases started within the portal but settled prior to allocation to the multi-track are subject to fixed costs irrespective of the settlement sum are not replicated under the new Part 45.

8. Links for further reading

- a) [Judiciary Note on the Rules](#)
- b) [New Part 45](#)
- c) [New PD45](#)
- d) [New Part 36](#)
- e) [New Part 26](#)
- f) [New PD26](#)
- g) [New Part 28](#)
- h) [New PD28](#)

Contacts



Gavin Reese
Partner
+44 20 3060 6895
gavin.reese@rpc.co.uk



Fiona Hahlo
Partner
+44 20 3060 6121
fiona.hahlo@rpc.co.uk



Beth Lewis
Associate
+44 20 3060 6048
beth.lewis@rpc.co.uk



Chris Gower
Associate
+44 20 3060 6726
chris.gower@rpc.co.uk



Courtney Brotherson
Associate
+44 20 3060 6475
courtney.brotherson@rpc.co.uk