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Review of Civil Litigation Costs: Supplemental Report Fixed Recoverable Costs

By the Right Honourable Lord Justice Jackson

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The appendices to this report are available online. They can be accessed on the Judiciary Website at <https://www.judiciary.gov.uk/?p=74278>.

Glossary

Word or expression Meaning or description

2016/17 Report	NHS Resolution Annual Report and Accounts 2016/17.
Aarhus Rules	Rules based on the Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters, signed in Aarhus, Denmark, on 25th June 1998.
ADR	Alternative dispute resolution.
ALBA	The Administrative Law Bar Association.
APIL	The Association of Personal Injury Lawyers.
ATE	After-the-event insurance: insurance by one party against the risk of it having to pay its opponent's legal costs, where the insurance policy is taken out after the event giving rise to court proceedings (e.g. an accident involving personal injury). ATE insurance may also cover a party's own disbursements.
Briggs Review	Civil Courts Structure Review carried out by Lord Justice Briggs, July 2016 (https://www.judiciary.gov.uk/wp-content/uploads/2016/07/civil-courts-structure-review-final-report-jul-16-final-1.pdf).
BTE	Before-the-event insurance: litigation costs insurance that is in place before the event giving rise to legal proceedings.
Capped Costs Pilot	A proposed pilot of capped recoverable costs, in conjunction with streamlined procedures, for business and property cases in certain specialist courts with a value up to £250,000.
CBS	Cumulative back syndrome.
CCMC	Costs and case management conference.
CCO	Costs capping order, a new regime of judicial review costs capping orders which came into force on 8 th August 2016.
CFA	Conditional fee agreement: a contract between lawyer and client by which: <ul style="list-style-type: none"> (i) the lawyer agrees to charge no fee or a low fee if unsuccessful, (ii) the client agrees to pay the normal fee ('base cost') plus a success fee (a percentage of the base cost), if successful.
ChBA	The Chancery Bar Association.
CILEx	The Chartered Institute of Legal Executives.
CJC	The Civil Justice Council.
CMC	Case management conference.
Combar	The Commercial Bar Association.
Costs shifting	A regime under which the loser normally pays a winning party's costs.

Word or expression	Meaning or description
CPR	The Civil Procedure Rules 1998, as amended from time to time.
DBA	Damages-based agreement, sometimes known as a contingency fee agreement: a contract between lawyer and client by which the lawyer agrees: <ul style="list-style-type: none"> (i) to charge no fee (if the client loses), (ii) to receive a percentage of the winnings if the client is successful.
DoH	The Department of Health.
ELA	Employers' liability accident.
ELD	Employers' liability disease.
Final Report	<i>Review of Civil Litigation Costs: Final Report</i> , published in January 2010 (https://www.judiciary.gov.uk/wp-content/uploads/JCO/Documents/Reports/jackson-final-report-140110.pdf).
Fixed recoverable costs or FRC	The term 'fixed recoverable costs' or FRC is used in this report as shorthand for a regime of scale or fixed costs, under which the amount recoverable is prescribed by a set of rules or can be calculated arithmetically in accordance with those rules.
FOIL	The Forum of Insurance Lawyers.
FSB	The Federation of Small Businesses.
FTWG	Fast Track Working Group, a working group comprising of four assessors, set up as part of this review to consider the details of fast track FRC.
GIRFT	Getting it Right First Time, a programme designed to improve clinical quality and efficiency within the NHS.
GLs	Government Lawyers.
GLD	The Government Legal Department.
HAVS	Hand arm vibration syndrome.
HLPAs	The Housing Law Practitioners Association.
IP	Intellectual property.
IPCC	The Independent Police Complaints Commission.
IPEC	The Intellectual Property Enterprise Court.
Jackson Reforms	The package of interlocking reforms set out in the Final Report, most of which were implemented in 2013.
JR	Judicial review.
JSM	Joint settlement meeting.
LASPO	The Legal Aid, Sentencing and Punishment of Offenders Act 2012.

Word or expression **Meaning or description**

Leeds matrix	Paper prepared by a working group proposing a hybrid of existing 'fixed fee' and 'budgeting' schemes for clinical negligence and personal injury claims up to £100,000.
LIP	Litigant(s) in person, usually an individual but it could be an organisation that is not represented in court by a solicitor or barrister.
LSLA	The London Solicitors Litigation Association.
MDU	The Medical Defence Union.
Moj	The Ministry of Justice.
MPS	The Medical Protection Society.
NAO	The National Audit Office.
NHSLA	The National Health Service Litigation Authority, established in 1995 as a not-for-profit part of the NHS providing indemnity schemes for the NHS in England and resolving claims for compensation. It became part of NHS Resolution in April 2017.
NHS Resolution	The NHSLA was consolidated with two related entities (the National Clinical Assessment Service and the Family Health Services Appeal Unit) and renamed 'NHS Resolution' in April 2017.
NIHL	Noise induced hearing loss.
One-way costs shifting	A regime under which the defendant pays the claimant's costs if the claim is successful, but the claimant does not pay the defendant's costs if the claim is unsuccessful.
PALG	The Police Action Lawyers Group.
PD	Practice Direction.
PIBA	The Personal Injuries Bar Association.
PL	Public liability.
PNBA	The Professional Negligence Bar Association.
PNLA	The Professional Negligence Lawyers Association.
Portal	A Government claims portal for personal injury claims up to £25,000.
Preliminary Report	<i>Review of Civil Litigation Costs: Preliminary Report</i> , published in May 2009 (https://www.judiciary.gov.uk/wp-content/uploads/JCO/Documents/Guidance/jackson-vol1-low.pdf and https://www.judiciary.gov.uk/wp-content/uploads/JCO/Documents/Guidance/jackson-vol2-low.pdf).
PTR	Pre-trial Review.
QOCS	Qualified one-way costs shifting: a system of one-way costs shifting under which the protected party may forfeit protection in certain circumstances.
RCJ	The Royal Courts of Justice.

Word or expression **Meaning or description**

RRR	The Department of Health's Rapid Resolution Redress scheme.
RTA	Road traffic accident.
Rule Committee	The Civil Procedure Rule Committee.
SEC	The South Eastern Circuit.
SME	A small or medium-sized enterprise.
TCC	The Technology and Construction Court.
Tecbar	The Technology and Construction Bar Association.
Westgate Report	Report of a working group chaired by Martin Westgate QC on how the Aarhus Rules might be developed for general application across the whole landscape of judicial review cases.

Executive summary

1. In England and Wales, the winning party in litigation is entitled to recover costs from the losing party. The traditional approach has been that the winner adds up its costs at the end and then claims back as much as it can from the loser. That is a recipe for runaway costs.

2. The only way to control costs effectively is to do so in advance: that is before the parties have run up excessive bills. There are two ways of doing that:

- (i) a general scheme of fixed recoverable costs (“FRC”);
- (ii) imposing a budget for each individual case (“costs budgeting”).

3. In my January 2010 report, I recommended FRC for ‘fast track’ cases (claims up to £25,000 which can be tried in one day) and costs budgeting for ‘multi-track’ cases (bigger claims). I also said that we would need to look again at fixing costs for cases in the lower regions of the multi-track, once the reforms which I was then recommending had bedded in.

4. Those reforms have now bedded in, although some fast track cases still do not have FRC. Therefore, it is now opportune to consider extending FRC. To that end, on 11th November 2016 the Lord Chief Justice and the Master of the Rolls commissioned me to carry out a further review, to develop proposals for extending FRC.

5. In carrying out this review, I was ably assisted by fourteen assessors from a variety of legal and other backgrounds. This review takes place against a range of other civil justice initiatives, described in more detail in chapter 1. It is important that the various initiatives (including my own) remain co-ordinated.

6. During this review, I have gathered evidence from many sources and received numerous written submissions, as summarised in chapter 3. I have held five public seminars and had meetings with a variety of stakeholder groups, despite the constraints of sitting as a judge in the Court of Appeal, which occupies most of my working time. A variety of opinions were aired at the meetings, many of which have been incorporated into this review. Chapter 4 provides further details of those meetings coupled with a summary of their content. I am grateful to the Master of the Rolls’ office for organising the seminars, to those who hosted the various events and to all who took part.

7. In this report, I recommend a grid of FRC for all fast track cases, as set out in chapter 5. Above the fast track, I recommend a new ‘intermediate’ track for certain claims up to £100,000 which can be tried in three days or less, with no more than two expert witnesses giving oral evidence on each side. The intermediate track will have streamlined procedures and a grid of FRC, as set out in chapter 7.

8. The costs grids in chapters 5 and 7 are based upon (a) evidence and submissions received during the review, (b) a detailed analysis of recent approved or agreed budgets, (c) a robust analysis of recent costs data by Professor Fenn, one of the assessors and (d) the experience and expertise of all the assessors.

9. Clinical negligence claims are often of low financial value, but of huge concern to the individuals on both sides. The complexity of such cases means that they are usually unsuited to either the fast track or my proposed intermediate track. In chapter 8, I

recommend that the Department of Health and the Civil Justice Council should set up a working party with both claimant and defendant representatives to develop a bespoke process for handling clinical negligence claims up to £25,000. That bespoke process should have a grid of FRC attached. This scheme will capture most clinical negligence claims. Previous experience (for example, with noise induced hearing loss claims) shows that it is possible for the 'industry' to come together and develop such schemes. There is sufficient good will on both sides to achieve that in the field of clinical negligence. I remain willing to arbitrate informally on any points of disagreement.

10. Business cases raise different problems. It is essential that small and medium-sized enterprises (generally known as SMEs) should have access to justice. The Federation of Small Businesses argues that there should be an FRC regime for commercial cases up to £250,000; the costs levels must be reasonable; they must balance incentives and "reduce the costs of going to law for small businesses"; there must be rigorous case management of cases subject to this regime; and there must be investment in modern IT systems to speed up court processes. I see force in those arguments, but not all business cases require FRC up to the suggested level. In chapter 9, I recommend that there be a voluntary pilot of a 'capped costs' regime for business and property cases up to £250,000, with streamlined procedures and capped recoverable costs up to £80,000. If the pilot is successful, the regime could be rolled out more widely for use in appropriate cases.

11. Chapter 10 recommends measures to limit recoverable costs in judicial review claims, by extending the protective costs rules which are currently reserved for environmental cases. Whilst those rules were originally introduced to achieve compliance with the Aarhus Convention, they are in principle suitable for judicial review cases in general, all of which are of constitutional importance. Citizens must be able to challenge the executive without facing crushing costs liabilities if they lose.

12. This report marks the completion of my second review to control the costs of civil litigation. In the first review, I put forward extensive proposals to revise civil procedure, to amend funding rules, to incentivise early settlement, to reform costs assessment procedures and to introduce costs budgeting. Those reforms have now been in place for four years. The focus of this review is much more narrow, namely to develop FRC for lower value cases. But at the heart of both reviews has been the same objective of promoting access to justice. Controlling litigation costs (while ensuring proper remuneration for lawyers) is a vital part of promoting access to justice. If the costs are too high, people cannot afford lawyers. If the costs are too low, there will not be any lawyers doing the work.

13. In this review I have sought to balance the many competing interests in terms of access to justice and proportionality of costs. I have made my recommendations and set out what I believe to be reasonable costs and proposals. It will now fall to the Government to consider this report, and no doubt subject their own proposals for reform to public consultation. This will enable the profession and all other interested parties to feed their views into the policy-making process. I will observe developments with interest. If I can usefully make any further contribution I will do so (as I did during the consultation process following my previous report), but the baton now passes to others.

Rupert Jackson

21 July 2017

Chapter 1 - Introduction

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1. What is the purpose of this review?
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1 What is the purpose of this review?

1.1 Costs. The *actual* costs of litigation are the costs which each party pays to its own lawyers for running the case. The *recoverable* costs are those which the winning party recovers from the losing party by order of the court or by agreement.

1.2 The holy grail. The holy grail pursued by every civil justice reformer is a system in which the actual costs of each party are a modest fraction of the sum in issue, and the winner recovers those modest costs from the loser. Germany comes closer to the ideal than we do, because it has a civil justice system fundamentally different from our own, with little disclosure and little oral evidence.¹ In the context of a common law jurisdiction, however, there are limits on what can be achieved. Adversarial litigation is an inherently expensive process.

1.3 What is achievable in the real world? The best that can be achieved is:

- (i) to modify the procedural rules with the aim of reducing the actual costs so far as possible;
- (ii) to restrict recoverable costs to that which is 'proportionate' as defined in the new proportionality rule;² and
- (iii) to control the recoverable costs in advance.

1.4 Why only restrict the recoverable costs, not the actual costs? Given the multifarious kinds of litigation it is not feasible to preordain how much clients must pay to their lawyers in every individual case. Also, that would be an unacceptable interference with freedom of contract. The best that we can do is to restrict the recoverable costs. This incentivises lawyers (who are in competition with one another) to keep the actual costs down, so that the client's shortfall in costs recovery (if it wins) is as low as possible.

1.5 Why is it important to control the recoverable costs in advance? For two reasons. First, this is necessary to impose discipline. The traditional approach of parties doing what they see fit, then adding up the costs at the end and recovering as much as they can from the opposing party is a recipe for runaway costs. Secondly, parties need certainty. They need to know at the outset what costs they will recover if they win and what costs they will pay out if they lose.

¹ For further details, see *Review of Civil Litigation Costs: Preliminary Report*, May 2009, chapter 55 (<https://www.judiciary.gov.uk/wp-content/uploads/JCO/Documents/Guidance/jackson-vol1-low.pdf> and <https://www.judiciary.gov.uk/wp-content/uploads/JCO/Documents/Guidance/jackson-vol2-low.pdf>).

² CPR rule 44.3 (5), the new proportionality rule, was proposed in my Final Report of January 2010 at chapter 3, paragraph 5.15 (<https://www.judiciary.gov.uk/wp-content/uploads/JCO/Documents/Reports/jackson-final-report-140110.pdf>) and adopted on 1st April 2013. The rule is set out below in chapter 2, paragraph 2.14.

1.6 How can you control the recoverable costs in advance? There are only two ways of controlling the recoverable costs in advance:

- (i) A general scheme of fixed recoverable costs (“FRC”), so that parties can look at a grid and read off from it what the recoverable costs will be in their case. That, essentially, is the German system.
- (ii) Imposing at an early stage a binding budget in each case. That is ‘costs management’ or ‘costs budgeting’.

1.7 Did the previous Jackson report recommend doing all that? Yes. My Final Report of January 2010 proposed that there should be FRC for cases in the fast track and costs management for cases in the multi-track. My Final Report also proposed that after those reforms had bedded in work should be done on extending FRC to the lower regions of the multi-track. The logic of that approach was (and still is) that once the primary reforms proposed in that report had bedded in and after people had gained experience of the new proportionality rule and costs management, it would be easier to devise a realistic grid of FRC for lower value multi-track cases.

1.8 So what next? The time has now come to work on extending FRC across those parts of the fast track where costs are still at large and across the lower regions of the multi-track. That is the purpose of this review.

1.9 Access to justice. Access to justice lies at the core of this review, just as it lay at the core of my previous review. Controlling the costs of litigation and providing clarity as to each party’s financial commitment are vital elements in achieving access to justice.³

2 Setting up this review, terms of reference and assessors

2.1 Lord Chancellor’s paper dated 15th September 2016. In a paper presented to Parliament on 15th September 2016 the former Lord Chancellor stated:

“Fixed recoverable costs are legal costs which can be recovered from the losing side by the successful party to a claim, at a prescribed rate. (For civil claims, these are set out in the Civil Procedure Rules). We will build on measures introduced in the last Parliament for low value personal injury claims, to limit the level of legal costs recoverable. These measures provide transparency and certainty for all parties and are designed to ensure that the amount of legal work done is proportionate to the value of the claim. We are keen to extend the fixed recoverable costs regime to as many civil cases as possible. The senior judiciary will be developing proposals on which we will then consult.”

2.2 Joint statement by the Lord Chancellor, the Lord Chief Justice and the Senior President of Tribunals. In their joint statement “Transforming our justice system”⁴ dated September 2016 the former Lord Chancellor, the Lord Chief Justice and the Senior President of Tribunals stated:

“More needs to be done to control the costs of civil cases so they are proportionate to the case, and legal costs are more certain from the start. Building on earlier reforms, we will look at options to extend fixed recoverable costs much more widely,

³ Process reforms and funding reforms are equally important as discussed in chapter 2, but these are not issues for the present review, except in so far as FRC require procedural changes.

⁴ <https://www.judiciary.gov.uk/wp-content/uploads/2016/09/narrative.pdf>.

so the costs of going to court will be clearer and more appropriate. Our aim is that losing parties should not be hit with disproportionately high legal costs, and people will be able to make more informed decisions on whether to take or defend legal action.”

2.3 Terms of reference for this review. On 11th November 2016, the Lord Chief Justice and the Master of the Rolls commissioned me to carry out a review with the following terms of reference:

“(i) To develop proposals for extending the present civil fixed recoverable costs regime in England and Wales so as to make the costs of going to court more certain, transparent and proportionate for litigants.

(ii) To consider the types and areas of litigation in which such costs should be extended, and the value of claims to which such a regime should apply.

(iii) To report to the Lord Chief Justice and the Master of the Rolls by the 31st July 2017.”

2.4 An open-minded inquiry. These terms of reference required me to carry out an open-minded review, not to adopt any pre-conceived notions or to take the lectures which I gave on this topic last year⁵ as a starting point.

2.5 Assessors. Fourteen assessors have provided advice and assistance throughout the review. They are (in alphabetical order):

- Sara Ashby, intellectual property solicitor, with experience of litigating in a variety of courts, including the Intellectual Property Enterprise Court
- Nicholas Bacon QC, Queen’s Counsel specialising in costs, chair of Bar Council Fixed Fees Working Group
- Professor Richard Disney, professor of economics at Sussex University and former member of various government bodies concerning pay
- Professor Paul Fenn*, emeritus professor at Nottingham University Business School and policy adviser on costs issues to the government, the judiciary and the legal profession
- Master Barbara Fontaine, Senior Master of the Queen’s Bench Division
- Master Andrew Gordon-Saker, Senior Costs Judge
- Richard Lander, Manchester counsel specialising in property litigation
- David Marshall, claimant solicitor and chair of the Law Society’s Civil Justice Committee, formerly President of the Association of Personal Injury Lawyers
- HHJ Martin McKenna, Designated Civil Judge for Birmingham and member of the Civil Procedure Rule Committee (“the Rule Committee”)
- DJ Simon Middleton, a regional costs judge, former Course Director and tutor at the Judicial College, prolific author on costs issues
- Andrew Parker*, defendant solicitor and executive member of the Civil Justice Council
- Vikram Sachdeva QC, Queen’s Counsel specialising in public law and human rights, member of the Executive Committee of the Administrative Law Bar Association

⁵ *Fixed Costs - The Time Has Come*, 28th January 2016 (<https://www.judiciary.gov.uk/wp-content/uploads/2016/01/fixedcostslecture-1.pdf>) and *The Future for Civil Litigation and the Fixed Costs Regime*, 23rd May 2016 (<https://www.judiciary.gov.uk/wp-content/uploads/2016/05/lj-jackson-future-for-civil-litigation.pdf>).

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- Nicole Sandells, chancery counsel specialising in civil fraud and recoveries, trusts and estates, property and mortgage litigation
 - Iain Stark, costs lawyer with 25 years' experience, chairman of the Association of Costs Lawyers

A star (*) after the name in the above list denotes that the person served as an assessor during the 2009 Review of Civil Litigation Costs. More detailed mini-biographies of each of the assessors appear on the 'Costs Review' section of the Judiciary website.⁶

2.6 Future consultation. The former Lord Chancellor indicated in her statement of 15th September 2016 that the proposals resulting from this review will be the subject of consultation.

2.7 Not a rule drafting exercise. The terms of reference require me to put forward substantive proposals, not a detailed set of rules. The task of rule drafting cannot begin until after (a) the Ministry of Justice ("MoJ") has carried out its planned consultation and (b) policy decisions have been taken.

3 Other current civil justice initiatives

3.1 Importance of a co-ordinated approach. Any reforms which I propose must fit with other civil justice initiatives which are under way. The Law Society and Robert Bourns (until recently its President) have stressed the importance of co-ordinating the different civil justice reform programmes which are under consideration.

3.2 The other current civil justice initiatives. The other principal initiatives are:

- Implementation of the Briggs Review
- Court Reform Programme
- MoJ review of the Legal Aid, Sentencing and Punishment of Offenders Act 2012 ("LASPO")
- Department of Health ("DoH") consultation/report on FRC in clinical negligence litigation
- National Audit Office ("NAO") investigation into NHS Resolution (formerly the National Health Service Litigation Authority – "NHSLA")⁷ and clinical negligence costs
- DoH Rapid Resolution Redress ("RRR") scheme
- Whiplash reforms and increase in small claims personal injuries limit
- Renaming the specialist civil courts – Business and Property Courts
- Simplifying disclosure

3.3 The Briggs Review. The final report of the Civil Courts Structure Review⁸ carried out by Lord Justice Briggs made 62 recommendations, which I will not lay out in full. The Report identifies five main weaknesses in the service provided by the civil courts, in respect of which remedial recommendations are made. The first of these weaknesses is lack of adequate access to justice in lower value cases, for which Briggs LJ proposes a new Online Solutions Court and an extension in the regime for FRC. The Online Solutions Court would be a new court, separate from the County Court, dealing with money claims up to an initial

⁶ <https://www.judiciary.gov.uk/publications/assessors-for-the-review-of-fixed-recoverable-costs/>.

⁷ From April 2017, the NHSLA is now a part of a wider umbrella organisation named NHS Resolution.

⁸ <https://www.judiciary.gov.uk/wp-content/uploads/2016/07/civil-courts-structure-review-final-report-jul-16-final-1.pdf>.

ceiling of £25,000. It would have a new simplified procedure and would be designed for litigants to use without legal assistance. The second weakness identified consists of “the inefficiencies arising from the continuing tyranny of paper, coupled with the use of obsolete and inadequate IT facilities in most of the civil courts”. This is to be addressed by the digitisation of all the processes of those courts. Thirdly, the Report highlighted the unacceptable delays in the Court of Appeal, caused by its excessive workload. It explored a number of reform proposals, which were consulted on in May 2016 by the Rule Committee. Some of those proposals were implemented and came into force on 3rd October 2016, including ending the right to automatic oral renewal for permission to appeal applications. Briggs LJ also recommended increasing the value threshold for issuing a claim in the High Court from its current level of £100,000 (£50,000 for personal injury claims) to £250,000 (and no lower limit for personal injury claims) with a view to a subsequent increase to £500,000. The fourth weakness is the under-investment in provision for civil justice outside London, for which the Report recommends giving effect to the principle that no case is too big to be resolved in the regions. Further, there should be more civil circuit judges, teams of three senior circuit judges in each regional centre, and civil work should make up at least 40% of every civil circuit judge’s judicial practice. Fifthly, and finally, Briggs LJ lamented the widespread weaknesses in the processes for the enforcement of judgments and orders. He recommended unifying enforcement processes within a single court, namely the County Court. As is partly evidenced by the below paragraph, the Government and senior judiciary are actively engaged in implementing a number of the review’s recommendations.

3.4 Court Reform Programme. On 15th September 2016, the MoJ published the document “Transforming our justice system: summary of reforms and consultation”.⁹ It outlines the Government’s plan to invest over £700m in the courts and tribunals. The changes specific to civil courts include the introduction of a cross-jurisdictional Online Solutions Court, along the lines proposed by Briggs LJ (see above), and measures designed to encourage alternative dispute resolution. It also outlines the intention to extend FRC, and declares that “The senior judiciary will be developing proposals on which we will then consult”. Indeed, that is the task I have been commissioned to undertake with this review. A different initiative described is change to civil enforcement. The document also outlines the replacement of statutory declarations in county court proceedings with a witness statement verified by a statement of truth.

3.5 Resourcing of the courts. The planned substantial investment in the courts including civil courts, the upgrading of court IT and the development of digital working (as described in “Transforming our Justice System”) is particularly welcome. By its statement of 15th September 2016, the MoJ committed itself to enabling civil cases to be started online in **all** civil courts. A recent article in the *Law Society Gazette*¹⁰ emphasised the importance of proper resourcing of the courts as an adjunct to developing FRC.

3.6 MoJ Review of LASPO. On 17th January 2017 Sir Oliver Heald QC, the then Justice Minister, announced that the MoJ will be undertaking a review of the effects of the LASPO. Principally the review will be considering the effect of withdrawing much of the legal aid that was previously available.

⁹ https://consult.justice.gov.uk/digital-communications/transforming-our-courts-and-tribunals/supporting_documents/consultationpaper.pdf.

¹⁰ *Some hints on fixed costs*, *Law Society Gazette*, 16th March 2017.

3.7 DoH Consultation on FRC for clinical negligence. The DoH published a consultation document on 30th January 2017,¹¹ inviting responses to its suggestion to introduce a mandatory scheme of FRC for clinical negligence claims. This scheme would apply to claims between £1,000 and £25,000 in the fast track or multi-track, but not those in the small claims track. The foreword to this document notes that for claims under £25,000, claimant recoverable legal costs are on average 220% of damages awarded. The consultation closed on 2nd May 2017, and the response is awaited.

3.8 NAO investigation. In December 2016, the NAO announced that it would be undertaking a study, named “Managing the costs of clinical negligence in trusts”,¹² examining whether the DoH and the NHSLA¹³ understand what is causing increased clinical negligence costs, and evaluating their efforts to manage and reduce the costs associated with clinical negligence claims. The announcement stated it would also assess the NHSLA’s contribution to helping trusts to reduce the number of negligence claims they receive by sharing learning about past incidents and by encouraging wider forms of redress for affected patients. The result of this study is expected to be published in September 2017.

3.9 The DoH RRR scheme. This consultation document was published on 2nd March 2017¹⁴ and the consultation ended on 26th May 2017. At the time of writing the report is outstanding. The RRR scheme is proposed for severe avoidable birth injuries, to provide an alternative to litigating through the courts. The suggested scheme involves two stages. Stage One introduces standardised, independent investigations (launched within 90 days) of potentially avoidable neurological birth injury, involving a panel of independent experts conducting a thorough root cause analysis and producing a report. Stage One also includes the provision of an apology and explanation to families, and a determination of whether or not a particular incident meets the threshold for Stage Two. Stage Two involves the calculation and provision of a compensation package, using a different panel of experts from that in Stage One. The idea is that this compensation is provided sooner than it would be via the court route. The proposed scheme is voluntary, meaning that families could still litigate if they wished to do so.

3.10 Whiplash reforms. On 23rd February 2017, the Government published part one of its responses to the consultation, “Reforming the soft tissue injury (‘whiplash’) claims process”, which closed on 6th January 2017.¹⁵ This included a number of reforms, including the introduction of a tariff of fixed compensation for pain, suffering and loss of amenity for injuries with a duration of less than two years. Further reforms include a ban on settlement of claims without medical evidence, increasing the small claims limit for RTA related personal injury claims to £5,000, and increasing the small claims limit for all other types of personal injury claims to £2,000. The current limit for these types of claim is £1,000. The aim of these reforms is to disincentivise minor, exaggerated and fraudulent road traffic accident related soft-tissue claims, leading to projected overall savings to insurers of £1bn. The Government included clauses on these reforms in the Prison and Court Reform Bill, before the June General Election necessitated the dissolution of Parliament. In the Queen’s Speech on 21st June, the new Government stated its intention to proceed with whiplash reform by a new Civil Liability Bill.

¹¹ https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/586641/FRC_consultation.pdf.

¹² <https://www.nao.org.uk/work-in-progress/managing-the-costs-of-clinical-negligence-in-trusts/>.

¹³ Since the date of that announcement the NHSLA has become part of a wider umbrella organisation named NHS Resolution.

¹⁴ https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/595811/RRR_consultation_A.pdf.

¹⁵ https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/593431/part-1-response-to-reforming-soft-tissue-injury-claims.pdf.

3.11 Restructuring the specialist civil courts. From July 2017, the specialist civil jurisdictions of the High Court have come to be known collectively as the ‘Business and Property Courts of England and Wales’.¹⁶ This encompasses the Commercial Court (including the Admiralty Court and Mercantile Court), the Technology and Construction Court, and the courts of the Chancery Division (including those dealing with financial services, intellectual property, competition, and insolvency). In the County Court, specialist cases falling within the ambit of the Business and Property Courts will be heard in a newly designated ‘Business and Property List’. The principal reasons for these changes were to promote a wider understanding of what the specialist courts do and to allow for more flexible cross-deployment of judges. This reform also creates a closer link between the regional Business and Property Courts and their counterparts at the Rolls Building in London.

3.12 Simplifying disclosure. A seminar on disclosure took place at the Rolls Building in April 2016, attended by court users, practitioners and judges. Speakers expressed concern about the scale and costs of disclosure in commercial litigation. It was acknowledged that the new disclosure rules¹⁷ give the court the tools for controlling disclosure, but the parties and the courts are not making sufficient use of them. A working group was set up, chaired by Lady Justice Gloster, to look at the topic of simplifying disclosure.

4 Thanks

4.1 Assessors. First and foremost, my thanks go to the fourteen assessors. They are all busy people in senior positions and/or with heavy professional practices. They took time out of their other work to attend monthly meetings. These played a vital part in hammering out the problems and debating the issues. The assessors also attended and spoke at the various seminars held during the review. They frequently advised me by phone, email or at meetings on specific points. The assessors brought to bear a wealth of experience. Indeed, I could not have conducted this review without their help.

4.2 The assessors are not responsible for this report. The assessors were contributing in their personal capacity, rather than as representatives of other organisations. It was not their function to agree with one another or with me on the various issues. Their function was to expose the competing arguments and to test all the proposals which were in play. Therefore, the assessors are not personally responsible for this report. Even so, and despite their divergent viewpoints at the outset of this review, as we worked through the evidence and assimilated the competing arguments over seven long months, a considerable degree of consensus emerged. By the end of the process, the only issue about which there was a sharp difference of opinion concerned *Broadhurst v Tan* [2016] EWCA Civ 94: see chapter 5, paragraph 2.6.

4.3 Judicial assistants. Richard Collier and Juliet Wells, judicial assistants at the Court of Appeal, have devoted much of their time to working on this review. Hogan Lovells International LLP kindly seconded Lookman Rawat to the review during the periods 10th January to 17th March and 23rd June to 21st July 2017. White & Case LLP kindly seconded Kieran Anderson to the review between 10th January and 10th February 2017. During the first two months, the judicial assistants were principally engaged upon analysing budgets.

¹⁶ <https://www.judiciary.gov.uk/announcements/business-and-property-courts-media-release/>. See also the Chancellor’s lecture on 20th June 2017, *The UK Jurisdictions after 2019* <https://www.judiciary.gov.uk/wp-content/uploads/2017/06/chc-speech-faculty-of-advocates.pdf>.

¹⁷ As to which see chapter 2, paragraph 2.4 and chapter 3, paragraphs 2.11-2.12.

They also attended assessors' meetings and the first two public seminars. From March onwards, the work of the judicial assistants included research, analysis, assistance with drafting, and attendance at meetings and seminars. All the judicial assistants worked long hours and with great care. My warm thanks to all of them.

4.4 Actuarial judicial assistant. Ernst & Young LLP kindly seconded Catherine Senior, an actuary, to the review for one week per month between February and July 2017. Catherine undertook numerous analyses of budgets and of the data which respondents sent in to the review. She attended all the assessors' meetings. She produced many of the tables which appear in this report and the appendices. My sincere thanks to Catherine for her help and support.

4.5 Hogan Lovells International LLP, White & Case LLP, Ernst & Young LLP. As noted above, each of these firms seconded one of their fee earners, at no charge, to assist with the review. I am extremely grateful to Hogan Lovells International LLP, White & Case LLP and Ernst & Young LLP for their generosity in doing this.

4.6 Working groups. As noted in later chapters, a number of working groups were formed to do detailed work on specific issues. Appendix 1 lists the members of those working groups. I am very grateful to all those who served on the working groups for their assistance.

4.7 Master of the Rolls' office and my clerk. Peter Farr, Andrew Caton, Graham Hutchens, Noella Roberts and Andrea Dowsett have provided administrative back up, as well as organising and attending the seminars and assessors' meetings. My clerk, Charmaine Hunte, has provided support for the review in addition to her normal duties as judge's clerk. My thanks to all of them for providing essential 'back office' services.

Chapter 2 - What are the Jackson Reforms and why do we need any more?

Index

1. Introduction
2. The Jackson Reforms
3. Analysis and conclusion

1 Introduction

1.1 The purpose of this chapter. The purpose of this chapter is to put the present fixed recoverable costs (“FRC”) review into context. The FRC review is the last stage of the task which Sir Anthony Clarke MR set for me nine years ago.

1.2 The terms of reference which the Master of the Rolls set in November 2008. The original terms of reference were as follows:

“With the support of the Ministry of Justice, the Master of the Rolls has asked Lord Justice Jackson to conduct a wide ranging review into civil costs.

Objective

To carry out an independent review of the rules and principles governing the costs of civil litigation and to make recommendations in order to promote access to justice at proportionate cost.

Terms of reference:

In conducting the review Lord Justice Jackson will:

- Establish how present costs rules operate and how they impact on the behaviour of both parties and lawyers.
- Establish the effect case management procedures have on costs and consider whether changes in process and/or procedure could bring about more proportionate costs.
- Have regard to previous and current research into costs and funding issues; for example any further Government research into Conditional Fee Agreements - ‘No win, No fee’, following the scoping study.
- Seek the views of judges, practitioners, Government, court users and other interested parties through both informal consultation and a series of public seminars.
- Compare the costs regime for England and Wales with those operating in other jurisdictions.
- Prepare a report setting out recommendations with supporting evidence by 31 December 2009.”

1.3 The first Review of Civil Litigation Costs. The original terms of reference, therefore, required me to propose reforms to civil procedure, the costs rules and the various means of funding civil litigation. I duly carried out that review and delivered my report in December

2009,¹ proposing a package of interlocking reforms (generally known as “the Jackson Reforms”).

1.4 Implementation. Some of the Jackson Reforms required primary legislation. Some required new Civil Procedure Rules or protocol amendments. Some required changes in practice or in the training modules for practitioners and judges. Most of the proposed reforms were implemented in April 2013, when the Legal Aid, Sentencing and Punishment of Offenders Act 2012 came into force.

1.5 Unfinished business. The principal piece of unfinished business concerns FRC.

- So far as the fast track is concerned, chapter 15 of my previous report recommended a full FRC regime for fast track cases. In the event, the Ministry of Justice and the Civil Procedure Rule Committee only implemented that recommendation in part.
- So far as the multi-track is concerned, chapter 16 of my previous report deferred for future consideration the question of FRC for lower value multi-track cases. It was necessary to see how all the other reforms worked out before designing any FRC regime for those cases. I suggested various possible models of FRC (including the German system)² for consideration in that future costs review.

1.6 The present review was therefore inevitable. If the Government and the senior judiciary were minded to accept the recommendations of the previous report (as in the event they were), it was inevitable that in due course another judge-led review would be set up to develop proposals for fixing the recoverable costs of lower value cases. This is that review. The terms of reference for the present project flow inexorably from the terms of reference set by Sir Anthony Clarke MR in 2008 and from the unfinished business of the previous review.

1.7 The context for the present recommendations. The present recommendations must therefore be considered not only in the context of other current initiatives³ but also in the context of the other Jackson Reforms, of which they form an integral part. I shall therefore now turn to the package of reforms which bear my name.

2 The Jackson Reforms

2.1 A very brief synopsis. What follows is an extremely brief synopsis of the principal reforms which were recommended in my previous report and duly implemented. This report is not the place to itemise all the reforms or to go into the details. I have provided a much fuller and hopefully user-friendly account of those reforms in my book “The Reform of Civil Litigation”.⁴

2.2 Five strategies. The Jackson Reforms are based upon five strategic objectives:

¹ *Review of Civil Litigation Costs: Final Report* (<https://www.judiciary.gov.uk/wp-content/uploads/JCO/Documents/Reports/jackson-final-report-140110.pdf>).

² Described in chapter 55 of the *Review of Civil Litigation Costs: Preliminary Report*, May 2009. (<https://www.judiciary.gov.uk/wp-content/uploads/JCO/Documents/Guidance/jackson-vol1-low.pdf> and <https://www.judiciary.gov.uk/wp-content/uploads/JCO/Documents/Guidance/jackson-vol2-low.pdf>).

³ Discussed in chapters 1 and 11

⁴ Published by Sweet & Maxwell in September 2016

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- Amending rules of procedure, so as to streamline the litigation process and cut out unnecessary work.
 - Amending funding rules, so that (a) no method of funding generates increased costs and (b) there are as many different funding options as possible.
 - Facilitating and incentivising early settlement of disputes.
 - Limiting recoverable costs to proportionate levels and streamlining the process of assessment.
 - Controlling the amount of recoverable costs in advance.

(i) Procedural reforms promoting efficiency

2.3 Case management reforms. These reforms included:

- Making standard directions available online.
- More docketing of cases.
- Early fixing of trial dates.
- Directions questionnaires replacing allocation questionnaires.
- Requiring proper compliance with rules and orders.⁵
- Designating lords/lady justices to hear CPR appeals, promoting greater consistency of appellate guidance on procedural issues.

2.4 Disclosure. These reforms included:

- New rules requiring parties and the court to choose between a menu of disclosure orders, rather than simply direct 'standard disclosure' as the default option.
- Introducing a practice direction governing electronic disclosure (proposed by the Senior Master and endorsed by my previous report).

2.5 Control of evidence. These reforms included rules:

- Enabling the court to limit the length and content of factual witness statements.
- Requiring that parties, who seek permission to adduce expert evidence, should identify the expert issues and furnish estimates of the expert's fees.
- Enabling the court to focus expert evidence upon identified issues and to limit the recoverable fees of each expert witness.
- Permitting concurrent expert evidence ("hot tubbing").

(ii) Reforming funding rules

2.6 Conditional fee agreements and after-the-event insurance. The reforms to conditional fee agreements ("CFAs") and after-the-event ("ATE") insurance included ending the recoverability of:

- Success fees due under CFAs from opposing parties.
- ATE premiums from opposing parties.

⁵ See CPR rule 3.9 and *Denton v TH White Ltd* [2014] EWCA Civ 906; [2014] 1 WLR 795. The *Law Society Gazette* of 12th June 2017 reports the view of the profession that this strikes the right balance between the pre-Jackson "culture of apathy" towards court orders and undue harshness.

2.7 Compensatory measures to assist claimants. These reforms included:

- Increasing general damages by 10%.
- Introducing qualified one-way costs shifting (“QOCS”) to protect personal injury claimants.⁶
- In personal injury cases, capping a claimant’s liability to their own solicitor for the CFA success fee at 25% of damages excluding damages referable to future care costs or future losses.
- Enhancing the rewards for effective claimant offers (10% on the first £500,000 of damages plus 5% of any award above that figure with an overall cap of £75,000).⁷

2.8 Increasing funding options which do not drive up costs. These reforms included:

- Permitting damages-based agreements (otherwise known as “contingency fees”).⁸
- Promoting third party funding and a code of conduct for litigation funders.
- Encouraging greater use of before-the-event insurance.

2.9 Contingent Legal Aid Fund. My previous report took up and supported the recommendation first made by JUSTICE in 1978 for a Contingent Legal Aid Fund. The Law Society, the Bar Council and the Chartered Institute of Legal Executives are currently considering this option. It is not known whether anything will come of it.

(iii) Facilitating and incentivising early settlement of disputes

2.10 Protocol amendments. These reforms included:

- Allowing more time for response letters in clinical negligence claims, once defendant organisations had accepted (as they did) my previous report’s recommendation to obtain independent expert evidence before denying liability.
- Proposing a raft of specific amendments to individual protocols.

2.11 Promoting alternative dispute resolution. These reforms included:

- Publishing a book on alternative dispute resolution (“ADR”), the “Jackson ADR Handbook” (first edition in 2013, second edition in 2016).⁹
- Taking steps to promote better understanding of ADR.
- Handing down of judicial decisions designed to incentivise the use of ADR, in particular *PGF II SA v OMFS Co 1 Ltd* [2013] EWCA Civ 1288; [2014] 1 WLR 1386.

2.12 Reforms to Part 36. These reforms included:

- Reversing the effect of *Carver v BAA* [2008] EWCA Civ 412; [2009] 1 WLR 113 by rule change.

⁶ Whether QOCS should be extended to other areas of litigation is under consideration by the Civil Justice Council.

⁷ My Final Report set out the general scheme. I proposed and published the precise figures on the Judiciary website in January 2011: see *The Reform of Civil Litigation* (Sweet & Maxwell, 2016) at pages 234-235.

⁸ There are serious problems with the regulations implementing this reform, which need fixing: see *The Reform of Civil Litigation*, pages 54-57.

⁹ Edited by Blake, Brown and Sime; published by Oxford University Press; endorsed by the Judicial College, the Civil Justice Council and the Civil Mediation Council.

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- Enhancing the rewards for claimant offers (this reform had a dual purpose, namely promoting early settlement and assisting those claimants on CFAs who proceeded to trial and had to fund their own success fee – see above).

2.13 Negotiations in intellectual property disputes. Fair and open correspondence in relation to intellectual property claims was inhibited by legislation imposing sanctions for ‘groundless threats’. Chapter 24 of my previous report recommended that this issue should be addressed. The Law Commission took up this recommendation in its 2013 consultation paper and subsequently sponsored a bill which will allow effective pre-action correspondence in a wider range of scenarios than was previously possible. The Intellectual Property (Unjustified Threats) Act 2017 received royal assent on 27th April 2017 and is expected to come into force later this year.

(iv) Limiting recoverable costs to proportionate levels and streamlining the process of assessment

2.14 The new proportionality rule. A new rule¹⁰ limits recoverable costs to what is proportionate and defines proportionality as follows:

“Costs incurred are proportionate if they bear a reasonable relationship to –

- (a) the sums in issue in the proceedings;
 - (b) the value of any non-monetary relief in issue in the proceedings;
 - (c) the complexity of the litigation;
 - (d) any additional work generated by the conduct of the paying party;
- and
- (e) any wider factors involved in the proceedings, such as reputation or public importance.”

2.15 Summary assessment. The rules for summary assessment have been tightened up. A new form N260 requires parties to provide proper details of work on documents. This is often a major item in summary assessment.

2.16 Provisional assessment. This is a new procedure for detailed assessment of bills up to £75,000 (piloted in Leeds between 2010 and 2013), whereby the costs judge carries out an assessment on paper. After that, either party can request an oral hearing, but will incur a costs penalty if they do not achieve a result which is at least 20% better. In practice, few parties request an oral hearing, so the process is relatively swift and inexpensive.

2.17 Detailed assessment. The rules have been re-written to streamline the whole process of detailed assessment. The rules now require more focused points of dispute and points of reply, in Scott Schedule form. They also require the paying party to make an offer when serving their points of dispute. A variant of the Part 36 procedure has been introduced into detailed assessment.

2.18 New form bill of costs. The traditional bill of costs is based on a Victorian account book format and is singularly uninformative. The new form bill, currently being piloted, is in the form of an electronic spreadsheet. Bills for summary assessment, detailed assessment or for both internal and external comparison with budgets can readily be generated

¹⁰ Proposed in chapter 5 of my previous report (at paragraph 5.15) and now in CPR rule 44.3(5).

directly from contemporaneously time-recorded data and arranged phase by phase. The new form bill of costs is far more informative than the old form and will make the process of assessment cheaper, easier and more accurate for both practitioners and judges. It is anticipated that the new form bill will become compulsory next year.

(v) Controlling costs in advance

2.19 The only effective way to control costs. The only effective way to control costs is to do so in advance. That means either FRC or a variant of FRC (such as capped stage costs) or costs management. My previous report recommended a combination of those methods.

2.20 Fixed costs for fast track personal injury cases. As discussed in chapter 5 below, the great majority of all personal injury cases in the fast track are now subject to FRC. The costs grid is based on the scheme set out in chapter 15 and appendix 5 of my previous report.

2.21 Banning referral fees for personal injury claims. Referral fees were prohibited throughout the twentieth century. In 2004 the Solicitors Conduct Rules were amended to permit the payment of referral fees. That opened the floodgates. Solicitors competed for business by paying ever higher referral fees. The beneficiaries were claims management companies and other referrers, not the injured claimants. The banning of referral fees was part of my reforms. Fast track fixed costs were set on the basis that such a ban would be introduced, as happened in 2013.

2.22 Intellectual Property Enterprise Court. At the time of my previous review practitioners and judges were developing a variant of fixed costs, namely capped stage costs, for the Patent County Court, now the Intellectual Property Enterprise Court. That scheme fitted neatly with the Jackson Reforms and I strongly endorsed it in chapter 24 of my previous report. The scheme was introduced in 2011 and has proved popular with individuals and small or medium-sized enterprises (“SMEs”) using the court.

2.23 Costs management in the multi-track. Following pilots in several courts during the period 2009-2013, costs management was introduced generally for multi-track cases in 2013. Chapter 6 below discusses that regime.

3 Analysis and conclusion

3.1 An urban myth. Many people assert that the 2013 cutbacks in legal aid were based on my recommendations. Indeed, a very senior Queen’s Counsel, who has held public office, suggested that at the Cardiff seminar. As can be seen from the above summary, that is not correct. In fact, I recommended in forthright terms that there should be no cutbacks in legal aid.¹¹

3.2 Interrelationship between reforms. The reforms described above are closely interconnected. The organogram¹² at the end of this chapter illustrates those interconnections, in so far as it is possible to do so on a single sheet of paper. The proposals made in this report fit neatly into that scheme.

¹¹ *Review of Civil Litigation Costs: Final Report*, page 70, paragraph 4.2

¹² Originally published on page 222 of *The Reform of Civil Litigation* (September 2016). I am grateful to Sweet & Maxwell for permission to re-use the organogram here.

3.3 Have these reforms reduced the costs of civil litigation? Yes. Collectively these civil justice reforms have substantially reduced litigation costs. By way of example, recoverable success fees and recoverable ATE insurance premiums (which substantially drove up costs and distorted incentives) have come to an end. Referral fees, which drew money out of the system and inflated the costs of personal injury litigation, have been banned. There are now FRC for most fast track claims, which have reduced the costs of a large swathe of civil litigation. The standard directions online provide practical assistance to practitioners and thereby save time in the run up to case management hearings. The new disclosure rules, when properly used (which does not always happen), have cut down the work and the costs of disclosure. The new CPR rule 3.9, as interpreted by the Court of Appeal,¹³ has promoted more effective compliance, thereby reducing the need for adjournments. According to many of the submissions received in recent months, costs management is now working much better and is reining in the costs of litigation after the first case management conference. The amendments to CPR Part 36 provide a further incentive to settle early.

3.4 Have these reforms promoted access to justice? Yes. The reduction of overall litigation costs is itself a positive step which promotes access to justice. The package of measures to assist claimants referred to in paragraph 2.7 above promotes access to Justice for personal injury claimants. As Lord Justice Briggs observed at paragraph 6.29 of his Civil Courts Structure Review, final report:

“But a fixed or budgeted recoverable costs regime, backed by Qualified One-way Costs Shifting (“QOCS”) plus uplifted damages has, in the sphere of personal injury (including clinical negligence) litigation been a powerful promoter of access to justice, in an area where the playing field is at first sight sharply tilted against the individual claimant, facing a sophisticated insurance company as the real (even if not nominal) defendant.”¹⁴

The measures to encourage ADR and to develop alternative forms of funding (which do not drive up costs) also promote access to justice.

3.5 Is everything perfect then? No. Briggs LJ has stated in his Civil Courts Structure Reports¹⁵ that in many cases costs remain disproportionate and beyond the means of those who would wish to bring or defend claims. He therefore supports the principle of FRC. I agree.

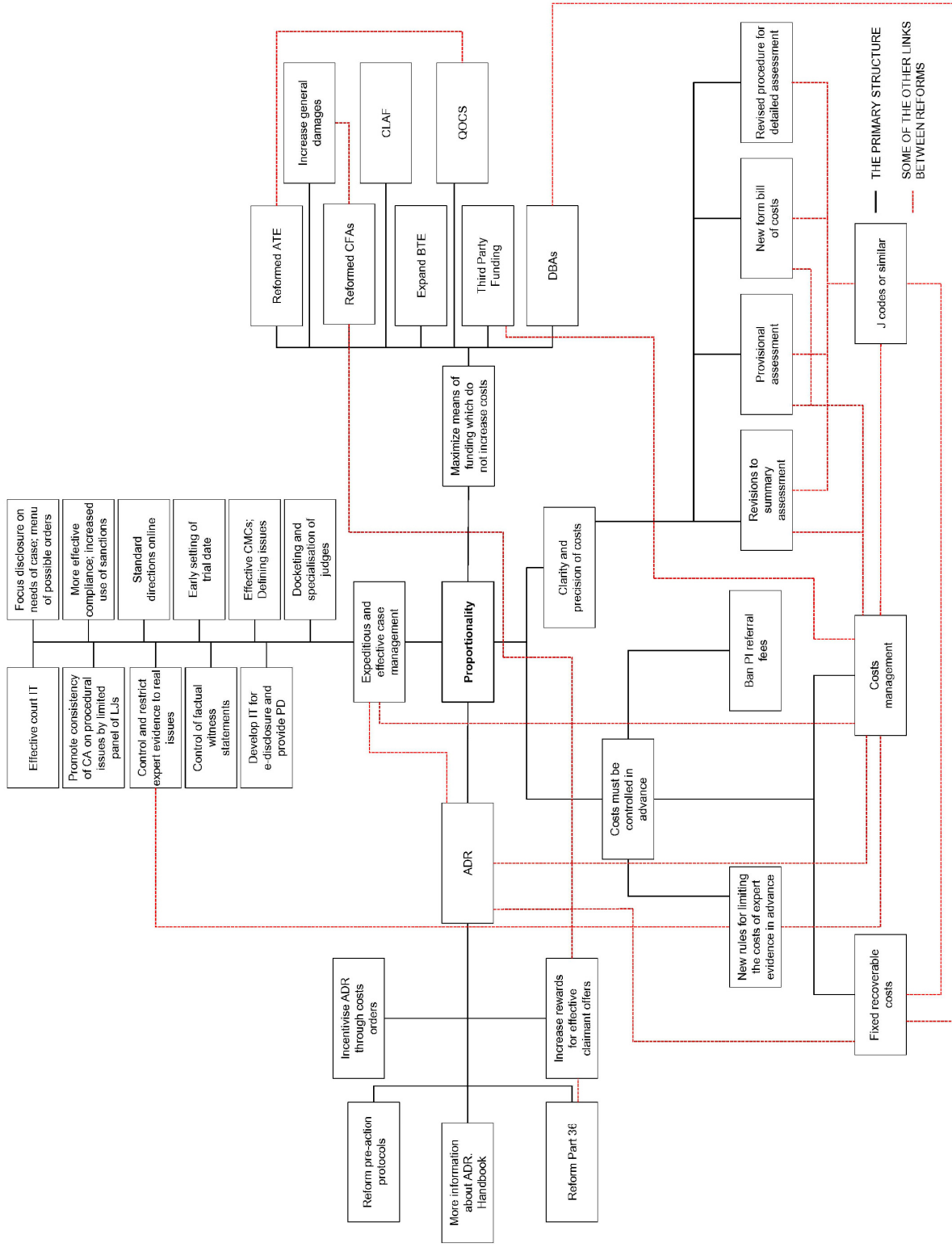
3.6 The next stage. As noted at the start of this chapter, it was always envisaged that, in due course, some lower value multi-track cases would pass from the costs management regime into an FRC regime. We now have sufficient experience to take that forward. The recommendations in this report (if implemented) will be the final stage of the reform programme upon which I embarked nine years ago.

¹³ In *Denton v TH White Ltd* [2014] EWCA Civ 906; [2014] 1 WLR 795

¹⁴ <https://www.judiciary.gov.uk/wp-content/uploads/2016/07/civil-courts-structure-review-final-report-jul-16-final-1.pdf>

¹⁵ Paragraph 5.24 of the interim report <https://www.judiciary.gov.uk/wp-content/uploads/2016/01/CCSR-interim-report-dec-15-final-31.pdf>, paragraph 5.14 of the final report.

DIAGRAM ILLUSTRATING THE RELATIONSHIP BETWEEN SOME OF THE REFORMS PROPOSED IN THE REVIEW OF CIVIL LITIGATION COSTS FINAL REPORT
A SCHEME DESIGNED TO PROMOTE ACCESS TO JUSTICE AND THE FAIR RESOLUTION OF DISPUTES AT PROPORTIONATE COST



Chapter 3 - Work undertaken and data collected during this review

Index

1. Introduction
2. The budget exercise
3. Review of fast track data
4. Review of multi-track data

1 Introduction

1.1 Omnia Gallia in tres partes divisa est.¹ This review, like Gaul, is divided into three parts. They are:

- (i) Gathering in data and submissions from stakeholders (December 2016 – January 2017).
- (ii) Debate and argument (February – April 2017).
- (iii) Analysis and report writing (April – July 2017).

1.2 Gathering in data and submissions from stakeholders. On 11th November 2016, I invited all stakeholders and others with an interest in the civil justice system to send in evidence and/or submissions relevant to this review by the end of January. There were responses to this request, some short and some lengthy, from 141 respondents. Many of those who responded sent in details about the costs of litigation in which they had been engaged. I am grateful to all who took the trouble to respond. The budget exercise, described in section 2 of this chapter, was also part of the ‘fact finding’ phase of this review.

1.3 Debate and argument. The principal forum for debate and argument was the programme of five public seminars held between February and April 2017, as described in chapter 4 below. The various meetings described in chapter 4 provided further opportunities for discussion with individual stakeholder groups. The monthly assessors’ meetings were occasions for private debate, in which wide ranging views were freely expressed.

1.4 Analysis and report writing. Throughout the review, I was circulating drafts on specific issues for consideration, revision and sometimes demolition by the assessors. Analysis and report writing in earnest, however, did not start until after the final seminar on 5th April. This work occupied the final phase of the review.

1.5 My position. Throughout the period of this review, my primary function has been to serve as a judge in the Court of Appeal. For one week per month,² however, I have been released from sitting in the Court of Appeal to conduct the present review. Each of the monthly assessors’ meetings were held during those ‘costs weeks’, usually on a Wednesday morning. Obviously, the conduct of the review and the drafting of this report has required

¹ “Gaul is divided into three parts” – the opening words of Caesar’s *Gallic War*.

² And for two weeks in July.

more than one week per month. That additional work has been ‘fitted in’ at weekends and vacations, in accordance with normal judicial practice.³

2 The budget exercise

2.1 Collection of budgets. In late 2016 I requested all courts which had the time and resources to do so to send in copies of the budgets that they dealt with at costs and case management conferences (“CCMCs”) between 5th December 2016 and 20th January 2017, together with statements of case. Those judges and courts who could do so kindly responded to this request. I received usable budgets for a total of 223 cases – others had to be discarded because they were duplicates of cases already received, were valued at well over £300,000, or contained no budget data. For those 223 cases, there were 535 individual budgets.⁴ Some budgets were page 1 only, some included all pages of the Precedent H form. Some budgets were the original budgets as claimed by the parties, some were as agreed between the parties or as approved by the court. Sometimes the budgets of both parties came in, sometimes of one party only. Sometimes the case management directions also came in.

2.2 Classification. My team of judicial assistants divided the cases into the following categories:

- A. Clinical negligence
- B. Personal injury
- C. Business disputes
- D. Chancery and property
- E. Technology and Construction Court (“TCC”)
- F. Defamation
- G. Other

2.3 Extraction of information. The team then extracted all the information which could be extracted in respect of each case and summarised that information in spreadsheets A to G.⁵ That information included:

- whether the budget was claimant or defendant-side;
- whether the sums were those originally claimed by the party, were as agreed between the parties, or were as approved by the court;
- the value of the claim and any counterclaim;
- the cause of action and the nature of the dispute;
- key features of the case which might help to explain the level of costs, such as the number of parties, the number of issues in dispute, the number of witnesses and expert witnesses, the anticipated length of trial, whether provision was made for a Pre-Trial Review (“PTR”) or alternative dispute resolution (“ADR”), and the nature of any contingency costs; and
- the numerical data from the budgets: costs incurred to date for each Precedent H phase (recording time costs and disbursements separately), future costs for

³ Most judges have onerous responsibilities in addition to their judicial duties.

⁴ For these purposes, each ‘as claimed’ budget was counted once, as was each ‘as agreed’ or ‘as approved’ budget. So a single Precedent H form would be counted as two budgets if it showed both the sums originally claimed by the party, and the judge’s annotations amending those sums.

⁵ For reasons of confidentiality, the spreadsheets containing the raw budget data are not annexed to this report. Instead, the analyses of those data are attached at appendix 2.

each Precedent H phase (again recording time costs and disbursements separately), as well as counsel's fees and experts' fees (where the back pages of the Precedent H form were available).

2.4 Valuation of claims. In relation to the value of the claim, in each case the team made their best assessment of quantum insofar as it was possible to do so, having regard to the pleaded facts. For the cases in spreadsheets A and B, they used the Judicial College Guidelines for assessing general damages.

2.5 Material from the Police Action Lawyers Group. I also received, from the Police Action Lawyers Group ("PALG"), a total of 218 budgets for 65 cases following the coming into force of the Legal Aid, Sentencing and Punishment of Offenders Act 2012 ("LASPO") which were civil actions against the police or other public authorities. A few of those cases were discarded, for example because they contained insufficient data, or (in two cases which concerned alleged British complicity in extraordinary renditions) they were valued at well over £300,000. The team again extracted the relevant information for each of the remaining 59 cases, and input it into an additional spreadsheet, spreadsheet H.

2.6 Actuarial analysis. Catherine Senior (my actuarial judicial assistant) then prepared the tables which appear in appendix 2, derived from the eight spreadsheets. For the purposes of the analysis, spreadsheets C (business disputes) and E (TCC) were combined, since these are specialist disputes which arise (or typically arise) in a business context, and since there were only a small number of cases in each category.

2.7 How useful are the budgets? It should be noted that the number of budgets in each category (but especially the business disputes, chancery, TCC, defamation, and 'other' categories) was not statistically significant. The analyses derived from them do not by themselves form a sufficient evidence basis for setting the levels of fixed recoverable costs ("FRC") – nor are the cases necessarily a representative sample of lower-value multi-track cases in each of the categories. Further, the budget data were inherently limited in certain respects. For example, since the budgeting process is prospective, it does not control incurred costs (as to which, see chapter 6 below). As such, the budget totals are likely to be significantly higher than the winning party would receive at the end of the case, even if fully contested. They also include certain disbursements (notably expert fees and court fees) that are additional to the grid of FRC proposed in chapter 7 below. Nevertheless, the analyses are a useful yardstick against which to compare other data received during this review (dealt with further below), and they do disclose some interesting patterns in costs management in the lower reaches of the multi-track. The summary tables which follow are derived from the fuller tables in appendix 2. The sums shown are exclusive of VAT and of the cost of the costs budgeting process.

2.8 Explanation of summary tables below. Summary tables 3.1 to 3.5 below are derived from tables 1 to 38 in appendix 2. They are based on all agreed or approved budgets for clinical negligence, personal injury, business disputes and TCC, chancery and property, and the PALG cases respectively. For reasons set out at paragraphs 2.14 and 2.15 below, summary tables have not been included for spreadsheets F (defamation) and G ('other'). The summary tables separate out data for claimants and defendants, and include for each value band the number of agreed or approved budgets, average total incurred costs, average total agreed or approved future costs, and average total costs. In the narrative that follows, only the four principal value bands £0-25,000, £25-50,000, £50-100,000, and £100-250,000 are discussed, unless otherwise stated.

Summary Table 3.1

Clinical negligence: agreed/approved budgets for claimants and defendants, split by incurred and future costs

Clinical Negligence – Claimant – Average				
Value (£)	Number of Budgets	Incurred (£)	Agreed or Approved Future (£)	Total (£)
0-25k	6	35,988	59,568	95,555
25-50k	12	47,965	107,665	155,630
50-100k	15	59,987	137,214	197,200
100-250k	13	74,920	152,695	227,615
250k+	2	64,062	85,526	149,588
Value unknown	3	93,640	227,221	320,861

Clinical Negligence – Defendant – Average				
Value (£)	Number of Budgets	Incurred (£)	Agreed or Approved Future (£)	Total (£)
0-25k	4	3,771	30,728	34,499
25-50k	9	10,589	74,225	84,814
50-100k	15	15,192	67,705	82,898
100-250k	13	10,885	82,119	93,004
250k+	2	11,053	70,051	81,104
Value unknown	3	15,629	105,383	121,013

Summary Table 3.2

Personal injury: agreed/approved budgets for claimants and defendants, split by incurred and future costs

Personal Injury – Claimant – Average				
Value (£)	Number of Budgets	Incurred (£)	Agreed or Approved Future (£)	Total (£)
0-25k	13	16,723	34,589	51,312
25-50k	17	21,151	47,912	69,062
50-100k	10	30,074	52,592	82,667
100-250k	9	51,443	97,593	149,035
250k+	1	40,703	92,908	133,611
Value unknown	6	26,962	45,718	72,680

Personal Injury – Defendant – Average				
Value (£)	Number of Budgets	Incurred (£)	Agreed or Approved Future (£)	Total (£)
0-25k	14	3,954	26,542	30,496
25-50k	17	3,652	29,847	33,499
50-100k	11	4,062	36,726	40,787
100-250k	9	14,621	72,230	86,851
250k+	1	15,422	114,880	130,302
Value unknown	5	2,712	41,458	44,170

Summary Table 3.3

Business disputes and TCC: agreed/approved budgets for claimants and defendants, split by incurred and future costs

Business Disputes and TCC – Claimant – Average				
Value (£)	Number of Budgets	Incurred (£)	Agreed or Approved Future (£)	Total (£)
0-25k	0	0	0	0
25-50k	1	18,701	57,895	76,596
50-100k	1	20,711	89,350	110,061
100-250k	3	27,804	59,712	87,517
250k+	1	18,407	52,768	71,175
Value unknown	0	0	0	0

Business Disputes and TCC – Defendant – Average				
Value (£)	Number of Budgets	Incurred (£)	Agreed or Approved Future (£)	Total (£)
0-25k	0	0	0	0
25-50k	3	7,914	45,964	53,878
50-100k	1	20,600	108,892	129,492
100-250k	3	6,848	46,647	53,494
250k+	1	9,013	35,690	44,703
Value unknown	0	0	0	0

Summary Table 3.4

Chancery and property: agreed/approved budgets for claimants and defendants, split by incurred and future costs

Chancery and Property – Claimant – Average				
Value (£)	Number of Budgets	Incurred (£)	Agreed or Approved Future (£)	Total (£)
0-25k	1	12,710	41,139	53,849
25-50k	0	0	0	0
50-100k	1	21,976	57,960	79,936
100-250k	1	19,583	35,221	54,804
250k+	2	19,696	40,845	60,541
Value unknown	3	9,718	21,130	30,847

Chancery and Property – Defendant – Average				
Value (£)	Number of Budgets	Incurred (£)	Agreed or Approved Future (£)	Total (£)
0-25k	1	6,420	40,846	47,266
25-50k	1	1,492	6,971	8,463
50-100k	0	0	0	0
100-250k	1	8,373	30,475	38,848
250k+	1	11,760	45,200	56,960
Value unknown	2	6,994	28,002	34,995

Summary Table 3.5

PALG: agreed/approved budgets for claimants and defendants, split by incurred and future costs

PALG – Claimant – Average				
Value (£)	Number of Budgets	Incurred (£)	Agreed or Approved Future (£)	Total (£)
0-25k	11	33,550	53,049	86,600
25-50k	30	53,291	76,938	130,229
50-100k	7	46,243	61,404	107,646
100-250k	6	71,358	85,566	156,924
250k+	0	0	0	0
Value unknown	1	45,610	116,755	162,365

PALG – Defendant – Average				
Value (£)	Number of Budgets	Incurred (£)	Agreed or Approved Future (£)	Total (£)
0-25k	7	19,950	33,107	52,698
25-50k	27	15,785	45,518	61,302
50-100k	7	11,629	33,163	44,791
100-250k	5	7,998	42,121	50,119
250k+	0	0	0	0
Value unknown	1	12,376	61,628	74,004

2.9 Clinical negligence. There were 194 budgets for 62 cases, which related to a wide range of medical failures and disciplines. Overall, costs in clinical negligence litigation were much higher than for other categories, including personal injury. The following features may be noted from tables 1 to 4 in appendix 2:

- (i) For claimants, there was a reasonably clear correlation between the amount of damages claimed and the level of agreed or approved costs, although future disbursements were slightly higher in the band £25-50,000 than the band £50-100,000. Incurred costs represented a particularly high proportion of the total in the band £0-25,000, being 38% of budgeted costs. The pattern for defendant-side agreed or approved costs was slightly less clear: average costs for the band £0-25,000 was just £34,499, but for the band £25-50,000 average costs leapt to £84,814, dropped down slightly to £82,898 for the band £50-100,000, and £93,004 for the band £100-250,000. Table 3.6 below (which includes only those cases where both the claimant's and the defendant's budgets were available) shows that claimants' budgets were much higher than defendants' budgets: across the four principal bands, defendants' budgets were between 39-51% of claimants' budgets.

Table 3.6
Clinical negligence: total costs in cases where agreed/approved budgets were available for both the claimant and the defendant

Clinical Negligence				
Value (£)	Number of Cases	Total Cost (£) - Average		Difference in Claimant and Defendant Agreed or Approved (£)
		Claimant	Defendant	
		Agreed or Approved	Agreed or Approved	
0-25k	4	88,504	34,499	54,005
25-50k	9	166,730	84,814	81,916
50-100k	12	195,088	85,187	109,902
100-250k	11	218,590	98,218	120,372
250k+	2	149,588	81,104	68,485
Claim value unknown	3	320,861	121,013	199,848

- (ii) Table 3.7 below (which only includes those cases where a party's 'as claimed' and 'as agreed or approved' budgets were both available) shows the average reduction in budgets following CCMCs, for claimants and defendants respectively. For claimants in particular, there were significant differences between the 'as claimed' and 'as agreed or approved' budgets, with the difference generally increasing as the value of the case increases. For defendants, the reductions were much smaller, although the band £25-50,000 was an outlier, with an average *increase* of £5,588.

Table 3.7
Clinical negligence: total costs in cases where both claimed and agreed/approved budgets were available

Clinical Negligence - Claimant				
Value (£)	Number of Cases	Total Cost (£) - Average		
		Claimed	Agreed or Approved	Reduction
0-25k	1	78,764	74,204	4,560
25-50k	6	168,746	156,519	12,227
50-100k	10	244,059	206,842	37,216
100-250k	13	259,791	227,615	32,176
250k+	2	197,722	149,588	48,133
Claim value unknown	2	611,450	396,228	215,222
Clinical Negligence - Defendant				
Value (£)	Number of Cases	Total Cost (£) - Average		
		Claimed	Agreed or Approved	Reduction
0-25k	2	39,306	36,285	3,022
25-50k	6	64,265	69,854	(5,588)
50-100k	13	88,491	86,557	1,935
100-250k	12	91,807	89,348	2,459
250k+	2	80,079	81,104	(1,025)
Claim value unknown	3	147,072	121,013	26,059

- (iii) Across all parties and value bands, the most expensive work phases were expert reports and trial. For claimants, the expert reports phase accounted for 27-30% of total costs across the four principal bands, and for defendants it was

20-25% (except for the band £100-250,000, where 30% of the total was the expert reports phase). Pre-action was also a costly phase for claimants. For all four principal bands, they spent an average of around £8,700 (whereas defendants typically spent less than a quarter of this, across the bands).

- (iv) Finally, it should be noted that the assumptions and directions that came in with the budgets made clear that the great majority of clinical negligence cases in our sample would not be suitable for allocation to the new track proposed in chapter 7 below: of the cases valued below £100,000 (some 41), only nine were even potential candidates for the new intermediate track (in that there were to be a maximum of two experts per party, and the trial was to last a maximum of three days).

2.10 Personal injury. This was the largest category by a considerable margin, with 232 budgets for 106 cases. Of these, 91 budgets related to road traffic accident (“RTA”) cases, 65 to employer’s liability accident (“ELA”) cases, and 53 to employer’s liability disease (“ELD”) cases. Apart from the fact that overall costs were much lower in personal injury litigation compared with clinical negligence, patterns similar to those noted above emerged. The following features may be noted from tables 5 to 8 in appendix 2:

- (i) For both parties, there was a reasonably clear correlation between the amount of damages claimed and the level of agreed or approved costs. For claimants, costs in the £100-250,000 band were particularly high at £149,035. Again, claimants’ budgets were higher than defendants’ budgets across all bands (although the difference was not quite as stark as in clinical negligence), as shown by Table 3.8 (which is based on cases where the agreed/approved budgets were available for both the claimant and the defendant) below.

Table 3.8

Personal injury: total costs in cases where agreed/approved budgets were available for both the claimant and the defendant

All Personal Injury Cases				
Value (£)	Number of Cases	Total Cost (£) - Average		Difference in Claimant and Defendant Agreed or Approved (£)
		Claimant	Defendant	
		Agreed or Approved	Agreed or Approved	
0-25k	9	36,932	28,660	8,272
25-50k	13	64,977	35,440	29,537
50-100k	9	83,870	43,292	40,579
100-250k	7	131,313	83,780	47,533
250k+	0	0	0	0
Claim value unknown	5	63,492	44,170	19,322

- (ii) As in clinical negligence, claimants more frequently saw their budgets reduced, and to a greater extent, than defendants. This is shown in Table 3.9 below (which includes only those cases where both the ‘as claimed’ and ‘as agreed or approved’ budgets were available):

Table 3.9
Personal injury: total costs in cases where both claimed and agreed/approved budgets were available

All Personal Injury Cases - Claimant				
Value (£)	Number of Cases	Total Cost (£) - Average		
		Claimed	Agreed or Approved	Reduction
0-25k	4	48,409	39,137	9,272
25-50k	12	79,441	60,663	18,779
50-100k	4	85,864	64,799	21,064
100-250k	6	144,979	123,069	21,910
250k+	0	0	0	0
Claim value unknown	3	97,683	83,992	13,691
All Personal Injury Cases - Defendant				
Value (£)	Number of Cases	Total Cost (£) - Average		
		Claimed	Agreed or Approved	Reduction
0-25k	6	31,488	30,667	821
25-50k	13	41,532	34,069	7,464
50-100k	6	50,507	40,086	10,421
100-250k	5	98,067	93,690	4,377
250k+	1	130,302	130,302	0
Claim value unknown	3	48,473	49,946	(1,473)

- (iii) The most expensive work phases for both sides and across all value bands were expert reports and trial. For both claimants and defendants, the expert reports phase accounted for 16-21% of total costs across the four principal bands (except for claimants for the band £100-250,000, where 32% of the total was the expert reports phase). Pre-action was a costly phase for claimants. They typically spent an average of around £4,500, except in the £100-250,000 band where the average spend was £9,725. Defendants, meanwhile, say that they spent less than £300 on average pre-action, except for cases in the £100-250,000 band (£2,950).
- (iv) There was no significant difference between the RTA, ELA and ELD cases: none bucked any of the trends described above, and no one case was significantly more costly than the others – either overall or in respect of particular work phases. For claimants, the expert reports phase was marginally less expensive in ELD cases than in the other two sub-categories. Defendants typically spent slightly more on expert reports, and overall, in RTA cases.

2.11 **Business disputes and TCC.** There were a total of 29 budgets for 10 cases (of which eight cases and 23 budgets related to business disputes, and two cases and six budgets were TCC). Because there were very few cases in each value band, little can be said about average costs or the relationship between the amount of damages sought and costs in these cases. Issue and trial were consistently the most expensive phases. The directions which accompanied the budgets indicated that standard disclosure was ordered in every case.

2.12 Comment on excessive disclosure. The London Solicitors Litigation Association (“LSLA”) suggested last year⁶ that both practitioners and judges were making inadequate use of the new disclosure rules contained in CPR rule 31.5. The President of the LSLA stated:

“The onus must surely be not only on the parties and their advisers to explore and agree a proportionate approach to disclosure in advance of the case management conference (CMC), but also on the courts proactively to challenge parties where they have failed to do so. A more robust and challenging case management approach to disclosure by the courts would be welcomed by many.”

The picture emerging from the budget exercise lends some support to that observation.

2.13 Chancery and property. There were 40 budgets relating to 19 cases. These covered a range of disputes including claims for possession, applications under s.14 of the Trusts of Land and Appointment of Trustees Act 1996, claims based on proprietary estoppel, boundary disputes, and claims under the Inheritance (Provision for Family and Dependents) Act 1975. Five of the 19 claims were brought under CPR Part 8. It was not possible to value the claim in about half of the cases, and consequently there were only a few budgets in each value band. Although little can therefore be drawn from these budgets, what was clear was that there was no correlation between value and costs budgeted. This is hardly surprising since all but three of the claims were principally for non-monetary remedies such as injunctions, orders for possession, and orders for the sale or transfer of land.

2.14 Defamation. Nothing could be drawn from the defamation table, since there was just one case with two budgets. It is for this reason that summary tables have not been prepared for spreadsheet F. The limited information that is available can be viewed in tables 29 and 30 of appendix 2.

2.15 Other. There were a total of 39 budgets for 14 cases, which comprised five civil actions against public authorities, two nuisance claims, three credit hire claims, one professional negligence claim, and three debt claims (not being business disputes). Because of the limited number of cases, and the disparate areas which they concerned, little can be drawn from this category (although more is said about the five civil actions against public authorities in relation to the budgets supplied by PALG, below). As with spreadsheet F, no summary tables have been prepared for spreadsheet G. The available information can be viewed in tables 31 to 34 of appendix 2.

2.16 The PALG budgets. 216 budgets for 59 cases were analysed. Most of the actions were against the police or other detaining authorities, although in a small number the NHS was a defendant. Claimants had qualified one-way costs shifting (“QOCS”) protection in 11 of the cases. The claims were wide-ranging in their subject-matter, and included claims for assault, trespass and false imprisonment, malicious prosecution and misfeasance in public office, breaches of the Data Protection Act 1998, and violation of the Human Rights Act 1998. Several cases arose out of arrests of protestors, thus engaging important questions about freedom of speech and association; several others concerned deaths in custody, and thus alleged breaches of the UK’s responsibilities under Article 2 of the European Convention on Human Rights. The following features may be noted from tables 35 to 38 in appendix 2.

- (i) Overall, costs in this area were very high, and bore no real resemblance to the amount of damages claimed, as shown by Summary Table 3.5 above. Incurred

⁶ LSLA survey, June 2016. The GC100 Group expressed similar concerns. This is set out more fully in *The Reform of Civil Litigation* (Sweet & Maxwell, September 2016) at pages 114-5.

costs were, for claimants, very high indeed (representing 39-45% of total agreed or approved costs across the four principal bands), largely because of participation in inquests and/or IPCC investigations before action. However, even when incurred costs are excluded, claimants' costs are still high: future costs are on average £53,049 for the band £0-25,000, £76,938 for the band £25-50,000, £61,404 for the band £50-100,000, and £85,566 for the band £100-250,000. The five civil actions against public authorities in the 'other' category followed a similar pattern: here, the claimants' budget ranged from £17,380 (for a case concerning wrongful arrest and detention for seven hours, valued between £1,000 and £13,500), to £61,406 (for a case alleging wrongful immigration detention, in the value band £50-100,000). This picture is not altogether surprising: quite apart from the complexity and importance of the issues raised in cases of this kind, time costs tend to be high, as claimants are frequently vulnerable and in need of extra assistance; cases are typically hotly disputed on the facts and may require reams of witness evidence; and disclosure often includes hours of CCTV footage, and is sometimes complicated by difficult questions as to public interest immunity.

- (ii) It is for this reason that civil actions against public authorities will generally be excluded from the fixed costs regime proposed below, in chapter 7. They frequently raise issues of great complexity or wider public importance, which makes them unsuitable for a constrained procedure and trial timetable; and it will often not be possible or appropriate to limit the evidence to that contemplated in chapter 7 below. Indeed, of the 59 cases included in the PALG table, only around eight were identified as even being potential candidates for the new intermediate track described below in chapter 7. The five civil actions against public authorities in the 'other' category appeared to confirm this: of these, only one was arguably suitable for the proposed new intermediate track, even though four were valued at less than £50,000 (and the fifth case was in the value band £50-100,000).

3 Review of fast track data

3.1 Professor Fenn's analysis. Professor Fenn, who chaired the Fast Track Working Group (see chapter 5 below), received defendant data from Taylor Rose TTKW.⁷ Their records are held in a bespoke case management system and its underlying database. The dataset extends over several years, including both pre and post-LASPO settlements in the fast track and multi-track. In relation to the fast track, this dataset proved helpful, because it included data on those areas of litigation not currently subject to fixed costs, notably non-personal injury RTA and ELD claims. The following table shows the total numbers of such claims in the dataset, according to the stage of the litigation at which they settled:

⁷ Solicitors and costs lawyers providing (among other things) costs and advocacy services predominantly to insurers and compensators.

Stage	Fast Track Non-Personal Injury RTA (£10,000-£25,000)	Fast Track ELD (£1,000-£25,000)
Pre-issue	101	991
Post-issue, pre-allocation	202	829
Post allocation, pre-listing	106	214
Post listing	112	83
Total	521	2,117

Data on damages (both special and general) and agreed profit costs (following a negotiated settlement) were available for these claims. The ELD claims included all types of disease, though the great majority were noise induced hearing loss (“NIHL”) claims.

Roberts Jackson Solicitors, a law firm specialising in representing industrial disease claimants, also provided useful data on non-NIHL settled claims.⁸ The Fast Track Working Group considered this material, as well as collating data from similar firms. The total numbers of claims with general damages less than £25,000 in the combined dataset provided, broken down by type of disease, is summarised in the table below.

Type of disease	Number of cases	Proportion of Total (%)
Cumulative back injury	68	16.19
HAVS/VWF	87	20.71
Occupational asthma	43	10.24
Occupational dermatitis	112	26.67
Repetitive strain injury/WRULD	75	17.86
Other	35	8.33
Total	420	100.00

These data were analysed and the results compared with the analyses of the defendant data from Taylor Rose TTKW. However, it was not possible to determine which of these claims were settled in the fast track. Other data on ELD claims were provided by members of the Association of Personal Injury Lawyers (“APIL”), but again, it was not possible to determine whether these were settled in the fast track or the multi-track.

3.2 Through the submissions, I received a modest amount of data concerning costs in fast track cases, all (with two exceptions, at paragraphs 3.3 and 3.8 to 3.9 below) personal injury. Certain other datasets which principally related to the multi-track also appeared to contain some fast track cases (these data are dealt with below, in section 4 of this chapter).

3.3 The Bar Council. From the Bar Council I received two tables detailing what were described as ‘typical’ fees charged by junior barristers (that is, of up to five years call) in (a) property, landlord and tenant, and professional liability fast track cases,⁹ and (b) personal injury fast track cases (consisting of RTAs, employer’s liability, and occupier’s liability). These showed that fees are typically higher for cases in category (a), although the same is charged for attendance at a CMC or PTR irrespective of the area of law. In personal injury cases, the trial fee appears to generally be limited to the fixed trial advocacy fees in CPR rules 45.29C and 45.29E. Trial fees were not so limited for cases within category (a), even though fast track trial costs for non-portal cases (fixed by CPR rule 45.38) are lower than the trial

⁸ See chapter 4, paragraph 11.2.

⁹ Property and landlord and tenant disputes were combined with professional liability because there was very little difference between the figures for these categories.

advocacy fees in CPR rules 45.29C and 45.29E. It should however be noted that property, landlord and tenant, and professional liability trial fees were only markedly higher than personal injury trial fees where the case was valued at more than £10,000. It was not clear how many chambers provided data to produce the below averages, nor was it clear where these chambers were based.

Property, landlord and tenant, and professional liability				
	Value: no more than £3,000	Value: more than £3,000 but not more than £10,000	Value: more than £10,000 but not more than £15,000	Value: more than £15,000
Pre-action advice (either written or in conference)	£500	£750	£1,000	£1,250
Pleadings (i.e. fee for PoCs¹⁰ and Reply, or Defence)	£350	£600	£750	£1,000
CMC	£350	£500	£750	£1,000
PTR	£350	£500	£750	£1,000
Trial (i.e. a fast track trial lasting one day)	£500	£750	£1,500	£2,500

Personal injury				
	Value: no more than £3,000	Value: more than £3,000 but not more than £10,000	Value: more than £10,000 but not more than £15,000	Value: more than £15,000
Pre-action advice (either written or in conference)	£450	£600	£750	£900
Pleadings (i.e. fee for PoCs and Reply, or Defence)	£300	£450	£600	£500
CMC	£350	£500	£750	£1,000
PTR	£350	£500	£750	£1,000
Trial (i.e. a fast track trial lasting one day)	£500	£710	£1,070	£1,710

3.4 Costs in fast track RTA personal injury cases. The Bar Council also provided details of costs awarded following summary assessment in nine fast track RTA cases. Some of these cases attracted the fixed costs provided for in Section III of CPR Part 45, although it seems that in a number of cases the figures given also included disbursements awarded under CPR rule 45.29I. In other cases, it seems that the costs were not those fixed by Section III of CPR Part 45, for example because the costs consequences of CPR Part 36 applied, or because

¹⁰ Particulars of claim.

CPR rule 45.29J applied. Six of the cases were valued below £10,000, and in each of these costs were awarded following summary assessment at the conclusion of the trial. Some of the awards were in favour of defendants, and some in favour of claimants. Average total costs were £6,094 (and the range was from £5,060 to £7,432), of which £829 was the average counsel's fee. There were three further fast track RTA cases, valued between £10,000 and £24,999, where costs were awarded following summary assessment at the conclusion of the trial. Here, average costs were £12,803, of which £2,475 were counsel's fees. One of these cases was significantly more costly than the other two, with £20,876 allowed in costs (it was not clear why, but it is probable that either CPR Part 36 or CPR rule 45.29J applied). Putting that case to one side, there was little difference between the total costs in the other two: £8,586 and £8,947 respectively.

3.5 A large claimant firm. A UK-wide firm of solicitors specialising in conducting claimant personal injury work sent me two tables: the first illustrating the difference between average costs incurred and fixed fees recovered in cases concluded *within* the EL/public liability ("PL") and RTA Portals, between January and December 2016 (although it was not clear how many); the second showing the difference between average costs incurred and fixed fees recovered in cases which have *exited* the EL/PL and RTA Portals, in the same period (again, it was not clear how many cases were included). Those tables are at page 1 of appendix 3. The second table appears to show that where a case has exited the RTA or EL/PL Portal, there is typically a shortfall between the actual costs incurred (calculated on the basis of approved hourly rates multiplied by recorded hours) and the fixed costs recovered; and that this shortfall generally increases the further the case progresses. Thus, across the three value bands given, there was a shortfall of approximately £1,000-1,800 at the pre-issue stage (between -29% and -46%); and at the trial stage, the average shortfall was approximately £7,000-9,700 (between -44% and -60%). It should be noted that a very small proportion of fast track personal injury cases go to trial.

3.6 A large tour operator. A number of travel businesses sent me information about an apparent increase in the number of low-value holiday sickness claims in the past year or two (particularly arising out of alleged gastric illness). Under the Package Travel, Package Holidays and Package Tours Regulations 1992, holidaymakers suffering injury are able to bring claims in the UK against their tour operator, notwithstanding that the accident or injury occurred abroad. One operator sent me the following information, about costs in relation to damages in seven such claims (the costs of which are not fixed under the current fast track rules). It should be noted that it was not clear at what stage of the litigation the claims settled:¹¹

Case No.	Injury	Damages	Costs Claimed	Costs Agreed
1	Short period of gastric illness	£3,400	£9,695	£6,000
2	Slipping accident	£4,500	£8,207	£4,500
3	Short period of gastric illness	£1,500	£2,938	£2,000
4	Short period of gastric illness	£1,050	£5,921	£3,105

¹¹ This was a difficulty which affected much of the data discussed in this chapter.

Case No.	Injury	Damages	Costs Claimed	Costs Agreed
5	Short period of gastric illness	£1,000	£3,171	£2,150
6	Short period of gastric illness	£1,000	£3,115	£2,100
7	Short period of gastric illness	£2,700	£6,936	£4,500

3.7 A firm of costs lawyers. A firm of costs lawyers provided a graph (appendix 4) showing profit costs claimed in relation to damages recovered, in 79 holiday sickness cases which settled between April 2014 and November 2016. In the majority of cases damages were very low. In only six of these cases did the damages exceed about £10,000. It is assumed that almost all these cases were in the fast track.

3.8 The Housing Law Practitioners Association. The Housing Law Practitioners Association (“HLPAs”) provided two datasets concerning housing disrepair cases. The first (at appendix 5) provided detailed information on 83 housing disrepair cases, collected from solicitor members (who were asked to send in details of their last 10 fast track cases to settle (or all cases if less than 10 in the case of new fee earners)). The information included: whether the landlord was public or private (though only four were private), the nature and period of the disrepair, the effect on the tenant (such as damage to health, damage to possessions, and whether the tenant needed to be rehoused), the amount of damages and the cost of repairs, the stage at which the case settled, the costs claimed, and the costs recovered. The costs figures were inclusive of VAT and disbursements (including court fees and expert fees, which the HLPAs informed me were usually in the region of £750 plus VAT per expert). The following features may be noted:

- (i) There were 34 cases that settled pre-issue: 16 where the damages were under £5,000, 11 where the damages (excluding the cost of repair)¹² were £5,000 to £9,999, and seven where the damages were £10,000 or more. In the lowest bracket, average damages were £2,619, average costs claimed were £5,746, and average costs recovered were £4,259. In the band £5,000 to £9,999, average damages were £6,741, average costs claimed were £8,704, and average costs recovered were £6,427. In the uppermost band, average damages were £13,671, average costs claimed were £8,800, and average costs recovered were £6,984. Whilst these figures might appear to show a modest increase in costs depending on the level of damages, however, the extent of deviation from the mean showed this not to be the case. The cheapest case in the lowest bracket had recovered costs of £1,350, whilst the most expensive recovered £11,250. For the cheapest in the band £5,000 to £9,999, recovered costs were £2,500, whereas they were £11,000 for the most expensive. Meanwhile, the cheapest case in the highest band got £3,250 in recovered costs, compared with £13,250 for the most expensive.
- (ii) There were nine cases that settled post-issue: four each in the bands £0-5,000 and £5,000-9,999, and just one in the over £10,000 bracket. In the lowest band, average damages were £2,021, average costs claimed were £8,268, and

¹² Generally in such cases, there is an agreement or an order that the landlord will carry out the necessary works. For the purposes of this analysis, the value of such an agreement or order is not included as part of the damages recovered. But under the matrix of FRC proposed in chapter 5 below, the agreement or order will be treated as having a value of £10,000 (subject to the court’s power to vary that figure) for the purposes of assessing the costs recoverable.

average costs recovered were £6,633. In the band £5,000 to £9,999, average damages were £8,225, average costs claimed were £9,607, and average costs recovered were £8,246. Again, there was significant deviation from the mean: in the cheapest case in the lowest bracket, recovered costs were £3,500, whilst recovered costs in the most expensive case were £12,781. In the band £5,000-9,999, the cheapest case obtained recovered costs of £6,726, whereas for the most expensive case that sum was £10,500.

- (iii) There were 13 cases that settled between the filing of the defence and exchange of witness statements: three where damages were up to £5,000, and five each in the other two bands. In the lowest band, average damages were £4,361, average costs claimed were £12,438, and average costs recovered were £10,325. In the band £5,000 to £9,999, average damages were £7,730, average costs claimed were £53,153, and average costs recovered were £14,546. Average costs claimed were exceptionally high since there was one case where the claimed costs were £141,450. It is possible that this was a typo, since the recovered costs in that case were only £10,483, and there was nothing in the case information to explain the level of claimed costs. Excluding that case, average costs claimed were £23,720, and average costs recovered were £15,900. In the uppermost band, average damages were £25,540, average costs claimed were £28,745, and average costs recovered were £20,850. The average damages were high, because in the sample there were two cases where the damages were over £40,000 (one where the tenant was a buy-to-let leaseholder who had lost a significant amount of rental money as a result of the disrepair; and another where the disrepair was of a very serious nature and had been prolonged for five years). However, excluding these cases made very little difference to the average costs claimed and recovered: £28,224 and £10,850 respectively. Again, deviation from the mean was substantial: the cheapest case in the lowest bracket had recovered costs of £6,275, whilst the most expensive recovered £17,400. For the cheapest in the band £5,000 to £9,999, recovered costs were £8,750, whereas they were £26,000 for the most expensive. And the cheapest case in the highest band got £7,500 in recovered costs, compared with £35,000 for the most expensive.
- (iv) 24 cases settled after exchange of witness statements but before trial: nine where damages were between £5,000 and £9,999, and 15 where damages were £10,000 or over. There were no cases where the damages were below £5,000. In the band £5,000 to £9,999, average damages were £8,238, average costs claimed were £23,717, and average costs recovered were £21,119. In the uppermost band, average damages were £16,003, average costs claimed were £26,074, and average costs recovered were £22,127. In this upper band, the difference between the lowest and highest recovered costs was again significant: £12,000 and £50,000 respectively. In the band £5,000-9,999 it was very similar: £11,500 for the cheapest case and £55,000 for the most expensive (although costs in this latter case were exceptionally high, perhaps because of the severity and length of the disrepair; the second most expensive case in this category had recovered costs of £28,549).
- (v) Only three cases settled at trial: one where the damages were £2,781, and the claimed costs were £42,649 (and were still in dispute). In the other two, damages were similar (£9,000 and £8,000), claimed costs were identical

(£25,000), and recovered costs were also very close (£22,330 and £24,000 respectively).

3.9 Second dataset from HLPAs. The second dataset (appendix 6) gave more detailed information on 31 further housing disrepair cases, including profit costs, experts fees, counsel's fees, other disbursements, total costs claimed (including VAT) and total costs recovered (also including VAT).

- (i) 19 cases settled pre-issue, and as with the first dataset, damages were of little relevance in determining costs. Average costs recovered pre-issue were £6,947, of which £805 was the average amount paid in respect of experts fees (in the 16 cases where expert fees had been incurred). Counsel was not required pre-issue in any of the cases.
- (ii) There were only two cases that settled post-issue: counsel was instructed in neither case.
- (iii) There were three cases that settled after the defence was filed but before exchange of witness statements: here damages ranged from £3,000 to nearly £41,500, though the variance in the costs recovered was much less, from £10,157 to £21,000. Counsel was instructed in none of the cases, and average experts fees were £700 (ranging from £400 to £1,100).
- (iv) There were six cases that settled after exchange of witness statements but before trial: damages ranged from £7,875 to £18,500 (averaging at £10,853), and total costs recovered averaged at £21,012. Experts were instructed in all of the cases (and counsel only in two), and the average fee was £918 (ranging from £465 to £1,567).
- (v) There was just one case that settled at trial: here damages were around £20,000, and total costs recovered were £25,000 (of which experts fees and counsel fees were both in the region of £1,380).

3.10 Comparison of data with Tables 5.1 and 5.2. Readers may wish to compare the figures set out in this section of chapter 3 with Tables 5.1 and 5.2 in chapter 5. In conducting any such exercise, they should bear in mind that:

- (i) There will be 'process' savings if recoverable costs are fixed.
- (ii) Many of the figures quoted in this chapter include disbursements which are additional to the sums shown in Tables 5.1 and 5.2.

4 Review of multi-track data

4.1 Extensive data and submissions. I received a substantial amount of data concerning the multi-track through the submissions. These ranged from individual case studies to large datasets. I do not set out in detail all of the information received; instead I focus principally on the larger and more informative datasets, whilst attempting also to give a picture of the various other data received. For example, many submissions contained one or more detailed case studies, intended to illustrate some of the costs and proportionality issues that typically arise in the litigation under consideration. I have taken those points into account, but I refer only to a selection of case studies below. Much of the data received through the submissions concerned clinical negligence. It should be noted that sometimes datasets included data drawn from both clinical negligence and personal injury cases. Where possible, this chapter separates out that material.

(a) Clinical negligence

4.2 Data from the Medical Protection Society. The Medical Protection Society sent through a spreadsheet with data from 1,214 clinical negligence cases which were funded by way of a conditional fee agreement entered into on or after 1st April 2013. It gave details of the estimate of damages, the claimant's 'claimed' budget total, and the claimant's 'agreed' budget total. Using this information, I produced the following table:

	Damages £0-£25,000	Damages £25,001-£50,000	Damages £50,001-£100,000	Damages £100,001-£250,000
Number of cases	1,047	133	32	2
Average Claimed Budget	£12,524	£20,110	£35,958	£93,535
Average Approved Budget	£8,505	£14,782	£27,455	£105,550
Average Reduction	£4,020	£5,328	£8,503	-£11,965
Average Percentage Reduction	32%	26%	24%	-13%

For the cases valued up to £100,000, the agreed costs are between 24-32% lower than the claimed costs, with the majority of cases valued up to £25,000. There were only two relevant cases above £100,000 – one case had a reduction of £20,242, whereas the other case had an increase of £44,172.

4.3 The Bar Council. According to data from the Bar Council, average approved costs in multi-track clinical negligence cases up to a value of £250,000 were £100,975. This figure was based on approved budgeted costs for the entirety of the cases in the sample; and the dataset indicated that the budgets were all claimant-side. There were, however, only four cases in the sample, ranging in value from the £10,000-£25,000 bracket, to £200,001-£250,000.

4.4 NHS Resolution data concerning costs paid. From NHS Resolution (until recently NHSLA) I received three sizeable datasets, showing costs paid to claimants in post-LASPO cases where three costs negotiators had negotiated or settled costs on the NHSLA's behalf.

- (i) The first dataset contained 62 cases, although in four of those the damages were well over £250,000, and a further nine were employers' liability or public liability cases. It gave details of the amount of damages, the claimant's 'claimed' budget total, the claimant's 'approved' budget total, costs incurred prior to the CCMC, incurred costs as a percentage of the claimant's approved budget, the amount of costs sought by the claimant at the end of the case, and (where available) the amount of costs actually agreed to be paid. Using that information, I was able to put together the following table showing average costs:

	Damages £0- £25,000	Damages £25,001- £50,000	Damages £50,001- £100,000	Damages £100,001- £250,000
Number of cases	18	17	9	5
Average Claimed Budget	£107,557	£148,879	£171,257	£211,154
Average Approved Budget	£85,489	£111,593	£134,769	£181,941
Average Reduction	£22,068	£37,286	£36,488	£29,213
Average Percentage Reduction	21%	25%	21%	14%
Average Incurred Costs	£25,124	£37,385	£46,988	£56,125
Average Costs Claimed at End of Case	£53,786	£71,956	£85,489	£118,081
Average Costs Paid¹³	£28,904	£43,833	£56,930	£92,630

- (ii) The second dataset (containing 24 cases, of which three were valued at well over £250,000) gave the date of the incident, the amount of damages, the claimant's incurred costs, the claimant's claimed post-budget costs, and the claimant's approved costs (both incurred and post-budget). Based on these data, I produced the following table:

	Damages £0- £25,000	Damages £25,001- £50,000	Damages £50,001- £100,000	Damages £100,001- £250,000
Number of cases	8	5	4	4
Average Claimed Budget	£151,632	£96,956	£85,571	£158,648
Average Approved Budget¹⁴	£130,998	£82,131	N/A	N/A
Average Reduction	£20,634	£24,825	N/A	N/A
Average Incurred Costs	£38,695	£20,318	£20,769	£39,119

For some reason, several of the cases in the lowest band were exceptionally costly. In all but one case, claimed costs ran to well over £100,000 (and in two cases, they exceeded £200,000). Of the cases where a CCMC had taken place,

¹³ Not all cases had reached costs-settlement. Thus, the figures for 'average costs paid' were based on 15 cases in the band £0-£25,000, on 15 cases in the band £25,001-£50,000, on all nine cases in the band £50,001-£100,000, and on all five cases in the top band.

¹⁴ Not all cases reached the CCMC. Thus, the figures for 'average approved budget' were based on six cases in the band £0-£25,000, and on two cases in the band £25,001-£50,000. There were no cases which had reached the CCMC in the top two bands.

approved costs were below £100,000 in one case only. Excluding the highest outliers, the average claimed budget was £122,208, and the average approved budget was £93,523.

- (iii) The third dataset (containing 28 cases, of which 15 were valued below £250,000) gave the value band, the claimant's incurred costs, the claimant's claimed costs, and the claimant's approved costs. Based on these data, I produced the following table in respect of the 15 cases valued below £250,000:

	Damages £0- £50,000	Damages £50,001- £100,000	Damages £100,001- £250,000
Number of cases	5	5	5
Average Incurred Costs	£23,444	£71,956	£73,362
Average Claimed Future Budget (excluding incurred costs)	£89,611	£157,697	£149,106
Average Approved Future Budget (excluding incurred costs)	£62,791	£103,420	£130,327
Average Reduction	£26,820	£54,278	£18,779

4.5 NHS Resolution data concerning both budgets and costs paid. NHS Resolution have supplied the details of both budgets and the costs actually paid out in 62 post-LASPO cases. The spreadsheet at appendix 7 sets out this information. The total damages paid to claimants in those 62 cases amounted to £4.8 million. The total costs paid to claimant representatives amounted to £3.1 million. The latter figure includes court fees, expert fees and other disbursements, but excludes the costs of six cases which have not yet been resolved. The total of the budgeted costs for all 62 cases (assuming each one was contested to trial) was £7.3 million (actual incurred plus future approved/agreed costs).

4.6 A firm of costs lawyers.¹⁵ A firm of costs lawyers provided a graph (appendix 8) showing profit costs claimed in relation to damages recovered, in 660 clinical negligence cases which settled between April 2014 and November 2016, where the damages were up to £250,000. One difficulty with the data is that the stage at which each case settled is not known. It is assumed that most of these cases were multi-track.

4.7 A large claimant firm. A UK-wide claimant firm with a significant clinical negligence practice provided a set of tables showing the average amount approved for each of the Precedent H phases (including incurred costs), in all of their clinical negligence and personal injury cases which have been the subject of costs management. In the band £25,000-£49,999 there were 84 cases, of which 25 were clinical negligence cases and 59 were personal injury; in the band £50,000-£99,999 there were 126 cases, of which 53 were clinical negligence cases and 73 were personal injury. The firm found that on average, 24% of costs were represented by disbursements (though not including counsel's fees).

¹⁵ This is the same firm as referred to in paragraph 3.7 above. They have also produced similar graphs for other personal injury cases. I do not reproduce those graphs here because the split between fast track and multi-track cases is unclear.

Subtracting that amount from the totals produced average approved amounts across all phases of £62,635 for the band £25,000-£49,999, and £85,840 for the band £50,000-£99,999.

Phase	Value £25,000-£49,999	Value £50,000-£99,999
Pre-Action Costs	£3,990	£5,593
Issue/Pleadings	£9,448	£12,569
CMC	£4,546	£5,198
Disclosure	£4,308	£5,674
Witness Statements	£4,675	£5,595
Expert reports	£19,218	£27,473
PTR	£1,990	£2,036
Trial Preparation	£7,646	£10,102
Trial	£19,225	£26,202
Settlement/ADR	£5,980	£8,534
Contingent Costs	£1,388	£480
Total	£82,414	£109,456

The firm also supplied further details of 20 of the cases within the sample (10 of which were clinical negligence cases): including the type of case, estimated damages, what issues were in dispute at the date of the budget, key features of the case, the total of the approved budget (both with and without disbursements), and the amount allowed for each Precedent H phase.

4.8 A large defendant firm. From a Senior Consultant at an England-wide firm of solicitors undertaking a high volume of cases for NHS Resolution, I received information on the average costs incurred by firms on NHS Resolution's legal panel, for all cases closed in the 12 months to 30th November 2016 (some 1,259 in total). These data show that the defendants' costs in cases valued between £1,000 and £50,000 were on average £6,180, while the average in cases valued between £50,001 and £250,000 were just £18,968. These figures must be treated with some caution, however. There was no information as to at what stage (if at all) the underlying cases had settled; it was not clear whether all cases in the bottom two bands (where the claimant lost, and where the damages were between £1,000 and £50,000) were multi-track cases; and the numbers do not tell us much about average defendant costs *within* the bands £1,000-50,000 and £50,001-250,000.

Damages:	0	£1,000-£50,000	£50,001-£250,000	£250,001 - £500,000	£500,001 -£1 million	>£1 million	PPOs
No. of Cases:	526	496	150	32	17	8	22
Panel Average Costs (£):	4,498	6,180	18,968	43,404	64,255	89,374	118,132

4.9 Large set of chambers outside London: approved budgets. A large set of chambers outside London provided the following details of approved budgets in four of their post-LASPO clinical negligence cases.

Band of case	£50-100k	£50-100k	£50-100k	£175-250k
Profit Costs	126,689	42,121	26,753	91,095
Counsel's fees	44,480	17,395	14,850	30,250
Total profit costs and counsel's fees	171,169	59,516	41,603.20	121,345
Comments	Delayed diagnosis of HIV. Fought by defendant until one month before trial. Claim limited to £100,000 (in fact settled for £35,000). Budget approved by Circuit Judge.	Delayed diagnosis of appendicitis. Breach admitted. Causation in issue. One expert on each side.	Breach admitted. Dispute over cause of hearing loss in one ear. Only special damages for cochlear implants.	Hand injury significantly reducing mobility of already disabled patient.

4.10 Costs recovered by a large claimant firm. A large claimant firm of solicitors has supplied details of the damages and costs received in seventeen clinical negligence cases, but only one of those cases was post-LASPO. That was a case of neonatal death and psychiatric injury to a mother. The mother was a midwife and has been unable to return to her profession. The defendant admitted causing the child's death but denied the mother's claim. Two experts were instructed. The case settled after issue but before the CCMC. The agreed damages were £141,000 and the agreed costs were £115,000.

(b) Personal injury

4.11 Extensive data. The amount of data received in respect of clinical negligence was exceeded only by the data relating to personal injury. As noted above, the dataset from the large UK-wide claimant firm contained both clinical negligence and personal injury data.

4.12 Professor Fenn's analysis. Professor Fenn undertook an analysis of defendant data received from Taylor Rose TTKW on multi-track personal injury cases settled since LASPO, where (a) the claimant recovered less than £100,000 and (b) the claimants had provided not more than three expert reports. The graphs representing the data are at appendix 9. The second page of the appendix contains a fairly technical account of Professor Fenn's analysis of the data. Readers will find a more user-friendly explanation in chapter 7, paragraph 5.5.

4.13 The Bar Council. The Bar Council data showed that the average approved budget in three multi-track RTA cases and one multi-track non-RTA personal injury case, all valued between £25,001 and £50,000, came to £58,571. The dataset indicated that the budgets were all claimant-side. There were two further budgets in the dataset (also apparently claimant-side): one for a case valued between £50,001 and £100,000, for £100,000; and one for a case in the £200,001-£250,000 bracket, for £96,189. The average approved budget in three multi-track industrial disease cases, valued up to £50,000 was £60,117 (all

claimant budgets). Combining the four RTA and three industrial disease cases produced an average approved budget of £59,233.

4.14 Association of British Insurers. From the Association of British Insurers, I received three sets of data which were collated by two of their member insurers.

- (i) Insurer 1 provided the following tables, showing average costs in personal injury cases actually paid to claimants in cases where the accident had occurred after 1 April 2013, and which had settled (including costs settlement) before 22 February 2017. One difficulty with this data, of course, is that it did not show at what stage the litigation had settled:

Value Bracket (Settlement)	No. of Cases Settled	Total Costs Paid (excluding disbursements)	Average Costs Paid (excluding disbursements)
£25,001-£50,000	174	£1,464,647	£8,417
£50,001-£100,000	65	£896,550	£13,793
£100,001-£150,000	16	£299,613	£18,725
£150,001-£200,000	2	£54,350	£27,175
£200,001-£250,000	4	£169,901	£42,475

Value Bracket (Settlement)	No. of Cases Settled	Total Costs Paid (including disbursements)	Average Costs Paid (including disbursements)
£25,001-£50,000	174	£1,761,822	£10,125
£50,001-£100,000	65	£1,055,189	£16,234
£100,001-£150,000	16	£352,615	£22,038
£150,001-£200,000	2	£54,500	£27,250
£200,001-£250,000	4	£173,980	£43,473

- (ii) Insurer 2 provided two datasets. The first concerned information about employer's liability (excluding industrial disease), PL, RTA and industrial disease claims, which had commenced after 1 April 2013. Although this data stated the average time between notification of the claim and settlement, it was still not generally clear at precisely what stage the underlying cases had settled. Crucially, it was also not known whether these were costs claimed or costs actually paid. The first table shows disease claims, the second other personal injury claims:

Claim Type	Value Band	Count of Claimants	Ave Claimant's Costs	Average Days to Settle
Disease excluding NIHL	Up to £25,000	273	£18,585.97	171
Disease excluding NIHL	£25,000 to £50,000	67	£28,900.03	192
Disease excluding NIHL	£50,001 to £100,000	57	£37,178.28	145
Disease excluding NIHL	£100,001 to £175,000	45	£42,478.15	122
Disease excluding NIHL	£175,001 to £250,000	19	£45,390.38	179
Disease NIHL	Up to £25,000	462	£13,294.58	162
Disease NIHL	£25,000 to £50,000	1	£33,500.00	127

Claim Type	Value Band	Count of Claimants	Ave Claimant's Costs	Average Days to Settle
EL	£25,000 to £50,000	14	£14,978.35	47
EL	£50,001 to £100,000	6	£21,461.67	85
EL	£100,001 to £175,000	3	£22,135.40	132
EL	£175,001 to £250,000	1	£10,500.00	47
PL	£25,000 to £50,000	10	£20,453.52	105
PL	£50,001 to £100,000	2	£55,500.00	80
PL	£100,001 to £175,000	3	£16,808.27	112
PL	£175,001 to £250,000	1	£33,800.00	8
Motor	£25,000 to £50,000	3	£17,256.61	136
Motor	£50,001 to £100,000	1	£12,625.00	55
Motor	£100,001 to £175,000	2	£14,750.00	232

- (iii) The second dataset from Insurer 2 concerned personal injury cases (ELD, ELA, RTA, public/product liability and occupier's liability), where the accident occurred after 1 April 2013:

	Count of Claims	Average of Total Base Costs paid	Average of Time to agree costs [Days]
ELD	18	£12,348	84
£0 - £25k	6	£7,142	37
£25k - £50k	1	£12,039	423
£50k - £250k	11	£15,215	79
ELA	225	£5,417	79
£0 - £25k	188	£4,815	84
£25k - £50k	24	£6,536	45
£50k - £250k	13	£12,068	82
RTA	71	£4,389	90
£0 - £25k	52	£3,058	86
£25k - £50k	12	£7,582	124
£50k - £250k	7	£8,803	61
Public/Products Liability	71	£5,418	44
£0 - £25k	55	£4,853	44
£25k - £50k	14	£7,856	47
£50k - £250k	2	£3,878	35
Occupiers Liability	75	£4,966	75
£0 - £25k	66	£4,690	77
£25k - £50k	7	£6,317	53
£50k - £250k	2	£9,344	80
Grand Total	460	£5,456	75

4.15 A large claimant firm. A UK-wide firm of solicitors specialising in conducting claimant personal injury work sent me the table at page 2 of appendix 3. This shows the chronological stage (pre-issue, between issue and CMC, between CMC and PTR, between PTR and trial, and trial) at which average costs for each Precedent H phase were incurred. The averages were based on 28 personal injury cases (I understand that one may have been a clinical negligence case) valued between £25,000-50,000, £50,001-100,000, £100,001-175,000, and £175,001-250,000. Of these 28 cases, 19 were valued below £100,000. The

table shows that the average approved budget in a case valued between £25,000-50,000 was £54,703; between £50,001-100,000 it was £60,891; between £100,001-175,000 it was £83,583; and between £175,001-250,000 it was £174,628. The table is particularly interesting in showing something of the interrelationship between the Precedent H phases and the actual progress of multi-track personal injury litigation. For example, across all four bands, 25% of the work involved in the disclosure, witness statement and expert reports phases was done pre-issue.

4.16 Case studies. I received a significant number of case studies, from APIL, FOCIS,¹⁶ and a number of solicitors firms, as well as a large set of chambers outside London, which sought to illustrate the costs and proportionality factors (such as parties' behaviour, the difficulty in valuing claims at the outset, the lack of a clear relationship between value and costs, and so on) which often arise in personal injury claims. Many of the case studies concerned high-value catastrophic injury claims, mesothelioma and other fatal claims, and claims for historic sexual abuse. Nevertheless, I take into account all of the points made, and include some of the case studies which included information on costs below.

- (i) An RTA claim, where liability was admitted. The claimant sustained injury to his neck and lower back, as well as psychological injury. The value of the claim was £30,500, and the claimant's budget was approved in the sum of £23,779.
- (ii) An RTA claim, where liability was admitted. The claimant's primary injury was a fractured right arm, although he had other soft tissue and psychological injuries. He was unable to work for some time after the accident (as a self-employed garage mechanic) and there was a complicated claim for loss of earnings. The value of the claim was £45,000-50,000, and the claimant's budget was approved in the sum of £33,604.
- (iii) An RTA claim, where liability was admitted. The issues on quantum were described as 'typical', in that there was said to be a minor effect on the claimant's ability to perform domestic activities and work. There was also an issue as to the possible short acceleration of a pre-existing heart condition. There were three experts for the claimant. The value of the claim was £50,001-100,000, and the claimant's budget was approved at £64,660 (of which £19,660 were counsel's fees).
- (iv) An ELA claim, where liability was in dispute and contributory negligence alleged. The claimant slipped and fell, hitting his head. He developed somatoform and psychological symptoms. The value of the claim was £21,000, and the claimant's budget was approved in the sum of £55,123.
- (v) An ELA claim, where causation was in dispute. The claimant developed back problems, allegedly as a result of having to undertake manual digging when his mechanical digger was taken away by his employer. The claimant had pre-existing back problems, and there was a dispute as to whether his inability to return to manual work was due to those problems, or to the injuries sustained as a result of the accident. The value of the claim was £30,000-50,000, and the claimant's budget was approved in the sum of £41,354.
- (vi) An occupational stress claim, where causation and quantum were disputed. There was one psychiatry expert on each side. The claim was valued between £100,001 and £175,000 (although it later settled, without any admission, for

¹⁶ The Forum of Complex Injury Solicitors.

£20,000). The claimant's budget was approved in the sum of £75,125 (of which £22,625 were counsel's fees).

- (vii) A fatal ELA claim, where no expert evidence was required. The claim was valued between £200,001 and £250,000 (and later settled for £200,000). The claimant's budget was approved at £60,784 (of which £25,600 were counsel's fees).

(c) Business and property disputes, including non-medical professional negligence

4.17 Case studies. I received case summaries from several sources, designed to illustrate some of the proportionality factors (especially technical complexity) which typically arise in cases in this area. I take all those points into account, but in the interests of time and space only refer to a few examples here:

- (i) A claim against a mortgage broker, alleging negligent advice to take a particular mortgage product. Limitation was in issue. The damages claimed were just under £35,000, and the trial estimate was two days. The claimant's budget was approved in the following sums (the defendant's was not available, but was approved in the amount of £75,692):

Phase	Approved sum
Pre-Action	£8,727 incurred
Issue/Pleadings	£10,953 (£9,548 incurred)
CMC	£3,153
Disclosure	£3,940
Witness Statements	£2,955
Expert Reports	£15,170 (£5,170 incurred)
PTR	£4,994
Trial Preparation	£6,640
Trial	£16,300
ADR/Settlement Negotiations	£4,857
Contingency: mediation	£5,340
Total	£83,029

- (ii) A subrogated property damage claim arising out of the flooding of domestic premises, allegedly because the defendant failed to ensure that its adapted arable field was properly drained. The claim is for up to about £225,000, including general damages for inconvenience. At the CCMC directions were given for expert evidence in two fields (agriculture and drainage), and for a five day trial. The claimants' budget was approved as follows:

Budget phase	Allowed
Pre-Action	£31,316 incurred
Issue/Pleadings	£30,000
CMC	£10,070
Disclosure	£20,000
Witness Statements	£15,000
Expert Reports	£50,000
PTR	£11,548
Trial Preparation	£22,785

Budget phase	Allowed
Trial	£43,831
ADR/Settlement Negotiations	£10,000
Contingency: Mediation	£22,955
Total	£267,505

4.18 The Bar Council. According to data from the Bar Council, the average approved budget in multi-track property cases (including landlord and tenant disputes) up to a value of £250,000 was £90,307; however, the sample consisted of only three cases (one in the £25,001-£50,000 bracket, one in the £100,001-£150,000 bracket, and one in the £200,001-£250,000 band). For breach of contract claims (including non-medical professional negligence and construction disputes), the average approved budget was £127,576. This included both claimants' and defendants' budgets, and the sample consisted of seven budgets for six cases (one case in the £25,001-£50,000 bracket, two in the £50,001-£100,000 bracket, and three which were valued at over £100,000). A further seven cases had been concluded (though it was not clear at what stage) and had been agreed, or reached detailed or summary assessment; there the average costs awarded were £25,747.

4.19 An international commercial law firm. From an international commercial law firm, I received details of costs billed by them (plus counsel's fees) in the following five claims with values within (or around) the proposed pilot claim value. The work was carried out from offices outside London:

	Example 1	Example 2	Example 3	Example 4	Example 5
Value	£28,000; £45,000 counterclaim	£70,000 (settlement, plus costs of £120,000)	£88,000 (plus costs)	£220,000 (originally pleaded as £100- 150,000)	£325,094
Type of claim	Debt/breach of contract (unpaid professional fees; counterclaim for professional negligence)	Debt/breach of contract (unpaid invoices; counterclaim for defective goods)	Debt/breach of contract (unpaid invoices)	Breach of contract (in respect of pension contributions)	Breach of contract (wrongful termination)
Pre-Action Costs	£10	£48,000	£750	£9,000	£3,900
Issue/ Pleadings	£16,700	£19,000	£34,450	£8,000	£5,000
CMC	£7,750	£24,000	£5,800	£6,000	£6,750
Disclosure	£11,200	£17,000	£5,500	£5,500	£11,700
Witness Statements	£10,500	£16,000	£10,200	£8,000	£4,500
Expert reports	£0	£79,000	£13,000	£4,500	£4,300

PTR	£6,350	£9,500	£1,400	NA (settled; approved budget was £5,000)	£5,100
Trial Preparation	£9,500	£9,000	£16,400	NA (settled; approved budget was £7,000)	£10,000
Trial	£12,500	NA (settled)	£21,000	NA (settled; approved budget was £15,000)	£33,000
Settlement/ADR	£9,000	£12,750	£1,500	£3,500	£14,500
Total	£83,510	£234,250	£110,000	£44,500	£98,750

4.20 A set of chambers in London. A leading set of London chambers, specialising in commercial work, non-medical professional negligence and TCC, sent in a table showing its counsel's fees that had been approved for each Precedent H phase at CCMCs between February 2013 and March 2016, across 61 cases valued between £25,000 and £250,000. The cases consisted of general civil, commercial, shipping, non-medical professional negligence, and TCC cases.

Phase	Value £25,001-£50,000	Value £50,001-£100,000	Value £100,001-£175,000	Value £175,001-£250,000
Pre-Action Costs	£6,248	£1,035	£1,597	£0
Issue/statements of case	£2,357	£2,148	£3,411	£5,655
CMC	£1,421	£1,773	£2,205	£2,442
Disclosure	£ 891	£ 947	£1,600	£2,369
Witness Statements	£1,751	£1,162	£2,410	£4,792
Expert reports	£1,717	£2,014	£2,035	£4,786
PTR	£1,486	£1,718	£2,098	£2,288
Trial Preparation	£5,522	£6,063	£8,407	£8,988
Trial	£5,938	£10,186	£10,300	£21,802
Negotiations/ADR	£1,014	£1,533	£2,799	£2,092
Total	£28,345	£28,579	£38,882	£66,214
Total number of cases	13	17	18	13

They also very helpfully sent details of the underlying cases (appendix 10). This enabled me to identify that, for the purposes of calculating the average fees, the chambers had excluded cases where no fee was charged. Thus, the sum of £6,248 for pre-action costs in the lowest band was based on only two cases, not all 15 that fell within the band. The tables derived from the budget exercise (see section 2 above) calculated the average costs on the basis of all cases irrespective of whether any costs were allowed for a particular phase. Therefore, in order to be comparing like with like (and to reflect the fact that some phases typically do not require counsel's involvement), I recalculated the averages as follows:¹⁷

¹⁷ I should also note that one of the cases in the band £25-50,000 appeared to be an extremely complex financial services case, which merited the involvement of counsel of the highest level at every stage of the case (and as a consequence, approved counsel's fees ran to some £99,000). I therefore excluded that case when recalculating the averages.

Phase	Value £25,001- £50,000	Value £50,001- £100,000	Value £100,001- £175,000	Value £175,001- £250,000
Pre-Action Costs	£81	£61	£266	£0
Issue/statements of case	£1,357	£2,021	£3,221	£5,655
CMC	£1,005	£1,773	£2,082	£2,442
Disclosure	£460	£780	£889	£1,640
Witness Statements	£1,335	£1,162	£2,410	£4,423
Expert reports	£871	£1,303	£1,469	£3,313
PTR	£946	£1,718	£1,865	£2,112
Trial Preparation	£2,979	£4,279	£7,006	£2,765
Trial	£4,121	£10,186	£10,300	£20,125
Negotiations/ADR	£591	£1,172	£1,555	£1,448
Total	£13,745	£24,455	£31,063	£43,925
Total number of cases	12	17	18	13

(d) Defamation

4.21 Media Lawyers Association. From the Media Lawyers Association, an association of lawyers working in-house at a wide range of publications, I received a table detailing costs incurred in 11 libel, privacy and/or breach of confidence claims. Figures are approximate; those in bold refer to costs budgets approved by the court; and shaded cells signify that the information is not known. It should be noted that it is by no means clear that all or indeed any of these cases were post-LASPO, and there was no information as to the value or features of any of the claims:

Type of claim	Stage at which litigation was concluded	Claimant's costs	Defendant's costs	Uplift pursuant to any CFA ¹⁸
Libel	Trial	£975,000	£671,000	None
Libel	Preliminary issue trial (public interest) and appeal		£220,000	100% counsel; 95% solicitors

¹⁸ Conditional fee agreement.

Libel	Trial	£535,000	£450,000	100%; £500,000 ATE ¹⁹
Libel	Strike-out	£930,000	£435,000	None
Libel/privacy	Strike-out		£274,000	
Breach of confident	Injunction granted	£70,000	£20,000	None
Defamation	Trial		£325,000	100%
Libel	Trial		£240,000	
Libel	Ongoing	£279,000	£200,000	
Libel	Appeal	£138,000		Up to 100%
Libel	Trial	£330,000	£350,000	None

4.22 A set of chambers in London. A leading set of London chambers, specialising in media and defamation work, provided the information summarised in the following table detailing the budgets approved in 14 post-LASPO cases (again, shaded cells signify that the information was not known):

Cause of action	Value on claim form	Result	Estimated trial length	Total approved budget (£)	Trial Prep (solicitors + counsel's fees) (£)	Trial (solicitors + counsel's fees) (£) ²⁰
Libel	Unlimited	D win	7 days	C: 370,000 D: 346,554	C: 56,000 D: 39,800	C: 223,000 D: 205,000
Libel		£5,000	7 days	C: 260,624 D: 422,924	D: 63,000	D: 68,000
Libel			10 days	C: 954,606 D: 712,801	C: 87,250	C: 309,100
Privacy		£5,000	3 days	C: 128,695	C: 30,600	C: 38,820
False imp., slander, harassment	£100,000	£32,000	7 days	C: 127,734	C: 5,380	C: 34,895 ²¹
Libel		Settled ²²	5 days	C: 230,010	C: 44,500	C: 35,000
Privacy	£15,000	Settled	3 days	C: 520,430	C: 33,492 ²³	C: 94,990
Libel	Unlimited	D win	6-10 days	C: 427,000 D: 579,621	C: 34,725 D: 41,700	C: 204,750 D: 245,700
Libel		£10	1 ½ days	C: 91,557 D: 93,616		

¹⁹ After-the-event insurance.

²⁰ Counsel's fees, on both sides, typically accounted for 69% of the approved sum for trial.

²¹ Counsel only.

²² Where the case settled, no information about the damages agreed is available for confidentiality reasons.

²³ Solicitor only.

Libel, harassment	Unlimited	Ongoing	10 days	C: 722,693	C: 31,465 ²⁴	C: 237,000
Libel, harassment	£50,000	Settled	4 days	C: 139,240 D: 190,598	C: 31,900 D: 17,000	C: 21,000 D: 70,000
Libel	Unlimited	£185,000	10 days	C: 1,144,054 D: 823,727	C: 105,290 D: 66,250	C: 335,286 D: 350,000
Libel	£100,000	Ongoing	10 days	C: 279,373 D: 354,667	C: 16,800 D: 18,000	C: 148,400 D: 145,000
Libel	£10,000	Ongoing	3 days	C: 196,995	C: 21,800	C: 58,800

(e) Judicial review and civil actions against public authorities

4.23 Scarcity of data. Aside from the extensive budget data supplied by PALG, I received very little in the way of data concerning actions against public authorities. This is hardly surprising, since costs management does not apply to judicial review claims, and civil actions against public authorities form a relatively small and specialist area.

4.24 Case studies. I did, however, receive some case studies setting out the costs and proportionality considerations that arise in such cases. In the context of judicial review claims, those considerations are discussed in chapter 10 below. Some of the same considerations apply to private law actions against public authorities. In particular, such actions provide another mechanism by which public authorities may be held to account for their actions; and such actions can make important contributions to the law on the scope of public authorities' duties. I include a few illustrative case studies below:

- (i) A claim against the police for assault, battery and false imprisonment. The claimant had QOCS protection, and was funded by way of a CFA and post-LASPO ATE insurance. Psychiatric and orthopaedic reports were required, and the trial lasted for one week in the High Court Queen's Bench Division. £48,000 was awarded in damages. The claimant's budget was approved in the sum of £230,000 (of which £47,000 were counsel's fees).
- (ii) The female claimant was arrested in a nightclub and strip searched by male officers, in breach of police codes of practice. She suffered psychiatric injury as a result. The case settled for £37,000, after 240 hours had been worked by the solicitors firm having conduct of the case (amounting to around £66,000 in time costs). Costs were agreed at £70,000 (comprising £42,000 in time costs, plus VAT, and counsel's fees of £7,500, ATE premium of £7,420, other disbursements (court fees and experts) of £5,080).
- (iii) The claimant's mother (the deceased) was admitted to a psychiatric hospital, and assessed as at a low risk of suicide (despite having expressed an intention to take her own life). At handover, staff were not informed that she should be reassessed if she became agitated and tried to leave the ward. She did leave the ward, and the staff delayed in searching for her and contacting the police. During that time, she sadly took her own life. An inquest took place over three weeks, which resulted in findings of a number of failings by staff at the hospital. The claim for damages settled shortly after the inquest for £17,500.

²⁴ Solicitor only.

Costs are yet to be assessed, but consisted of time costs of £79,889, counsel's fees of £9,448, and a court fee of £2,750.

4.25 Comparison of data with Table 7.1. Readers may wish to compare the figures set out in sections 2 and 4 of this chapter with Table 7.1 in chapter 7. In undertaking any such exercise, they should bear in mind that:

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

Chapter 4 - Seminars and meetings

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1 Introduction

1.1 During this review, I have held five public seminars, which were organised by the Master of the Rolls' office. These were at Leeds, Manchester, London, Birmingham and Cardiff. I have also attended other civil justice events and had meetings with stakeholder groups. The objective has been to consult as widely as possible, despite the constraints of sitting as a judge in the Court of Appeal (which occupies most of my working hours). I am grateful to all those who took part and to those who hosted the events/meetings which I attended.

1.2 This chapter provides a brief summary of those seminars and meetings. The events are set out in chronological order.

2 Meeting with compensators

2.1 On the afternoon of 10th January 2017, I attended a meeting¹ with representatives of liability insurers, before the event insurers and the National Health Service Litigation Authority ("NHSLA"). They were unanimously supportive of the proposal to extend fixed recoverable costs ("FRC") across the lower regions of the multi-track. Most favoured introducing FRC for claims up to £250,000, although one delegate suggested that we should stop at £100,000. All present accepted that the vast majority of their claims were below £100,000.

¹ Kindly hosted by Keoghs.

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- 2.2 They made the following points during the meeting:
- (i) Too many cases are escaping from the fast track FRC regime, because of the increasing number of exceptions.
 - (ii) Costs budgeting, though effective at controlling costs after the costs and case management conference (“CCMC”), does not bite on pre-issue costs. These can be substantial, especially if claimant solicitors front load.
 - (iii) Any FRC regime should apply across the board. Otherwise there will be displacement. There was a marked increase in noise induced hearing loss (“NIHL”) claims after fixed costs were introduced for other fast track personal injury claims.
 - (iv) There should be prescriptive pre-action protocols to regulate the conduct of multi-track cases falling within any FRC regime. These protocols should include a requirement to agree the classification of the case within the FRC regime at an early stage. Certainty of costs from the outset is the goal.
 - (v) Views differed on whether any FRC structure should (a) be chronological as in the fast track or (b) follow the Precedent H stages. The litmus test will be which variant promotes greater certainty and predictability.
 - (vi) Whatever upper limit may be chosen for the fixed costs regime will result in ‘squeezing of the sausage’ (in other words, claimants artificially pushing their cases above that limit, in order to avoid fixed costs).
 - (vii) At the moment (a) almost all clinical negligence cases below £25,000 and (b) a small proportion of employers' liability disease cases and professional negligence cases below £25,000 are allocated to the multi-track. Therefore, any fixed costs regime for the multi-track will need to cater for these cases.
 - (viii) It is important not just to look at data regarding historic costs. It is also necessary to explore how long work should take and what costs ought to be.

3 Meeting with claimants

3.1 On the evening of 10th January 2017, I attended a meeting² with claimants and their solicitors. I shall refer to the individual claimants by letters. Also present were a few in-house solicitors from large organisations which frequently litigate, both as claimants and defendants.

3.2 The individual claimants gave vivid accounts of their experiences.

- (i) A had been involved in litigation over shares in a small business. A’s story had a satisfactory outcome. The case settled just before trial and A recovered costs in line with the court approved budget.
- (ii) B brought judicial review (“JR”) proceedings against a public authority following alleged mistreatment of B’s son. B’s own costs were not a problem because there was a CFA in place. B obtained permission to proceed with the JR claim, but thereafter dropped the case because of the adverse costs risk (some £30,000).
- (iii) C was a local authority tenant, who suffered flood damage and botched repairs. She was excluded from her home for three years. C eventually recovered £38,000 damages. C’s solicitor said that C’ costs were £48,000 +

² Kindly hosted by Dentons UKMEA LLP. Practical Law Dispute Resolution organised the meeting. They contacted the profession, inviting claimant solicitors to attend with their clients.

VAT. Such cases usually cost about £50,000 + VAT and expenses, if they run to trial.

- (iv) D, E, F and G brought claims for damages against the police. They described their cases and the stress of litigation. D had been wrongly arrested in a ‘mass arrest’. E’s mother had been murdered. F had been the victim of a sexual relationship with an under-cover police officer. G had been wrongly arrested and injured in the process.

3.3 Two claimants who did not wish to speak publicly in the meeting approached me afterwards with similar stories. Most claimants stressed that they had brought their claims in order to change behaviour, rather than to make money.³ The general view was that (a) costs budgeting seemed to be working well in these cases, (b) a fixed costs regime may make such cases unviable and (c) qualified one way costs shifting (“QOCS”) should be extended to actions against the police and housing claims. One solicitor said that in such cases it is normal for costs to exceed damages and for factors (b) to (e) in CPR rule 44.3 (5) to be relevant.

3.4 The large organisations had a different perspective. They were troubled by the volume of weak or frivolous cases brought against them, increasingly with the support of McKenzie friends. They were concerned that a fixed costs regime would reduce the adverse costs risk for such claimants and therefore lead to more frivolous claims.⁴ There was a fear that if the adverse costs risk is lessened, there may be less incentive to mediate. If recoverable costs are reduced, utilities may litigate less often to recover debts, which would be to the detriment of the general public. One in-house solicitor from an organisation with a high volume of litigation as both claimant and defendant believed that fixed costs would be beneficial on the defendant side, but not the claimant side. Another solicitor dealing with business disputes approached me at the end of the meeting to say that fixed costs would be helpful for business litigants.

4 Meeting with a firm of claimant solicitors

4.1 On the morning of 12th January 2017, I attended a meeting with a firm of claimant solicitors. They took me through a number of their cases, which involved high complexity and modest damages. The previous chapter summarises some of those cases.⁵ The purpose of the exercise was to demonstrate that those cases could not be conducted if there was a fixed costs regime, with costs set at the levels discussed in 2016.

5 Leeds seminar

5.1 On the afternoon of 6th February 2017, I held a seminar in the Leeds office of DAC Beachcroft LLP (with a video link to Newcastle) to discuss chancery and property cases. There were four formal presentations and two discussion sessions. The formal presentations were as follows:

³ D said that he had given his damages to charity. Obviously housing disrepair cases are different: claimants need the damages to restore their homes.

⁴ I commented that most frivolous claims fall within the small claims track, where the adverse costs risk is already minimal. That point was accepted.

⁵ Chapter 3, paragraph 4.24

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- Sara Ashby (solicitor and assessor) explained the regime in the Intellectual Property Enterprise Court (“IPEC”): capped costs for stages of the litigation and an overall cap on costs, with summary assessment (and no costs budgeting); pleadings have documents attached and may stand as evidence in chief; no automatic disclosure or witness/expert evidence, only any specifically ordered by the judge, by reference to a list of issues settled at the CMC; trials completed in two days. This regime is popular and has attracted increased work. The overall costs cap means the maximum adverse costs risk is known (but there are concerns about the operation of Part 36). Any fixed or capped costs regime must be accompanied by procedural reform.
 - Richard Lander (barrister and assessor) said that there are pressures to control costs in chancery and property cases. Costs management is labour intensive, but has the advantage of being flexible. Property and chancery cases are very varied. Some would benefit from FRC and others would not. Possibly there should be an optional fixed costs regime to which appropriate cases could be assigned.
 - Gordon Exall (barrister) was concerned that FRC would prevent cases from being properly prepared. Litigation is inherently expensive and business litigants often behave irrationally. Nevertheless, costs budgeting is starting to work. He had attended an excellent CCMC a few days previously. Mr Exall supports costs budgeting and the new proportionality rule,⁶ but not FRC.
 - Kerry Underwood (solicitor and author of books on fixed costs) said that fixed costs are very successful where we have them. Fixed costs drive behaviour and incentivise efficiency. There is no costs recovery at all in employment tribunals, but they facilitate access to justice (or at least they did until the Ministry of Justice (“Moj”) imposed exorbitant tribunal fees). Mr Underwood would like to see FRC in every case. At present small businesses feel totally excluded from the legal process. Every client is worried about adverse costs.

5.2 In the ensuing discussion, participants expressed a wide variety of views. It was suggested that the IPEC system might apply to inheritance claims, but there was debate about whether claimants for reasonable support could bear part of their own costs. There was both praise and criticism of the way costs management was operating, but most speakers found the process helpful. There were calls for robust case management. The difficulties of putting values on chancery and property claims were discussed. It is necessary to consider complexity as well as the value of what is at stake – the ‘y’ axis as well as the ‘x’ axis. Mediation costs should be included in any FRC regime. It was suggested that pre-action costs should be limited. One barrister explained the operation of the fast track in the Competition Tribunal. This worked well and recoverable costs were capped. Another barrister stressed the public importance of directors’ disqualification cases. They are not suitable for FRC. Unfortunately, they are not subject to costs budgeting.

6 Manchester seminar

6.1 On the morning of 7th February 2017, I held a seminar at the Manchester Civil Justice Centre to discuss personal injury and clinical negligence cases. There were four formal presentations and two discussion sessions. The formal presentations were as follows:

⁶ CPR rule 44.3(5)

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- John Mead (NHSLA)⁷ said that costs have now got out of hand, sometimes far exceeding damages. The NHSLA favours FRC, initially up to £100,000 (which would cover 85% of NHSLA cases), but increasing later to £250,000. The main problem with costs budgeting is that it does not control pre-budget costs. These are on average 30% of total claimant costs. Fixed costs should be calculated “from the ground up”, not be based on current costs which reflect inefficiencies in the current system.
 - Darryl Allen QC (Personal Injuries Bar Association (“PIBA”)) said PIBA accepted that all fast track personal injury and clinical negligence cases should be subject to fixed costs, but opposed fixing costs in the multi-track. Personal injury and clinical negligence are different from all other litigation. The FRC regime has not improved fast track litigation. At best, it has preserved the status quo, but with the junior Bar losing work. Costs budgeting and the new proportionality rule are working, so there is no need for FRC in the multi-track. FRC in the multi-track will have unintended consequences: cases will be run to maximise profit; injured people will have less access to justice; there will be more litigants in person (“LIPs”) and McKenzie friends.
 - Brett Dixon (Association of Personal Injury Lawyers (“APIL”)) said that we are only beginning to see the effects of FRC in the fast track; the case for FRC in the multi-track is not yet made out. The value of a personal injury claim is not a good indication of what it will cost. Only 3.4% of personal injury cases are between £25,000 and £250,000. Costs budgeting is working, although there are issues around incurred costs. In both personal injury and clinical negligence there should be early settlement of issues and costs budgeting of other issues. The *Serious Injury Guide* (the product of collaboration with insurers, soon to be endorsed by the Civil Procedure Rule Committee (“the Rule Committee”)) encourages early settlement of issues.
 - Nigel Teasdale (Forum of Insurance Lawyers (“FOIL”)) said that FOIL has always supported FRC. They bring clarity, certainty and proportionality. Process reform is also important. We must look again at protocols, as these drive behaviours and therefore costs. Two recent Court of Appeal decisions on fixed costs (*Broadhurst*⁸ and *Bird*⁹) have created unintended consequences for defendants. There is superficial attraction in a grid of fixed costs based on Precedent H, since people are now comfortable with Precedent H. But a regime of fixed costs based on chronological stages would allow less scope for ‘costs building’ (e.g. by preparing all witness statements before issue). An incremental approach to reform is best.

6.2 A lively discussion followed both pairs of presentations. Some said that the present FRC regime in the fast track was harsh on the junior Bar. It was suggested that in any multi-track FRC regime the following items of work should be ring-fenced, potentially for barristers: pleadings; conference with expert; advice on evidence and on quantum; pre-trial advocacy; joint settlement meetings in claims for £50,000-100,000; trial advocacy (abated if early settlement). There was criticism of the way the NHSLA conducts litigation by delaying settlement, by failing to make appropriate admissions or proper use of Part 36 and by just

⁷ The body by which Mr Mead was employed was the NHSLA at the date of the seminar. The transition to NHS Resolution did not occur until April 2017.

⁸ *Broadhurst v Tan* [2016] EWCA Civ 94.

⁹ *Bird v Acorn Group Ltd* [2016] EWCA Civ 1096.

going through the motions at settlement meetings. Mr Mead intervened to say that the NHSLA wins 60-75% of the cases that it fights. A solicitor who acts for the NHSLA and the Medical Defence Union was critical of claimant lawyers for drip-feeding information, front loading and over-pleading.

6.3 One solicitor said that fixed costs are beneficial. They are going to come and lawyers should engage with the process. He produced a paper suggesting a grid of fixed costs for all fast track personal injury cases, adding that the current claims Portal figures (relevant to certain personal injury cases) need to be increased. A practitioner dealing with child abuse cases said that these are special and should be exempt from FRC. So should personal injury cases with an international element. A number of speakers stressed that costs budgeting is now working, therefore there is little need for FRC. A solicitor said that the costs figures proposed in the current Department of Health (“DoH”) consultation paper¹⁰ would make the majority of her firm’s clinical negligence cases below £25,000 uneconomic.

6.4 Master Cook (who specialises in managing clinical negligence cases) said that the introduction of costs budgeting had been fraught with difficulty because of the MoJ’s failure to provide sufficient resources. But it is now beginning to work. As a result of judicial training, there is more consistent costs management between different courts. Often parties are agreeing proportionate budgets. The big problem is incurred costs. Perhaps we should fix pre-issue and pre-budget costs, with a rule saying ‘don’t exceed £x without permission’. If we do that, since costs budgeting is now working, there may be no need for a general FRC regime in clinical negligence cases. The Senior Queen’s Bench Master, Barbara Fontaine (assessor to the FRC review), supported what Master Cook had said. She stated that much of the Queen’s Bench masters’ work was in personal injury and clinical negligence. These cases had their own special difficulties. Many of them may not be suitable for FRC. The masters take account of complexity as well as value in costs budgeting. Costs budgeting is now working better and CCMCs are much shorter.

7 Seminar at Cambridge University

7.1 On 20th February 2017, I chaired a small seminar in Cambridge, attended by Professor Neil Andrews (Professor of Civil Justice and Private Law), Robert Turner (former Senior Master and assessor to Lord Woolf) and civil procedure students. I invited views on whether there should be an intermediate track with fixed costs; if so, what cases should go into such a track and what should be its procedures. There was a lively discussion. Professor Andrews proposed that cases where costs are likely to become disproportionate should go into such a track: in particular disputes between neighbours, certain private nuisance claims, disputes concerning family businesses and some other disputes with a ‘family’ element. He suggested that disclosure in the intermediate track should be limited to documents relied upon and other documents specifically ordered by the court. Trial length should be limited. Other speakers said that this could work injustice if the court does not sit full days. Mr Turner said that that problem arises from extra cases being ‘slipped in’. This should not be allowed if there is a time limited trial. Professor Andrews commented that a lot of oral evidence is unnecessary. Perhaps oral evidence should be curtailed.

¹⁰https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/586641/FRC_consultation.pdf.

8 Meeting with the Asbestos Victims Support Groups Forum

8.1 On 10th March 2017, I had a meeting at the Royal Courts of Justice with the chair (Graham Dring) and members of the Asbestos Victims Support Groups Forum UK (“AVSGF”), who I shall refer to by their initials. The forum deals with people suffering from mesothelioma, asbestosis, diffused pleural thickening and asbestos related lung cancer. Mr Dring said that in each of the last three years there were just over 2,500 new cases diagnosed. The expected peak is between 2020 and 2025. Some of the patients claim compensation, others do not. All the claims are multi-track. It is difficult to predict their value in advance. There is a lot of uncertainty and complexity in the claims. The initial process of tracing defendants and their insurers is arduous. Potential defendants are often obstructive, for example by withholding relevant documents. Sometimes you need to employ an insurance archaeologist. Professor H described the process of bringing a claim in respect of his late father, who had died from asbestos related lung cancer. Professor H only managed to trace one defendant, who was liable for 44% of the damages. He said that the costs budgeting process worked satisfactorily in that case.

8.2 The general view of the AVSGF was that such cases were not suited to FRC. The only possible exception was straightforward cases, where only quantum was in issue or where there was only one (co-operative) defendant.

9 London seminar

9.1 On the afternoon of 13th March 2017, I held a seminar at the Law Society in London, principally to discuss JR. There were four formal presentations and two discussion sessions. The formal presentations were as follows:

- Vikram Sachdeva QC (assessor) stated that JR is a special area of law of constitutional importance. Public authorities are better resourced than most individuals. Claimants may face a moving target, because the defendant can retake the decision under attack. Non-legally aided claimants are often deterred by the adverse costs risk. The Government has rejected the QOCS proposal. Therefore, something needs to be done. He outlined several possible reforms, including optional FRC (an extension of the Aarhus Rules)¹¹ and discretionary costs budgeting for larger cases. This first presentation effectively set the agenda for the seminar.
- Nicholas Bacon QC (assessor) reviewed the history of reform proposals in this area, including my own previous proposal for QOCS and Professor Zuckerman’s writings. He surveyed the evidence from different sources as to the costs of JR proceedings. This suggested that in all but exceptional cases the costs were less than £100,000 and very often they were less than £50,000. Indeed, in most cases costs on each side were £35,000 or less. Mr Bacon surveyed the new costs capping rules and the Aarhus Rules. He believed that “a fixed costs regime with the right fair, reasonable and proportionate costs, coupled with an exit route in appropriate cases” could work.
- Robert Bourns (President of the Law Society) welcomed the current programme of seminars and the open consultation process of the FRC review. The Law Society is not opposed in principle to the extension of FRC. But FRC

¹¹ Based on the Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters, signed in Aarhus, Denmark, on 25th June 1998.

must be proportionate and there must be accompanying procedural changes to limit the work which solicitors need to do. The Law Society has no concluded view on whether a modified FRC regime would be suitable for JR cases. It is listening to the arguments. It is important to consider the effect on defendant behaviour. The introduction of FRC needs to be considered as part of an overarching strategy of reform on access to justice.

[In a letter to me after the seminar, having listened to the full debate, Mr Bourns wrote: “the idea of an opt-in proposal with a series of bands for judicial review cases looks well worth further consideration.”]

- Andrew Walker QC (Vice-chairman of the Bar) said that the Bar’s position on FRC is set out in the paper on its website. The Bar recognises that FRC will be extended across the fast track, but has set out several qualifications, including that the rates must be right and there must be escape clauses. Most barristers oppose the extension of FRC into the multi-track. Although barristers do not like costs budgeting, they recognise that it provides transparency at an early stage and it makes recoverable costs proportionate. Therefore, there is no need for FRC in the multi-track. The idea of an intermediate track for cases suited to FRC has some possible attraction, subject to the same qualifications as FRC in the fast track. But the figures must be right and the procedures streamlined. It would need to be limited to cases for which FRC may genuinely be suited and can be designed with confidence. Counsel’s fees must be treated separately and ring-fenced, in the public interest.

9.2 In the ensuing discussion, most people spoke positively about the benefits of the Aarhus Rules in environmental JR, but some expressed concern about the recent reforms to those rules introducing means testing. One solicitor said that defendants “controlled” costs by the way that they conducted JR proceedings. A government lawyer (expressing his personal views) said that he could see the merit of fixed costs for straightforward cases and budgeting for the larger cases. The director of the Public Law Project said that FRC were double edged. They provided certainty, but some claimants could not fund litigation without full costs recovery. It is right that public authorities bear most of the costs.

9.3 Martin Westgate, chairman of the Administrative Law Bar Association, said that there is not a general problem of costs being out of control in JR. Therefore, the object of this inquiry is securing better access to justice. The adverse costs risk has a chilling effect. Mr Westgate reviewed the present state of the law and assessed the options which speakers had mooted during the seminar. He favoured developing the Aarhus Rules and applying them to all JR. He kindly agreed to set up a working party to take this forward. The working party was to report by 31st March. A barrister from leading public law chambers (who agreed to serve on the working party) said that there is a real problem here, because so few people qualify for legal aid. He has experience of IPEC, where the fixed costs regime works well: there is absolute certainty about the adverse costs risk. In the case of JR, it is possible to estimate complexity by reference to trial length. The main bands are 1 day cases, 1.5 day cases and 2-3 day cases. A few big cases fall outside that. Another public law barrister expressed agreement with Mr Westgate. He pointed out that many JR cases proceed in the Upper Tribunal, where there are resource problems.¹²

9.4 During the second half of the seminar, a senior MoJ official said that the Government does not have a firm view on these issues. Indeed, that is a reason for setting up this review.

¹² I acknowledged the force of that point, but explained that tribunal costs fall outside the scope of this review.

The Government has an interest in controlling the expenditure of taxpayers' money. One point missing from the discussion so far is that not all claimants are poor. There are wealthy individuals and wealthy organisations who bring JR claims. Their costs liability should not be limited. If QOCS is introduced in areas outside personal injury, such as defamation or JR, there would need to be means testing.

9.5 Turning to general (non-JR) litigation there was some discussion about the possible creation of an intermediate track. DJ Simon Middleton (assessor to the FRC review) pointed out that this could be used to control the amount of work required. A claimant solicitor said that was not appropriate in mesothelioma cases, where tracing defendants and insurers is a meticulous process.¹³ A barrister from PIBA said that all personal injury cases above the fast track required individual scrutiny. They should remain under the present costs management regime of the multi-track, which worked well.

10 Birmingham seminar

10.1 On the morning of 16th March 2017, I held a seminar at St Philip's Chambers in Birmingham to discuss mercantile and business litigation. The participants were 23 solicitors (two of whom are solicitor advocates), 11 barristers, three specialist judges and several (non-voting) members of the FRC review team.

10.2 The views of clients are important and are seldom heard in consultation exercises. I therefore asked the Federation of Small Businesses ("FSB") to contribute to the seminar. They were unable to attend, but circulated a paper setting out their views. There were four oral presentations and two discussion sessions. In summary, the FSB paper and the four oral presentations were as follows:

- The FSB argued that there should be a FRC regime for commercial cases up to £250,000. The costs levels must be reasonable. They must balance incentives and "reduce the costs of going to law for small businesses". There must be regular reviews of the costs and thresholds. There must be rigorous case management of cases subject to this regime. There must be investment in modern IT systems to speed up court processes and make them more efficient. At the same time the upper limit of the small claims track should be raised. There must be a drive to encourage greater use of alternative dispute resolution ("ADR"). FSB research shows that currently businesses use litigation three times more often than ADR.¹⁴
- HH Judge David Waksman QC outlined plans for a voluntary pilot, which we were planning to run in the London Mercantile Court, the Leeds specialist courts and the Manchester specialist courts, if the Rule Committee agreed.¹⁵ If both parties agree, their case will go into a 'fixed costs list'. There will be a truncated procedure, robust case management, limited disclosure, restrictions on evidence, early trial dates and short trials with control of cross-examination. The fixed costs will take the form of capped recoverable costs, based on the IPEC costs model.
- Ed Pepperall QC (the Commercial Bar Association) said that the 2013 Jackson Reforms were controversial, but they had merit. He has always taken a positive

¹³ I accept this point: see chapter 7.

¹⁴ The FSB also made a number of wider points about the civil justice system, which are not directly relevant to this review.

¹⁵ The Rule Committee did subsequently agree: see chapter 9, paragraph 3.2.

view of costs budgeting. That is a bespoke procedure for individual cases. Budgeting works well, especially in the Mercantile Court. FRC are only suitable for low value cases and bulk work. They should be limited to the fast track. They are not suitable for complex cases. If extended to the multi-track, FRC should not extend to claims above £50,000 or to cases where the trial is likely to last more than two days. There is no objection to the proposed voluntary pilot. If there is a mandatory scheme, the figures must be evidence-based and the judge must have a discretion to decide whether any individual case should go into the scheme. Once the parties have submitted budgets, there is no point in putting the case into any fixed costs list and costs management is the better approach. Fees for counsel should be ring-fenced. There should be no London uplift.

- John Hughes (President of the Birmingham Law Society) said that there was some benefit in the FRC proposals, especially in the specialist courts where the judiciary has relevant expertise. The Birmingham Law Society welcome the concept that fees should be transparent, but they have concerns as to whether FRC are workable in high value cases. In general litigation, FRC are only suitable for lower value, straightforward cases. Otherwise smaller firms may struggle. High street firms must be able to survive. What is an appropriate upper value for FRC cases? Probably somewhere between £50,000 and £250,000. In principle, the Birmingham Law Society is in favour, but there are issues to be addressed and the devil is in the detail. Mr Hughes welcomes the proposed voluntary pilot and hopes that it will iron out the difficulties.
- Isabel Hitching (stating the position of the Technology and Construction Bar Association (“Tecbar”)) by contrast did not welcome the proposed voluntary pilot. She said that it should not go ahead.¹⁶ Even if both parties to a Technology and Construction Court (“TCC”) case wish to litigate in the fixed costs pilot, they should not be permitted to do so. More generally, Tecbar opposed FRC. If FRC are introduced, the TCC should be excluded from any such regime. Parties who want a ‘no costs’ regime, can use adjudication (although there is doubt about whether parties can agree in advance that the adjudicator’s award will be finally binding). The TCC covers a wide range of complex and varied work, often involving sub-disputes. Most TCC cases require detailed expert evidence and are document heavy. Costs budgeting works well in the TCC, as does active case management. Therefore, there is no need for FRC. Furthermore, Tecbar was concerned that FRC would have a negative effect on the junior Bar and the Bar outside London.

10.3 Thus, there was before the seminar a wide spread of views, ranging from the FSB at one extreme to Tecbar at the other. The two discussion sessions were lively, to say the least. A partner in a well-known firm of solicitors spoke first and planted his flag firmly in the FSB camp. He said that businesses need certainty. Budgeting does not provide sufficient certainty because it does not control incurred costs. There should be a grid of fixed costs from the outset, linked to chronological stages – perhaps close of pleadings, exchange of witness statements and six weeks before trial. Recoverable costs should be linked to the value of the claim and nothing else. Once the client knows what the recoverable costs are, they will decide how much they want to spend on the case. FRC are not the same as what the client pays to their own legal team.

¹⁶ If it is to go ahead, Tecbar would welcome the opportunity to be involved in the detail.

10.4 A barrister said that counsel's fees for pleadings and advice should be ring-fenced. The early involvement of counsel – and ideally the trial advocate – narrows issues and saves costs. A partner in a large Birmingham firm endorsed those views, but said that some solicitors are not willing to instruct counsel. Another solicitor said that he did his own CCMCs and applications; the proposal for FRC is attractive, but it should include special provision for counsel.

10.5 After hearing all the arguments on this point, I took a vote on the question of whether in any FRC regime the FRC should (a) be single lump sums or (b) include sums ring-fenced for counsel. The voting was eight in favour of single lump sums and 23 in favour of ring-fencing fees for counsel.

10.6 There was much discussion about unreasonable opponents who drive up costs by obstructive behaviour or by lengthy, argumentative correspondence. The general view was that there must be special provisions to deal with unreasonable litigation conduct, otherwise unreasonable opponents will frustrate the FRC regime. So far as correspondence is concerned, sometimes it serves a useful persuasive purpose in bringing about settlement. But pointless aggressive correspondence, which is not directed to promoting settlement, is best ignored. 'Litigation by correspondence' simply drives up costs.

10.7 Two specialist judges from Birmingham and Bristol stressed the importance of docketing. The CCMC judge must also be the trial judge in FRC cases. One judge suggested that in the pilot the FRC should exclude pre-action costs, but that in any future mandatory scheme the FRC should include pre-action costs. A solicitor pointed out that now the temptation is to front load costs. Under any overall FRC scheme the temptation will be to do as little as possible pre-issue. If FRC take the form of capped recoverable costs, this would meet that problem. Several speakers opined that the costs of applications should be additional to FRC.

10.8 James Wibberley, a Bristol barrister, pointed out that FRC might not work in cases where costs are governed by contract, for example mortgage or guarantee claims. There was a debate about whether this was a good thing or a bad thing and – if a bad thing – what should be done about it. Mr Wibberley agreed to set up a working group to consider this issue and to report back by 30th March. In the event, rather than convening a working group, he sent in a helpful note of his own about the issue, which the assessors and I have taken into account.

10.9 Finally, having regard to Tecbar's position, I asked whether there was any role for FRC in TCC cases. Two practitioners put their heads above the parapet. One said that FRC were appropriate where a private individual was bringing a claim (above the fast track limit) against their builder. FRC should be compulsory in such a case, if the claimant opted in. The second practitioner agreed with that. She said that the same comments applied to litigation by a small sub-contractor against a main contractor.

11 Meeting with Roberts Jackson Solicitors

11.1 On 17th March 2017, I had a meeting at the Royal Courts of Justice ("RCJ") with Karen Jackson (a founding partner of Roberts Jackson Solicitors, also a leading member of the CJC's NIHL working group) and her colleague, Jennifer Corris. The purpose of the meeting was to discuss fixing costs for fast track disease cases. Ms Jackson took me through

the mediated agreement reached by the NIHL working group and said that the outstanding issues were (a) the level of advocacy fee for fast track NIHL trials and (b) whether a case should stay in the fast track if there is a preliminary issue trial on limitation. Apparently, it is quite common in one part of the country for judges to order the preliminary trial of limitation issues in NIHL cases. Ms Jackson said that military cases do not fall within the mediated agreement. I said that fixed costs must be set for any of those cases which remain in the fast track.

11.2 Ms Jackson said that the main fast track disease cases outside NIHL are: asthma, dermatitis, hand arm vibration syndrome (“HAVS”), and cumulative back syndrome (“CBS”).¹⁷ Ms Jackson said that in those cases her recovered costs were on average 44% higher than in NIHL cases. Therefore, she argued, the fixed costs for those other cases should be the NIHL figures plus 44%. She listed a number of matters for which counsel’s fees should be allowed as a disbursement. Ms Jackson commented that the proposed intermediate track with fixed costs would be suitable for straightforward cases above the fast track limit, such as road traffic accident (“RTA”) and employers’ liability accident, but not for disease cases.

12 Cardiff seminar

12.1 On the afternoon of Wednesday 5th April 2017, I held a seminar at Cardiff University to discuss (a) JR and (b) structural issues concerning fixed recoverable costs. There were four formal presentations and two discussion sessions. The first two presentations were as follows:

- Theo Huckle QC (Doughty Street Chambers, former Counsel General for Wales) strongly criticised the legal aid cuts introduced by the Legal Aid, Sentencing and Punishment of Offenders Act 2012 (“LASPO”), which he incorrectly portrayed as being part of the Jackson Reforms. [In fact, the legal aid cuts were contrary to my recommendation.] Turning to JR, Mr Huckle stressed the importance of constitutional protection for individuals and of holding public authorities to account. He opposed the extension of fixed costs into JR, but if that is to happen, the best course is to adapt the Aarhus Rules (CPR rules 45.41 to 45.44) and apply them generally across JR. Mr Huckle identified changes which were required to make those rules acceptable. Legally aided claims should be excluded. He concluded that “a suitably adapted system could work and might even be an improvement of access to justice and appropriate control of executive action”.
- Richard Buxton (a solicitor, who has acted for claimants in many of the leading environmental cases) was more optimistic. He said that, although he regretted the recent rule amendments, the Aarhus Rules model was a really good model to follow in JR cases. It was far more satisfactory than protective costs orders or costs capping orders. What clients want is certainty about costs from an early stage. Otherwise lawyers spend too much time dealing with costs, thereby increasing costs. Most, but not all, of his cases could be conducted within the Aarhus Rules limit of £35,000 recoverable costs for claimants. He demonstrated this by presenting on screen the costs of five recent cases.

¹⁷ Mesothelioma, asbestosis, diffused pleural thickening and asbestos related lung cancer are not relevant for these purposes, because they go into the multi-track.

Claimants may be prepared to pay extra if they win, because they have had (a) certainty and (b) reduced liability for adverse costs. He then attacked two myths, namely 'frivolous claimants' and 'cash-strapped public authorities'. First, people don't like going to court. They only do so when they have a real grievance against a public authority. Secondly, public authorities do have funds to litigate. They are defensive about their decisions and spend large sums to defend them. Environmental litigation has been a successful pilot of the Aarhus Rules. Those rules should now be rolled out more generally.

12.2 In the ensuing discussion, a partner at Richard Buxton's firm added that the Aarhus Rules figures were exclusive of VAT. He regretted that the Aarhus Rules did not apply to statutory appeals. Two solicitors doing non-environmental JR work said that their costs were significantly higher than those shown in Mr Buxton's examples. In their opinion, the £35,000 cap stated in CPR rule 45.43(3) is too low. An MoJ official repeated the points which he had made at the London seminar (as to which see paragraph 9.4 above). There was much discussion about what means questionnaire was appropriate for claimants and whether the court should treat this information as confidential. The majority favoured something like the application forms for remission of court fees. A lawyer from the Administrative Court office in Cardiff said that such information should be disclosed to defendants. Mr Buxton voiced caution about the details of such disclosure. People without means may have no difficulty in completing the forms and may be content to do so, to reduce their capped liability. In other circumstances, means disclosure can lead to great complexity and expenditure of time, thereby having a 'chilling effect' on access to justice.

12.3 After the tea break, the seminar turned to the possibility of FRC in general litigation and structural issues. There were two formal presentations as follows:

- DJ Simon Middleton (assessor) said that judges and parties were not making proper use of their case management powers under the rules. For example, disclosure reports were vanishingly rare. One way to tackle this was to create an intermediate track with prescriptive rules limiting disclosure and restricting evidence at trial. The criteria for putting cases into the intermediate track should be based upon the proportionality factors in CPR rule 44.3(5). Cases which meet those criteria should go into the intermediate track, unless there is some good reason for them to go into the multi-track. FRC for cases in the intermediate track should be set by reference to chronological stages, rather than Precedent H phases. If the defendant fails to beat the claimant's Part 36 offer, there should be a percentage uplift of fixed costs rather than unrestricted indemnity costs.
- Stephen Webber (head of claimant litigation at Hugh James and chairman of the Society of Clinical Injury Lawyers) said that he used to be sceptical about costs management, but he is now a convert. It has been "a huge success" and is continuing to improve. The best course is to develop costs management and to tackle the problem of 'incurred' costs, rather than switch to FRC. Average costs per case paid by the NHSLA post-LASPO have dropped from £61,663 to £27,470.¹⁸ Nevertheless, if fixed costs are coming, they should be set by reference to chronological stages, not Precedent H phases. The one benefit of fixed costs is certainty and we don't want to lose that. The procedures in any

¹⁸ Freedom of information request 10th August 2016. Another request elicited that NHSLA settle 76% of cases after issue of proceedings.

intermediate track must be streamlined. Complexity and issues of reputation are important, as well as the financial value of a case. There should be an escape provision in the event of bad litigation conduct. FRC should be piloted in low value cases.

12.4 There was then another general discussion. A lecturer from Cardiff Law School pointed to the tension between the need for early settlement and the need for full information. A claimant solicitor said that in any FRC regime the stages must be well defined and not too wide. A defendant solicitor supported DJ Middleton's proposal that the reward for an effective claimant Part 36 offer should be a bolt-on to costs rather than indemnity costs.

12.5 There was debate about the appropriate criteria for intermediate track cases. One possible formulation was 'cases with a maximum trial length of two days and one expert witness on each side'. (Fast track cases have a trial length of one day and no oral expert evidence.)¹⁹ A solicitor pointed out that this definition would catch Equality Act²⁰ cases and some housing cases, which would be unsuitable for FRC.

13 Meeting with the Housing Law Practitioners Association

13.1 On the morning of 6th April 2017, I had a meeting at the RCJ with representatives of the Housing Law Practitioners Association ("HPLA"). They outlined the nature of disrepair claims, stressing that each case was different and the importance of expert evidence. Most disrepair claims proceed in the fast track. The HPLA representatives agreed to provide further details about the 83 cases summarised in their submission to the review (which they duly did shortly after the meeting). HPLA maintain that if FRC are introduced, they should only apply to cases where the defendants have complied with the pre-action protocol.

13.2 There was also a discussion about contested possession claims and unlawful eviction claims, although no such claims were included in HPLA's schedule of 83 cases. In practice, unlawful eviction claims go into the multi-track because the issues are complex.

14 Meeting with the Chancery Bar Association

14.1 On the afternoon of 12th April 2017, I had a meeting with representatives of the Chancery Bar Association ("ChBA"). The ChBA is not opposed to FRC in principle, but is concerned about two matters: ring-fencing fees for counsel and the complexity of some cases, which should take them out of FRC.

14.2 There is a public interest in involving counsel early, because this focuses the litigation and often promotes settlement. The ring-fenced fees should be described as 'fee for advocacy', 'fee for advice' etc. It is not possible to insist that such fees go to barristers, rather than to solicitors of appropriate expertise.

14.3 The ChBA representatives explained that very few chancery cases proceed in the fast track. Examples would be consumer credit cases, possession cases and small contractual disputes. Costs data will not be available.

¹⁹ A personal injury barrister stated that – despite what CPR rule 26.6 (5) (b) says – in practice there is no oral expert evidence at fast track trials. At most and very occasionally a single joint expert might give oral evidence.

²⁰ The Equality Act 2010.

14.4 It was agreed that straightforward cases (up to £100,000 in dispute, so far as such cases can be valued), with a trial length of three days or less and no more than one expert on each side, might be appropriate for an intermediate track with (a) streamlined procedure and (b) FRC. There was discussion about banding and how a costs grid might be structured. The costs figures will have to be based on general experience and the proportionality rule. High volumes of data will never be available about the costs of chancery cases.

14.5 Some chancery claims cannot be valued. These claims will usually, but not always, be unsuitable for the intermediate track.

14.6 The ChBA expressed interest in the proposed pilot for capped costs in certain specialist courts. If the pilot is successful, it may be appropriate to create a 'capped costs list' for business/chancery cases in the specialist courts, where the value of the dispute (so far as ascertainable) is between £100,000 and £250,000. The proposed pilot will be voluntary. If it is successful, the court should have a discretion to put appropriate cases into that list.

15 Meeting with NHS Improvement

15.1 On the afternoon of 13th April 2017, I had a meeting at the RCJ with Professor Tim Briggs (National Director of Clinical Quality and Efficiency) and Mr John Machin (Clinical Litigation Lead, Getting it Right First Time ("GIRFT"), a programme designed to improve clinical quality and efficiency within the NHS). Professor Briggs explained the GIRFT project which he is overseeing. This has been running for four years in orthopaedic surgery and has led to a significant reduction in claims. GIRFT is now being rolled out to other specialties. It is expected that this will lead to a material drop in valid claims.

15.2 Professor Briggs and Mr Machin then took me through the current data on litigation costs. They maintain that litigation costs are crippling the NHS and adversely affecting front line services.

15.3 I explained the beneficial effect of LASPO in abolishing recoverable success fees and after-the-event insurance premiums in respect of post-March 2013 cases. I added that costs management is now working better and that further improvements are expected. Most clinical negligence claims (a) fall outside the fast track and (b) will also fall outside the proposed intermediate track about which I am consulting. The best way to reduce litigation costs is to settle meritorious claims early, or failing that to admit liability early. At the moment, far too many claims are settled after the issue of proceedings. Given the way our civil justice system is structured, any claims which are seriously contested (with expert evidence on both sides) are bound to generate substantial costs.

15.4 Following the meeting Mr Machin sent me a spreadsheet prepared by Acumension in respect of 62 cases, which I have reproduced at appendix 7, where (a) the CFAs had been entered into after 31st March 2013 and (b) there was an approved or agreed budget. The total damages paid to claimants in those 62 cases were £4.8 million. The total costs in the approved/agreed budgets were £7.3 million (30.3% of which were 'incurred' costs – i.e. pre-budget and therefore not approved). The total costs paid in the various settlements were £3.1 million.²¹ Budgeted costs are, of course, bound to be substantially higher than

²¹ Excluding the costs of six cases which have not yet been resolved.

the costs actually paid, because almost all cases settle pre-trial and therefore do not 'use up' all of the budget allowances.

16 Meeting with Government Lawyers

16.1 On the afternoon of 19th April 2017, I had a meeting at the RCJ with a group of nine government lawyers ("GLs") from the Government Legal Department ("GLD") and a representative from the MoJ. They worked with different departments, but were not representing departmental views. They were contributing to the present debate on the basis of their own (extensive) experience.

16.2 The GLs commented that the majority of JR cases not covered by costs capping orders or the Aarhus Rules are immigration cases. The rest comprise a wide range of cases, such as challenges to decisions of the Parole Board or to decisions of the Secretary of State for Justice by prisoners concerning their imprisonment. Most of these cases are not legally aided. They are either privately funded or LIP cases.

16.3 In the case of immigration JR cases, approximately 80% go to the Upper Tribunal and 20% to the Administrative Court. Almost all the other (i.e. non-immigration) JR cases go to the Administrative Court.

16.4 The GLs do not favour extending the present Aarhus Rules to cover non-environmental JR cases, in circumstances where there are costs capping orders available for litigation in the public interest. They queried what the evidence was for an access to justice problem, which requires such an extension. They believe that such an extension would encourage unmeritorious claims. Also, it would not be easy to set the appropriate cap for non-environmental claims. The default figures of £5,000 and £35,000 for environmental JR cases would not necessarily be appropriate default figures in other cases.

16.5 There was a general discussion about means testing, the costs of investigating a claimant's means and how often it would be economic for a public authority to challenge the default figure (currently £5,000 for claimants in cases dealt with under the Aarhus Rules).

16.6 The GLs accepted that (as one of them had said at the London seminar) many JR claims at the lower end of the complexity scale fall into a standard pattern, leading to a one day hearing. They agreed to send me a note defining such category of cases and setting out the typical costs for such cases. A regime of FRC may be appropriate for such cases.

16.7 The GLs do not accept that the permission procedure provides adequate protection against unmeritorious claims. They point out that defendants incur substantial costs in initial investigations and in drafting the acknowledgements of service. When permission is refused, defendants often obtain costs orders. The GLDs' clients invariably seek to enforce such orders (including the Home Office which seeks to recover all costs orders in immigration cases).

16.8 The GLs favoured the introduction of discretionary post-permission costs management in larger JR cases (a proposal mooted at the London seminar). In such cases the judge could at the permission stage, on the application of either party or on his/her own motion, order the parties to file budgets and thereafter hold a costs management hearing. Precedent H would need to be adapted for JR cases. One GL with extensive experience of

costs management said that he found it a beneficial procedure for controlling costs in Queen's Bench Division cases.

16.9 Finally, the MoJ representative made a point that the government did not “reject” my previous recommendation for QOCS in JR cases. The position is that the government has neither accepted nor rejected that recommendation. It has simply not implemented the recommendation.

17 Seminar at Oxford University

17.1 In the afternoon of 9th May 2017, I chaired a seminar at Oxford to discuss the ideas which had been emerging during the review to date. Present were an Associate Professor of Civil Procedure, a judge of the Ontario Court of Appeal, BCL students, and research students.

17.2 There was general agreement that the objective of these reforms must be to promote access to justice, and that controlling costs would serve that end.

17.3 An Australian solicitor raised the problem of intransigent and unreasonable litigants who put other parties to undue expense. I suggested that indemnity costs could be awarded as a fixed percentage uplift, with a residual power to set costs at large in extreme cases. Concern was expressed that such a dual power would bring uncertainty. How would one identify an ‘extreme case’? One solution might be for the court to warn any party at risk of costs being set at large.

17.4 There was discussion about the constitutional importance of JR, and the need to protect claimants against swingeing costs orders. The Canadian judge said that in his jurisdiction, often public authorities did not ask for costs. If they did ask for costs, the court may well refuse, unless the claimant had acted unreasonably.²² It is part of the Canadian culture and practice to recognise the importance of facilitating judicial scrutiny of executive action, although not enshrined in any rule as such.

17.5 There was a discussion about the tendency of prolix pleadings and repeated amendments to drive up costs. This would not fit within a fixed costs regime. The general view was that the early involvement of competent counsel was the best means of focusing pleadings properly. Early and thorough analysis of the case would save costs in the long run.²³

17.6 There was discussion about ADR. One speaker made the point that early mediation, even if unsuccessful in resolving the dispute, could help to narrow the issues. Another speaker argued that the functions of mediation and focusing of issues should be kept separate.

²² This echoes what Canadian judges and practitioners told me during the main costs review: Preliminary Report, Chapter 35, paragraphs 3.8-3.9 (<https://www.judiciary.gov.uk/wp-content/uploads/JCO/Documents/Guidance/jackson-vol1-low.pdf> and <https://www.judiciary.gov.uk/wp-content/uploads/JCO/Documents/Guidance/jackson-vol2-low.pdf>).

²³ Similar points have been made at previous seminars. Speakers have suggested that fees for early advice and pleadings should be ring-fenced for the intended trial advocate.

18 Association of Personal Injury Lawyers' Annual Conference

18.1 On 18-19th May 2017 I attended part of the annual conference of APIL at Newport. I gave a keynote lecture about the progress of the present review and heard presentations by Master Roberts (who manages, both in terms of case and costs management, substantial clinical negligence cases) and DJ Ian Besford (a highly experienced regional costs judge, based in Hull).

18.2 Master Roberts explained that costs management now works much better. Hearings are shorter and budgets, or parts of budgets, are often agreed. He observed:

“In a binary world where costs are managed either by fixed costs or costs budgeting, costs budgeting is a far more precise tool and one that is more likely to ensure a just and proportionate outcome.”

18.3 DJ Besford explained (a) how he carries out costs management and (b) how he carries out detailed assessments in budgeted cases. He expressed surprise that often advocates at CCMCs do not ask him to comment on incurred costs. He added that when comments are made, they are likely to be decisive at the later detailed assessment.

18.4 Both Master Roberts and DJ Besford gave extremely helpful updates on recent case law concerning costs management. They divided the terrain between themselves, in order to achieve comprehensive coverage. They also answered some penetrating questions during a panel session.

18.5 The APIL conference provided an opportunity for me to talk informally to many highly experienced personal injury and clinical negligence lawyers. This informal feedback revealed:

- (i) The proposed intermediate track will catch very few cases if it is limited to cases where each party only has one oral expert. Furthermore, ‘one oral expert cases’ will not need three days. It would be more realistic to limit the intermediate track to cases where there are not more than two oral experts on each side and the trial will take not more than three days.
- (ii) Multiple defendant cases would be unsuitable for the intermediate track, unless liability is admitted and the only issue is quantum.
- (iii) Quite a few solicitors would be content to have FRC in personal injury cases (but not clinical negligence cases) where the claim is up to £75,000 or £100,000, provided that (a) there is a streamlined procedure and (b) the figures are right.
- (iv) An FRC regime should be designed to reward defendants who admit liability early.
- (v) If an FRC regime is introduced, lawyers are likely to innovate and find ways of working within it.
- (vi) It is not right to say that all RTA cases or all ‘bent metal’ cases are simple. In cases where there is a claim for vehicle damage, there is almost always a personal injury claim as well.
- (vii) In any FRC regime there must be clarity about escape provisions.
- (viii) Several APIL members are involved in developing a special process for clinical negligence claims up to £25,000. They believe that if a prescriptive procedure for such cases is developed collaboratively with the DoH, then it could be combined with an FRC regime for cases up to £25,000.

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- (ix) In Scotland, there is now an “All-Scotland Sheriff Personal Injury Court” with streamlined procedures. This has a lower threshold of £1,000/£5,000. Personal injury cases cannot start in the Court of Session (the Scottish equivalent of the High Court) unless they have a value above £100,000, albeit they follow the same procedures. Gordon Dalyell (Vice-President of APIL) says that the regime of the Sheriff Personal Injury Court generally works well, although there have been some issues relating to administrative resources.

Chapter 5 - The fast track

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2. The current fixed recoverable costs regime
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4. Noise induced hearing loss
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1 Introduction

1.1 Fast Track Working Group. On 8th February 2017, I set up a Fast Track Working Group (“FTWG”) to consider the details of fast track fixed recoverable costs (“FRC”). The members of the FTWG were Professor Paul Fenn (chairman), David Marshall, DJ Simon Middleton, Andrew Parker and Iain Stark. They have reported back to the assessors and myself. This chapter draws upon their excellent work.

1.2 Nature of the fast track. Under CPR rule 26.6 (5) the fast track is the normal track for cases where (a) the trial is likely to last for no longer than one day and (b) oral expert evidence will be limited to one expert per party in any field and not more than two expert fields. In relation to expert evidence, that definition is unrealistic. It is usually impracticable to have multiple expert witnesses giving oral evidence in the context of a one day trial. In practice, I understand that in most fast track trials all expert evidence is in writing. On those rare occasions when there is any oral expert evidence, it is usually given by a single joint expert.

1.3 Case management. The majority of directions are given at the time of allocation upon judicial consideration of the papers alone. The fast track was not built for continuous active case management. Cases proceed from issue to trial under written directions, in accordance with CPR Part 28. There is no costs management in that track, so that FRC are the only means of controlling costs in advance. The judge normally gives an oral judgment immediately at the end of the hearing.

1.4 The proposed Online Solutions Court. Lord Justice Briggs has recommended the creation of an Online Solutions Court, which will deal with cases up to a value of £25,000. Personal injury, clinical negligence, possession, intellectual property and housing disrepair claims will be excluded from the Online Solutions Court: see Briggs LJ’s Final Report, paragraphs 6.95-6.102.¹ It therefore follows that the Online Solutions Court will scoop up some of the current fast track cases and assign to them strictly limited recoverable costs. But a large rump of the fast track will remain in place under the rules proposed in this chapter.

¹ <https://www.judiciary.gov.uk/wp-content/uploads/2016/07/civil-courts-structure-review-final-report-jul-16-final-1.pdf>.

2 The current fixed recoverable costs regime

2.1 Previous recommendations for FRC in the fast track. Lord Woolf in his Final Report of July 1996² recommended that all recoverable costs in the fast track should be fixed. In the event, only trial advocacy costs were fixed. Fourteen years later, I recommended FRC across the whole fast track in my report of January 2010 (the “Final Report”).³ That recommendation was implemented in respect of personal injury accident cases, but not in respect of non-personal injury fast track cases.

2.2 The current fixed costs regime in the fast track. CPR Part 45 sets out the current FRC regime, which is based on the recommendations made in chapter 15 and appendix 5 of my Final Report. It provides a matrix of FRC for the main categories of personal injury claims. These are: road traffic accident (“RTA”), employers’ liability accident (“ELA”) and public liability (“PL”) cases.

2.3 The low value protocols. Each of the protocols for low value RTA claims and low value ELA and PL claims provides for notification of claims via an electronic “Portal”, a strict time limit for defendants to make a decision on liability and limited fixed costs in cases where liability is admitted within that time limit. Where a claim does not settle pre-litigation, a streamlined and low cost CPR Part 8 quantum assessment process is available. These procedures are specific to the straightforward personal injury claims covered by this Portal process and are of no wider application. I do not propose to consider the limited fixed costs for ‘liability admitted’ cases within this report: the current FRC referred to above and considered further in this chapter are for cases which began in this Portal process, but then left that process (usually because liability was not admitted).

2.4 How is the current fixed costs regime working? Overall it is working satisfactorily, as many of the respondents to my recent consultation accept. I do not propose any changes to it, apart from uprating for inflation.

2.5 Does anyone want to change the present regime? Yes, some people do.

- Claimant representatives have urged various modifications to the current FRC regime, to make it more favourable to claimants: for example, to make better provision for the costs of pre-action disclosure applications, as suggested by the Court of Appeal in *Sharp v Leeds City Council* [2017] EWCA Civ 33 at [38]-[40]; to increase the fixed costs in children cases which progress to stage 3; or to increase the level of FRC generally.⁴
- Liability insurers have urged various modifications to the current FRC regime, to make it more favourable to defendants (e.g. reversal of *Bird v Acorn* [2016] EWCA Civ 1096 by rule change).

I have come to the conclusion that it is not appropriate for me in this review to start ‘tinkering’ with the existing fast track FRC regime, which overall works well. The focus of this report is upon whether and how to introduce FRC for cases where costs are currently at large. I therefore leave it to the Civil Procedure Rule Committee (“the Rule Committee”) to consider the points of detail which have been raised concerning the current regime.

² *Access to Justice*.

<http://webarchive.nationalarchives.gov.uk/20060213205513/http://www.dca.gov.uk/civil/final/contents.htm>.

³ *Review of Civil Litigation Costs: Final Report* (<https://www.judiciary.gov.uk/wp-content/uploads/ICO/Documents/Reports/jackson-final-report-140110.pdf>).

⁴ See chapter 3, paragraph 3.5.

2.6 *Broadhurst v Tan* and the effect of an order for indemnity costs. The one issue which cannot be ducked, however, is *Broadhurst v Tan* [2016] EWCA Civ 94; [2016] 1 WLR 1928. This decision, unless its effect is modified by rule change, will impact upon fixed costs generally. This issue is equally important in relation to higher value claims, but I deal with it here and will not repeat the discussion in later chapters. Views on this issue are sharply divided:

- (i) Nine of my assessors consider that, although CPR Part 36 must continue to bring rewards for claimants who make effective Part 36 offers, in the context of a fixed costs regime it would be better for there to be a percentage uplift on the fixed costs rather than an order for indemnity costs. This will avoid the need for a detailed assessment of costs. Also, it will provide certainty for litigants. Certainty is an essential feature of an FRC regime. As to the level of percentage uplift, views range between 25% and 50%.
- (ii) Five of my assessors take the opposite view. Nicholas Bacon QC writes:

“I do not agree with the proposal that we do away with the *Broadhurst* indemnity costs order. These cases on indemnity costs are not clogging up the courts with detailed assessments. It is a powerful message for a party to consider rejection/acceptance. A 30% enhancement is not sufficient to redress the failure to accept an offer. It ignores the fact that as between solicitor and client more than the fixed costs will have been incurred by the client. Why should a client not be entitled to be reimbursed for their actual legal spend, rather than fixed costs, where a party has misconducted themselves or caused a party to incur costs unnecessarily because an earlier offer should have been accepted.”

I have set out the competing arguments, because this is the only issue on which my assessors are sharply divided. After considering the powerful arguments on both sides, on balance, for the reasons set out in sub-paragraph (i) above, I favour replacing indemnity costs with a percentage uplift of 30% or perhaps 40%. BUT this is a clear issue of policy, which will need to be addressed in the consultation exercise following this report.

2.7 Sanction for unreasonable litigation conduct. In cases of unreasonable litigation conduct,⁵ the court should have the power either to award a percentage uplift on costs⁶ or to make an order for indemnity costs. The court will exercise that power, having regard to the seriousness of the conduct in question. One example of such unreasonable conduct might be substantial non-compliance with the relevant pre-action protocol.

2.8 The indemnity principle. I have previously argued that, in relation to costs, the common law ‘indemnity principle’⁷ served no useful purpose and should be abolished: see chapter 5 of my Final Report. That argument fell on deaf ears. In those circumstances, the CPR must make it clear that the indemnity principle has no application to FRC. Nor does that principle cut down the receiving party’s entitlement to a percentage uplift in cases where there is an order for indemnity costs.

⁵ As to what constitutes unreasonable litigation conduct, see *Dammermann v Lanyon Bowdler LLP* [2017] EWCA Civ 269 at [30]-[32].

⁶ Either 30% or 40%, depending upon what is decided in relation to the preceding paragraph.

⁷ The ‘indemnity principle’ must not be confused with ‘indemnity costs’: see *Review of Civil Litigation Costs: Preliminary Report*, May 2009 (<https://www.judiciary.gov.uk/wp-content/uploads/JCO/Documents/Guidance/jackson-vol1-low.pdf> and <https://www.judiciary.gov.uk/wp-content/uploads/JCO/Documents/Guidance/jackson-vol2-low.pdf>) at pages 24 to 26.

2.9 Uprating for inflation. Many submissions make the point that FRC must be uprated for inflation. I agree and recommend that FRC in the fast track be adjusted periodically by reference to the Services Producer Price Index. This index is a measure of inflation for the UK services sector. It is constructed from quarterly surveys measuring the price received for selected services.⁸ Annual increases will generate too much complexity and confusion in ongoing cases. I therefore recommend reviews every three years. To the extent that technological advances reduce legal costs at a faster rate than those of other services, the triennial review may wish to adjust the uprating accordingly. This uprating will only apply to the 'lump sum' elements of fixed costs, not to any percentages of damages which may be added. The level of damages rises over time to take account of inflation, so the 'percentage' elements will not need uprating.

3 Extending fixed recoverable costs across the whole fast track

3.1 The time has come to finish the task. The time has surely come to complete the introduction of FRC across the fast track, not to keep kicking the issue into the long grass. There is now a general acceptance that FRC should be extended horizontally across the whole of the fast track. The Bar Council, the Personal Injury Bar Association and many others accept that principle, although they add caveats and points on the details. The South East Circuit ("SEC") in their written submissions state:

"The SEC can see that fixed costs on the fast-track (claims of up to £25,000) is probably appropriate and, perhaps, desirable.

This is because fast-track claims:

- a. Are inherently simpler, otherwise they would have been allocated to the multi-track.
- b. Are subject to simpler procedural rules and thus involve less and more predictable work, making the idea of broad-brush fixed costs more just and legitimate amongst stake-holders.
- c. Are at greater risk of disproportionate costs given the relatively low value of the claims.
- d. Constitute the great majority of non-small claims work. According to Civil Justice Quarterly Statistics, 80% of non-small claims cases are allocated to the fast-track."

I agree with that view and recommend that all recoverable costs in the fast track should be fixed.

3.2 Fast track cases for which we do not yet have FRC. We do not yet have FRC for non-personal injury claims. Also, there are categories of personal injury claims for which FRC are not yet in place. In particular:

- Holiday sickness claims. These are growing in frequency and are the subject of much discussion in the media.⁹ Appendix 4 plots claimant costs against damages received in 79 such cases. On the basis of the evidence received

⁸ For a fuller explanation of this index, see: <https://www.ons.gov.uk/economy/inflationandpriceindices/bulletins/servicesproducerpriceindices/jantomar2017>.

⁹ The Government has recently announced an intention to introduce FRC for holiday sickness claims. I support that proposal, but suggest that it should be implemented as part of a comprehensive FRC regime.

during this review, I would suggest that the FRC for such claims (when pursued individually)¹⁰ should be the same as for RTA personal injury cases.

- Employers' liability disease ("ELD"). In recent years, most ELD cases in the fast track have been claims for noise induced hearing loss ("NIHL").
- Other fast track personal injury claims which are excluded from the Protocols for Low Value RTA, ELA and PL Claims.

3.3 NIHL. A working party set up by the Civil Justice Council ("CJC"), whose members include claimant and defendant representatives, has put forward proposals for FRC in respect of NIHL claims which remain in the fast track. This agreement was reached following a mediation. A summary of the NIHL mediated agreement is at Appendix 11. The agreement reached also includes a detailed bespoke procedure for NIHL claims, which is not appended but builds on principles of transparency and early information exchange between the parties. Its key recommendations include new forms of letter of claim and letter of response, with the letter of claim accompanied by an audiogram from an accredited audiologist as objective evidence of the claimant's level of hearing. Post-issue there should be specialist standard directions. Certain types of more complex claim have been excluded but the agreement is believed to cover the vast majority of fast track NIHL claims. The final report is with the CJC for approval and I anticipate that this will soon be published by the CJC.

3.4 Lack of data for non-personal injury cases. Despite the best efforts of the assessors and myself, very little data are available in respect of the costs of non-personal injury fast track cases, apart from non-personal injury RTA claims. By definition, such cases fall outside the costs management regime. So there are no court approved budgets for us to look at. The Bar Council's online survey only included two non-personal injury fast track cases. The Housing Law Practitioners Association ("HLP") has supplied details of 83 fast track disrepair cases, which the FTWG and I have examined with care. These data give an impression of recoverable costs in recent cases where courts have applied the new proportionality rule. But they do not provide evidence relating to agreed costs at settlement on a sufficient volume of claims to allow any degree of statistical confidence about the average amounts recovered on such cases.

3.5 Does that mean we can never fix costs for non-personal injury fast track cases? No. We should put forward what seem to be reasonable figures for each category of case, having regard to:

- (i) the proportionality factors set out in CPR rule 44.3(5);
- (ii) such data as are available;
- (iii) the experience of the assessors;
- (iv) the costs of conducting personal injury cases of comparable complexity.

Some may criticise this approach as too rough and ready. On the other hand, figures derived by this means have a firmer basis than the old scale costs which governed awards of costs in the county court for many decades before the introduction of the CPR.

3.6 London weighting. The current FRC rules in the fast track provide for a 12.5% uplift on fixed costs payable to a party who lives in the London area and instructs a legal representative who practises in the London area: see CPR rule 45.29C(2), rule 45.29F(5) and

¹⁰ Multi-party actions in holiday sickness cases should proceed in the multi-track, as now.

Practice Direction 45 paragraph 2.6. Those rules should remain in place and should apply to the extended FRC regime proposed in this chapter.

3.7 Contractual entitlement to costs. Some contracts contain express provisions governing costs in the event of litigation. Examples of such contracts may be mortgages, guarantees or leases. Often, particularly in the case of mortgages, the Court will not be asked to make any costs order at all as the mortgagee will recover its costs from the proceeds of sale of the property. The CPR expressly provide that a mortgagee is not obliged to apply for a costs order: see CPR rule 44.5 and Practice Direction 44, paragraph 7.1. Such costs can also be recovered by a pleaded claim for a contractual indemnity. Even where the Court is asked to make a costs order under the discretionary power in section 51 of the Senior Courts Act 1981, the effect of CPR rule 44.5 is that in contractual costs cases the Court will make an indemnity costs order, unless the contract expressly provides otherwise. This reflects the substantive law position, as indicated by *Gomba Holdings (UK) Ltd v Minorities Finance Ltd* [1993] Ch 171, *Church Commissioners v Ibrahim* [1997] EGLR 13 and *Chaplain Holdings (UK) Ltd v Kumari* [2015] EWCA Civ 798, that the contractual entitlement is free from the restraints imposed by procedural rules on recovery of costs and will be free from the FRC regimes suggested in this report. The court will enforce the contractual right, subject to its equitable power to disallow unreasonable expenses. There is nothing in the rule making powers in respect of the CPR which enable the rules to exclude or override a contractual entitlement. Primary legislation would be required to alter that position. Although there has been some discussion of this issue at the seminars, the question whether the present position is satisfactory does not fall within my terms of reference. Wider policy issues are in play, such as what would be the effect on overall mortgage interest rates, if mortgagees could not provide for the contractual recovery of litigation costs. In this report, therefore, I do not address the question of contractual entitlement to costs.

3.8 Such cases remain in the fast track. The fact that one party has a contractual entitlement to costs does not prevent a case proceeding in the fast track. The case will be subject to the case management rules of CPR Part 28. If the party with a contractual entitlement to costs succeeds, then the costs position will be as set out in the preceding paragraph.

4 Noise induced hearing loss

4.1 The mediated agreement. As can be seen from appendix 11, 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. In my view, the agreement reached is a reasonable one and I endorse it.

4.2 Costs grid for NIHL claims. The agreed costs grid for NIHL claims, which I endorse, is as follows:

Table 5.1
Proposed matrix of FRC for NIHL claims (applies to both claimant and defendant recoverable costs)

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	Not agreed

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

4.3 Counsel's fees and trial advocacy fees. The CJC working group did not reach full agreement on these matters. I have considered the relevant material and the rival submissions made within the working group. I recommend that counsel's fees and trial advocacy fees in NIHL cases should be the same as those which I propose for 'Band 4' cases in the next section of this chapter. Almost all NIHL claims are low value. So, as set out below, the trial advocacy fee will generally be £1,380.

5 The remainder of the fast track

5.1 Proposed matrix of FRC and paradigm cases. Drawing on the work of the FTWG, I propose that all fast track cases be placed into four bands of complexity, Band 1 being the least complex and Band 4 being the most complex. The following are paradigm cases for each band:

- Band 1: RTA non-personal injury claims (popularly known as 'bent metal' claims).
- Band 2: RTA personal injury claims.
- Band 3: ELA and PL accident claims.
- Band 4: ELD claims (non-NIHL) and the most complex fast track claims.

5.2 A fuller list of cases suitable for each band. I propose the following:

- Band 1: RTA non-personal injury, defended debt cases.
- Band 2: RTA personal injury (within Protocol), holiday sickness claims.
- Band 3: RTA personal injury (outside Protocol), ELA, PL, tracked possession claims, housing disrepair, other money claims.
- Band 4: ELD claims (other than NIHL), any particularly complex tracked possession claims or housing disrepair claims, property disputes, professional negligence claims and other claims at the top end of the fast track.

5.3 At the allocation stage, the court must have discretion to move individual claims between those bands having regard to the nature of the individual case. Judges should exercise this discretion sparingly and bearing in mind the proportionality factors set out in CPR rule 44.3(5). Any case of particular complexity does not belong in the fast track at all.

5.4 Recoverable costs. I propose that the recoverable costs for each band be as follows:

Table 5.2

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

Stage:	Complexity Band			
	1	2	3	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 ¹¹	a. £500 b. £710 c. £1,070 d. £1,705	a. £500 b. £710 c. £1,070 d. £1,705	a. £500 b. £710 c. £1,070 d. £1,705	a. £1,380 b. £1,380 c. £1,800 d. £2,500

The figures in all boxes are cumulative, except for the trial advocacy fees shown in the bottom line. The word “damages” is used as shorthand for debt, liquidated sum or other monetary relief. There is obviously some difficulty in applying the above table to claims for, or including, non-monetary relief. The court must, I am afraid assign a value to such relief. I propose that a claim for a declaration or injunction should be treated as the equivalent of a claim for £10,000, with the court having power to vary that figure upwards or downwards.¹²

¹¹ a. claim value up to £3,000; b. claim value £3,001 to £10,000; c. claim value £10,001 to £15,000; d. claim value £15,001 to £25,000.

¹² For example, in a housing disrepair claim where the defendant is ordered to carry out repairs with a value of £20,000, the injunction requiring such works should be treated as if it were an award of £20,000.

If the claimant succeeds, the specified percentage applies to the relief recovered. If the defendant succeeds, the specified percentage applies to the claim defeated, as valued in the particulars of claim.

5.5 How are the figures in the table derived? The figures in **Band 1** are based on an analysis of data from Taylor Rose TTKW¹³ in which fast track RTA claims, with zero general damages but positive special damages between £10,000 and £25,000 in value, were summarised by the chronological stage of litigation at settlement. The mean amounts of recovered base costs were estimated, and adjusted to take account of efficiency savings from fixed costs. These adjustments were necessary to make the figures comparable with the other fast track fixed cost bands.

5.6 The figures in **Bands 2 and 3** are the existing figures for fast track pre-trial fixed costs in personal injury cases with an uplift of 4% to take account of inflation from July 2013 (when those figures were set) to July 2016. I appreciate that a few of those figures have an earlier origin than 2013, but a policy decision was taken in July 2013 to re-adopt those earlier figures. The figure of 4% is derived from the Services Producer Price Index.

5.7 The figures in **Band 4** are based on an analysis of Taylor Rose TTKW data, recording the claimants' costs agreed in a large volume of fast track ELD claims. The figures have been adjusted to take account of efficiency savings from fixed costs. These cases are of comparable complexity to the heaviest non-personal injury claims in the fast track.

5.8 Counsel's fees. Many of the written submissions and many speakers at the seminars maintain that fees should be specifically ring fenced for counsel. They put forward two arguments with equal vigour:

- (i) Ring fencing is necessary for the protection of the junior Bar, which is very much in the public interest.
- (ii) Counsel's specialist input at an early stage is beneficial for the client and for the efficient conduct of the litigation.

Professor Richard Disney (one of my 14 assessors) has, with good reason, questioned the validity of the first argument. I do not see how I can recommend any reform because it is necessary to 'protect' one part of a profession. The professions exist to serve the public, not vice versa. It must be for the professions to organise themselves in whatever way is necessary to protect younger practitioners. The second argument, however, does have force in relation to the more complex fast track cases.

5.9 Does that mean ring fencing for barristers alone? No. Very often barristers will do the ring-fenced work and receive the ring-fenced fee. But on occasions the proper person to do the work and receive the ring-fenced fee may be a solicitor, for example the intended trial advocate. On some occasions the proper person to do the ring-fenced work and receive the ring-fenced fee may be a fellow of the Chartered Institute of Legal Executives with appropriate expertise. I shall use the phrase "counsel or specialist lawyer" to describe all such individuals.

5.10 In relation to Bands 1, 2 and 3 (where there is currently very little ring fencing of fees for counsel) I recommend no change to the present rules, essentially for the reasons set out in chapter 15 of my Final Report. It is for solicitors to decide whether to do items of pre-trial

¹³ See chapter 3, paragraph 3.1.

work themselves or to instruct counsel. In relation to the new Band 4 and NIHL claims, however, I recommend a different approach.

5.11 The mediated NIHL agreement provides that £500 be ring-fenced for settling the particulars of claim. I recommend that this should apply to all Band 4 cases. The mediated NIHL agreement also provides that £1,280 be paid for restoring a company to the register. That includes both preparatory work and any necessary court appearance. This should apply in both NIHL and Band 4 cases. The mediated NIHL agreement recommends that other counsel fees should be recovered on top of the FRC, if justified. In my view that approach is too uncertain. I recommend that in NIHL and Band 4 cases separate fees should be recovered in respect of any of the following items done by counsel or specialist lawyers:

Post-issue advice or conference	£1,000
Settling defence or defence and counterclaim	£500

Solicitors may well choose to instruct counsel or specialist lawyers in respect of other matters, but the fees for that other work should not be recoverable as an addition to the monies set out in Tables 5.1 and 5.2.

5.12 Trial advocacy fee. The NIHL working group accepted that in NIHL cases the trial advocacy fees should be higher, but they could not agree on a figure. Having considered the rival arguments, I recommend the trial advocacy fee should be increased as follows for both Band 4 and NIHL cases:

(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 £1,800
(d) Claim value £15,001 to £25,000	Trial advocacy fee £2,500

CPR rule 45.39, which provides some flexibility in respect of fast track trial costs will continue to apply.

5.13 Interim applications and preliminary issues. The costs of any applications properly made (e.g. because the other party is in default) should be recovered separately. There are fixed costs for such applications under CPR rule 45.29H. I propose that in NIHL and Band 4 cases, the provision in CPR rule 45.29H(1) "one half of the applicable Type A and Type B costs" should be amended to "two thirds of the applicable Type A and Type B costs". The fixed recoverable fee for an interim injunction application should be £750.

5.14 Preliminary issues. The costs of any preliminary issue trials should be recovered separately. Having said that, absent special circumstances, I strongly discourage the ordering of preliminary issue trials in the fast track. In some parts of the country, apparently, it is the practice to try limitation as a preliminary issue in ELD claims. This is generally unwise for four reasons:

- (i) There is much overlap of evidence between limitation and liability.
- (ii) The litigation will get hopelessly bogged down if the limitation decision goes on appeal.
- (iii) To have two trials of a fast track case drives up costs and is disproportionate.
- (iv) If the claimant wins on limitation and then loses on liability, the first trial has been a waste of time.

5.15 Clinical negligence. Clinical negligence claims will not generally fall within the parameters of the fast track. They are more demanding than other forms of personal injury

litigation and require more complex pre-issue investigation. The Department of Health has recently conducted a consultation on FRC in clinical negligence cases up to £25,000, as discussed in chapter 8 below. The only clinical negligence claims which would fall within the fast track fixed costs scheme proposed in this chapter 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.

5.16 Intellectual property cases. The Intellectual Property Enterprise Court (“IPEC”) provides a small claims track for low value intellectual property (“IP”) cases. The IPEC provides a capped stage costs regime for cases above the small claims track, as explained in chapter 9 below. Therefore, low value IP claims will not fall within the fast track regime which is the subject of this chapter.

5.17 Military cases. Military cases are excluded from the NIHL mediated agreement. Such cases are a small proportion of the total. Out of the 110 budgets for personal injury cases collected by the FRC review team only one is a military case. Probably most of the military cases will go into the multi-track. I suggest that any military ELD cases assigned to the fast track should go into Band 4.

5.18 Housing claims. The principal categories of housing claims are:¹⁴

1. Defending claims for possession, including mortgage repossession.
2. Claims for unlawful eviction.
3. Homelessness applications, including County Court appeals.
4. Claims for breach of repairing obligations.
5. Judicial review in respect of housing law issues.

The HLPAs say that they are particularly concerned about housing disrepair claims because these seldom qualify for legal aid. I understand from one of my assessors, who has experience of managing disrepair cases in the fast track, that the FRC regime proposed above would be satisfactory for most disrepair claims.¹⁵ Most such claims would fit into either Band 3 or Band 4. Nevertheless, in certain of the cases cited by the HLPAs, the recovered costs are higher than the proposed FRC (even allowing for the fact that the HLPAs figures include VAT and disbursements). Possibly these are cases which ought not to have been in the fast track at all or possibly they are exceptional cases where the escape clause might be invoked (as to which see below). It is difficult to say without having the details of individual cases.

5.19 Who will decide on the bands and when? The pre-action protocols should be amended to require the parties to endeavour to agree pre-action (a) the appropriate track for cases and (b) in respect of fast track cases, the appropriate band. Claimants should state their proposals in this regard in the letter of claim. Defendants should do the same in the letter of response. If the case reaches allocation stage, the district judge or master should allocate in the usual way and (for fast track cases) specify the band if that is in dispute. Either party could challenge that decision by an application on paper under CPR rule 3.3(5)-(6). I propose that the unsuccessful party on such an application should incur a costs liability of £150. If the case settles before issue or before allocation, then the band allocation decision should fall to the judge assessing costs if there is disagreement between the parties.

¹⁴ As explained in the submission of the HLPAs.

¹⁵ For example: a complex disrepair claim assigned to Band 4, where the claimant obtains an injunction + damages of £10,000 at a one day trial. Recoverable costs will be £17,300.

5.20 Escape clause. CPR rule 45.29J enables a party to escape from the fast track FRC regime in exceptional circumstances. That provision will continue to apply, but its reach will be extended following the extension of FRC across the whole of the fast track. Use of this provision will continue to be rare, because any case of exceptional complexity is unlikely to be in the fast track.¹⁶

5.21 Fast track procedure. The standard directions in Practice Direction 28 may require modification in Band 4 and NIHL cases. For example, in NIHL cases the mediated agreement envisages a set of directions capable of covering the use of experts in different disciplines to deal separately with issues of liability and quantum: those directions would typically allow for questions to be put to the claimant's quantum expert and for the joint instruction of a liability expert. Band 4 cases may require different modifications, but always within the context of the case remaining in the fast track. This is something that the Rule Committee will need to consider in due course.

5.22 Assessment of costs. In most cases, the assessment of recoverable costs should be a straightforward exercise, not requiring judicial input. In so far as there is any dispute, the court will assess costs. If the case goes to trial, the judge will summarily assess costs at the end of the hearing. In cases which do not go to trial, there should be a shortened form of detailed assessment, of the kind described in the last sentence of Practice Direction 47, paragraph 5.7, with a provisional assessment fee cap of – say – £500.

5.23 How do the figures in this chapter compare with the data in chapter 3? In my view, there is a reasonable fit on a 'swings and roundabouts' basis with the data in section 3 of chapter 3. One should bear in mind that there will be 'process savings', if recoverable costs are fixed. Also, many of the figures quoted in section 3 of chapter 3 include disbursements and VAT, which are additional to the sums shown in tables 5.1 and 5.2.

5.24 Recommendation. I recommend that all recoverable costs in fast track cases be fixed and that the figures be reviewed every three years.

¹⁶ CPR rule 26.8 sets out the matters to be considered when allocating a case to the fast track. CPR rule 26.10 enables the court to re-allocate a case which ought not to be in the fast track.

Chapter 6 - Costs management

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1 Introduction

1.1 What is costs management? Costs management, popularly known as costs budgeting, is a process whereby the parties prepare, discuss and attempt to agree budgets for their litigation; the court amends/approves the budgets (in so far as they are not agreed); thereafter the parties and the court manage the litigation in accordance with the approved/agreed budgets; the recoverable costs at the end are (absent good reason) assessed in accordance with the receiving party's last approved or agreed budget. The costs management rules in conjunction with the new rules on proportionality (CPR rule 44.3(2) and (5)) are designed to restrict recoverable costs to proportionate levels.

1.2 Fuller account of costs management. I have given a fuller account of costs management in a lecture on 13th May 2015¹ and in chapter 14 of my book "The Reform of Civil Litigation".²

1.3 The purpose of this chapter. The purpose of this chapter is to review how costs management is working and the extent to which (if at all) that renders any extension of the fixed recoverable costs ("FRC") regime unnecessary.

2 Feedback received about costs management

2.1 Extensive feedback during the review. Many of those who contributed written submissions or who spoke at seminars have discussed costs management. This is because many stakeholders maintain that the success of costs management has rendered any extension of the FRC regime unnecessary.

2.2 One firm of costs lawyers. One long established firm of costs lawyers with regional offices writes:

"This proposal [costs budgeting] has undoubtedly had the largest impact to date owing to its effect on the everyday work of solicitors and the judiciary. At the outset there was of course a significant degree of resistance to the entire concept, however, solicitors are clearly now more comfortable with the idea of budgeting. At the inception of the regime, solicitors were deferring to our expertise although as time has progressed they are increasingly undertaking the drafting of budgets themselves. [This firm] regularly delivers seminars to its clients and it is apparent from the

¹ *Confronting Costs Management* (also known as the "Harbour lecture"), available on the Judiciary website (<https://www.judiciary.gov.uk/wp-content/uploads/2015/05/speech-jackson-lj-confronting-costs-management-1.pdf>).

² Published by Sweet & Maxwell in September 2016.

engagement at all levels, from junior to partner, that costs budgeting is being accepted as a more important part of the whole case management process than it was 3½ years ago.

Although we are being instructed on matters that have been costs managed, generally our opinion is that clients are settling matters using approved budgets as a basis for negotiations. It is usually only on those matters where the parties are significantly apart on any attempted negotiations where we are then instructed. Costs budgeting therefore appears to be having the intended effect of reducing the number of claims that have to proceed to detailed assessment.

The procedural rules and the relevant forms have evolved to take account of various issues that have arisen in the application of the budgeting regime. Indeed, further rule changes are apparently imminent to address the *SARPD Oil* judgment and uncertainty concerning the application of the 1% and 2% allowance for the costs of the budgeting process. This evolution of the regime over a period of 3½ years was not unexpected given the drastic shift in practice required, however, it is clear that both practitioners and the judiciary are more *au fait* with the entire process and now is the appropriate time to assess its impact.”

That firm goes on to argue that the combined effect of costs management and the new proportionality rule has “led to a reduction in recoverable legal costs thus negating the proposition of fixed costs.”

2.3 Chambers outside London. A large set of chambers in Bristol argues that FRC are misconceived, because costs management is the best way to control costs:

“Budgets are easy to explain to clients and provide them with reasonable certainty and predictability. The costs of budgeting are modest (capped at 3% of overall costs). Costs of budgeting and assessment are a reasonable price to pay for fairness.”

A large set of chambers in Manchester makes similar points.

2.4 South Eastern circuit and Bar Council. The South Eastern Circuit (“SEC”) states:

“In the multi-track budgeting, done effectively, should prevent disproportionate costs. It means that at an early stage parties have a clear idea as to their likely costs recovery and liability. It is done on a bespoke basis by experienced local judges after the parties have had a fair chance to make relevant points. The redrafted provisions on proportionality apply and can be applied to the specific case. The SEC is aware that budgeting is still bedding down and has mixed popularity but believes that with time it should be effective in achieving the goals identified above. It should lead to more appropriate and refined outcomes than the much broader brush of fixed recoverable costs.”

The Bar Council advances a similar argument in paragraph 38 of its written submissions.³

2.5 Law Society and Chartered Institute of Legal Executives. The Law Society points out that:

“Cost budgeting also allows parties to identify a number of non standardised contingencies which may be unique features of their case such as seeking trial on

³ Available on the Bar Council’s website (http://www.barcouncil.org.uk/media/547292/20170130_bar_council_submission_on_fixed_recoverable_costs.pdf).

preliminary issues, applications for specific disclosure, or costs for a mediation process.”

They continue:

“It is also worth remembering that parties do not have a "blank cheque" when it comes to their costs budgets. Proportionality is already written into the Civil Procedure Rules, reinforced by case law. Even if costs are necessarily and reasonably incurred, they will not be recoverable if they are disproportionate to the issues at stake.”

The Chartered Institute of Legal Executives (generally known as “CILEX”) states that costs budgeting “has worked well”, but it is only recently that judicial consistency has emerged.

2.6 Stephen Webber (claimant solicitor and chairman of the Society of Clinical Injury Lawyers). Mr Webber, an experienced clinical negligence solicitor, states that costs management “has been a huge success” and is continuing to improve.⁴ He goes on to argue that this is a more effective means of controlling costs than FRC.

2.7 Costs management in business litigation. The spokesman for the Commercial Bar Association at the Birmingham seminar said that budgeting works well in the Mercantile Courts. It provides a bespoke process for individual cases.⁵

2.8 The views of Queen’s Bench masters managing clinical negligence cases. Master Cook (supported by the Senior Master and assessor to the FRC review, Barbara Fontaine) reports that costs management is now working much better.⁶ There is more consistency between different courts as a result of judicial training. Parties are often agreeing proportionate costs, which shortens hearings. The one big problem is incurred costs, which are not currently subject to budgeting. Master Roberts in his lecture at the Association of Personal Injury Lawyers Annual Conference on 19th May 2017 stated that costs management now worked much better.⁷ Hearings are shorter and budgets or parts of budgets are often agreed. In summary, the Queen’s Bench masters specialising in clinical negligence regard costs management rather than FRC as the appropriate means of controlling costs.

2.9 Costs management in technology and construction litigation. The Technology and Construction Bar Association report that costs management works well in the Technology and Construction Court (“TCC”).⁸ The TCC has for long been in the forefront of costs management. In the Society of Construction Law’s paper D185, dated December 2015,⁹ three experienced TCC practitioners wrote:

“Costs Management

Where (i) a budget has been approved or agreed (particularly where, when approving that budget, the court has made clear comments about incurred costs); and where (ii) a standard basis costs award is made, it appears that courts are increasingly willing to summarily assess the costs of the claim as a whole at the end of the case, rather than send the matter to detailed assessment.

⁴ Mr Webber’s views were expressed at the Cardiff seminar: see chapter 4, paragraph 12.3.

⁵ See chapter 4, paragraph 10.2.

⁶ See chapter 4, paragraph 6.4.

⁷ See chapter 4, paragraph 18.2.

⁸ See chapter 4 paragraph 10.2.

⁹ *The Pioneering TCC: Pushing the Boundaries on Litigation Costs*, available on the Society of Construction Law website (<https://www.scl.org.uk/papers/pioneering-tcc-pushing-boundaries-litigation-costs>).

This appears to be particularly the case where, as is common in courts such as the TCC, the judge who decides the case is the same judge who has case managed it – and who therefore set the budget. An example of this approach can be seen in *Safetynet Security v Coppage*.¹⁰ Such an outcome has the significant advantage for the receiving party that payment of the full costs will be due in 14 days, rather than having to incur the costs of preparing a detailed bill and then to wait many months for the outcome of an assessment or for the opponent to agree the costs.

Proportionality

The second factor is the more robust test of proportionality introduced into the CPR 44.3(2) in April 2013. This not merely allows, but in practice encourages, courts to take a robust, ‘broad brush’ approach to costs, without having to conduct a detailed, line by line, analysis of the costs. The combination of the ability to take such an approach, with the greater availability of costs information as a result of costs management and the presumption under CPR rule 3.18 that an approved budget will not normally be departed from provide a powerful temptation to a court, whether invited or not, to cut through costs issues at the end of a case and conduct a robust summary assessment.”

3 The problem of incurred costs

3.1 The problem. Defendant representatives are particularly concerned that costs incurred before the first costs and case management conference (“CCMC”) are not subject to budgeting. Mr John Mead (technical claims director of the NHSLA¹¹) describes this as “the main problem with costs budgeting”.¹² To their credit, many claimant representatives acknowledge that this is a serious problem which needs to be tackled.

3.2 The figures. During the budget exercise my team received 191 agreed or approved claimant budgets and 183 agreed or approved defendant budgets.¹³ Table 6.1 below sets out the total incurred costs and the total future agreed or approved costs in those budgets. On average, in the claimant budgets, incurred costs represented 35% of the total budget figure; in the defendant budgets, incurred costs represented 18% of the total budget figure. For present purposes, it is probably appropriate to treat actions against the police separately (the corresponding data in Table 6.1 is shown as “PALG”, the data having been supplied by the Police Action Lawyers Group). They often have higher incurred costs because of inquests and/or IPCC investigations. Also, those actions form a relatively small specialist area of litigation.¹⁴ If we focus on cases other than actions against the police, the figures are as follows: on average, in the claimant budgets, incurred costs represented 32% of the total budget figure; in the defendant budgets, incurred costs represented 15% of the total budget figure.

¹⁰ *Safetynet Security Ltd v Coppage* [2002] EWHC B11 (Mercantile).

¹¹ From April 2017, the NHSLA is now a part of a wider umbrella organisation named NHS Resolution.

¹² Mr Mead's views were expressed at the Manchester seminar: see chapter 4, paragraph 6.1.

¹³ The team also received 161 budgets, showing only the ‘claimed’ figures. Table 6.1 below does not include those 161 budgets.

¹⁴ The only reason why we have such a large number of budgets for actions against the police is that the PALG has been diligent in collecting budgets and case details from their members.

Table 6.1

Claimant

Approved/Agreed	Number of Cases	Average (£):			Incurred/Total Cost
		Incurred	Future Cost	Total Cost	
Clinical Negligence	51	60,280	128,754	189,034	32%
Personal Injury	55	27,198	52,841	80,039	34%
Business Disputes	5	21,272	62,653	83,924	25%
Chancery and Property TCC	8	15,352	34,925	50,277	31%
Defamation	1	43,555	97,717	141,272	31%
Other	0	0	0	0	0%
PALG	12	8,942	31,627	40,569	22%
PALG	59	49,555	69,007	118,562	42%
Total including PALG (this gives distorted picture: see para 3.2)	191	41,500	76,306	117,806	35%
Total excluding PALG	132	37,816	79,618	117,434	32%

Defendant

Approved/Agreed	Number of Cases	Average (£):			Incurred/Total Cost
		Incurred	Future Cost	Total Cost	
Clinical Negligence	46	11,930	71,956	83,886	14%
Personal Injury	58	6,587	41,114	47,701	14%
Business Disputes	6	8,947	47,076	56,023	16%
Chancery and Property TCC	6	7,005	29,916	36,921	19%
Defamation	2	10,109	69,980	80,089	13%
Other	1	2,230	18,397	20,627	11%
Other	8	5,868	18,936	24,804	24%
PALG ¹⁵	56	13,471	38,481	51,952	26%
Total including PALG (this gives distorted picture: see para 3.2)	183	10,111	46,836	56,947	18%
Total excluding PALG	127	8,628	50,580	59,209	15%

3.3 Master Cook's proposal. Master Cook suggested at the Manchester seminar that it might be appropriate to fix pre-issue and pre-budget costs. Clearly any grid of fixed pre-issue and pre-budget costs would not suit every case. Therefore, Master Cook suggested that there could be a rule saying "don't exceed £x without permission".

3.4 Paper prepared by the Personal Injuries Bar Association. Following the Manchester seminar, the Personal Injuries Bar Association ("PIBA") prepared a paper on the issue of

¹⁵ Details supplied by Police Action Lawyers Group.

incurred costs in clinical negligence litigation, since that had emerged as a major issue. PIBA's paper was dated 26th February¹⁶ and proposed the following solution:

"13. The solution to the problem of incurred costs is for the Costs and Case Management Hearing to be properly recognised as a very significant hearing and **for the Judge positively to take into account the amount of costs already incurred when setting the budget for the future conduct of the case.** In order to do so, the Judge would have to be provided with essential information as to what steps have been taken to date and what evidence has been obtained. That places the incurred costs into a proper context and informs the judge as to how much work is yet to be done. As Master Cook described it, "*Pursuing a case to its conclusion is like a car journey. In order to budget for the rest of the journey, I need to know how far you have travelled already.*" Starting with a provisional global budget to pursue a case of a particular type to its conclusion, the budgeting Judge could then adjust that initial global budget recognising the particular circumstances of the individual case and then *sets the budget for the future* taking into account and reflecting (a) what has been done to date, (b) what has to be done in the future, and (c) how much has been spent thus far.

14. If this approach is adopted then the Court would be able to exert appropriate control over incurred costs by bringing those costs *into account* in the budgeting exercise. It would also retain ultimate control over incurred costs with its power to assess incurred costs at the detailed assessment stage and to depart from the budget if one party establishes good reason to do so to justify a detailed assessment in a budgeted case.

15. This approach would encourage good behaviour from claimants as any attempt at front loading and incurring excessive pre-issue costs would (a) result in a reduced budget for future costs, (b) limit their ability to complete the necessary future steps to bring the case to its conclusion, and (c) be vulnerable to challenge at two stages – the budgeting stage and the detailed assessment stage. It would enable the court and both parties to have far greater confidence in the budgeting process, knowing that the budget took account of the work done and the costs incurred in the individual case.

16. If costs incurred were taken into account as a standard component of the budgeting process then the interlocutory skirmishes of advocates arguing for comments on the incurred costs would be eliminated and the budgeting exercise would be much more straightforward."

3.5 Comments of the Professional Negligence Bar Association. The Professional Negligence Bar Association ("PNBA") make similar comments. In a paper expressing agreement with PIBA, the PNBA state: "The costs management process has not been operated as vigorously or as it could be, especially with regard to incurred costs".

3.6 Overstatement of incurred costs. At a late stage in the review my attention was drawn to *Tucker v Griffiths* (Senior Courts Costs Office, 19th May 2017). Master Rowley held that the claimant's solicitors were using an incorrect rate to calculate incurred costs. At [35] he said:

"Whatever the reason, it is an approach which must be deprecated. It is self-evident that a solicitor preparing a costs budget should not overstate a party's liability to his

¹⁶ The full paper is on PIBA's website: (http://bit.ly/PIBA_Clin_Neg_Incurred).

solicitor for costs that have already been incurred. It is to all intents and purposes a breach of the indemnity principle. It is bound to mislead both the opponent and the court in circumstances where neither has any opportunity to examine the costs claimed in any detail at a budgeting hearing. It is no answer to say that the opponent's liability to pay such costs is ultimately protected by the option of going to a detailed assessment. The whole purpose of costs management is meant to limit the need for detailed assessments and part of that must involve the parties and the court being able to rely upon the information provided by the other party."

Tucker is subject to an application for permission to appeal. I do not know how widespread is the approach to incurred costs which Master Rowley deprecated. If the decision stands and if that approach is widespread, it will mean that many of the incurred costs figures quoted throughout this report are overstated.

4 Discussion

4.1 The sea change. The costs management regime was, initially, greeted with horror in many quarters. However, opposition to this new discipline has slowly been diminishing.¹⁷ In the last eighteen months the process of accepting and embracing costs management has accelerated. This is for several reasons, including:

- (i) High quality judicial training delivered by the Judicial College, which has improved the level of consistency between different courts.
- (ii) Increasing familiarity with the process on the part of both practitioners and judges.
- (iii) Increased willingness by the profession to discuss and agree budgets or parts of budgets before the first CCMC.
- (iv) General acceptance that, one way or another, costs must be controlled in advance combined with a preference by the profession for costs management over FRC.
- (v) Refinement and improvement of the costs management rules by the Civil Procedure Rule Committee ("the Rule Committee"), as experience of costs management has accumulated.

4.2 What should be done about incurred costs? PIBA make some constructive suggestions. DJ Middleton (one of my assessors) states:

"If appropriate account of incurred costs is taken by the case managing judge under the existing provision at CPR PD 3E 7.4, when approving budgeted costs, then the budgeted costs will reflect both the just and proportionate case management decision and the overall cost determined as reasonable and proportionate for any particular phase. Recent Judicial College training addressed this issue in some detail. In addition, the inclusion of CPR r.3.15(4) and r.3.18 (c) from April 2017, has reinforced the ability of the case/costs managing judge to make comments on incurred costs and the obligation on the assessing judge to take account of any comments."

¹⁷ See *The Reform of Civil Litigation*, page 138.

It is not my function in this review to tinker with the costs management rules or with judicial training modules. It must be a matter for the Rule Committee whether any further amendments are required in relation to incurred costs.

4.3 What about fixing pre-issue and pre-budget costs? This issue does fall within my terms of reference. I see considerable merit in Master Cook's proposal referred to in paragraph 3.3 above. In order to implement this proposal, we would need to look at all areas of litigation, not just clinical negligence. It would be necessary to draw up quite an elaborate grid of pre-issue and pre-budget provisional costs, with different figures for different types of case. It would then be necessary to develop a procedure for pre-action applications to the court for approval of expenditure above the provisional figures. Such a scheme would probably require primary legislation, to give the court appropriate pre-action jurisdiction. The best way to do that would be by amending section 33 of the Senior Courts Act 1981 and section 52 of the County Courts Act 1984.¹⁸ In my view it would be premature to take this proposal forward now for three reasons:

- (i) I am already recommending some significant reforms. Those reforms should be allowed to bed in before we take this quite major step.
- (ii) There will be resource implications for district judges and masters if applications for pre-action costs budgeting are added to their workload. This is not an objection to the reform, but the resource implications must be addressed first.¹⁹
- (iii) By definition this scheme will only apply to cases which are above the proposed intermediate track and are subject to costs management. The experience of a fixed costs regime in the intermediate track will be highly relevant to the development of any grid of any pre-issue/pre-budget provisional fixed costs for multi-track cases.

My only recommendation, therefore, is that in the future consideration should be given to developing (a) a grid of FRC for incurred costs in different categories of case and (b) a pre-action procedure for seeking leave to exceed the FRC in the grid.

4.4 If costs management is now working much better, does that reduce the need for FRC? Yes. I am bound to accept that improvements in costs management (especially in the last one-and-a-half years) have eliminated any need to develop FRC on the scale canvassed in my lecture of January 2016.²⁰ Nevertheless, the possibility remains of substantially extending FRC in the future, if the costs management process either fails to deliver effective control over costs or becomes unduly expensive.

4.5 What am I proposing then? Although I do not propose any massive extension of FRC, I still hold the view, expressed in chapter 16 of my previous report, that after the main reforms have bedded in (which has now happened) we need to work on developing FRC for the lower value cases above the fast track level. This is because:

- (i) Many cases which are currently in the lower reaches of the multi-track are sufficiently straightforward to be accommodated within a fixed costs regime.

¹⁸ These provisions facilitate pre-action applications for disclosure of documents.

¹⁹ In my previous report (<https://www.judiciary.gov.uk/wp-content/uploads/ICO/Documents/Reports/jackson-final-report-140110.pdf>, at pages 243-4), I recommended a pilot of pre-action costs management for clinical negligence cases, which would have required the appointment of an extra Queen's Bench master. I subsequently developed draft pilot rules with the help of the then Senior Costs Judge. Ultimately, that pilot did not happen, because no additional master was appointed.

²⁰ *Fixed costs – the time has come*. Insolvency Practitioners Association Annual Lecture, 28th January 2016 (<https://www.judiciary.gov.uk/wp-content/uploads/2016/01/fixcostslecture-1.pdf>).

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- (ii) A fixed costs regime will eliminate the process of costs budgeting and assessment. In lower value cases, there is a greater risk that those process costs will themselves be disproportionate.
 - (iii) The extension of FRC to such cases will bring a greater level of certainty than costs management can achieve.
 - (iv) Such a regime will promote access to justice for some individuals and SMEs, who may otherwise be unable to litigate.
 - (v) We now have four years' experience of FRC in the fast track and of costs management in the multi-track. The profession and the judiciary have a much better understanding of litigation costs than they did in 2009, when I wrote my previous report. With the assistance of experienced practitioners, judges and economists, it is now possible to draw up a realistic grid of FRC for straightforward lower value cases outside the fast track.

4.6 I will develop these proposals in the next chapter.

5 Conclusion

5.1 Assessment costs management. Costs management is now working distinctly better than it was two years ago, although there is still room for improvement. This is borne out both by the written submissions during this review and by numerous contributions during the seminars. That does not, however, dispense with the need for extending FRC.

5.2 Incurred costs. The principal problem is incurred costs which on average represent 32% of the claimant's budget and 15% of the defendant's budget. That is not an argument against having costs management. The lion's share of the costs still lie in the future and it is well worth controlling those future costs. Nevertheless, we do need to take steps to control incurred costs. PIBA have made some proposals which merit consideration. So has Master Cook, supported by the Senior Master.

5.3 Recommendation. When the reforms recommended elsewhere in this report have been implemented and have bedded in, consideration should be given to developing (a) a grid of FRC for incurred costs in different categories of case and (b) a pre-action procedure for seeking leave to exceed the FRC in that grid.

Chapter 7 - A new intermediate track for fixed costs cases

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1 Should there be any fixed recoverable costs above the fast track?

1.1 The debate about fixed recoverable costs above the fast track. There has been much debate about whether there is any scope for introducing a fixed costs regime above the fast track. A large part of the legal profession is opposed to any extension of fixed costs above the current limit of £25,000. They put forward two principal arguments:

- (i) Multi-track cases are so varied in character that they do not lend themselves to any rigid costs matrix.
- (ii) Costs management is now working well in the multi-track (as noted in the preceding chapter). Therefore, there is no need for fixed costs.

1.2 Conclusion. I acknowledge the force of both these arguments. In particular, I accept that recent improvements in costs management reduce the need for fixed costs. Nevertheless, after considering the extensive written submissions and the debates at the seminars, I have concluded that there is scope for fixing the recoverable costs of some categories of cases above the fast track.

1.3 Recent evidence shows that the cost of litigating lower value cases in the multi-track remains disproportionate to the value of such cases. Applying a fixed recoverable costs ("FRC") regime to suitable cases will reduce the overall costs of litigation, by encouraging efficient working, together with streamlining and limiting the amount of work that needs to be done. It will also eliminate the process costs of budgeting or assessing the costs of such cases on an individual basis. Furthermore, fixing recoverable costs creates a clear, transparent and predictable costs structure, which will enable parties to take an informed decision at the outset as to whether a proposed claim is worth pursuing or defending. This will be particularly valuable for litigants of modest means, including small and medium-sized enterprises. As the Birmingham Law Society observed in their submissions:

"Birmingham Law Society accepts that fixed fees can, in certain circumstances, bring certainty to parties considering and engaging in litigation. They can also offer transparency to members of the public looking to engage in litigation. As such Birmingham Law Society does not oppose the concept of fixed fees provided they are applied in the right circumstances/cases."

In my view it is now right to extend FRC above the fast track, but we must proceed with caution in order to protect access to justice.

1.4 How far above the fast track limit of £25,000 should any new FRC regime go? The Law Society, the Bar Council and others have argued that reform should be progressive and gradual, rather than a great leap forward. I accept that point. I also accept that we should not suddenly move to a universal FRC regime for all cases up to £250,000.¹ I propose that there should be an upper limit of £100,000 and that only cases of modest complexity should fall within the new FRC regime.

1.5 What sort of cases should go into the new FRC regime? The new FRC regime should apply to claims which are principally for monetary relief, such as damages or debt. The regime will include cases where declarations are sought largely to support claims for monetary relief. It will not be possible to evade the regime by including incidental claims for declaratory relief. In exceptional circumstances a claim for non-monetary relief may be assigned to the new FRC regime, where that is necessary to promote access to justice. For example:

- (i) If individual householders are claiming an injunction to restrain private nuisance caused by a nearby industrial enterprise, they may not be able to proceed unless their adverse costs risk is limited by an FRC regime.
- (ii) Individuals of modest means bringing defamation claims because of material on the Internet (a growing category of claimants) may only feel comfortable proceeding if their adverse costs risk is limited by an FRC regime.

2 How should such a regime be structured?

2.1 Into what track should the new fixed costs cases go? There are three views about how we should provide for the new raft of fixed costs cases. First, these cases could remain in the multi-track but be subject to an FRC regime instead of costs management. Secondly, we could simply expand the fast track. The third option is to create a new track, sitting between the fast track and the multi-track, to provide for such cases. After full discussion at an assessors' meeting, the first option was rejected as impracticable. FRC cases will require a different case management regime and they will not be subject to costs management. You cannot have two entirely different streams of cases in the same track. So, the choice really lies between the second and third options.

2.2 I favour the third option for three reasons:

- (i) The fast track works well. Practitioners are familiar with it. I do not want to change the character of a track which works well and already caters for a large proportion of all contested cases.
- (ii) Cases in the bracket £25,000 to £100,000 will usually be more complex than fast track cases. They may require more elaborate evidence and take longer to try. The procedural rules for such cases should therefore be different from those in CPR Part 28.
- (iii) The fast track upper limit of £25,000 coincides with the planned upper limit of the Online Solutions Court. When that court comes into existence it will replace the fast track as the normal court for many categories of claims up to

¹ In chapter 9 below, however, I propose a separate capped costs regime for certain mercantile, chancery and TCC cases up to £250,000.

£25,000: see paragraphs 6.92-6.102 of Briggs LJ's Final Report.² My proposed track will sit immediately above (a) the Online Solutions Court and (b) the residue of the fast track. Joined up law reform requires that the different civil justice initiatives should dovetail together, as the former President of the Law Society emphasised in his speech at the London seminar.

2.3 What should the new track be called? I propose that the new track be called the 'intermediate track'.

3 Allocation of cases to the intermediate track

3.1 Value cannot be the sole criterion. Many of the submissions make two important points. First, value must not be the sole criterion for assigning cases to an FRC regime: some high value cases are straightforward; some low value cases are complex; some cases are difficult to value. Secondly, if the recoverable costs are going to be fixed, the procedure must be streamlined, so that lawyers on both sides do less work. It follows from this second point that only cases suitable for a streamlined procedure should be allocated to the intermediate track.

3.2 Proposed criteria. I propose that the following be the criteria for allocating a case to the intermediate track:

- (i) The case is not suitable for the small claims track or the fast track.
- (ii) The claim is for debt, damages or other monetary relief, no higher than £100,000.³
- (iii) If the case is managed proportionately, the trial will not last longer than three days.
- (iv) There will be no more than two expert witnesses giving oral evidence for each party.
- (v) The case can be justly and proportionately managed under the expedited procedure described in section 4 below.
- (vi) There are no wider factors, such as reputation or public importance, which make the case inappropriate for the intermediate track.
- (vii) The claim is not for mesothelioma⁴ or other asbestos related lung diseases.
- (viii) Alternatively, even if none of criteria (i)-(vii) are met, there are particular reasons to assign the case to the intermediate track, of the kind described in paragraphs 3.7-3.8 below.

3.3 Why exclude mesothelioma and other asbestos related lung diseases? These claims are managed in accordance with the procedure in the Mesothelioma Practice Direction (Practice Direction 3D). They are case managed in specific courts in specialist Asbestos Lists by judges experienced in this work. The law applying to the determination of such claims is in accordance with other personal injury claims, but in addition specific statutes and case law apply. The value of such claims varies. A few are of a value and/or level of complexity that would otherwise come within the intermediate track, principally claims for diffuse

² *Civil Courts Structure Review: Final Report*, July 2016 (<https://www.judiciary.gov.uk/wp-content/uploads/2016/07/civil-courts-structure-review-final-report-jul-16-final-1.pdf>).

³ The value of the case may change during the litigation for a variety of reasons. In the ordinary way, cases should remain within the track and band to which they were originally assigned. But if the case changes fundamentally, for example because the defendant admits part of the claim, then the court should have power to re-allocate.

⁴ There is a bespoke procedure for mesothelioma claims in Practice Direction 3D.

pleural thickening (many of which include a claim for provisional damages). Even so, I think that they should be excluded from the FRC regime. There is not always a clear distinction between mesothelioma cases and pleural thickening cases because (i) quite frequently the diagnosis is not clear-cut, at least in the early stages, and (ii) some claimants with relatively benign conditions will go on to develop mesothelioma or lung cancer or disabling respiratory disease. The Asbestos Lists are well used, operate very efficiently and have been the subject of few complaints from either claimants or defendant insurers. It would inevitably cause inefficiencies if some of these claims were removed from the specialist management provided by Practice Direction 3D, and case managed differently from other mesothelioma claims. That would defeat the aim of the Practice Direction.

3.4 What about complex personal injury claims and professional negligence claims? The criteria in paragraph 3.2 will exclude those complex personal injury and professional negligence cases which the Personal Injuries Bar Association and the Professional Negligence Bar Association maintain are unsuitable for FRC. My hope and expectation is that the criteria in paragraph 3.2 will catch only those cases which are suitable for FRC.

3.5 What about clinical negligence cases? As discussed in chapter 8 below, there is reason to believe that a bespoke process for clinical negligence claims up to £25,000 (including claims where breach and causation are in issue) with an accompanying grid of FRC, will result from the work which is in hand. Clinical negligence claims above £25,000 will seldom be suitable for the intermediate track, unless both breach of duty and causation have been admitted at an early stage. The multi-track will be the normal track for clinical negligence claims above £25,000.

3.6 Will some other categories of case generally be unsuitable for the intermediate track? Yes. On the basis of the above criteria, the intermediate track will seldom be suitable for (a) some multi-party cases; (b) actions against the police⁵ (as demonstrated by the submissions of the Police Action Lawyers Group); (c) child sexual abuse claims (as demonstrated by the submissions of the Association of Child Abuse Lawyers); and (d) intellectual property cases.

3.7 Additional discretion. The court should have a residual discretion to allocate any case not satisfying the criteria set out in paragraph 3.2 above (including any claim for non-monetary relief) to the intermediate track, where such allocation is necessary in order to promote access to justice. Paragraph 1.5 above gives examples of cases where such an order may be necessary to promote access to justice.

3.8 Cases where for other reasons recoverable costs should be limited. In some categories of litigation, where emotions are apt to run high, parties may need to be protected from their own enthusiasm for the fray.⁶ If mediation is unsuccessful or unacceptable to such parties, the straitjacket of the intermediate track may save them from ruinous litigation. This would be a factor to bear in mind on allocation.

3.9 The bands. Band 1 will be for the least complex cases in the intermediate track. A simple claim over the fast track limit, where there is only one issue and the trial will take a day or less, would generally be suitable for that band: for example, many debt claims or quantum only personal injury claims would be suitable for Band 1. Band 4 will be for the most complex cases in the intermediate track: for example, a business dispute or an

⁵ The approved/agreed claimant's costs budgets in 59 such actions are summarised in chapter 3 above.

⁶ Examples may be disputes about family businesses or boundary disputes between neighbours, where the disputed land has no great value.

employers' liability disease claim where there are serious issues of fact/law and the trial is likely to last three days. Bands 2 and 3 will be the 'normal' bands for intermediate track cases, with the more straightforward cases going into Band 2 and the more complex cases going into Band 4.⁷

3.10 Pre-action process. The pre-action protocols should be amended to require the parties to endeavour to agree pre-action (a) the appropriate track for cases and (b) in respect of intermediate track cases, the appropriate band. Claimants should state their proposals in this regard in the letter of claim. Defendants should do the same in the letter of response. If the case settles before issue or before allocation without any agreement on the appropriate track and band, then a decision on that issue should fall to the judge assessing costs.

3.11 Assignment to bands at the allocation stage. On allocating a case to the intermediate track, the judge will (either by agreement between the parties or by reference to the directions questionnaires) assign it to Band 1, Band 2, Band 3 or Band 4. On issue, the claimant will have ascribed a value to their claim for court fee purposes. That may assist the judge in the task of allocating cases to tracks and bands. At the subsequent case management conference ("CMC"), either party may challenge the assigned band. If the only reason for holding a CMC is the dispute about assignment, the unsuccessful party on that issue should incur a costs liability of £300 to the successful party.

3.12 Need for a practice direction. There will need to be a practice direction for the intermediate track. This practice direction will include specific guidance on assignment to bands.⁸ Matters which are obviously relevant are: complexity of the factual and legal issues, volume of evidence, remedy sought and value of claim. A new directions questionnaire must be designed to elicit the information which the court will need for this task.

3.13 Exiting the intermediate track. The court must have a residual power to take cases out of the intermediate track. It may be necessary to do so if the nature of the case changes fundamentally. The discretion should be strictly limited. Otherwise litigants will not enjoy certainty as to costs, which is one of the principal benefits of the fixed costs regime. I propose that the court should only be permitted to take cases out of the intermediate track after the first CMC "in exceptional circumstances".

4 Procedure for cases in the intermediate track

4.1 Requirement for a streamlined procedure. As previously noted, many of the written submissions have stressed that if recoverable costs are to be fixed, then the work to be done by the parties or their lawyers must also be controlled. This is necessary to ensure that the litigation process is efficient, so that only those steps that "are genuinely required in order to take a case to a fair trial" are taken (submission of the City of London Law Society). The procedure I propose below is intended to achieve that objective. Obviously, any rules embodying such a procedure must contain the familiar proviso "unless the court otherwise orders".

⁷ For further discussion of how these principles will apply to personal injury and non-personal injury cases, see paragraphs 5.9 to 5.11 below.

⁸ In the same way that the current CPR rule 26.8 gives guidance on allocation to tracks.

4.2 Statements of case. Each statement of case shall be no longer than 10 pages⁹ and shall be served together with any core documents¹⁰ which are not in the possession of other parties. It should not be possible, however, to evade the intermediate track by deliberately drafting particulars of claim to exceed the specified length. The court at the CMC will simply order the claimant to re-draft the pleading more concisely and at its own expense.

4.3 CMC. At the CMC, the court will review and approve a list of issues, resolve any disputed document requests, consider alternative dispute resolution (“ADR”), give directions and fix a date for the trial and (if it is needed) the pre-trial review (“PTR”). The court will also identify the specific matters to which any oral evidence should be directed and will limit the number of factual witnesses in the exercise of its powers under CPR rule 32.2 (3). Although trials up to three days in length fall within the parameters of the intermediate track, both the advocates and the judge should bear in mind that trial days are the most expensive stage of the litigation and involve the most inconvenience to parties and witnesses (although not to lawyers, for whom trials are normal work). Therefore, they should together design case management directions to keep the trial as short as possible, ideally no more than one day.

4.4 Disclosure in non-personal injury cases. CPR rules 31.5 (3) to (8) shall not apply. Instead, each party shall disclose:

- (i) The documents upon which it relies, in so far as not previously disclosed;
- (ii) Any documents or classes of documents which the court specifically orders at the CMC. The parties will exchange document requests seven days before the CMC.

4.5 Disclosure in personal injury cases. In personal injury litigation, disclosure is not generally a driver of high costs. Therefore, my Final Report recommended that personal injury litigation should be exempted from the proposed new disclosure rules: see chapter 37 paragraph 3.14. That recommendation was accepted and CPR rule 31.5 (2) exempts personal injury litigation from the new disclosure rules introduced in April 2013. For essentially the same reasons, I would exempt personal injury litigation from the proposed disclosure rules in the intermediate track. Standard disclosure will be the normal order in personal injury cases.

4.6 Factual evidence. Written witness statements shall stand as evidence-in-chief. The total length of all the witness statements of a party shall not exceed 30 pages.

4.7 Expert evidence. Oral expert evidence shall be limited to one or, if reasonably required and proportionate, two expert witnesses for each party. Each expert report shall be no more than 20 pages. This limit does not apply to any necessary photographs, plans and academic or technical articles attached to the report. In appropriate cases opposing experts shall give their evidence concurrently, in accordance with section 11 of Practice Direction 35.

4.8 Trial. Oral evidence at trial shall be directed to the specific matters identified by the court at the CMC or subsequently. The court will set time limits for oral evidence and submissions (so far as it is necessary to do so), in order to complete the trial within its allotted span.

⁹ In order to avoid argument about font size, the limit could be specified as a certain number of words. The same comment applies to all the suggested page limits in this chapter.

¹⁰ In this context “core documents” means (a) documents relied upon by the party and (b) documents which are obviously necessary for other parties to understand the case they have to meet.

4.9 **Applications.** So far as possible, all applications should be made at the CMC. The rules for any applications made after the CMC should be:

- (i) All applications and documents filed in support must be concise.
- (ii) The respondent must answer in writing within 7 days of service of the application notice. The response must be concise.
- (iii) Any reply from the applicant must be provided within two business days of service of the response and be concise.
- (iv) The court will deal with an application without a hearing unless the court considers it necessary to hold a hearing. In appropriate cases that may be a hearing by telephone.
- (v) The court will decide who shall pay the costs of any interim application and summarily assess them. Any such costs order will be additional to FRC.

4.10 **Vexatious applications.** The Bar Council make the point that the court must control “the scope and number of any interim applications or procedural gamesmanship”. They give as examples repeated applications by a deep pocket party for specific disclosure or for answers to CPR Part 18 requests. I agree. The court should deal with such tactics by applying the rules governing unreasonable litigation conduct: see below.

4.11 **Hand down of judgment.** Whereas judges usually give *ex tempore* judgments in fast track cases, they will often wish to reserve judgment in intermediate track cases. This will necessitate a separate hand down hearing. It will be possible to dispense with the attendance of parties or advocates, if they have agreed all consequential matters. In the absence of such agreement, a short hearing is probably more efficient than continuing correspondence between the parties or their representatives.

5 Fixed recoverable costs

5.1 **How should FRC be structured?** This has been the subject of much debate, in particular at the Cardiff seminar. The Precedent H phases are suitable for costs management, but inevitably they generate argument about how much work in a particular phase has been done. Also, a party may do work earlier than is necessary for tactical reasons. In my view, the better approach for FRC is to draw up a grid by reference to chronological stages.¹¹ This has worked in the fast track over the last four years and it brings greater certainty.

5.2 **Ring fencing fees for counsel.** Many practitioners, both solicitors and barristers, have urged the importance of ring fencing fees for counsel. The involvement of counsel at an early stage, both in advising and drafting, brings substantial benefits. Independent counsel bringing a fresh eye to the case can focus the litigation and sometimes bring about settlement. On the other hand, the rules cannot insist upon the use of counsel. Many other specialist lawyers bring the same benefits. In my view, for the reasons set out in chapter 5, the best course is to specify fees for items of work which are to be done by counsel or specialist lawyers.

5.3 **Proposed grid.** I propose a grid of FRC for intermediate track cases as set out in table 7.1 below. The grid must be read subject to the following rules:

¹¹ As one of my assessors DJ Middleton and Stephen Webber (an experienced litigation solicitor) argued at the Cardiff seminar.

- (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. I 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.

Table 7.1

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 ¹²	£2,000 ¹³
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 ¹⁴	£5,700 + 15% of damages	£15,000 + 20% of damages	£16,200 + 20% of damages	£24,700 + 22% of damages
S9 Attendance of solicitor ¹⁵ at trial per day ¹⁶	£500	£750	£1,000	£1,250

¹² £3,000 if there is a counterclaim and defence to counterclaim. The rules may need to specify how costs are split between claim and counterclaim.

¹³ £3,000 if there is a counterclaim and defence to counterclaim. The rules may need to specify how costs are split between claim and counterclaim.

¹⁴ If the receiving party did not prepare the bundle, subtract: (a) £500 for a Band 1 case, (b) £750 for a Band 2 case, (c) £1,000 for a Band 3 case, and (d) £1,250 for a Band 4 case.

¹⁵ In this table “solicitor” includes a representative of the solicitor’s firm.

¹⁶ To be halved if attendance is for half a day or less.

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 ¹⁷	£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 ¹⁸	(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

5.4 Why should the figures in stage S1 be FRC in personal injury cases but capped costs in other cases? In personal injury cases, there is a minimum amount of work which must be done to achieve a settlement pre-issue. On a 'swings and roundabouts' basis the S1 figures can fairly stand as FRC in personal injury cases. In non-personal injury cases, the amount of work to be done to achieve a pre-issue settlement may vary substantially. In some cases, a simple letter of claim may suffice to bring about a settlement. In other cases, a large amount of investigation may be required.

5.5 How are the costs figures derived? The figures in Table 7.1 are based upon (a) Professor Fenn's analysis of data on personal injury cases received from Taylor Rose TTKW,¹⁹ (b) discussions with the assessors, (c) consideration of the budget exercise, the submissions and data received and (d) my view as to how CPR rule 44.3 (5) (defining proportionality) should be applied to cases falling within the intermediate track. By way of elaboration:

- (i) The graphs at appendix 9 show all 1,461 observations extracted from the Taylor Rose TTKW dataset relating to multi-track claims settled since the coming into force of the Legal Aid, Sentencing and Punishment of Offenders Act 2012 with damages less than £100,000 and where the claimants had provided no more than three expert reports. Each separate chart in the graphs contains those observations on claims that were settled at four different chronological stages of litigation - pre-issue, pre-CMC, pre-expert exchange, pre-PTR. The dots show the observed combinations of agreed costs and damages at settlement for each claim, where agreed costs are measured on the vertical axis, and damages on the horizontal axis. Within each chart, several lines are drawn through the data. The lines labelled "Band 1" (i.e. the first from the bottom in each chart) show the expected agreed costs as estimated

¹⁷ To be halved if attendance is for half a day or less.

¹⁸ Assuming a one day trial in Band 1, a two day trial in Band 2, and a three day trial in Bands 3 and 4. For all bands, it is assumed that there was no counterclaim, that the receiving party prepared the trial bundles, that there was unsuccessful ADR and that there was no approval of settlement for a child or protected party.

¹⁹ Solicitors and costs lawyers.

for varying levels of damages for the claims categorised as non-personal injury road traffic accident (“RTA”). The lines labelled “Band 2” (i.e. the second from the bottom in each chart) show the expected agreed costs as estimated for varying levels of damages for the claims categorised as RTA, employers’ liability accident, or public liability. The lines labelled “Band 3” (i.e. the third from the bottom in each chart) show the expected agreed costs as estimated for varying levels of damages for the claims categorised as employers’ liability disease. The lines labelled “Band 4” represent an attempt, by extrapolation and based on judgement, to characterise the relationship between agreed costs and damages for the most complex claims, irrespective of claim type. A formula is derived to produce each of these lines for the purposes of Table 7.1. The slope of each line is used to determine the ‘% of damages’ figure attached to Bands 1 to 3. From inspecting the graphs, it is evident that as the complexity of the case (and the stage of litigation at settlement) increases the slope becomes steeper, and this leads to a higher ‘% of damages’ figure. Based on the formula derived for each line, the lump sums are calculated as constant amounts of costs, irrespective of the level of damages. This is the point at which each line intersects the vertical axis. The Band 4 ‘% of damages’ and lump sums are based on judgement for the most complex cases, using a similar relationship between agreed costs and damages to the other bands. Further explanation of how these formulae were estimated can be found in appendix 9.

- (ii) I have then added to the fixed costs formulae the figures in the boxes for stages 2 and 7, in order to ring fence fees for counsel or specialist lawyers, as urged by many of those who sent in submissions or who spoke at seminars. In boxes S9 – S12 I have added in trial costs. (Almost all of the cases analysed by Professor Fenn settled before trial and so did not include these costs.) Next, I have added in ADR costs. In personal injury cases below £100,000, this usually means direct negotiations or a joint settlement meeting. In non-personal injury cases below £100,000, ADR may involve a mediation. Finally, box S15 provides for settlements which may require court approval. That is discussed further in paragraph 6.2 below.
- (iii) The figures in table 7.1 are broadly in line with the data set out in chapter 3 above (as discussed in paragraph 5.7 below) and with the experience of those assessors involved in the budgeting of cases suitable for the intermediate track.²⁰ The figures in Bands 2 and 3 are reasonably close, because (a) that is where Professor Fenn’s analysis of the Taylor Rose data leads and (b) most cases in this range tend to gravitate towards the centre. Bands 1 and 4 are for those cases which are simpler or more complex respectively.

5.6 Are you being more ‘generous’ than a strict derivation from the Fenn graphs? Yes. First, all the costs for stages S2, S7 and S9-S15 are all additional to the costs derived from the Fenn graphs. Secondly, the Band 4 figures go above that which can be derived statistically from the data, but fit with my own and my assessors’ understanding of what are reasonable costs for the most complex types of case likely to go into the intermediate track.

²⁰ Allowance must be made for process savings (because of FRC) and efficiency savings (because of the streamlined procedure for the intermediate track).

5.7 How do the figures in Table 7.1 compare with the data in chapter 3? In my view, there is a reasonable fit with the data in sections 2 and 4 of chapter 3, if one bears in mind the following:

- (i) There will be ‘process’ savings, if recoverable costs are fixed.
- (ii) There will be ‘efficiency’ savings consequent upon the streamlined procedure proposed in this chapter.
- (iii) Approved budgets and many of the costs figures quoted in chapter 3 include disbursements which are additional to the sums shown in Table 7.1.
- (iv) Not all of the cases up to £100,000 in value will go into the new intermediate track – only those which meet the criteria set out in this chapter. Many of the multi-track cases reviewed in chapter 3 self-evidently do not meet those criteria.

5.8 For the above exercise, I have ignored data received concerning cases which are unlikely to go into the intermediate track, such as substantial defamation claims and actions against the police. The damages in such cases may not be high, but their complexity indicates that they will not generally be suitable for the intermediate track.

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

5.10 What about non-personal injury cases? Straightforward cases, where only one issue is in dispute (e.g. proving a debt), will generally go into Band 1. Most intermediate track cases will go into Band 2 or Band 3. Complex cases falling within the intermediate track will go into Band 4. The recoverable costs set out in Table 7.1 represent my best effort at converting the proportionality rules into hard figures. This must be the correct approach.²¹ The grid cannot be an exact pre-estimate of the costs which every party will incur in every intermediate track case. We do not have, and we never will have, large volumes of evidence about the costs of different types of non-personal injury cases comparable to the material available on personal injury claims. As the Chancery Bar Association observed in their paper on fixed costs last year:

“Traditionally litigants have had to expect to pay a substantial shortfall in the event of success where they are awarded costs on a standard basis.”

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

5.12 Disbursements. The above table does not include disbursements. The principal disbursements will be court fees, expert fees and (where ADR takes the form of mediation) the mediator’s fee. In some cases, translators and/or interpreters are needed. I recommend that once the new fixed costs regime is in place, work should commence on developing fixed costs for experts. This is essentially what happened in the fast track. Once the fast track fixed costs for personal injury cases had been in place for a year, a scheme of fixed

²¹ See *The Reform of Civil Litigation*, published by Sweet & Maxwell in September 2016, chapters 3 and 19.

costs for medical reports²² was introduced: see chapter 15, paragraph 5.22 of my previous report and CPR rule 45.19. It would also be sensible to develop fixed costs for mediators, translators and interpreters.

5.13 Defendant's failure to beat claimant's Part 36 offer. If the defendant fails to beat an effective claimant offer under CPR Part 36, for the reasons set out in chapter 5 above and subject to the same caveats, I tentatively propose that there should be a 30% or 40% uplift on costs rather than indemnity costs.

5.14 Unreasonable litigation conduct. In cases of unreasonable litigation conduct,²³ the court should have the power either to award a percentage uplift²⁴ on costs or to make an order for indemnity costs. The court will exercise that power, having regard to the seriousness of the conduct in question. One example of such unreasonable conduct might be substantial non-compliance with the relevant pre-action protocol.

5.15 London weighting. The current FRC rules in the fast track provide for a 12.5% uplift on fixed costs payable to a party who lives in the London area and instructs a legal representative who practises in the London area: see CPR rule 45.29C (2), rule 45.29F (5) and Practice Direction 45 paragraph 2.6. I recommend that similar rules should apply to the extended FRC regime proposed in this chapter.

5.16 Uprating for inflation. I recommend that FRC in the intermediate track should be adjusted for inflation every three years, in the same manner as set out in chapter 5 concerning FRC in the fast track.

5.17 Contractual entitlement to costs. Any intermediate track case where one party has a contractual entitlement to costs will be subject to the streamlined procedure set out in this chapter. If the party with a contractual entitlement to costs is successful, the position will be as set out in chapter 5, paragraph 3.7. It is not within my terms of reference to consider whether the substantive law in this area should be reformed and I do not address that question.

6 Should the intermediate track include Part 8 claims?

6.1 Not yet. Some financial claims which proceed under CPR Part 8 would be suitable for FRC, as was noted at the Leeds seminar. It would be possible to modify the grid in Table 7.1 to accommodate those claims. The assessors and I have discussed at some length whether to propose FRC for such claims in this report. In the end, we have all concluded that such a step would be premature. For the time being, the costs of such claims should, where appropriate, be controlled by costs management. It is first necessary to let the intermediate track and the proposed FRC for Part 7 claims bed in. Many of the submissions to the review call for a gradualist approach to developing FRC. In relation to this issue, I heed their call. Subject to the minor exceptions set out below, I recommend that the question of extending FRC to Part 8 claims should be deferred for future consideration.

6.2 Approval of settlements for children and protected parties. Table 7.1 includes FRC for the approval of settlements for children and protected parties. If the settlement is pre-

²² In respect of soft-tissue injury RTA claims, which represent a large proportion of fast track personal injury claims.

²³ As to what constitutes unreasonable litigation conduct, see *Dammermann v Lanyon Bowdler LLP* [2017] EWCA Civ 269 at [30]-[32].

²⁴ Either 30% or 40%, depending upon what is decided in relation to the preceding paragraph

issue, the application for approval is made under CPR Part 8. If proceedings are on foot, the application for approval is made under CPR Part 23. In any intermediate track case, the FRC for that application should be the same, regardless whether it is made under Part 8 or Part 23.²⁵

6.3 Costs only proceedings. Costs only proceedings are brought under CPR Part 8. The receiving party files short particulars of claim referring to the settlement agreement, the defendant files an acknowledgement of service and the court makes an order for assessment of costs. I recommend that the FRC for a claimant in such proceedings should be £300 and for a defendant in such proceedings²⁶ £150.

6.4 And finally. It should be noted that Part 8 is already used, in modified fashion, for determining quantum in low value personal injury cases not settled within the Portal. These cases already have FRC. They are excluded from the general rule that Part 8 claims are allocated to the multi-track. These arrangements will continue and are unaffected by my proposals in this chapter. These figures are, of course, exclusive of court fees and VAT.

7 The future

7.1 Bedding in of these reforms and future review. If the above proposals are accepted, I recommend that after four years there be a review of these arrangements. If they are working satisfactorily, then the Civil Procedure Rule Committee (“the Rule Committee”) may decide to expand the scope of the intermediate track to include:

- (i) Monetary claims above £100,000;
- (ii) Claims for non-monetary relief.

7.2 Such an approach would give the reforms time to bed in, as well as enabling the Rule Committee to address any issues that arise. As one major insurer put it in their submission:

“any revised approach to fixed costs should be, to a degree, evolutionary so as to ensure that they are fair; proportionate; facilitate access to justice; make efficient use of limited and valuable court time and resources and prevent unintended consequences”.

7.3 Analogy with the fast track. Such an approach would also replicate our experience with the fast track. There have been FRC for part of the fast track since July 2013. It is now widely accepted that it is appropriate to expand the scope of that fixed recoverable costs regime.

7.4 Developing more bespoke processes. I refer in chapter 8 to work which is in hand to develop bespoke processes for clinical negligence claims. There is scope for more work of this nature in respect of other areas of high volume litigation. Claimant and defendant representatives have worked together to develop bespoke processes for handling low value RTA claims and noise induced hearing loss claims. They have also worked together constructively to develop the Serious Injury Guide. Both the Association of Personal Injury Lawyers and the liability insurers speak warmly of that collaboration in their submissions.

²⁵ Court fees will, of course, be a recoverable disbursement.

²⁶ The paying party may occasionally secure an order for costs: for example, if the costs only proceedings fail for some reason or if there is a relevant CPR Part 36 offer.

Liability insurers lament that there is a gap between the fast track cases on the one hand and serious injury cases on the other, where there has been no such co-operation. They state:

“The parties (on both sides) have not worked together to create a consumer-friendly way of resolving disputes above the fast track threshold.”

I see much force in that comment and recommend that the collaboration between claimant bodies and liability insurers should now extend to areas of litigation above the fast track (whether or not within the intermediate track). This would be to the benefit of claimants as well as liability insurers and the legal profession. A regime of FRC can probably be developed on the back of any further bespoke processes.

8 Conclusion

8.1 Recommendations. I recommend that:

- (i) A new intermediate track with a streamlined procedure should be created for cases above the fast track, which are of modest complexity and up to a value of £100,000.
- (ii) There should be a grid of FRC for such cases, as set out in this chapter, and the figures should be reviewed every three years.
- (iii) There should be FRC for (a) applications to approve settlements for children and protected parties and (b) costs only proceedings, in respect of intermediate track cases.
- (iv) Save as set out in (iii), CPR Part 8 claims should be excluded from the proposed FRC regime.
- (v) After these reforms have bedded in, consideration should be given to extending the scope of the intermediate track and the range of FRC.

Chapter 8 - Clinical negligence litigation

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1. Introduction
2. Data on the costs of clinical negligence litigation
3. The competing arguments
4. The Leeds proposal
5. The way forward
6. Conclusion

1 Introduction

1.1 High volume litigation. The budget exercise undertaken in December 2016-January 2017 provided a snapshot of current cases passing through the courts. Clinical negligence claims formed the second largest category of claims (the largest being personal injury). It is plain both from the budget exercise and from the submissions received that contested clinical negligence claims are now a major part of the workload of the courts and the legal profession.

1.2 Data from NHS Resolution (formerly National Health Service Litigation Authority). According to the NHS Resolution Annual Report and Accounts 2016/17 (“the 2016/17 Report”),¹ the annual cost of clinical negligence in the NHS in England has risen by just over £200 million, from £1.489 billion in 2015/16 to £1.707 billion in 2016/17, and legal costs were 36% of the 2016/17 expenditure. The 2016/17 Report shows that the numbers of new clinical claims reported in the last seven financial years were:

(i)	2010/11:	8,655
(ii)	2011/12:	9,143
(iii)	2012/13:	10,129
(iv)	2013/14:	11,945
(v)	2014/15:	11,497
(vi)	2015/16:	10,965
(vii)	2016/17:	10,686

1.3 Breakdown of claims closed in 2015/2016. According to a Department of Health (“DoH”) consultation document,² the breakdown by value of claims resolved in 2015/2016 is:

Damages tranche £	No. of claims	% of total claims	% of successful claims (i.e. settled for damages)
Nil (i.e. claims unsuccessful)	4,983	46.23%	n/a
£1 - £1,000	184	1.71%	3.18%
£1,001 - £25,000	3,475	32.24%	59.97%

¹ <http://resolution.nhs.uk/annual-report-and-accounts-201617/>.

² https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/586641/FRC_consultation.pdf. There is no equivalent breakdown by value in the 2016/17 Report.

Damages tranche £	No. of claims	% of total claims	% of successful claims (i.e. settled for damages)
£25,001 - £50,000	866	8.03%	14.94%
£50,001 - £100,000	556	5.16%	9.59%
£100,001 - £150,000	202	1.87%	3.49%
£150,001 - £200,000	129	1.20%	2.23%
£200,001 - £250,000	67	0.62%	1.16%
£250,000 +	316	2.93%	5.45%
Total	10,778		

1.4 Breakdown by value of clinical negligence claims. In the above table, there were 5,795 'successful' claims, in which the National Health Service Litigation Authority paid damages. In some 63% of the successful cases the claims were valued at up to £25,000. Appendix 12 is a breakdown by value of clinical negligence claims from three other sources, namely:

- (i) the recent budget exercise;
- (ii) the data detailing 62 cases post-dating the Legal Aid, Sentencing and Punishment of Offenders Act 2012 ("LASPO") at appendix 7;
- (iii) data from the Medical Protection Society.

Although there are differences between the data sources, the general picture is that claims up to £25,000 form a significant part of the total caseload.

2 Data on the costs of clinical negligence litigation

2.1 Budget exercise. My team received budgets for 62 clinical negligence cases. Please see chapter 3 above for a summary and analysis of those budgets.

2.2 Data and evidence. Many claimant and defendant representatives have sent in details of recent or current cases and their associated costs. Chapter 3 above reviews the data and evidence submitted. I do not repeat that review in this chapter.

2.3 Savings consequent upon the civil justice reforms of 2013. Several submissions make the point that LASPO and the new proportionality rule have substantially reduced claimants' recoverable costs. There have been attempts to quantify the savings based on replies to freedom of information requests. I accept that there have been significant savings in the costs paid to claimant solicitors in individual cases because of those reforms, but I do not accept that it is yet possible to quantify the savings attributable to LASPO and the new proportionality rule. This is because there are still many pre-LASPO cases within the data analysed.

2.4 Post-LASPO cases which have gone to detailed assessment. I am aware of two post-LASPO clinical negligence cases, which have been subject to costs management and have subsequently reached the stage of detailed assessment. Details of those cases, including the bills of costs (though not the costs as assessed following detailed assessment), were kindly

supplied by one of my assessors. One of the cases had damages of £2.8m together with a periodical payment order, and so is not relevant to this review. The other case settled for damages of £50,000, following acceptance of the defendant's Part 36 offer (which was made after it served its expert evidence). In relation to the latter case, the table below compares, for each Precedent H phase, the approved/agreed budget with the costs claimed in the Precedent Q form (split into costs incurred before and after the budgeting exercise). For those phases on which the claimant had embarked by the time of settlement, the costs actually incurred were in total £10,728 less than the budgeted costs. Further, for each of the individual phases undertaken (with the exception of CMC), the actual costs were below budget.

Precedent H Phase	Approved/ Agreed Budget	Actual Costs			Difference Between Budget and Total
		Pre Budget	Post Budget	Total	
Pre-Action	£5,465	£5,171	£0	£5,171	£-294
Issue/Statements of Case	£5,731	£3,560	£1,568	£5,128	£-603
CMC	£6,303	£5,387	£1,584	£6,971	£668
Disclosure	£5,835	£4,609	£224	£4,833	£-1,002
Witness Statements	£4,611	£736	£1,290	£2,026	£-2,586
Expert Reports	£28,463	£17,068	£6,632	£23,700	£-4,763
PTR	£4,200	£0	£0	£0	£-4,200
Trial Preparation	£9,115	£0	£0	£0	£-9,115
Trial	£12,405	£0	£0	£0	£-12,405
ADR/Settlement	£5,262	£448	£2,665	£3,113	£-2,149
Total (all phases)	£87,389	£36,978	£13,963	£50,941	£-36,448
Total (phases undertaken)	£61,669	£36,978	£13,963	£50,941	£-10,728

2.5 Seminars. The main oral argument about the role of fixed recoverable costs ("FRC") in clinical negligence was at the Manchester and Cardiff seminars. Please see chapter 4, sections 6 and 12 for a summary of the debates at those two seminars.

3 The competing arguments

3.1 Claimant representatives. In their written submissions, claimant representatives put forward formidable opposition to fixing recoverable costs in clinical negligence litigation. They also maintained that now is not the right time to take any step, because the savings achieved by the last round of reforms cannot yet be quantified. More fundamentally, they argue that clinical negligence is inherently unsuited to FRC because of the complexity and variability of the subject matter. Costs budgeting is the appropriate way to control costs, because that is a procedure tailored to the circumstances of each individual case. They argue that, because of the subject matter, costs in many contested cases are bound to exceed the sum in issue. FRC would, therefore, inhibit access to justice. Despite the vigour of the written submissions, I have noticed that in informal conversation some claimant representatives do accept that there is a role for FRC in lower value cases. I shall revert to this topic in section 5 below.

3.2 Defendant conduct. As a separate strand to their arguments, claimant representatives maintain that defendants frequently drive up litigation costs, by (a) maintaining forlorn denials of liability in strong cases and (b) making unrealistic offers right up to a late stage of the litigation. As noted in chapter 1, the National Audit Office (“NAO”) is currently investigating the manner in which clinical negligence claims are being handled on the defendant side. It is not therefore appropriate for me to reach any conclusion on this issue. Nevertheless, I am bound to say that there is some evidence in this regard, which merits investigation by the NAO. At appendix 13 is a note prepared for me by a senior Queen’s Counsel, specialising in clinical negligence work on behalf of both claimants and defendants.

3.3 Defendant arguments. There is a strong feeling on the defendant side that litigation costs are “crippling the National Health Service and adversely affecting front line services”: see chapter 4, paragraph 15.2. They believe that FRC are the only viable solution to the problem. Defendant representatives pressed this view both in their written submissions and at meetings. By way of example:

- (i) The Medical Defence Union are firmly in favour of FRC. They argue against exempting clinical negligence from any proposed regime:

“We believe it is possible to recognise the additional complexity of clinical negligence claims within a fixed costs regime. We cannot support any exceptions for clinical negligence to an agreed table of fixed costs as that would open the way for legal challenges that would undermine the whole point of fixed costs. There should be no exceptions by type or complexity of case, even for clinical negligence.”

- (ii) The Medical Protection Society advocate the introduction of an FRC regime up to a value of £250,000. They describe how in their experience it is not unusual for claimant lawyers’ costs to exceed the damages awarded to the claimants themselves, even where claims are settled at an early stage. FRC would, they say, benefit both parties financially as the costs of the budgeting process would be avoided.
- (iii) NHS Resolution argues that there is a strong need for FRC in the lower reaches of the multi-track to tackle the currently substantial disproportion between claimant costs and damages. This disproportion applies also to the cases litigated under the post-LASPO regime. John Mead on behalf of the NHS Resolution made the same point at the Manchester seminar. He also explained that the main problem with costs budgeting is pre-budget incurred costs, which are not subject to budgeting. As an illustration of the current level of costs, NHS Resolution rely upon the spreadsheet at appendix 7, which is referred to in paragraph 15.4 of chapter 4. That summarises the outcomes of 62 post-LASPO cases which were subject to costs management. The total damages paid to claimants in those 62 cases amounted to £4.8 million. The total costs paid to claimant representatives in those 62 cases amounted to £3.1 million.³ The latter figure, of course, includes court fees, experts’ fees and other disbursements.

3.4 Claimant conduct. Defendant representatives are critical of claimant conduct. They complain of drip feeding information and front loading costs. The complaint is that

³ Excluding the costs of six cases which have not yet been resolved.

claimant representatives incur as much of the costs as they can pre-issue, so that those costs will not come under effective scrutiny at the first costs and case management conference. I am in no position to evaluate these comments, but no doubt the NAO will consider them during its review.

4 The Leeds proposal

4.1 Round-table discussion with Leeds barristers. On the evening of 6th February 2017, two of my judicial assistants and I attended a round-table meeting with a cross-section of the Leeds Bar. Practitioners emphasised that costs budgeting is now working much better, therefore calling into question any need for FRC. They suggested that for clinical negligence a better way forward would be to create a set of template budgets.

4.2 Working party. I asked the Leeds barristers to set up a working party in order to formulate their proposal. They duly set up a working party comprising Richard Copnall, Andrew Lewis QC, Stuart Jamieson and Hylton Armstrong, who reported back on 22nd February.

4.3 The working party's proposal. The working party's proposal (the "Leeds matrix") is at appendix 14. It is an ingenious scheme, in that recoverable costs go up or down at each stage, depending on the complexity of the case and the number of matters which are in issue.

4.4 Assessment. My actuarial judicial assistant has fed some 'real' cases into the Leeds matrix with varying results. This exercise shows that the Leeds matrix would require further development before it could be brought into general use. In the end, I have concluded that a different approach is appropriate for FRC above the fast track, as set out in this and the preceding chapter. Nevertheless, the Leeds matrix is well thought out. It suggests a way of converting value, numbers of experts and numbers of issues into costs figures. The Leeds matrix may merit further development and further consideration in the future, after my current proposals have been implemented. Costs management will continue to play a major role in clinical negligence litigation and template budgets could be of assistance.

5 The way forward

5.1 Costs and procedure must be linked. Earlier chapters have stressed the importance of linking procedure to recoverable costs. In the field of clinical negligence, any such linkage is particularly important. One cannot simply impose a grid of FRC and leave all the other rules of procedure as they are.

5.2 Lessons from the NIHL working group. As noted in chapter 5, the Civil Justice Council ("CJC") set up a working group to deal with claims for noise induced hearing loss ("NIHL"). There were both claimant and defendant representatives on the working group, including two of my present assessors. The working group agreed a detailed process for the conduct of NIHL claims and a grid of FRC to fit with that process. There were one or two points on which they failed to reach agreement, and I have set out my recommendations on those points in chapter 5 above. If those recommendations are accepted, there will be a scheme of FRC for NIHL cases and a bespoke process to accompany it. I understand that

the CJC will shortly be publishing the full text of the agreed procedure for handling NIHL claims.

5.3 Can we do the same again with clinical negligence claims up to £25,000? Yes. I have spoken to several claimant and defendant representatives, who are optimistic. There is a willingness amongst some influential members of Association of Personal Injury Lawyers (“APIL”) to serve on a joint working group, to develop a bespoke process for low value clinical negligence claims with an accompanying grid of FRC. “Low value” for these purposes means up to £25,000. Professor Fenn has obtained and analysed a large volume of data on claims up to £25,000. These data come from several different sources on both the claimant and defendant sides. The sources include NHS Resolution, APIL and the Society of Clinical Injury Lawyers. These data will provide a statistical basis for drawing up the grid, after allowing for efficiency savings consequential upon the bespoke process and FRC. If there are any specific issues on which the working group cannot agree, I would be willing to adjudicate on such matters, if so requested.

5.4 A stand-alone scheme. Any such process would be a stand-alone scheme catering for cases up to £25,000, regardless of whether they are suitable for the fast track, the intermediate track or the multi-track. A collaborative exercise of the kind suggested above would, in my view, lead to the creation of a workable FRC scheme suitable for those cases. As can be seen from the statistics in section 1 above, that would take care of a large swathe of clinical negligence litigation. It would also promote access to justice. Once delivered and implemented, in time it might be possible to extend the success of such an initiative to claims of somewhat higher value.

5.5 What about clinical negligence cases above £25,000? A minority of clinical negligence cases with a value between £25,000 and £100,000 might be suitable for the intermediate track. A good example of such a case may be one where the defendant admits breach and causation in the protocol period and all that remains are relatively straightforward quantum issues. The majority of cases above £25,000, however, are likely to proceed in the multi-track (as they do now). They will be subject to costs management. As discussed in chapter 6 above, costs management works well, but there is scope for improvement, particularly in relation to incurred costs.

5.6 Will this cut across other initiatives? No, it will complement them. The DoH is currently seeking to develop a grid of FRC for clinical negligence claims up to £25,000. The draft protocol and procedural rules proposed in the DoH consultation paper are a step in the right direction, but they do not constitute the same sort of bespoke process suggested above. I recommend that all parties should now embark upon a collaborative exercise, to develop the bespoke process and a grid of FRC in tandem.

6 Conclusion

6.1 Recommendation. I recommend that the Civil Justice Council should in conjunction with the Department of Health set up a working party, including both claimant and defendant representatives, to develop a bespoke process for clinical negligence claims initially up to £25,000 together with a grid of FRC for such cases.

Chapter 9 - Business and property litigation

Index

1. Introduction
2. Discussion
3. The proposed capped costs pilot
4. The future
5. Conclusion

1 Introduction

1.1 The focus of this chapter. This chapter is focused upon lower value litigation in the Business and Property Courts and in the planned 'Business and Property Lists' of the County Court. By 'lower value' I mean litigation where the sum in issue or the value of the property or rights in dispute is up to £250,000.

1.2 The types of litigation. Litigation in those courts or lists includes Part 7 and Part 8 claims, business disputes, financial claims, property disputes, probate and inheritance disputes, professional negligence claims, claims by contractors or sub-contractors for payment, claims for defects and so forth. No party is protected by qualified one way costs shifting. Both parties have a strong interest in controlling costs in lower value cases, because of the danger that litigation costs will become disproportionate. Sometimes one or other party is insured, but insurers also like to limit their costs exposure.

2 Discussion

2.1 A wide range of views. The strongly held views of court users in this field cover a wide spectrum. This emerges from the written submissions and was starkly apparent during the seminars.

2.2 Supporters of fixed costs. The Federation of Small Businesses ("FSB") advocates fixed recoverable costs ("FRC"), in conjunction with rigorous case management and efficient court processes, for all commercial cases up to £250,000. The FSB writes:

"A second but closely linked way that fixed recoverable costs can reduce the £11.6 billion cost of commercial disputes to small business is through creating more certainty over the final costs of litigation. This will give more confidence to smaller businesses to defend their interests through the courts when necessary."

One international commercial law firm, which supports extending FRC writes:

"There is no doubt that, as a firm, we have embraced fixed costs. Many of our clients, especially those in the insurance sectors, encourage them. Many of the business opportunities we are offered require that we work for fixed or capped fees. As technology improves and there are opportunities to work even more efficiently, it is clear that our clients will expect us to act for them on the basis of fixed fees, or

using other innovative funding arrangements, rather than traditional hourly rate retainers.”

2.3 Opponents of fixed costs. The Professional Negligence Lawyers Association and the Professional Negligence Bar Association are opposed to FRC. They believe that FRC will inhibit access to justice and that it is impossible to devise a grid which will be fair in all cases up to £250,000. The Bar Council and the Law Society are of a similar view. Both the Bar Council and some Specialist Bar Associations are concerned that FRC will be damaging to the Junior Bar. The Technology and Construction Bar Association opposes FRC root and branch, even to the extent of saying that where all parties in a Technology and Construction Court (“TCC”) case wish to participate in a voluntary fixed costs pilot, they should not be permitted to do so: see chapter 4, paragraph 10.2.

2.4 City of London Law Society. The City of London Law Society has submitted a thoughtful paper opposing the extension of FRC to commercial cases, but added in the final paragraph:

“A small minority of the Committee is more sympathetic to the aims of fixed recoverable costs because fixed recoverable costs do potentially reduce, even if not entirely eliminate, one aspect of the financial uncertainty involved in litigation. This may be attractive to some litigants in some types of case, even if it involves a rough and ready approach to justice. However, even those more favourably disposed towards fixed recoverable costs consider that a pilot is required in order to assess both whether there is demand for fixed recoverable costs and how it would work in practice. In the commercial sphere, a pilot in the Mercantile Court might be appropriate for cases involving, say, less than £250,000.”

2.5 Intellectual Property Enterprise Court. The Intellectual Property Enterprise Court (“IPEC”) provides a highly streamlined procedure for intellectual property (“IP”) cases. Statements of case stand as evidence-in-chief and have core documents attached. No further witness statements or disclosure are permitted unless specifically ordered by the judge. Applications are generally dealt with without a hearing; and the trial lasts no more than two days. Cases proceeding in the IPEC are robustly case managed by specialist IP judges. Any amendments to statements of case must pass a strict cost/benefit test. The IPEC has a capped recoverable costs regime and cost budgeting does not apply in the IPEC. After trial, the parties produce a schedule of costs by reference to various stages of the litigation, which are assessed summarily by the court. A cap applies to each stage, together with an overall cap (for a liability-only trial, of £50,000 plus court fees) if necessary. There is a limit on the ‘value’ of a claim in the IPEC of £500,000.¹ However, that does not mean that all cases that might result in damages of less than £500,000 are brought in the IPEC. Nor does it mean that all IP cases with anticipated damages of less than £500,000 are ‘low value’. Typically, in intellectual property cases clients are more interested in non-pecuniary remedies, such as injunctions and declarations of non-infringement. These are not usually ‘money’ claims. The factors which determine the suitability (or otherwise) of the IPEC as a venue for an IP dispute include: the size of the parties; the complexity of the claim; the nature of the evidence; the impact of IPEC’s strict controls on disclosure and cross-examination on conflicting factual evidence which needs to be resolved; the value of the claim; and importantly, whether the liability trial can be dealt with in no more than two days.

¹This is not an inflexible requirement: see CPR rule 63.17A(3) and the IPEC Guide paragraph 1.3.

2.6 Feedback from IPEC users. During my consultation, many court users have spoken warmly about the IPEC regime. The number of new cases issued in IPEC has steadily climbed ever since the regime was introduced. An article in the *New Law Journal* of 26th May 2017 states that there has been a substantial increase over the last twelve months. It adds “this cost-effectiveness makes IPEC more accessible to SMEs², giving them greater confidence to bring a claim”.³ The Intellectual Property Lawyers Association offers an even-handed assessment of the IPEC costs rules:

“Our collective experience is that clients do regard the inability to recover their costs above the overall cap as a disadvantage of the IPEC, since few cases are so simple that a party’s own legal costs can be kept to the recoverable limit; but this is counter-balanced (and for small clients suing or defending cases brought by larger companies, outweighed) by the fact that the “downside” risk is known and limited.”

2.7 Recent example. In *77M Ltd v Ordnance Survey Ltd* [2017] EWHC 1501 (IPEC) the claimant, an SME, argued that the case should remain in the IPEC, because the claimant could not afford to proceed if it was exposed to any greater adverse costs risk. The judge accepted that submission. He observed at [14]:

“An SME with limited financial resources is precisely the kind of litigant that is entitled to the benefit of the costs cap in the IPEC, subject to other considerations.”

He concluded at [24]:

“As matters stand now, the most important factor in the present case is that 77M is an SME which seeks the protection of the costs regime in IPEC. I am satisfied, on the evidence I have seen, that a transfer to the general Chancery Division would raise a serious likelihood of having the practical effect of blocking 77M's access to justice.”

2.8 Conclusions. I have reached four conclusions:

- (i) Low value business and property cases of the kind discussed in detail at two of the seminars⁴ and in this chapter, form a vast and inhomogeneous mass. In some instances, an FRC regime would promote access to justice, for example (as suggested at the Birmingham seminar) where a householder of modest means is suing their builder. In other instances, costs management would be preferable to FRC.
- (ii) Capped stage costs are the best variant of FRC for this class of litigation.
- (iii) If recoverable costs are capped in that way, the work to be done must also be controlled (as the Bar Council, the Law Society and many others have argued). That requires a streamlined procedure and robust case management.
- (iv) The best way forward is to run a voluntary pilot, in a small number of the Business and Property Courts.

² An “SME” is a small or medium-sized enterprise.

³ *SMEs get tough about IP* ([https://www.newLawjournal.co.uk/content/smes-get-tough-about-ip](https://www.newlawjournal.co.uk/content/smes-get-tough-about-ip)).

⁴ Leeds seminar on 6th February and Birmingham seminar on 16th March: see chapter 4, sections 5 and 10.

3 The proposed capped costs pilot

3.1 Proposal. Taking up the suggestion made in the last paragraph of the City of London Law Society's submissions, I proposed in March of this year⁵ that a pilot of fixed costs be run in some of the specialist courts, in order to assess whether there is a demand for such a regime and to see how it might work in practice. To that end, a working group was set up to prepare proposals to be presented to the Civil Procedure Rule Committee ("the Rule Committee"). The membership of the working group is at appendix 1. They produced an excellent draft, which the Rule Committee approved after making a small number of amendments.

3.2 Draft pilot rules. The final draft of the capped costs pilot (the "Capped Costs Pilot") rules, as approved by the Rule Committee, is at appendix 15. Its important features include the following:

- (i) The 'Aim of the Pilot' is defined in the Pilot as being to improve access to the Business and Property Courts of England and Wales, primarily through:
 - (1) streamlining the procedures of the Pilot courts;
 - (2) lowering the costs of litigation;
 - (3) increasing the certainty of costs exposure; and
 - (4) speeding up the resolution of claims.
- (ii) Where a case is proceeding in the 'Capped Costs List':
 - (1) the parties are expected at all times to further the Aim of the Pilot;
 - (2) the court will further the Aim of the Pilot when exercising any discretion and/or considering whether to make any orders;
 - (3) before making any order which departs from the general principles set out in the Pilot the court must be persuaded that the benefits that arise from the making of the order are likely to justify the cost of complying with the order.
- (iii) The Capped Costs Pilot will be open to any case in the pilot courts, except those with a monetary value in excess of £250,000, those which will require a trial of more than two days after appropriate case management, those which involve allegations of fraud, those which are likely to require extensive disclosure or reliance upon extensive witness or expert evidence, and those which involve numerous issues and numerous parties.
- (iv) Prospective parties to litigation in the Capped Costs List are expected to follow specific pre-issue steps set out in the Capped Costs Pilot rules.
- (v) The Capped Costs Pilot will be voluntary. The claimant may issue in the Capped Costs List, but prior to the case management conference (the "CMC") the defendant may object to the case proceeding in it. Thereafter, the court's permission will be required for a case to leave the Capped Costs List.
- (vi) Statements of case will be limited in length, and must be accompanied by the documents upon which the party proposes to rely. Statements of case may stand as evidence-in-chief. Statements of case should be accompanied by bundles of core documents.
- (vii) At the CMC the court will actively manage the case so as to further the Aim of the Pilot. The parties must prepare a list of issues in advance, and attend the

⁵ See Keynote Address on the Review of Fixed Recoverable Costs: 7th March 2017, available on the Judiciary website (<https://www.judiciary.gov.uk/wp-content/uploads/2017/03/control-of-incurred-costs-20170307.pdf>).

- CMC with a sufficiently detailed knowledge of the case to enable appropriate case management decisions to be made.
- (viii) Costs management shall not apply to cases in the Capped Costs List.
 - (ix) There is to be no automatic disclosure, witness statements or expert evidence. At the CMC, the court will consider whether to make any orders as to disclosure, witness statements or expert evidence which are necessary for the resolution of the identified issues.
 - (x) The general rule is that no disclosure will be ordered and the parties will be able to rely only on the documents contained in the bundles of core documents. Further disclosure will be permitted only in exceptional circumstances set out in the Capped Costs Pilot rules.
 - (xi) Witness statements, if ordered, will be limited in length, will deal only with issues set out in the list of issues, and there will be a general rule that a party may rely on the oral evidence of no more than two witnesses at trial.
 - (xii) The general rule is that expert evidence will not be permitted. The court will only make an order departing from that rule where to do so would further the Aim of the Pilot and the benefits would justify the likely cost. Unless otherwise ordered, expert evidence at trial shall be given in the form of a report from a single joint expert.
 - (xiii) Applications other than at the CMC will be dealt with without a hearing, unless the court considers it necessary to hold a hearing. A specific procedure for making and responding to applications applies. Except where a party has behaved unreasonably, the general rule is that the costs of an application will be reserved to the conclusion of the trial, when they will be summarily assessed.
 - (xiv) The trial will take place no more than eight months after the CMC, and will last no longer than two days (excluding reading time and judgment). So far as it is practical, there will be full docketing in the Capped Costs Pilot: the judge hearing the trial will be the judge who heard the CMC unless it is impractical for that judge to do so. The court will manage the trial so as to further the Aim of the Pilot and cross examination will be strictly controlled and time limited.
 - (xv) Not more than 21 days after the conclusion of the trial, the parties will produce a schedule of costs by reference to various stages of the litigation, which will be assessed summarily by the court. A cap applies to each stage, together with an overall cap £80,000 (exclusive of VAT, court fees, wasted costs, and costs of enforcement).
 - (xvi) Where a Part 36 offer is made by the claimant in proceedings within the Capped Costs Pilot, but is not accepted, costs will not be set at large; instead, the stage caps will increase by 25%,⁶ and the overall cap will increase to £100,000. The purpose of this is to enable the aims of Part 36 to be achieved in pilot cases, whilst retaining certainty in relation to the adverse costs risk.

3.3 Location of pilot. Subject to ministerial approval, I propose that the Capped Costs Pilot will run in the London Mercantile Court and the three specialist courts in the Manchester District Registry and Leeds District Registry, namely the Mercantile, TCC and Chancery courts. Because it is to run only in the High Court, it is in effect a pilot for cases with a monetary value of £100,000 to £250,000. When the County Court/High Court

⁶ It may be appropriate to amend this figure, in order to achieve consistency with the recommendations in chapters 5 and 7 above.

threshold is increased from £100,000 to £250,000, the pilot will operate as a temporary exception to that rule.

3.4 Duration of pilot. The Capped Costs Pilot will be open to new cases for two years. I recommend that this pilot (which already has the approval of the Rule Committee) should start as soon as practicable after the summer vacation.

3.5 Commencement of pilot. I originally hoped that the pilot would commence on 1st June of this year and thus generate some preliminary data for review in this report.⁷ However, following the announcement in April of the General Election on 8th June 2017, that became impossible because there was a period of Purdah. In the circumstances, my proposal that the pilot should take place must now be considered alongside the other recommendations in this report.

4 The future

4.1 Evaluation of the pilot. Feedback from the pilot will inform any future decision-making. Since the pilot will be voluntary, we will see how many business and property court users actually wish to benefit from the new regime. We will also see how the rules are working out in practice and what amendments are required, before those rules are rolled out more generally (if they are to be rolled out). Ideally a university should monitor the pilot.⁸ My experience between 2010 and 2013 was that each of the pilots⁹ set up on my recommendations identified certain ‘teething’ problems which had to be resolved before the rules were finalised.

4.2 Creation of a Capped Costs List. If the pilot is a success, I recommend that the capped costs regime used during the Capped Costs Pilot (with any modifications found necessary) should become available for any suitable case in the Business and Property Courts or the Business and Property Lists of the County Court up to a value of £250,000. This could be done by creating a ‘Capped Costs List’ in those courts. It may well become appropriate to extend the regime to cases up to £500,000, but that must be for future consideration.

4.3 The procedure should be discretionary. The procedure discussed in this chapter will certainly not be appropriate for every lower value case in the specialist courts. For example, some TCC cases require extensive expert evidence. The court should therefore have a discretion to put suitable cases into the Capped Costs List, either on an application by one of the parties or of its own motion. The parties may also, of course, agree to litigate in the Capped Costs List. IP cases which are suitable for the IPEC should, of course, continue to be heard in that forum.

4.4 Lower threshold. In practice, cases in the Capped Costs List will be likely to have a value above £100,000. For cases below that value the intermediate track (discussed in chapter 7 above) will be available. Cases in the intermediate track should remain in that track.

⁷ This was the procedure during my previous review (<https://www.judiciary.gov.uk/wp-content/uploads/JCO/Documents/Reports/jackson-final-report-140110.pdf>). Two of the recommended pilots started during that review and generated preliminary data for consideration in my report published in January 2010.

⁸ Academics at three different universities monitored the various pilots set up pursuant to my previous report.

⁹ Costs management, concurrent expert evidence/ ‘hot tubbing’, docketing and provisional assessment of costs.

4.5 Contractual entitlement to costs. Any case in the Capped Cost List where one party has a contractual entitlement to costs will be subject to the expedited procedure set out in this chapter. If the party with a contractual entitlement to costs is successful, the position will be as set out in chapter 5, paragraph 3.7. It is not within my terms of reference to consider whether the substantive law in this area should be reformed and I do not address that question.

5 Conclusion

5.1 Recommendations. I recommend that:

- (i) There be a pilot of capped recoverable costs, in conjunction with streamlined procedures, for business and property cases with a value up to £250,000.
- (ii) If the pilot is successful, such a regime should be made available at the judge's discretion for any suitable case in the Business and Property Courts or the Business and Property Lists of the County Court.

Chapter 10 - Judicial review

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1. Introduction
2. Discussion
3. Extending the Aarhus rules
4. Costs management in heavy judicial review cases
5. Conclusion and recommendations

1 Introduction

1.1 Nature of judicial review. Judicial review (“JR”) is the mechanism by which the courts hold public authorities to account for the legality of their conduct. It is a crucial means by which citizens can challenge the lawfulness of public authorities’ decisions, actions and omissions.

1.2 The special role of JR. The special role of JR in the constitution has been recognised by Government. For example, in the consultation paper that led to the Legal Aid, Sentencing and Punishment of Offenders Act 2012, explaining the reasons for its proposal to retain legal aid for JR proceedings, the Coalition Government explained that:

“In our view, proceedings where the litigant is seeking to hold the state to account by judicial review are important, because these cases are the means by which individual citizens can seek to check the exercise of executive power by appeal to the judiciary. These proceedings therefore represent a crucial way of ensuring that state power is exercised responsibly.”¹

An effectively functioning system of JR is, therefore, central to the rule of law.

1.3 Importance of access to justice. The importance of practical accessibility was emphasised by Lord Neuberger PSC in evidence to the House of Lords Constitution Select Committee in June 2014 when he said:

“If you don't have a healthy and accessible judicial review function for the courts then you do not have a satisfactory modern democratic society.”²

1.4 Limited availability of legal aid. Because of the special importance attaching to this category of litigation, legal aid is still available for meritorious JR claims, subject to means testing. The financial limits, however, are strict and many deserving claimants of modest means do not qualify for assistance.

1.5 Costs of JR proceedings. The costs of JR proceedings are generally more manageable than the costs of private law litigation. This is for a number of reasons as set out in chapter 5 of my Preliminary Report, at paragraphs 1.2 to 2.7.³ That is not, however, a reason for complacency. First, many (but by no means all) claimants are of modest means and are deterred from pursuing claims because of the adverse costs risk. Secondly, in a time of

¹ https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/228970/7967.pdf (at paragraph 4.16).

² <https://www.publications.parliament.uk/pa/ld201415/ldselect/ldconst/18/1803.htm>.

³ *Review of Civil Litigation Costs: Preliminary Report*, May 2009 (<https://www.judiciary.gov.uk/wp-content/uploads/JCO/Documents/Guidance/jackson-vol1-low.pdf> and <https://www.judiciary.gov.uk/wp-content/uploads/JCO/Documents/Guidance/jackson-vol2-low.pdf>).

austerity, defending JR claims puts a substantial burden on the public purse: see the note of my meeting with government lawyers on 19th April 2017 as set out in chapter 4 at section 16.

1.6 Recommendation in my previous report. In chapter 30 of my previous report,⁴ I noted that the then current regime of protective costs orders was “expensive to operate and uncertain in its outcome”. Also, it would be unsatisfactory to have one costs regime for environmental JR claims and a different costs regime for non-environmental JR claims. I recommended that qualified one way costs shifting (“QOCS”) be introduced for all JR claims. My proposed QOCS rule was:

“Costs ordered against the claimant in any claim for judicial review shall not exceed the amount (if any) which is a reasonable one for him to pay having regard to all the circumstances including:

- (a) the financial resources of all the parties to the proceedings, and
- (b) their conduct in connection with the dispute to which the proceedings relate.”

The Government did not take up that proposal, but has never formally either accepted or rejected it. For present purposes, it is probably realistic to proceed on the basis that QOCS in JR is not going to come.

1.7 Subsequent developments. There have been three principal developments in recent years.

- (i) On 1st April 2013, an optional regime was introduced for environmental JR claims by section VII of CPR Part 45, under which a claimant’s liability was capped at £5,000 (or £10,000 when claiming as or on behalf of a business) and a defendant’s liability was capped at £35,000. I shall refer to this regime as “the Aarhus Rules”, as the purpose of the rules was to comply with the Aarhus Convention.⁵
- (ii) On 8th August 2016, a new regime of ‘judicial review costs capping orders’ (“CCOs”) came into force. This enables the court to impose caps on each party’s liability, having regard to a wide variety of circumstances, as specified in section 88 of the Criminal Justice and Courts Act 2015 and CPR Part 46, section VI. Those circumstances include a claimant’s means and matters such as whether the claimant’s representatives “are acting free of charge”.
- (iii) On 28th February 2017, the Aarhus Rules were substantially amended.⁶ Claimants wishing to benefit from the Aarhus Rules must now submit a statement of means, including any financial support provided by others. In the light of that information, the court has power to vary either up or down the figures for capped costs. In other words, the cap for claimants’ liability of £5,000 or £10,000 and the cap for defendants’ liability of £35,000 are now provisional or default figures, subject to later variation.

1.8 Limited application of the Aarhus Rules. A set of London chambers, whose members feature in many JR cases, point out in their submissions that the costs regime set out in the

⁴ *Review of Civil Litigation Costs: Final Report* (<https://www.judiciary.gov.uk/wp-content/uploads/JCO/Documents/Reports/jackson-final-report-140110.pdf>).

⁵ As to which, see chapter 35 of my Preliminary Report (May 2009) and chapter 30 of my Final Report (January 2010).

⁶ For a full account of the changes made to the Aarhus Rules, please see Annex 1 to the Westgate Report (as referred to in section 3 below).

Aarhus Rules only apply to about 1% of JR cases. It would require significant modification if it were to be applied more generally.

2 Discussion

2.1 Written submissions. In so far as the written submissions addressed JR claims, there was general opposition to introducing a grid of fixed recoverable costs (“FRC”). People stressed the constitutional importance of JR and the variability of costs in this field. Many of those who contributed urged that the Government should adopt my previous recommendation for QOCS in JR.

2.2 Debate during the seminars. There was much debate during the London and Cardiff seminars about whether any reform was needed in relation to JR. Chapter 4 above sets out the principal arguments in play at those seminars.

2.3 Support for extending the Aarhus Rules. Although nothing is harmonious in the kaleidoscopic world of costs, it is fair to say that there was much support at the seminars for the proposal advanced by Vikram Sachdeva QC and Nicholas Bacon QC (two of my assessors) to adapt and extend the Aarhus Rules to all JR claims. Following the London seminar, a working group chaired by Martin Westgate QC produced a very helpful report (the “Westgate Report”) on how the Aarhus Rules might be developed for general application across the whole landscape of JR. A copy of that report is at appendix 16 to this report.

2.4 The view of government lawyers. Perhaps unsurprisingly, government lawyers are less enamoured of that idea. They suggested at our meeting on 19th April that there is no access to justice problem which needs to be addressed. The CCO regime together with the current Aarhus Rules for environmental cases provide sufficient protection for impecunious claimants in JR.

2.5 What about a grid of fixed recoverable costs for ‘standard’ JR cases? Several speakers at the seminars noted that JR cases tend to fall into a standard pattern. There is generally no disclosure and no oral evidence. Most cases proceed reasonably smoothly to a one day hearing. That certainly accords with my recollection of sitting as an Administrative Court judge between 1999 and 2008. Some speakers therefore suggested that there may be scope for developing a grid of FRC for such cases. Two people floated this idea during the London seminar. So did the government lawyers at our April meeting. On the other hand, the Public Law Project, in their written submissions, have put up formidable arguments against introducing a simple grid of FRC into the field of JR. They argue that this would fetter access to justice in a vital area of civil litigation.

2.6 How about introducing costs management? There was brief discussion at the London seminar about the possibility of introducing costs management for the larger JR cases. The government lawyers at the April meeting were supportive of this proposal, provided that costs management (a) is reserved for larger cases and (b) is at the discretion of the judge, rather than automatic.

2.7 My conclusions. After reflecting on the written submissions and the seminars, as well as the views of the assessors, my conclusions are:

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- (i) Even though many JR cases fall into a standard pattern, costs are too variable to permit the introduction of a grid of FRC.
 - (ii) CCOs are of little practical value, because the procedure for obtaining such orders is too cumbersome and too expensive. The criteria for granting CCOs are unacceptably wide and the outcome of any application must be uncertain. Also, that outcome will not be known until too late in the day.
 - (iii) There would be merit in extending the Aarhus Rules, suitably amended, to all JR claims. The fact that most JR cases fall into a standard pattern makes it possible to set default figures as caps, even though it is not practicable to draw up a grid of FRC.
 - (iv) The discipline of costs management should be available in larger JR claims, at the discretion of the court.

2.8 Comparison with Canada. Some may criticise the above proposal to extend the Aarhus Rules as unduly favourable to claimants. It is therefore worth pausing and comparing our own regime to that prevailing in Canada. Public authorities and judges in Canada recognise the importance of JR claims. They also recognise the need to protect JR claimants against oppressive adverse costs orders. In practice, defendant public authorities often do not seek costs if they win. If defendants do ask for costs, the court may well refuse unless the claimant has acted unreasonably: see chapter 35 of my Preliminary Report (May 2009), paragraphs 3.8-3.9. That report is now eight years old and was based upon discussions with judges and practitioners in Ontario during April 2009. However, at the recent Oxford seminar a Canadian appellate judge confirmed that this is still the position.⁷

3 Extending the Aarhus Rules

3.1 The Westgate Report. The Westgate Report (at appendix 16 to this report) neatly identifies the issues and the conflicting views within the profession. It sets out a great deal of valuable background information and detail, which I need not repeat. As can be seen from the following paragraphs, I accept the general thrust of that report, although not all its specific recommendations.

3.2 The way forward. In my view, if QOCS in JR is not acceptable, the Aarhus Rules should be extended to all JR claims. This is necessary in order (a) to increase access to justice and (b) to promote the public interest. I accept that it is both tiresome and expensive for hard pressed public authorities to face (as they do) (a) a stream of unmeritorious claims and (b) and a much smaller number of meritorious claims. The fact that most claims are knocked out at the permission stage is not a complete answer. By then the defendant authorities will often have incurred significant costs in investigating the facts and drafting the acknowledgement of service. Despite those unwelcome burdens falling on public authorities, the ready availability of JR proceedings in which public bodies are held to account for their actions and decisions, is a vital part of our democracy. Both JR and a free press are, in their different ways, bulwarks against the misuse of power.

3.3 As to the details. I propose:

⁷ See chapter 4, paragraph 17.4.

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- (i) The regime should be available in any case where the claimant is an individual (or an individual who is a representative of a number of natural persons with a similar interest) without legal aid.
 - (ii) The regime should be optional. Any JR claimant should be able to opt in.
 - (iii) There must be some form of means testing for those claimants who opt in.⁸ Any investigation of means should be in private and the claimant's disclosure should be made only to specified individuals within a defined confidentiality ring.
 - (iv) The default figures of £5,000/£10,000 for claimants and £35,000 for defendants should remain, but be subject to three yearly reviews.
 - (v) Any application to vary those figures should be made by the claimant in the claim form and by the defendant in the acknowledgement of service. Such applications should be dealt with at the permission stage. Such applications should only be entertained later in exceptional circumstances, for example a fundamental change in the case or the discovery of dishonesty in the claimant's disclosure.
 - (vi) If the claimant's costs liability is increased above the default figure, they should be permitted to discontinue within 21 days and (if they do) only be liable for adverse costs to the extent of the previous figure.

3.4 A modest proposal. The regime proposed above is not perfect. But it is an improvement on the present situation and it strikes the right balance between the conflicting interests which are in play. I say that for four reasons:

- (i) I accept that the risk of being held liable for £5,000 in adverse costs may make it impossible for some claimants to proceed; also the prospect of only being able to recover £35,000 in costs from the defendant may deter other claimants from using the scheme. On the other hand, the fact that the scheme is optional means that claimants who do not like it need not opt in. It is abundantly clear to me from all the evidence gathered during this review that some claimants (a) can accept an adverse costs risk of £5,000 or £10,000 and (b) can proceed in the knowledge that they will not recover more than £35,000 at the end.
- (ii) The fact that the defendant will not normally be liable for more than £35,000 in costs will protect the public purse against open-ended liability.
- (iii) The opportunity to vary the default figures at an early stage provides (a) an additional opportunity for claimants to secure access to justice, as well as (b) an opportunity for defendants to protect the expenditure of taxpayers' money in litigation brought by wealthy claimants.
- (iv) Overall, in my view, this proposed reform will promote access to justice. It will strike the right balance between (a) the need to protect the public purse and (b) the need to hold public authorities to account.

3.5 Can this reform be made by rule change alone? No. Sections 88-90 of the Criminal Courts and Justice Act 2015 will, at the very least, require amendment. These provisions impose restrictions on the costs capping orders which the courts can make in non-environmental JR cases. Ideally, sections 88-90 of the 2015 Act and the rules made under

⁸ As the Public Law Project observe, the regime should not enable "commercial or otherwise wealthy litigants to bring claims for judicial review, potentially against small regulatory bodies or local authorities with already stretched budgets, without the deterrent effect of the risk of an adverse costs order."

those provisions should be repealed. They serve little useful purpose now and they will serve no useful purpose whatsoever if the above proposal is accepted.

3.6 Should this proposal be piloted first? I would suggest not. As one speaker pointed out at the Cardiff seminar, the use of the Aarhus Rules in environmental cases over the last four years has, in effect, been a pilot. That pilot has been a success. Those rules have worked well before their recent amendment. Over the next few months we shall have a chance to see how the amended rules fare in practice. Further piloting of the Aarhus Rules will not be necessary.

4 Costs management in heavy judicial review cases

4.1 Heavy JR cases. Some JR cases (not just those about Brexit) can last for several days and generate massive costs. There is a public interest in controlling the costs of such litigation.

4.2 Why has there never been costs management in JR claims? Several contributors to the review have commented on the absence of costs management in JR. There is good reason for that absence. In 2009 (when I was drafting my previous report) and in 2011/2012 (when I was drafting costs management rules and putting drafts before the Civil Procedure Rule Committee), I took the view that most JR cases were unsuitable for costs management. That was because of the special features of JR litigation noted in section 1 above. It was not therefore sensible to introduce what was then a novel and controversial procedure into a field of litigation where it would usually be disappplied.

4.3 The position now. Costs management is now bedding in and working much better, as noted in chapter 6 above. It is therefore appropriate to consider its utility in JR claims.

4.4 Recommendation. I recommend that a new and simpler form of precedent H be developed for use in JR claims. In any JR case where the costs of a party are likely to exceed £100,000 or the hearing length is likely to exceed two days, the court should have a discretion to make a costs management order at the stage of granting permission. The court could do so, either of its own motion or upon the application of either party. If the court makes such an order, then:

- (i) The parties must (if they have not already done so) serve their budgets in the new form H within 21 days.
- (ii) The parties must discuss and seek to agree each other's budgets.
- (iii) In so far as the budgets are not agreed, the court will resolve any disputes at a costs management hearing.

4.5 Should the court have a discretion to override agreed JR budgets? No. Both public authorities and claimants must be assumed to act rationally. The defendants have a duty to conserve taxpayers' money. Claimants and interested parties have their own commercial interests to protect. It would be a waste of scarce judicial time for judges to pore over the details of agreed budgets in JR cases.

4.6 Should costs management in JR be piloted? That is certainly a possibility for consideration by the Rule Committee. A pilot may, however, prove to be unnecessary for two reasons:

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- (i) Judges and practitioners in the Administrative Court are already well familiar with budgeting in other contexts.
 - (ii) The proposed costs management regime will be discretionary and reserved for a small number of cases which require such discipline.

5 Conclusion and recommendations

5.1 For the reasons set out above I recommend that:

- (i) The Aarhus Rules be adapted and extended to all JR claims.
- (ii) Costs management be introduced, at the discretion of the judge, in heavy JR claims.

Chapter 11 - The wider context, conclusion and recommendations

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1. The wider context
2. Conclusion and recommendations

1 The wider context

1.1 Other current civil justice initiatives. Chapter 1 above contains a summary of other current civil justice initiatives. The assessors and I have had those in mind throughout this project. It is necessary that my recommendations should be consistent with those other initiatives.

1.2 A common theme. All of the initiatives described in Chapter 1 share a common theme with this review, namely to improve access to civil justice. Some of them have no practical overlap with the matters dealt with in this report. For example, (a) the Department of Health Rapid Resolution Redress scheme concerns high value clinical negligence cases, which fall outside the scope of this review; (b) changes to the Court of Appeal's practices and procedures affect only that jurisdiction; and (c) reform of civil enforcement does not affect the costs or conduct of the main litigation process. Some of the other initiatives will drive good behaviour and improve the efficiency of the litigation process in general, including for those cases falling within the scope of the recommendations made in this report.

1.3 Integration with other current civil justice initiatives. The key ongoing civil justice initiatives which need to be integrated with the recommendations set out in this report are as follows:

- (i) Whiplash reforms. These reforms will affect the lower threshold of the fast track and the number of personal injury claims falling within that track. The grid of fixed recoverable costs ("FRC") set out in chapter 5 will continue to be appropriate for those cases which remain in the fast track.
- (ii) Online Solutions Court. The Online Solutions Court will be a new court, separate from the County Court, intended for litigants to use without recourse to legal representation. It will have a simplified procedure and a strictly limited FRC regime. It will deal with matters up to a value of £25,000 (including cases that currently fall within both the small claims track and the fast track). However, fast track personal injury, clinical negligence, possession, intellectual property and housing disrepair claims will be excluded from its remit, as will any other case which is too complex for proper resolution within the Online Solutions Court. Such cases (with the exception of intellectual property cases) will remain in the Fast Track in the County Court. Those remaining cases will be subject to the rules proposed in Chapter 5 above. In this way, the Online Solutions Court and the fast track will sit side by side, subjecting all claims below £25,000 to some form of fixed costs recovery. It is in part for this reason, namely to ensure symmetry between the Online Solutions Court and

the fast track that I have declined to recommend an increase in the fast track limit.

- (iii) Raising the County Court/High Court threshold. The proposed increase in the County Court/High Court threshold does not directly affect any of my recommendations in respect of the fast track, the intermediate track, or judicial review claims. It does, however, have some implications for the future of the proposed capped costs pilot in the Business and Property Courts, as to which see below.
- (iv) The Business and Property Courts. The capped costs pilot is intended for use in suitable lower value business and property disputes, and has been designed with the features of the newly designated Business and Property Courts (for example, the presence of specialist judges, and relatively widespread use of docketing) firmly in mind. If the pilot is successful, that regime should be made available for any suitable case in the Business and Property Courts (except those proceeding in the Intellectual Property Enterprise Court, which already has its own similar system of capped recoverable costs), or in the Business and Property Lists of the County Court. Because the pilot is to run only in certain designated Business and Property Courts, cases valued at less than £100,000 are in practice likely to be excluded (since they will generally proceed in the County Court). By the time the capped costs regime comes to be rolled out more widely (if indeed that time should come), the County Court/High Court threshold is likely to have been raised. This means that any future iteration of the capped costs regime is likely to operate predominantly as a list in the County Court, unless and until the threshold of the Capped Costs List is itself increased. The question of whether to raise the upper limit of the Capped Costs List will be for future consideration by the Civil Procedure Rule Committee in the light of experience.
- (v) The upgrading of court IT. The planned upgrading of court IT discussed in chapter 1 is of obvious importance to the extension of FRC. If solicitors are working within an FRC regime, they need to take full advantage of the available technology.
- (vi) Simplifying disclosure. Lady Justice Gloster's working group may make recommendations for simplifying disclosure. My proposals for controlling disclosure in the intermediate track (set out in chapter 7 above) will need to be considered in conjunction with the Gloster recommendations, so that there is an integrated approach to any reforms of CPR Part 31.

1.4 Standard directions online about disclosure. Whatever may be decided about disclosure (following consideration of the above recommendations), it will be important to reflect the available disclosure orders in the standard directions online.

2 Conclusion and recommendations

2.1 Conclusion. The only effective way to control the costs of civil litigation is to do so in advance. That means either FRC¹ or costs budgeting on a case by case basis. In my view, the time has now come to expand the scope of FRC. This is the major piece of unfinished

¹ Or a variant of FRC, such as capped stage costs.

business left over from my previous review.² At the same time, work must be done to streamline the litigation process and to control the amount of work which litigants and their lawyers are required to do.

2.2 Recommendations. I recommend that:

- (i) All recoverable costs in the fast track should be fixed as set out in chapter 5 and the figures should be reviewed every three years.
- (ii) A new 'intermediate' track with a streamlined procedure should be created for monetary relief cases above the fast track, which are of modest complexity and up to a value of £100,000.
- (iii) There should be a grid of FRC for intermediate track cases as set out in chapter 7 and the figures should be reviewed every three years.
- (iv) There should be FRC for (a) applications to approve settlements for children and protected parties and (b) costs only proceedings, in respect of intermediate track cases.
- (v) Save as set out in recommendation (iv) above, Part 8 claims should be excluded from the proposed FRC regime.
- (vi) The Civil Justice Council should, in conjunction with the Department of Health, set up a working party, including both claimant and defendant representatives, to develop a bespoke process for clinical negligence claims up to £25,000, together with a grid of FRC for such cases.
- (vii) There should be a pilot of capped recoverable costs, in conjunction with streamlined procedures, for business and property cases with a value up to £250,000. Draft rules for that pilot, already approved by the Civil Procedure Rule Committee, are at appendix 15.
- (viii) If the pilot is successful, such a regime should be made available at the judge's discretion for any suitable case in the Business and Property Courts or the Business and Property Lists of the County Court.
- (ix) As set out in chapter 10, the Aarhus Rules should be adapted and extended to all judicial review claims.
- (x) Costs management should be introduced, at the discretion of the judge, in 'heavy' judicial review claims, as to which see section 4 of chapter 10.
- (xi) When the reforms recommended in this report have bedded in, consideration should be given to:
 - a. developing (1) a grid of FRC for incurred costs in different categories of case, and (2) a pre-action procedure for seeking leave to exceed the FRC in that grid; and
 - b. extending the scope of the intermediate track and the range of FRC.

² *Review of Civil Litigation Costs: Final Report* (<https://www.judiciary.gov.uk/wp-content/uploads/JCO/Documents/Reports/jackson-final-report-140110.pdf>).