



Informing Progress - Shaping the Future

FOIL UPDATE 3rd February 2022



Fixed recoverable costs in lower value clinical negligence claims

The Department of Health & Social Care has launched a consultation in relation to fixed recoverable costs (FRC) in lower value clinical negligence claims. The closing date for responses is **24th April 2022**. FOIL is considering these proposals and will submit a response.

The proposed scheme would apply to clinical negligence claims in England and Wales, valued between the upper small claims track limit for non-RTA personal injury claims (currently £1,000) and £25,000. They would be allocated to either a Standard Track or a Light Track, the latter being for cases deemed to be more straightforward. Certain claims are excluded including those requiring more than two liability experts; those with genuine multiple defendants; claims involving stillbirths or neonatal deaths; and claims where limitation is an issue.

Each phase has been coded, which is relevant to determining costs.

Standard Track

Claims on the standard track would start with a letter of claim (**ST(A)**), to be accompanied:

- by medical records – to be collated, sorted and paginated by the claimant
- experts' reports on breach of duty of care and causation (limited to a maximum of 2 such liability experts in different medical disciplines)
- witness statements (limited to 2 witnesses, statements in template form, including a statement of truth)
- where applicable, any separate report on condition and prognosis
- details of losses and supporting documentation, either in the letter or in a separate schedule if required, to be supported with a statement of truth and

- an offer to settle the claim.

The defendant would have to acknowledge the letter of claim within 21 days and would then have **6 months** in which to respond (**ST(B)**) and:

1. admit liability as to breach of duty of care and causation for the claim
2. accept the claimant's settlement offer
3. reject the claimant's offer and make a counteroffer to settle the claim or
4. send a response letter to the claimant, denying breach of duty of care and/or causation, disclosing the defendant's case and responding to the offer. If option 4 is adopted there are minimum requirements for the detail of the defendant's response.

The claimant has a right of reply to the defendant's response (**ST(C)**), to be sent within **six weeks** of the defendant response.

A mandatory stocktake and discussion would have to take place (**ST(D)**) if the case cannot be settled after the defendant response or claimant reply. This should take place within 4 weeks of the defendant response if no claimant reply is being made, or within 10 weeks of the defendant response if the claimant wishes to reply to the response (this 10-week period allows 6 weeks for the claimant to reply and then 4 weeks for both parties to prepare for stocktake).

At the stocktake, parties should examine the strength of each other's position and work towards settlement at, or shortly following, this meeting. Legal representatives at this stocktake meeting are to have full authority to settle where liability is admitted. Even where liability cannot be agreed, parties should strive, where possible to agree quantum. Even (and especially) where definitive agreement cannot be reached on liability or quantum, parties should seek to narrow issues so that progress is made.

A mandatory neutral (but non-binding) evaluation (**ST(E)**) would have to be held if the claim is not settled at the mandatory stocktake. The parties have 4 weeks from the mandatory stocktake meeting to select and commission a specialist barrister from the agreed panel. The evaluation should normally be a paper-only exercise.

The evaluator must forward the outcome of the evaluation (**ST(F)**) to all parties simultaneously within 4 weeks. The outcome of the evaluation would not be binding, but parties should make every effort to settle at this stage.

Claims adhering to the standard track process would not take longer than 44 weeks (308 days) in total to move from ST(A) claim letter to ST(F) mandatory neutral evaluation outcome.

Light Track

The Light Track process also starts with a claim notification letter (**LT(A)**) which should include:

- an explanation of the basis for the case being in the light track and any associated documents (such as a serious incident report)
- medical records – to be collated, sorted and paginated by the claimant and

- details of losses and any accompanying evidence.

All evidence and other documents included in the FRC claim notification letter would have to be of a sufficient quality as to conform to the evidentiary rules to be set out in the CPR to allow the defendant to consider the issues, respond appropriately and timeously and facilitate resolution.

The defendant would be required to acknowledge the claim notification letter within 21 days and provide an admission of liability (**LT(B)**): (within **8 weeks**), to ensure the claim remains in the light track. Provision is made for situations where the defendant's indemnifier cannot make a formal admission but can indicate that it will make a payment of compensation.

If the liability admission were not received within 8 weeks, the claim would transfer to the standard track and the clock would be reset to the standard track beginning with a claim letter being sent by the claimant in the standard track format.

If full liability (on breach of duty and causation) were to be admitted by the defendant, (or an agreement is made by the indemnifier to pay reasonable compensation) following the claim notification letter, and the claim has therefore continued in the light track, a mandatory telephone discussion/stocktake (**LT(C)**) must be held **within 4 weeks** of the defendant response.

Legal representatives at this stocktake meeting would have to have full authority to settle or at least narrow the issues so that progress is made. If there was no settlement at this stage but the parties decide that no further evidence is required, the case would enter the "no further evidence" phase from **LT(D)(NFE)** onwards and must move into mandatory neutral evaluation **within 4 weeks** of the mandatory stocktake.

A mandatory neutral (but non-binding) evaluation should be a paper-only exercise and the parties would have **4 weeks** from the mandatory stocktake meeting to select and commission a specialist barrister from the agreed panel. The evaluation must be completed, and an outcome sent to all parties (**LT(E)(NFE)**) simultaneously **within 4 weeks** of the evaluation commencement. The outcome of the evaluation would not be binding, but parties should make every effort to settle at this stage.

If at mandatory stocktake, there was no settlement and the parties decide that further evidence was required to resolve the claim, parties would then enter the "further evidence" phase below from **LT(D)(FE)** onwards. If at stocktake there is no settlement and further evidence is required, the parties must decide **within 2 weeks** of the mandatory stocktake whether a condition and prognosis report and a claimant witness statement dealing with the factual background and quantification of damages are required. If a condition and prognosis report was needed, the parties should agree a joint expert (limited to 1 expert), **within 4 weeks** of the mandatory stocktake discussion and should send instructions **within 2 weeks** of that agreement. If a claimant witness statement was needed setting out any continuing injuries for consideration by the expert, this should be provided **within 4 weeks** of the mandatory stocktake.

The expert should provide a paper-only report (**LT(E)(FE)**) as the default position, unless they indicate they need to assess the claimant. The joint expert must indicate **within 4 weeks** of instruction if an assessment is required. If no assessment were required, the joint expert should provide the report **within 6 weeks** of instruction. If an assessment were required, the joint expert should arrange an assessment **within 8 weeks** of instruction and should provide the report within 2 weeks of the assessment.

A further evidence stocktake ((**LT(F)(FE)**) must be held **within a maximum of 14 weeks** (if no claimant assessment) or **a maximum of 18 weeks** (if an assessment is required) following the mandatory stocktake. Legal representatives at this stocktake meeting would have full authority to settle.

Even (and especially) where definitive agreement cannot be reached, parties should seek to narrow issues so that progress is made.

A mandatory neutral (but non-binding) evaluation (**LT(G)(FE)**) must be held if the claim is not settled at the further evidence stocktake. The parties would have **4 weeks** from the further evidence stocktake meeting to select and commission a specialist barrister from the agreed panel. The evaluation should be a paper-only exercise by default.

The evaluation must be completed, and an outcome (**LT(H)(FE)**) sent to all parties **within 4 weeks** of the evaluation commencement. The outcome of the evaluation would not be binding, but parties should make every effort to settle at this stage.

NFE claims adhering to this process would not take longer than 20 weeks (140 days) in total.

FE cases adhering to the light track process would not take longer than 34 weeks (238 days) in total; (or 38 weeks (266 days) in total, if a claimant assessment was also required.

These are maxima. In many cases, the whole process should be significantly shorter, and many claims should be resolved well before a mandatory neutral evaluation is required.

The FRC are specified in the now usual matrix tables of costs, dependent on value and stage reached.

Table 1: Standard Track

Stage	Costs	Activity
Stage 1 ST(A) to ST(D)	£5,500 plus 20% of damages agreed	All steps up to and including stocktake (a maximum of 38 weeks from FRC letter of claim)
Stage 2 ST(E) to ST(F)	£500 in addition to standards track stage 1	From stocktake up to and including neutral evaluation (a maximum of 8 weeks)

Table 2: Light Track

Stage	Costs	Activity
Stage 1 LT(A) to LT(B)	£1,000 plus 10% of damages agreed	All steps up to 21 days after letter of response is due (a maximum period of 11 weeks from the FRC notification letter)
Stage 2a LT(B) to LT(C)	£500 in addition to light track stage 1	From 21 days after letter of response up to and including stocktake (a maximum of one week)

Stage 2b (LT(D)(NFE) to LT(E)(NFE); or LT(D)(FE) to (LT(H)(FE)	£500 in addition to light track stages 1 and 2a	From stocktake up to and including neutral evaluation (a maximum of 8 weeks if no further evidence is required following stocktake; or 24 weeks if further (non-liability) evidence is required).
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Table 3: Protected Party Claims

It is proposed that all claims on behalf of protected parties (for example, children or people who lack mental capacity) should remain in the fixed costs scheme with a suggested additional bolt-on cost of £650 applied, to recognise the extra work involved in these claims.

Stage	Costs	Activity
Suggested bolt-on costs (Protected Party Claims only)	£650 in addition to above stages	In recognition of extra work required in PP cases.

Evaluator Fees

The fees proposed for evaluators are:

Type	Fee
Liability and quantum	£2,000
Liability only	£1,500
Quantum only	£ 750

The consultation sets out guidance on a number of issues including sanctions to encourage compliance; the quality of evidence; and how neutral evaluation should operate in practice. Defendants not meeting the initial response times would be penalised by a standard track claim exiting the process; or a light track claim reverting to the standard track, thus increasing the costs recoverable by the claimant. Non-compliance with other deadlines would meet with costs penalties (probably a 50% reduction in a defaulting claimant's costs or a 50% increase in the claimant's damages if the defendant defaulted).

The consultation paper may be found at: [Fixed recoverable costs in lower value clinical negligence claims - GOV.UK \(www.gov.uk\)](https://www.gov.uk/government/consultations/fixed-recoverable-costs-in-lower-value-clinical-negligence-claims)

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