Ministry of Justice Consultation:

Extending Fixed Recoverable Costs: How vulnerability is addressed

Response from the Motor Accident Solicitors Society

June 2022

This response is prepared on behalf of the Motor Accident Solicitors Society (MASS) and submitted by the Chairman, Susan Brown.

MASS is a Society of solicitors acting for the victims of motor accidents, including those involving personal injury (PI). MASS has over 70 solicitor firm Members, representing approximately 2000 claims handlers. We estimate that member firms conduct in the region of 400,000 PI motor accident claims annually on behalf of the victims of those accidents. The Society's membership is spread throughout the United Kingdom.

The objective of the Society is to promote the best interests of the motor accident victim. This is central, and core to our activity. We seek to promote only those policy and other objectives which are consistent with the best interests of the accident victim. We seek to set aside any self interest in promoting these arguments, recognising that we are in a position of trust, and best placed to observe the best interests of motor accident PI victims first hand. We are a not for profit organisation, which requires specialism in motor accident claimant work as a pre-requisite for membership. We also have a Code of Conduct which member firms are required to abide by, which is directed to the best interests of the motor accident victim.

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Questions

(i) Do you agree that the Government's proposal (as outlined in paragraph 15) is the right way to address vulnerability within FRC?

We agree that the judiciary should determine vulnerability and whether or not vulnerability gives rise to any uplift.

There needs to be clear guidance around the factors, largely in line with PD1A, that would be considered to account for the uplift.

The provision of a threshold would be helpful but clarity needs to be given as to what the threshold would apply to. For instance, under the new FRC proposals for intermediate cases, the FRC post litigation is phased and so some phases may have substantial further cost. These additional costs should be assessed based on the phase rather than the case as a whole.

It is agreed that a simple process would be beneficial and that the process should be available for determination of a vulnerability uplift for non-litigated cases too.

Whilst it is necessary to assess costs retrospectively, Claimants should have surety that their vulnerabilities are going to be considered and will not prove a bar to their involvement in a claim, or will lead to them facing substantial costs because of those vulnerabilities.

(ii) If not, do you have an alternative proposal?

The term "swings and roundabouts" regarding the FRC is used three times in the consultation. Whilst it is accepted that the primary driver for fixed recoverable costs is the certainty that this brings, unfortunately vulnerable parties need to be treated individually and appropriate provision made to enable effective participation in litigation. If we treat all claimants as a cohort, we fail to consider and give effect to individual rights including access to justice.

As alluded to above, the issue of vulnerability could be assessed at case management stage (as is required under PD1A) for the purposes of FRC as well? That would at least give a vulnerable party and their legal team confidence in knowing that the first part of the test has been met. The court could potentially give an indication about which phases an uplift would apply to if that is appropriate for the nature of the case.

(iii) Do you have any drafting comments on the draft new rules?

The aim of the rules should be to ensure that the Overriding Objective is adhered to and given "overriding" precedence.

A vulnerable Claimant would be taking all of the risk: (1) they have a retrospective assessment of their vulnerability; (2) the amount of work that is done must exceed 20% of the fixed recoverable costs allowed; (3) the court will only allow the uplift in exceptional circumstances;

and (4) disbursements are excluded from any uplift. It is clear that the vulnerable party is taking the vast majority of the burden.

Clarity needs to be given as to what is actually to be assessed and form part of the costs regarding the threshold.

By seeking the uplift for vulnerable costs, the vulnerable party could actually achieve a lesser sum in costs than fixed costs if the assessment of costs does not go their way, which again penalises the vulnerable party given that this position does not occur in similar rules within the CPR for non-vulnerable parties (the exceptional uplift for instance).

This fails to give effect to the overriding objective and is at risk of breaching the Equality Act 2010 and the Human Rights Act 1998.

If there is an order for detailed assessment, there should be discretion to allow further costs recovery. If not, the points above apply.

(iv) Should any new provision in respect of vulnerability apply to existing FRC, which generally cover lower value PI (please consider in the context of paragraph 20)?

The overriding objective was changed so as to include vulnerability. The sums permitted under the FRC did not increase.

Point 19 (a) on the proposal is not understood. If the existing FRC take into account vulnerability, there would be no need for further reform in this area to reflect vulnerability on FRC cases. This assertion is also contradictory to CPR Part 45.13 which permits further costs in exceptional circumstances.

There is therefore a mechanism to 'escape' fixed costs, which could refer to vulnerability (Particularly given the introduction of PD1A), but as cases may well transition between various cost regimes, it makes sense to ensure that the rules are consistent on the approach to vulnerability provisions and the effect upon fixed costs.

Point 19 (b) needs to be reconsidered. It does not reflect that vulnerable people need to be treated as individuals and it fails to recognise that a claimant may have protected characteristics under the Equality Act 2010 which make them vulnerable; it fails to consider an individual claimant's right to access to justice and to a fair trial. It should be noted that the FRC scheme was not amended to reflect the introduction of PD1A and the provisions therein, however they apply to the cases.

A concern about increase in costs does not give effect to PD1A. It only considers the cost to a paying party and puts this above all other factors. CPR Part 45.13 gives appropriate discretion to consider cases on an individual basis in exceptional circumstances. This is a proportionate step to ensure that those with protected characteristics and / or vulnerable are treated fairly, lawfully and in accordance with the overriding objective however, as previously stated, it is desirable to have the FRC schemes aligned on this issue to prevent different access to justice provisions across different cases.

It is not accepted that the existing FRC sums take into account vulnerability. The evidential basis for this assertion has not been included. PD1A came into effect after the FRC figures

(which have never been amended or uplifted) came into effect. This was therefore never part of the original consideration.

Legal representatives or vulnerable parties have had to effectively swallow the additional costs, which can only be seen as a windfall to the insurance industry, but this is something that should be reconsidered as part of this consultation by allowing specific provisions.

There is incongruity in the rules, for instance, London weighting – without provision for vulnerable parties, it will simply be the case that you can recover more costs if your solicitor is from London but not if you need specialist assistance because of a vulnerability. This cannot be right.

(v) Do any changes need to be made to the arrangements for disbursements for vulnerability in FRC cases?

It is not clear why disbursements are excluded from the new rules. This may have the effect of disproportionately discriminating against claimants on the grounds of age, nationality, and /or disability. It is foreseeable that experts will need to spend longer with clients who are vulnerable. There may be translation costs (as required by changes to CPR 32PD) for non-English speaking claimants.

If a party needs to translate advice letters, pleadings, expert reports and witness statements, the case will become uneconomical. We are then left in the situation of facilitating access to justice on FRC matters for native English-speaking individuals only. The alternative is for the Claimant to fund the translation but not recover the cost or for lawyers to simply not recover the fees. The “swings and roundabouts” of Fixed Recoverable Costs should not be expected to cover this and this was never envisaged in the original fixed cost rules as again these changes came into effect after their drafting.

The case of Aldred v Cham [2019] EWCA Civ 1780 (which deals with the issue of recoverability of advice on settlement from counsel but also discusses translator’s fees) set out the position that such fees would not be seen as arising out of a characteristic of the claim but rather a characteristic of the Claimant and were therefore not recoverable.

Specifically, therefore, disbursements relating to vulnerability appear to have been excluded from the existing fixed recoverable costs rules.

There may be additional medical fees due to additional time being spent with a Claimant or perhaps needing more than one assessment. This would again suggest that only a reasonable fee for the average member of the public would be recoverable in fixed fees, rather than the additional costs required to respect a party’s vulnerability.

The supreme Court refused permission to appeal the decision recommending that the CRPRC needed to consider this issue further and this would seem the ideal time to protect the rights of vulnerable individuals injured through no fault of their own.