



**Informing Progress** - Shaping the Future

## **FOIL UPDATE 22<sup>nd</sup> November 2021**



### **The impact on Product Liability claims of the Extension of Fixed Recoverable Costs**

Following the 2019 consultation on Fixed Recoverable Costs (FRC), the government has published its intended approach in response, which generally though not entirely, follows the recommendations made by Jackson LJ.

It is intended for this new regime to be introduced at some point in the year 2022. It will apply to all qualifying cases where the accident date/cause of action is after the date of implementation, save for in disease cases where the letter of claim/notification of claim is the effective date.

FRC will be extended to apply to the majority of Fast Track cases (i.e., those cases presently with a value of up to £25,000 damages). The government has rejected the idea of a separate "intermediate" track and instead intends to simply expand the scope of the existing Fast Track to include claims with a value of up to £100,000 damages.

#### How will this impact on Product Liability claims?

We know from the introduction of the MOJ Portal that claimant law firms have been keen to exclude product liability from "standard" personal injury claims. Those attempts to distinguish product liability claims appear to have failed in respect of exclusion from the MOJ Portal and the associated reduced costs.

Similar attempts have now been made to exclude product liability from the extension of FRC. The claimant law firms have put forward arguments that product liability cases should not be suitable for FRC on the basis that there is a significant amount of money and time spent at the pre-issue or investigation stage to identify the correct defendant, the appropriate cause of action, and the evidence relating to the defect. The correct defendant will be more complex to identify than in other PI claims due to the complex corporate structures, and the involvement of multiple parties such as the retailer, manufacturer, importer, and the consideration of the correct jurisdiction where the potential defendant is abroad. They also argued that the appropriate cause of action is also complex, as it must be considered whether the claim should be brought under the Consumer

Protection Act 1987, negligence, or breach of contract and that Disclosure in product liability claims can also be considerable.

Despite the above submissions, the MOJ has rejected attempts to exclude product liability claims and therefore they will fall under the extension of FRC.

What band are product liability claims likely to fall into?

The qualifying Fast Track claims will be allocated to one of four bands based on complexity and/or value. Band One providing the lowest FRC for the simplest lowest value claims and Band Four providing the greatest FRC for the more complex and high value case.

Whilst the allocation of each claim to a band will be fact specific, it seems clear based on the above submissions from the claimant law firms, that strong arguments are likely to be put forward for product liability cases to be allocated to Bands 3 and 4 due to their purported complexity and therefore enhanced costs (within the FRC) are likely to be allocated to the cases.

Attached are the proposed FRC bands and it is clear that allocation to Bands 3 and 4 would result in significantly enhanced costs.

Early judicial decisions on the first contested allocations involving Product Liability cases will be eagerly awaited.

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**Table 3: Fixed recoverable costs for intermediate cases**

<b>Stage (S)</b>	<b>Band 1</b>	<b>Band 2</b>	<b>Band 3</b>	<b>Band 4</b>
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	£2,000
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	£5,700 + 15% of damages	£15,000 + 20% of damages	£16,200 + 20% of damages	£24,700 + 22% of damages
S9 Attendance of solicitor at trial per day	£500	£750	£1,000	£1,250

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