

Fixed Costs

Let them tax you no more!

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Scope of this presentation

1. What are 'fixed costs and why do we have them?
2. When do they apply?
3. How do they operate?
4. What are the main exceptions?
5. How will they be extended in the future?

What are 'fixed costs'?

- ▶ NOT a new concept. Fixed fees for work pre-date hourly billing in County Court Civil Litigation
- ▶ They set a prescribed sum (or sums) in costs that are recoverable *inter partes* in civil claims, regardless of the hours done and sums spent on a case.
- ▶ Current system is 'fixed costs' not 'fixed fees'

Why do we have fixed costs?



- ▶ Jackson LJ was commissioned to undertake a “fundamental review” of the costs of civil litigation in November 2008. Five Aims.
- ▶ Jackson reforms in 2010 introduced Recoverable Costs (“FRC”)
- ▶ Supplementary report in 2017: Proposed FRCs for all fast-track cases, a new fixed-cost ‘intermediate’ track for specified claims up to £100,000
- ▶ ‘Swings and roundabouts’ outcomes mean most practices should still be profitable

When do fixed costs apply? CPR 45

- ▶ **Part I:** Scope & miscellaneous costs (see Table 1)
- ▶ **Part II: Road Traffic Accidents—Fixed Recoverable Costs**
- ▶ **Part III:** The **Pre-action Protocols** for Low Value Personal Injury Claims in Road Traffic Accidents and Low Value Personal Injury (Employers' Liability and Public Liability) Claims
- ▶ **Part IIIA: Claims which no longer continue under the protocols & claims** where the Pre-Action Protocol for Resolution of Package Travel Claims Applies
- ▶ **Part IV: Claims in the Intellectual Property Enterprise Court**
- ▶ **Part V: HM Revenue and Customs**
- ▶ **Part VI: FT trial costs - Claims that didn't start in the protocols** (e.g. in a RTA claim which does not involve PI and is for special damages only (usually credit hire / vehicle repairs)).

When do FRC apply - ready reckoner?

Fixed Costs Apply

- ▶ Personal injury claims up to 25k
 - ▶ RTA
 - ▶ EL
 - ▶ PL
 - ▶ Package Travel (**gastro**)
- ▶ All small claims (D can only get costs if C has been unreasonable).
- ▶ Costs-only proceedings in the above

Fixed Costs Don't Apply

- ▶ Clinical Negligence
- ▶ Disease
- ▶ Claims worth >25k (the **multi-track** – cost budgeting instead)
- ▶ Where a D establishes an exception to **QOCS** – CPR 44.15/16
- ▶ When **Pt 36** applies
- ▶ **Exceptional circs 45.29J**

How do fixed costs work?

- ▶ Two basic variations:
 - ▶ 'Fixed sum' or 'tabular' method e.g. CPR 45I, CPR 45IIIMOJ Protocol
 - ▶ 'Formula method' e.g. CPR 45II (Fixed recoverable costs), CPR 45III (cases no longer proceeding under the MOJ Protocol)
- ▶ Court fees and disbursements recoverable in addition

CPR 45III: RTA Protocol Costs

Protocol claims (MOJ / “Stage 3” hearings)

- ▶ CPR 45.17 provides that only the following costs are allowed:
 - Fixed costs under CPR 45.18 and CPRs 45.23A and 23B;
 - Disbursements under CPR 45.19; and
 - VAT on everything where applicable.

Table 6 Fixed costs in relation to the RTA Protocol

<i>Where the value of the claim for damages is not more than £10,000</i>			<i>Where the value of the claim for damages is more than £10,000, but not more than £25,000</i>		
Stage 1 fixed costs		£200	Stage 1 fixed costs		£200
Stage 2 fixed costs		£300	Stage 2 fixed costs		£600
Stage 3	- Type A fixed costs	£250	Stage 3	- Type A fixed costs	£250
	- Type B fixed costs	£250		- Type B fixed costs	£250
	- Type C fixed costs	£150		- Type C fixed costs	£150

CPR 45IIIA: Table 6B Fixed costs (RTA)

If Parties reach a settlement prior to the claimant issuing proceedings under Part 7				
Agreed Damages	>1k<5k	>5k<10k	>10k	
Fixed Costs	The greater of— (a) £550; or (b) the total of— (i) £100; and (ii) 20% of the damages	The total of— (a) £1,100; and (b) 15% of damages over £5,000	The total of— (a) £1,930; and (b) 10% of damages over £10,000	
If proceedings are issued under Part 7, but the case settles before trial				
Stage at which case is settled	On or after the date of issue, but prior to the date of allocation under Part 26	On or after the date of allocation under Part 26, but prior to the date of listing	On or after the date of listing but prior to the date of trial	
Fixed Costs	The total of— (a) £1,160; and (b) 20% of the damages	The total of— (a) £1,880; and (b) 20% of the damages	The total of— (a) £2,655; and (b) 20% of the damages	
If the claim is disposed of at trial				
Fixed Costs	The total of— (a) £2,655; and (b) 20% of the damages agreed or awarded; and (c) the relevant trial advocacy fee			
Trial advocacy fees				
Damages agreed or awarded	>3k	>3k <10k	>10k <15k	>15k
Trial advocacy fees	£500	£710	£1,070	£1,705

CPR 45IIIA: Table 6B Fixed costs (EL)

If Parties reach a settlement prior to the claimant issuing proceedings under Part 7				
Agreed Damages	>1k<5k	>5k<10k	>10k	
Fixed Costs	The total of— (a) £950; and (b) 17.5% of the damages	The total of— (a) £1,855; and (b) 12.5% of damages over £5,000	The total of— (a) £2,500; and (b) 10% of damages over £10,000	
If proceedings are issued under Part 7, but the case settles before trial				
Stage at which case is settled	On or after the date of issue, but prior to the date of allocation under Part 26	On or after the date of allocation under Part 26, but prior to the date of listing	On or after the date of listing but prior to the date of trial	
Fixed Costs	The total of— (a) £2,630; and (b) 20% of the damages	The total of— (a) £3,350; and (b) 25% of the damages	The total of— (a) £4,280; and (b) 30% of the damages	
If the claim is disposed of at trial				
Fixed Costs	The total of— (a) £4,280; and (b) 30% of the damages agreed or awarded; and (c) the relevant trial advocacy fee			
Trial advocacy fees				
Damages agreed or awarded	>3k	>3k <10k	>10k <15k	>15k
Trial advocacy fees	£500	£710	£1,070	£1,705

CPR 45IIIA: Table 6D Fixed costs (PL)

If Parties reach a settlement prior to the claimant issuing proceedings under Part 7				
Agreed Damages	>1k<5k	>5k<10k	>10k	
Fixed Costs	The total of— (a) £950; and (b) 17.5% of the damages	The total of— (a) £1,855; and (b) 10% of damages over £5,000	The total of— (a) £2,370; and (b) 10% of damages over £10,000	
If proceedings are issued under Part 7, but the case settles before trial				
Stage at which case is settled	On or after the date of issue, but prior to the date of allocation under Part 26	On or after the date of allocation under Part 26, but prior to the date of listing	On or after the date of listing but prior to the date of trial	
Fixed Costs	The total of— (a) £2,450; and (b) 17.5% of the damages	The total of— (a) £3,065; and (b) 22.5% of the damages	The total of— (a) £3,790; and (b) 27.5% of the damages	
If the claim is disposed of at trial				
Fixed Costs	The total of— (a) £3,790; and (b) 27.5% of the damages agreed or awarded; and (c) the relevant trial advocacy fee			
Trial advocacy fees				
Damages agreed or awarded	>3k	>3k <10k	>10k <15k	>15k
Trial advocacy fees	£500	£710	£1,070	£1,705

Disbursements (CPR r45.19 and r45.29I)

- ▶ Medco / GP / physio report: £180 + VAT
 - ▶ You can obtain further reports – “where justified”
 - ▶ Ortho: £420 + VAT (includes reviewing the medical records)
 - ▶ Consultant in A&E medicine - £420 + VAT
 - ▶ Obtaining medical reports: no more than £30
 - ▶ RTA (25.29B), EL / PL / package travel (45.29D)
 - ▶ Addendum report: £50
 - ▶ Answers to Pt 35s: £80
- ▶ **45.19(2)(e) 45.29I(h)** : *“any other disbursement reasonably incurred due to a particular feature of the dispute.”*

CPR 45III A: *'particular feature of the dispute'*

Cham v Aldred [2019] EWCA Civ 1780; [2019] Costs LR 1683

- ▶ CA held that the cost of instructing counsel to advise on settlement in road traffic accident claims involving children, which was an almost mandatory requirement under **CPR r.21.10(1)** and **CPR PD 21 para.5.2**, was not a disbursement "*reasonably incurred due to a particular feature of the dispute*" within the meaning of **r.45.29I(2)(h)**. Being a child was a characteristic of the claimant, not a characteristic of the dispute, and counsel's fee was not therefore recoverable under the fixed costs regime.
- ▶ This sets down an extremely restrictive approach to the recovery of disbursements in FC cases.

CPR45 IIIA: Fee for Advice Recoverable: EL /PL

- ▶ However in *Finsbury Food Group Plc v Dover* [2020] EWHC 2176 (QB) it was confirmed on appeal that in claims under the EL/PL Protocol counsel's advice could be recovered under r.45.29I(2)(h) as it was provided for in that Protocol. On appeal D argued that the fee for the advice should be fixed at £150 + VAT.
- ▶ The appeal was dismissed by Mrs Justice Lambert who held that "*I also accept Mr Mallalieu's point that the drafting of Part IIIA suggests a greater degree of flexibility generally to costs in claims which have fallen out of the Protocol...*" The claim settled for £70,000 and £500 was recovered for counsel's advice on the case.

CPR45 IIIA: Interim Applications (r45.29H)

45.29H—

- ▶ (1) Where the court makes an order for costs of an interim application to be paid by one party in a case to which this Section applies, the order shall be for a sum equivalent to one **half of the applicable Type A and Type B costs in Table 6 or 6A.**
- ▶ (1A) Where the order for costs is made in a claim to which the Pre-Action Protocol for Resolution of Package Travel Claims applies, the order shall be for a sum equivalent to one half of the applicable Type A and Type B costs in Table 6A.
- ▶ (2) 12.5% London uplift
- ▶ (3) disbursements in accordance with rule 45.29I.
- ▶ (4) + VAT where applicable

CPR45 IIIA: Defendant's Costs (45.29F)

- ▶ In a nutshell, if the D is awarded costs they will only be awarded up the amount that C would have got (had C won) in fixed costs and disbursements – CPR 45.29(F)(2)
- ▶ The more ambitious / unclear the statement of value on the CF the better the D's brief fee. Accordingly, the D's trial fee will not be cut if the D's counsel successfully reduces the value of the claim. 45.29(F)(4)(b)(c):

**These rules don't apply when D can establish an exception to QOCS –
CPR 45.29F(10)**

CPR 45IIIA Counterclaims

Including PI – CPR 45.29G

- ▶ If the counterclaim includes a claim for PI to which the RTA protocol also applies (i.e. claim less than 25k) then the fixed costs of the counterclaim will be the normal fixed costs – as set out on the previous slide (i.e. £2,655 flat fee + 20% agreed / awarded damages + trial advocacy fee)

NOT including PI – CPR 45.29G(2)

- ▶ If a successful counterclaim does not include PI then the costs for the counterclaim will be half of the applicable Type A and Type B costs set out in Table
- ▶ NB An additional 12.5% if the D lives or ones in one of the areas set out in PD45 and their legal representative also practices in that area

Offers & Settlement: CPR45 III & IIIA

Settlement in RTA Protocol: C is entitled the fixed costs at CPR 45.21-23, or 45.25:

- ▶ Stage 1 and 2 costs;
- ▶ Stage 3 Type A costs if the settlement figure exceeds D's protocol offer
- ▶ Stage 3 Type A, B and C costs if the Claimant is a child (hence an approval is required) or advice reasonably required to value the claim
- ▶ Disbursements allowed under CPR 45.19.

Offers & Settlement: CPR45 III & IIIA

Settlement of a claim that falls out of the RTA Protocol (FRC):

- ▶ C is entitled to the fixed costs at CPR 45.29C: Tables 6B (RTA), 6C (EL) or 6D (PL) (whether the offer is a Part 36 Offer or a protocol offer)
- ▶ Fixed sum plus percentage of damages at the relevant stage in the claim;
- ▶ Disbursements allowed under CPR 45.29.

- ▶ BUT if C accepts D's offer after the end of the relevant period, C is entitled to the fixed costs at CPR 45.29C up to and including the stage in which the relevant period expires, but is liable for D's costs thereafter. This applies both to Part 36 and Protocol Offers.

- ▶ Late acceptance by D carries no significant consequences

Consequences of not beating an offer – RTA Protocol

- ▶ 1) The offers in the Court Proceedings Form Pack (Part B) are the 'Protocol Offers'. They are costs protecting offers for both parties in stage 3 proceedings.
- ▶ 2) Where C obtains judgment for a sum at least as advantageous as C's own Protocol Offer, D pays penalties under 36.29(4) – very similar to penalties under 36.17(4), but the fixed costs are the Protocol (Stage 1-3) costs
- ▶ 3) Where C fails to obtain judgment for a sum higher than D's Protocol Offer, C is awarded Stage 1 and 2 Protocol costs but pays penalties under 36.29 (2) – much like 36.17(3), but D is limited to stage 3 costs with interest.

Consequences of not beating an offer – cases no longer proceeding in RTA Protocol (IIIA)

- ▶ 1) Where better a Part 36 C recovers fixed costs to the expiry of the relevant period, and indemnity costs thereafter (**Broadhurst v Tan**)
- ▶ 2) Where judgment for C is less favourable than D's Part 36 Offer, modified Part 36 consequences apply. Part 36.17 (3) applies but C is entitled to fixed costs under CPR 45.29 to the end of the relevant period, but is liable for D's costs thereafter.
- ▶ 3) BUT ALSO D does not need to make a Part 36 Offer if it has made a Protocol Offer, which becomes almost a *de facto* Part 36 Offer for D (although it does not prevent either party making further Part 36 Offers.) C is entitled to stage 1 and 2 Protocol costs but is liable for D's costs on expiry of the Protocol Offer.

Departing from the basic formula

- ▶ ... we have been through the basic formula but here are some other things to look out for... FRC still apply – but with a difference
 - ▶ Multiple Cs / Ds
 - ▶ LIPs



Multiple Cs or Ds, and CPR 45.40

- ▶ **Neary & Neary v Bedspace**: Judge Pearce sitting in the County Court at Chester. Two sets of advocacy fees and fixed costs were awarded. We respectfully say that is wrong. The Judge's reasoning at paragraph 7 was as follows:
 - ▶ This is not binding and the Judge does not cite 45.40(1)(a)
 - ▶ We respectfully say this is not right...

Multiple Ds / Cs, CPR 45.40

- ▶ This is because if an advocate represents more than one party the court will only award one set of trial costs CPR 45.40(1)(a). The clients are then jointly entitled to those costs as awarded by the court CPR 45.40(1)(b). However, the value of the claim for the purpose of calculating the fixed costs will be, (i) where judgment is in favour of the Cs, the total amount of the judgment made in favour of all the Cs who are jointly represented; (ii) where judgment is for the D, the total amount claimed by the Cs.
- ▶ If there are multiple Cs and only 1 D & the court orders that D's costs are to be paid, the court may make only 1 award of FT trial costs to the D, for which the Cs will be jointly and severally liable, CPR 45.40(6).
- ▶ Correct approach, adopted in Karnicka v Zborek [2018] 2 WLUK 295, a decision of His Honour Hand QC sitting in the County court at Reading where it was held in fast-track trial related to a claim no longer continuing under the RTA Protocol and there was more than one claimant, each claimant would be entitled to a separate set of fixed costs. However, only a single trial advocacy fee would be recoverable.
- ▶ Multiple Ds: Ds are more commonly separately represented – when there are multiple Ds and any / all are separately represented FT trial costs can be awarded to each party who is represented.

Exceptions - Successful Litigants-In-Person

- ▶ If a LIP is successful in a fast-track trial to which fixed-costs apply, the court will order per CPR r.45.39(5):
 - ▶ 2/3rds of what would have been awarded – if financial loss proved. (n.b. the LIP should file and serve evidence demonstrating that evidence at least 24 hours before the hearing, PD46 3.2)
 - ▶ Otherwise – an amount, i.e. £19 p/h per PD 46.

(5) Where the party to whom fast track trial costs are to be awarded is a litigant in person, the court will award—

- (a) if the litigant in person can prove financial loss, two-thirds of the amount that would otherwise be awarded; or**
- (b) if the litigant in person fails to prove financial loss, an amount in respect of the time spent reasonably doing the work at the rate specified in Practice Direction 46.**

3.4 The amount, which may be allowed to a self represented litigant under rule 45.39(5)(b) and rule 46.5(4)(b), is £19 per hour.

Successfully avoiding FRC

- ***Scott v Ministry of Justice*** [2019] EWHC B13 (Costs). DM Friston held that:
 1. (Unsurprisingly) A claim by prison officer injured when restraining a prisoner was not a claim for “harm, abuse or neglect of or by ...vulnerable adults” so as to be exempt from FC.
 2. (More importantly) C’s being able to show that he reasonably valued the claim at more than £25,000 at the time of the LoC meant that he was not restricted to FC.
- ***Beardmore v Lancashire CC*** [2019] 2 WLUK 430 (HHJ Graham Wood QC). Reasonable fees of medical agencies are recoverable under FC.
- ***Ryan v Karl Hackett*** [2020] EWHC 288 (QB). Stewart J held a claimant who had erroneously exited the Pre-Action Protocol for Low Value Personal Injury Claims in Road Traffic Accidents online portal when he had not been entitled to do so, and who subsequently made a Pt 7 claim and accepted a Pt 36 offer, was **not limited to receiving only fixed costs**. The claim had become more valuable as it progressed and would inevitably have exited the portal validly at some point.
- ***Hilton v Proudfoot*** [2019] 4 WLUK 539 concerned whether FC applied to a claim worth c£10K carried on by personal representatives when the original C had died before proceedings were issued. HHJ Gargan held that it did not. However, he also held that in the exercise of his discretion it would be wrong award more than FC for the period before C’s death.

Successfully avoiding FRC: Exceptional Circumstances: (r45.29J)

- ▶ Exceptional circumstances (EC) is now a major battleground.
- ▶ It is a battle that Ds generally seem to be winning:



- ***Ferri v Gill*** [2019] EWHC 952 (QB); [2019] Costs LR 367: a strict approach applied to EC. It was not a low bar.
- ***Scutchings v Gibbs*** [2018] 6 WLUK 176 (CC, DJ Davies): that the claim settled for £40,000 after the court issued Notice of Proposed Allocation to the multi-track did not constitute EC.
- ***Parsa v DS Smith Plc*** [2019] Costs LR 331 (QBD, Carr J): D's acceptance of C's Pt 36 offer over 9 months late and less than 2 weeks before trial did not constitute EC. Affirmed that the threshold was a high one, and that conduct out of the norm justifying indemnity costs was insufficient. Also rejected ambitious arguments by C that (1) the Court had a general discretion to disapply FC; and (2) C's application to displace FC was an interim application per **CPR 45.29H** entitling C to extra costs.

Portal case – settled before reallocation – FRC only

- ▶ ***Ho v Adekun*** [2019] EWCA Civ 1724; [2020] PIQR Q3. Claim started in portal. Allocated to FT. C applied to re-allocated to MT on basis of increased value. D consented to re-allocation.
- ▶ Just before re-allocation hearing C accepted D's Pt 36 offer for £30,000 damages plus "*costs in accordance with CPR 36.13 to be subject to detailed assessment if not agreed*".
- ▶ DDJ held that FC apply. CJ held agreement to pay for assessment on standard basis inconsistent with FC. Therefore an agreement that FC did not apply. This was consistent with agreement to re-allocate. **C/A held that FC applied:**
 - D's clear intention was to make a Part 36 offer. A Part 36 offer in an ex-Protocol case could only be for fixed costs.
 - It was improbable D would have offered more than fixed costs.
 - Although the reference to assessment was "*was far from ideal*", it was not wholly inapposite. It was common ground that any dispute over FC had to be resolved by DA. Thus, as Moore-Bick LJ observed in ***Solomon v Cromwell*** at [19], the FC regime "*does involve an assessment of some kind*".

Fixed Costs & Detailed Assessment

- ▶ Assumption **Ho** that FC are subject to DA has been subject to recent challenge.
- ▶ In ***Ivanov v Lubbe*** [2020] 1 WLUK 256 HHJ Lethem held that an agreement to pay fixed costs did not by itself give rise to any costs order or any right to seek assessment. IN the event a dispute as to the amount of fixed costs the correct procedure was to apply for a costs order in principle and an order that those costs be assessed.
- ▶ In ***Nema v Kirkland*** [2019] EWHC B15 (Costs) Master Leonard went further and held that (save possibly where a claimant sought to rely upon the exceptional circumstances provision at **CPR r.45.29J**) there was no jurisdiction to subject fixed costs to any type of assessment and that the only procedure for resolving any dispute over quantification was by way of application. DJ Baldwin in ***Aalbregt v AXA Insurance UK plc*** (Birkenhead, County Court, 13 February 2015 and Master Haworth in ***Mughal v Samuel Higgs & EUI Limited***, SCCO, unreported, 6 October 2017 had earlier come to the same conclusion. So commence DA proceedings in a FC case at your peril. They are liable to be struck out!

6. How will they be extended in the future?



Extension to the FRC

- ▶ Sir Rupert Jackson's Supplemental Report – July 2017
 - ▶ Proposed **Intermediate Track** for certain claims up to **£100,000**
 - ▶ The intermediate track will have streamlined procedures and a grid of FRC.
- ▶ Rejected by Parliament in favour of extending the depth and breadth of the Fast Track – increasing the value and applying the FRC to cases beyond PI

Future Developments

- ▶ **The Civil Liability Act 2018 is now in force**
 - ▶ Extends definition of whiplash
 - ▶ Provides for introduction of a fixed tariff for injuries less than 2 years
 - ▶ Because of COVID the implementation of the whiplash reform programme has been delayed until **April 2021**
- ▶ Extension to the SCT
 - ▶ SCT limit will include damages for PSLA up to £5,000 (RTA cases) and up to £2,000 for all other cases
 - ▶ The increase in the small claims track limit will not apply to those who have been termed “vulnerable road-users”: (For example: motor-cyclists, cyclists and pedestrians)
 - ▶ SCT is going to get much bigger!

Thanks for listening!
...Love or hate fixed costs, they are here to stay!



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