



Department
of Health

Fixed Recoverable Costs in Lower Value Clinical Negligence Claims: a Consultation

Annex D: Illustrative Pre-Action Protocol and Civil
Procedure Rules

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Fixed Recoverable Costs in Lower Value Clinical Negligence Claims: a Consultation

Annex D: Illustrative Pre-Action Protocol and Civil
Procedure Rules

Prepared by Clinical Negligence Policy Team

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Executive summary

The result of the FRC consultation will be revised Sections 36 and 45 of Civil Procedure Rules. An illustrative Pre-Action Protocol for the Resolution of fixed Cost Clinical Disputes.

The Civil Procedure Rule Committee (CPRC) has supported the Department by developing an illustrative set of rules, which are set out in this document. In providing such support prior to the consultation, the CPRC is not expressing any opinion on the consultation itself.

The illustrative Protocol and Rules are provided as examples only and will need modification once a final position is reached after the consultation. We have separated out this aspect of the consultation in recognition that these illustrative rules are technical in nature and of greater interest to the legal fraternity though we would welcome all views, especially on the principles underpinning the illustrative rules which are set out in Chapter 7.

Illustrative Pre-Action Protocol for Resolution of Fixed cost Clinical Disputes

[CONTENTS TABLE]

INTRODUCTION

1 Definitions

1.1 In this Protocol—

() 'admission of liability' means the defendant admits that—

(a) the act or omission occurred;

(b) it was caused by the defendant's breach of duty;

(c) the defendant caused some loss to the claimant, the nature and extent of which is not admitted; and

(d) the defendant has no accrued defence to the claim under the Limitation Act 1980;

() 'clinical negligence' has the meaning in paragraph 2.1(1) and (2) below;

() 'fixed cost clinical negligence dispute' means a claim to which this protocol applies;

() 'legal representative' has the same meaning as in rule 2.3(1) of the Civil Procedure Rules 1998;

[ADD OTHERS]

1.2 A reference to a rule or practice direction, unless otherwise defined, is a reference to a rule in the Civil Procedure Rules 1998 ('CPR') or a practice direction supplementing them.

2 Scope

2.1 This Protocol applies where—

(1) a claim for damages is made against any hospital, GP, dentist or other healthcare provider;

(2) the claim is for damages in respect of personal injury that is alleged to be the result of clinical negligence;

(3) the claimant values the claim at no more than the Protocol upper limit;

(4) [INSERT TRANSITIONAL PROVISION – SEE CONSULTATION PAPER PARAGRAPHS 3.7 AND 3.8]; and

(5) if proceedings were started the small claims track would not be the normal track for that claim.

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(Rule 26.6 provides that the small claims track is not the normal track where the value of any claim for damages for personal injuries (defined as compensation for pain, suffering and loss of amenity) is more than £1,000.)

2.2 This Protocol ceases to apply to a claim where, at any stage, the claimant notifies the defendant that the claim has now been revalued at more than the Protocol upper limit¹.

2.2A Where paragraph 2.2 applies the claim will proceed instead under the Pre-Action Protocol for Resolution of Clinical Disputes. The point at which the provisions of that Protocol shall apply will depend on the stage the claim has reached at the date on which the claimant gives notice under paragraph 2.2.

2.3 This Protocol does not apply

(1) to a claim covered by—

(a) the Pre-Action Protocol for Disease and Illness Claims;

(b) the Pre-Action Protocol for Personal Injury Claims;

(c) the Pre-Action Protocol for Low Value Personal Injury Claims in Road Traffic Accidents;

(d) the Pre-Action Protocol for Low Value Personal Injury (Employers' Liability and Public Liability) Claims; or

(e) Practice Direction 3D – Mesothelioma Claims. (delete full stop)

(1A) W where a claim covered by a protocol listed in (1) above also involves allegations of clinical negligence;

(2) where the claimant is a protected party as defined in rule 21.1(2);

(3) where the claimant is bankrupt;

(4) where the claimant resides outside the United Kingdom;

(5) where the defendant is not a public body and is insolvent or, being a limited company, is dissolved or has ceased to trade;

(6) where the claimant is considering applying for a Group Litigation Order or there is a group or series of linked or related cases which are likely to be more appropriately resolved by agreed procedures; or

(6)... .

2.4

(1) The 'Protocol upper limit' is £ [TO BE COMPLETED]

on a full liability basis including pecuniary losses but excluding interest.

(2) Any reference in this Protocol to a claim which is, or damages which are, valued at no more than the Protocol upper limit, or between £1,000 and the Protocol upper limit, is to be read in accordance with subparagraph (1).

2.5 The fixed recoverable costs regime in Section VIII of CPR Part 45 applies to all cases which are or should be handled within this Protocol.

¹ Where a case leaves this Protocol, the fixed costs regime in Section VIII of Part 45 will not apply to any work done before the date on which the notice is given.

3 Preamble

3.1 This Protocol is intended to be sufficiently broad-based and flexible to apply to all sectors of healthcare, both public and private. It also recognises that a claimant and a defendant, as patient and healthcare provider, may have an ongoing relationship.

3.2 It is important that each party to a clinical dispute has sufficient information and understanding of the other's perspective and case to be able to investigate a claim efficiently and, where appropriate, to resolve it. This Protocol encourages a cards-on-the-table approach when something has gone wrong with a claimant's treatment or the claimant is dissatisfied with that treatment and/or the outcome.

3.3 This Protocol is regarded by the courts as setting the standard of normal reasonable pre-action conduct for the resolution of Fixed Cost clinical disputes.

3.4 In Wales, the National Health Service (Concerns, Complaints and Redress Arrangements (Wales) Regulations 2011 ("the Putting Things Right scheme") (<http://www.legislation.gov.uk/wsi/2011/704/regulation/35/made>) is designed to provide patients with an explanation of what happened giving rise to their concern, an apology where appropriate and for qualifying claims valued at £25,000 or less an offer of compensation . Where a claim commenced under the Putting Things Right scheme does not result in final satisfaction of the claim-

(a) And there has been no admission of liability, the claimant will need to follow the procedures set out in this Protocol by issuing a letter of claim;

(b) And there has been an admission of liability the parties should agree which steps under this Protocol have not been fully complied with, and seek to agree a timetable to address the same, prior to the commencement of court proceedings.

3.5 This Protocol sets out the conduct that prospective parties must follow prior to the commencement of any proceedings. It establishes a reasonable process and timetable for the exchange of information relevant to a dispute, sets out the standards for the content and quality of letters of claim and sets standards for the conduct of pre-action negotiations. It is intended to govern all cases which operate within the fixed recoverable costs regime in Section VIII of CPR Part 45.

3.6 The timetable and the arrangements for disclosing documents and obtaining expert evidence may need to be varied to suit the circumstances of the case.

4 Early Issue

4.1 The Protocol provides for a defendant to be given four months to investigate and respond to a Letter of Claim before proceedings are served. If this is not possible, the claimant's solicitor should give as much notice of the intention to issue and serve proceedings as is practicable. This Protocol does not alter the statutory time limits for starting court proceedings. If a claim is issued after the relevant statutory limitation period has expired, the defendant will be entitled to use that as a defence to the claim.

4.2 Where compliance with this Protocol is not possible before the expiry of the limitation period the claimant may start proceedings and apply to the court for an order to stay (i.e. suspend) the proceedings while the parties take steps to follow this Protocol.

4.3 Where the parties are then unable to reach a settlement the claimant must, in order to proceed, apply to lift the stay and request directions in the existing proceedings.

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4.4 The parties should also consider whether there is likely to be a dispute as to limitation should a claim be pursued.

5 Enforcement of the Protocol and sanctions

5.1 An illustrative flowchart is attached at Annex A which shows each of the stages that the parties are to take before the commencement of proceedings.

5.2 Subject to paragraph 5.3, where either party fails to comply with this Protocol the court may impose sanctions. When deciding whether to do so, the court will look at whether the parties have complied in substance with the Protocol's relevant principles and requirements. It will also consider the effect any non-compliance has had on any other party. It is not likely to be concerned with minor or technical shortcomings (see paragraph 4.3 to 4.5 of the Practice Direction on Pre-Action Conduct and Protocols).

5.3 Certain paragraphs of this Protocol contain mandatory requirements and may specify the consequences of failure to comply. Such provisions are intended to take precedence over paragraph 5.1 5.2 above.

6 Litigants in Person

6.1 If a party to a claim does not seek professional advice from a legal representative, they should still, in so far as is reasonably possible, comply with the terms of this Protocol.

6.2 If a party to a claim becomes aware that another party is a litigant in person, they should send a copy of this Protocol to the litigant in person at the earliest opportunity.

6.3 The fixed costs in rule 45.47 apply in relation to a claimant only where a claimant has a legal representative.

7 THE AIMS OF THE PROTOCOL

7.1 The general aims of the Protocol are –

(a) to maintain and/or restore the patient/healthcare provider relationship in an open and transparent way;

(b) to reduce delay; and

(c) to resolve as many disputes as possible without litigation and within a regime of fixed recoverable costs.

7.2 The specific objectives are–

(a) to encourage openness, transparency and early communication of the perceived problem between patients and healthcare providers;

(b) to provide an opportunity for healthcare providers to identify whether notification of a notifiable safety incident has been, or should be, sent to the claimant in accordance with the duty of candour imposed by section 20 of the Health and Social Care Act 2008 (Regulated Activities) Regulations 2014;

(c) to ensure that sufficient medical and other information is disclosed promptly by both parties to enable each to understand the other's perspective and case, and to encourage early resolution or a narrowing of the issues in dispute;

- (d) to provide an early opportunity for healthcare providers to identify cases where an investigation is required and to carry out that investigation promptly;
- (e) to encourage healthcare providers to involve the National Health Service Litigation Authority (NHSLA) or their defence organisations or insurers at an early stage;
- (f) to enable the parties to avoid litigation by agreeing a resolution of the dispute;
- (g) to enable the parties to explore the use of mediation or to narrow the issues in dispute before proceedings are commenced;
- (h) to enable parties to identify any issues that may require a separate or preliminary hearing, such as a dispute as to limitation;
- (i) to support the efficient management of proceedings where litigation cannot be avoided;
- (j) to discourage the prolonged pursuit of unmeritorious claims and the prolonged defence of meritorious claims;
- (k) to promote the provision of medical or rehabilitation treatment to address the needs of the claimant at the earliest opportunity; and
- (l) to encourage the defendant to make an early apology to the claimant if appropriate.

7.3 This Protocol does not—

- (a) provide any detailed guidance to healthcare providers on clinical risk management or the adoption of risk management systems and procedures;
- (b) provide any detailed guidance on which adverse outcomes should trigger an investigation; or
- (c) recommend changes to the codes of conduct of professionals in healthcare.

8 THE PROCESS

Obtaining health records

8.1 Any request for records by the claimant should—

- (a) provide sufficient information to alert the defendant where an adverse outcome has been serious or has had serious consequences or may constitute a notifiable safety incident;
- (b) be as specific as possible about the records which are required for an initial investigation of the claim (including, for example, a continuous copy of the CTG trace in birth injury cases); and
- (c) include a request for any relevant guidelines, analyses, protocols or policies and any documents created in relation to an adverse incident, notifiable safety incident or complaint.

8.2 Requests for copies of the claimant's clinical records should be made using the Law Society and Department of Health approved standard forms (enclosed at Annex B), adapted as necessary.

8.3 The copy records should be provided within 40 days of the request and for a cost not exceeding the charges permissible under the Access to Health Records Act 1990 and/or the Data Protection Act 1998. Payment may be required in advance by the healthcare provider.

8.4 The claimant may also make a request under the Freedom of Information Act 2000.

8.5 At the earliest opportunity, legible copies of the claimant's medical and other records should be placed in an indexed and paginated bundle by the claimant. This bundle should be kept up to date.

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8.6 In the rare circumstances that the defendant is in difficulty in complying with the request within 40 days, the problem should be explained quickly and details given of what is being done to resolve it.

8.7 If the defendant fails to provide the health records or an explanation for any delay within 40 days, the claimant or their adviser can then apply to the court under rule 31.16 for an order for pre-action disclosure. The court has the power to impose costs sanctions for unreasonable delay in providing records. Costs relating to any such application are separate from the fixed recoverable costs for the claim in rule 45.47.

8.8 If either the claimant or the defendant considers additional health records are required from a third party, in the first instance these should be requested by or through the claimant. Third party healthcare providers are expected to co-operate. Rule 31.17 deals with the procedure for applying to the court for disclosure by third parties.

Rehabilitation

8.9 The claimant and the defendant shall both consider as early as possible whether the claimant has reasonable needs that could be met by rehabilitation treatment or other measures. They should also discuss how these needs might be addressed. An immediate needs assessment report prepared for the purposes of rehabilitation should not be used in the litigation except by consent.

(A copy of the Rehabilitation Code can be found at:
http://www.iaa.co.uk/IAA_Member/Publications)

Letter of Notification

8.10 Annex C1 (left intentionally blank, to be drafted following consultation) to this Protocol provides a template for the recommended contents of a Letter of Notification; the level of detail will need to be varied to suit the particular circumstances.

8.11

(1) Where the claimant and their legal representative consider, prior to sending a Letter of Claim, that it is likely that breach of duty will be established, they are strongly encouraged to send a Letter of Notification to the defendant soon as practicable. This may for example be where a notifiable safety incident has been investigated and an outcome notified to the claimant.

(2) In any event following receipt and analysis of the records and, if appropriate, receipt of an initial supportive expert opinion, the claimant may wish to send a Letter of Notification to the defendant. It is recognised though that part of the purpose of this protocol is to save costs where appropriate and that the incurring of experts' report fees is a significant expense, which may be avoided or reduced by use of the early Letter of Notification.

(3) The Letter of Notification should advise the defendant that this is a claim where a Letter of Claim is likely to be sent because a case as to breach of duty and/or causation has been identified. A copy of the Letter of Notification should also be sent to the NHSLA or, where known, other relevant medical defence organisation or indemnity provider.

(4) where possible the claimant should include a certificate of value in the form provided for in paragraph 8.16.

8.12

- (1) On receipt of a Letter of Notification a defendant should—
- (a) acknowledge the letter within 14 days of receipt;
 - (b) identify who will be dealing with the matter and to whom any Letter of Claim should be sent;
 - (c) consider whether to commence investigations and/or to obtain factual and expert evidence;
 - (d) consider whether any information could be passed to the claimant which might narrow the issues in dispute or lead to an early resolution of the claim; and
 - (e) forward a copy of the Letter of Notification to the NHSLA or other relevant medical defence organisation/indemnity provider.
- (2) Where the defendant is prepared to make an admission of liability in response to the Letter of Notification, they are encouraged to do so. In that event the requirements for Letters of Claim and Response will be of no effect unless the defendant requires the claimant to serve a Letter of Claim.
- (3) There will be a presumption that the court may refuse any request by the defendant for extension of time limits if a Letter of Notification was sent but did not prompt an initial investigation.

Letter of Claim

8.13 Annex C2 (left intentionally blank, to be drafted following consultation) to this Protocol provides a template for the recommended contents of a Letter of Claim: the level of detail will need to be varied to suit the particular circumstances.

8.14 If, following the receipt and analysis of the records, and the receipt of any further advice (including from experts if necessary – see Section 4), the claimant decides that there are grounds for a claim, a Letter of Claim must be sent to the defendant as soon as practicable. Any Letter of Claim sent to an NHS Trust must be copied to the National Health Service Litigation Authority.

8.15 This letter must contain or be accompanied by—

- (a) a clear summary of the facts on which the claim is based, including the alleged adverse outcome, and the main allegations of negligence;
- (b) a description of the claimant's injuries, and present condition and prognosis;
- (c) an outline of the financial loss incurred by the claimant, with an indication of the heads of damage to be claimed and the scale of the loss, unless this is impracticable;
- (d) confirmation of the method of funding and whether any funding arrangement was entered into before or after April 2013;
- (e) a certificate of value;
- (f) copies of the reports of those experts on the issues of breach of duty and causation on which the claimant relies;
- (g) a paginated bundle limited to those health records which are considered material to the claim;

[LIMITS ON WITNESS EVIDENCE: SEE CONSULTATION PAPER AT PARAGRAPH 3.15. TO BE DRAFTED IF APPROPRIATE FOLLOWING CONSULTATION.]

8.16 A certificate of value must-

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(1) indicate the reasonable belief of the claimant or their legal representative that the value of the claim on full liability is more than £1,000 and no more than the Protocol upper limit;

(2) specify which of the following value bands is believed to apply:

more than £1,000 and no more than £10,000

more than £10,000 and no more than £25,000

more than £25,000 and no more than £50,000

more than £50,000 and no more than £100,000

more than £100,000 and no more than £250,000; and

(3) be signed by the claimant or their legal representative.

8.17 The certificate of value is taken to represent the reasonable belief of the claimant or their legal representative at the time it is signed but does not otherwise bind the claimant or the defendant to any particular value or value band.

8.18

(1) Where the claimant fails to serve experts' reports on the issues of breach of duty and causation, the defendant may indicate within [28 days²] that they are electing not to respond to the Letter of Claim until these reports are served. In that event time for the defendant's Letter of Response does not run until the expert's reports are served.

(2) The claimant may not serve and rely on the reports of more than [2³] experts on the issues of breach of duty and causation unless the defendant agrees or unless the need for further experts is supported by one of the experts originally instructed. For the avoidance of doubt the claimant is limited to two [2] experts in total under this paragraph unless the defendant agrees or unless the need for further experts is supported by one of the experts originally instructed.

(3) Where the claimant relies on the reports of more than [2] experts in accordance with paragraph (2) above, the claimant must serve the reports of all experts upon which they rely.

8.19 The defendant should request any documents in the claimant's possession which they believe are material and may be missing from the paginated bundle or identify other documents which may be material.

8.20 Sufficient information should be given to enable the defendant to focus investigations and to put an initial valuation on the claim.

8.21 Letters of Claim are not intended to have the same formal status as Particulars of Claim, nor should any sanctions necessarily apply if the Letter of Claim and any subsequent Particulars of Claim in the proceedings differ.

8.22 The claimant is encouraged to make an offer to settle the claim at this early stage by putting forward an offer in respect of liability and/or an amount of compensation in accordance with the legal and procedural requirements of CPR Part 36, but with a time limit for acceptance which coincides with the time for the letter of response. If an offer to settle is made, generally this should be supported by a medical report which deals with the injuries, condition and prognosis, and by a schedule of loss and supporting documentation. The level of detail

² The deadline is illustrative, to be reviewed following consultation

³ The limit on the number of experts is illustrative: see paragraphs 6.2 and 6.3 in the consultation paper where the issue is considered further.

necessary will depend on the value of the claim. Medical reports may not be necessary where there is no significant continuing injury and a detailed schedule may not be necessary in a low value case.

Letter of Response

8.23 Attached at Annex C3 (left intentionally blank, to be drafted following consultation) is a template for the suggested contents of the Letter of Response: the level of detail will need to be varied to suit the particular circumstances.

8.24 The defendant should acknowledge the Letter of Claim within 14 days of receipt and should identify who will be dealing with the matter.

8.25 Subject to paragraph 8.18(1) above the defendant must, within four months of the Letter of Claim, provide a reasoned answer in the form of a Letter of Response in which the defendant must—

- (a) if the claim is admitted, say so in clear terms;
- (b) if only part of the claim is admitted, make clear which issues of breach of duty and/or causation are admitted and which are denied and why;
- (c) if the claim is denied, include specific comments on the allegations of negligence and, if a synopsis or chronology of relevant events has been provided and is disputed, the defendant's version of those events;
- (d) if known, state whether the defendant requires copies of any relevant medical records obtained by the claimant (to be supplied for a reasonable copying charge);
- (e) provide copies of any additional documents relied upon;
- (f) if not indemnified by the NHS, supply details of the relevant indemnity insurer;
- (g) respond to the claimant's certificate of value to indicate whether it is agreed and if not, which value band the defendant considers should apply; and
- (h) inform the claimant of any other potential defendants to the claim.

8.26 Unless liability is admitted, the Defendant must serve with the Letter of Response any experts' reports on the issues of breach of duty and causation on which they seek to rely in defence of the claim.

8.27

(1) If the defendant does not serve any reports with the Letter of Response (or at such alternative time as may be agreed by the parties), the court may subsequently refuse permission for the defendant to rely on any expert evidence on the issues of breach of duty and causation.

(2) The defendant may not serve and rely on the reports of more than [2⁴] experts on the issues of breach of duty and causation unless the claimant agrees or unless the need for further experts is supported by one of the experts originally instructed. For the avoidance of doubt the claimant defendant is limited to two [2] experts in total under this paragraph unless the claimant

⁴ The limit on the number of experts is illustrative, see paragraphs 6.2 and 6.3 in the consultation paper

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agrees or unless the need for further experts is supported by one of the experts originally instructed.

(3) Where the defendant relies on the reports of more than [2] experts in accordance with paragraph (2) above, the defendant must serve the reports of all experts upon which they rely.

8.28 The defendant's response to the certificate of value is taken to represent the reasonable belief of the defendant or their legal representative at the time but does not otherwise bind the defendant or the claimant to any particular value or value band.

8.29

(1) If the defendant requires an extension of time for service of the Letter of Response, a request should be made as soon as the defendant becomes aware that it will be required and, in any event, within four months of the letter of claim.

(2) The defendant should explain why any extension of time is necessary.

(3) The claimant should adopt a reasonable approach to any request for an extension of time for provision of the Letter of Response, consistent with the overall aims of the protocol but acknowledging the applicable fixed costs regime.

8.30 If the claimant has made an offer to settle in accordance with paragraph 8.22, the defendant should respond to that offer at the same time as the Letter of Response, preferably with reasons. The defendant may also make an offer to settle at this stage. Any offer made by the defendant should be made in accordance with the legal and procedural requirements of CPR Part 36. If an offer to settle is made, the defendant should provide sufficient medical or other evidence to allow the claimant to properly consider the offer properly. The level of detail necessary will depend on the value of the claim. (change made to avoid split infinitive)

8.31 If the parties reach agreement on liability, or wish to explore the possibility of resolution with no admissions as to liability, but time is needed to resolve the value of the claim, they should aim to agree a reasonable period.

8.32 If the parties do not reach agreement on liability, they should discuss whether the claimant should start proceedings and whether the court might be invited to direct an early trial of a preliminary issue or of breach of duty and/or causation.

8.33 Following receipt of the Letter of Response, if the claimant is aware that there may be a delay of six months or more before the claimant decides if, when and how to proceed, the claimant should keep the defendant generally informed.

9 EXPERTS

9.1 In fixed cost clinical negligence disputes separate expert opinions may be needed—
on breach of duty;
on causation;
on the patient's condition and prognosis and other aspects of valuing the claim.

9.2 It is recognised that in fixed cost clinical negligence disputes, the parties and their advisers will require some flexibility in their approach to expert evidence. The parties should co-operate when making decisions on appropriate medical specialisms, whether experts might be instructed jointly and whether any reports obtained pre-action (and not already the subject of disclosure requirements in this Protocol) might be shared.

9.3 Obtaining expert evidence will often be an expensive step and may take time, especially in specialised areas of medicine where there are limited numbers of suitable experts.

9.4 When considering what expert evidence may be required during the Protocol period, parties should be aware that the use of any expert reports obtained pre-action will only be permitted in proceedings with the express permission of the court.

9.5 Nothing in this section is intended to reduce the obligations⁵-

(1) On the claimant to serve experts' reports on the issues of breach of duty and causation with the Letter of Claim;

(2) On the defendant to serve experts' reports on the issues of breach of duty and causation with the Letter of Response.

9.6 All relevant documents relied on by an expert should be cited in their report. Copies should not usually be supplied when serving the report, unless requested.

10 ALTERNATIVE DISPUTE RESOLUTION

10.1 Litigation should be a last resort. As part of this Protocol, the parties should consider whether negotiation or some other form of alternative dispute resolution ('ADR') might enable them to resolve their dispute without commencing proceedings.

10.2 Some of the options for resolving disputes without commencing proceedings are—

(a) discussion and negotiation (which may or may not include making Part 36 Offers or providing an explanation and/or apology)

(b) mediation, a third party facilitating a resolution ;

(c) arbitration, a third party deciding the dispute;

(d) early neutral evaluation, a third party giving an informed opinion on the dispute; and

(e) Ombudsmen schemes.

10.3 Information on mediation and other forms of ADR is available in the Jackson ADR Handbook (available from Oxford University Press) or at—

<http://www.civilmediation.justice.gov.uk/>

http://www.adviceguide.org.uk/england/law_e/law_legal_system_e/law_taking_legal_action_e/alternatives_to_court.htm

10.4 If proceedings are issued, the parties may be required by the court to provide evidence that ADR has been considered. It is expressly recognised that no party can or should be forced to mediate or enter into any form of ADR, but a party's silence in response to an invitation to participate in ADR might be considered unreasonable by the court and could lead to the court ordering that party to pay additional court costs.

11 STOCKTAKE

⁵ This paragraph is drafted without reference to the option of instructing a single joint expert as considered in paragraph 6.4 of the consultation paper, to be reviewed following consultation."

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11.1 Where a dispute has not been resolved after the parties have followed the procedure set out in this Protocol, the parties should review their positions before the claimant issues court proceedings.

11.2 At this stage in particular the parties are encouraged to consider whether participation in any of the forms of ADR in paragraph 10.2 above could avoid the need for proceedings to be issued.

11.3 If proceedings cannot be avoided, the parties should continue to co-operate and should seek to prepare a chronology of events which identifies the facts or issues that are agreed and those that remain in dispute. The parties should also seek to agree the necessary procedural directions for efficient case management during the proceedings.

12 EXIT POINTS

12.1 Where the claimant gives notice to the defendant that the claim is unsuitable for this Protocol, then the claim will no longer continue under this Protocol. However, where the court considers that the claimant acted unreasonably in giving such notice it will award no more than the fixed costs in rule 45.47.

12.2 Examples of cases where such notice may reasonably be given include-

(1) where the claimant reasonably believes the claim is now worth more than the Protocol upper limit;

(2) where the number of experts reasonably required by both sides on issues of breach of duty and causation exceeds a total of [2⁶] experts per party.

⁶ The limit on the number of experts is illustrative, see paragraphs XX to XXX in the consultation paper

Costs consequences of acceptance of a Part 36 offer where Section IIIA of Part 45 applies

36.20

(1) This rule applies where a claim no longer continues under the RTA or EL/PL Protocol pursuant to rule 45.29A(1).

(2) Where a Part 36 offer is accepted within the relevant period, the claimant is entitled to the fixed costs in Table 6B, Table 6C or Table 6D in Section IIIA of Part 45 for the stage applicable at the date on which notice of acceptance was served on the offeror.

(3) Where—

a defendant's Part 36 offer relates to part only of the claim; and

(b) at the time of serving notice of acceptance within the relevant period the claimant abandons the balance of the claim,

the claimant will be entitled to the fixed costs in paragraph (2).

(4) Subject to paragraphs (5), (6) and (7), where a defendant's Part 36 offer is accepted after the relevant period—

the claimant will be entitled to the fixed costs in Table 6B, Table 6C or Table 6D in Section IIIA of Part 45 for the stage applicable at the date on which the relevant period expired; and

the claimant will be liable for the defendant's costs for the period from the date of expiry of the relevant period to the date of acceptance.

(5) Subject to paragraphs (6) and (7), where the claimant accepts the defendant's Protocol offer after the date on which the claim leaves the Protocol—

the claimant will be entitled to the applicable Stage 1 and Stage 2 fixed costs in Table 6 or Table 6A in Section III of Part 45; and

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the claimant will be liable for the defendant's costs from the date on which the Protocol offer is deemed to have been made to the date of acceptance.

(6) In a soft tissue injury claim, if the defendant makes a Part 36 offer before the defendant receives a fixed cost medical report, paragraphs (4) and (5) will only have effect if the claimant accepts the offer more than 21 days after the defendant received the report.

(7) In this rule, "fixed cost medical report" and "soft tissue injury claim" have the same meaning as in paragraph 1.1(10A) and (16A) respectively of the RTA Protocol.

(8) For the purposes of this rule a defendant's Protocol offer is either—

defined in accordance with rules 36.25 and 36.26; or

if the claim leaves the Protocol before the Court Proceedings Pack Form is sent to the defendant—

the last offer made by the defendant before the claim leaves the Protocol; and
deemed to be made on the first business day after the claim leaves the Protocol.

(9) A reference to—

the "Court Proceedings Pack Form" is a reference to the form used in the Protocol; and

(b) "business day" is a reference to a business day as defined in rule 6.2.

(10) Fixed costs shall be calculated by reference to the amount of the offer which is accepted.

(11) Where the parties do not agree the liability for costs, the court must make an order as to costs.

(12) Where the court makes an order for costs in favour of the defendant—

(a) the court must have regard to; and

(b) the amount of costs ordered must not exceed,

the fixed costs in Table 6B, Table 6C or Table 6D in Section IIIA of Part 45 applicable at the date of acceptance, less the fixed costs to which the claimant is entitled under paragraph (4) or (5).

(13) The parties are entitled to disbursements allowed in accordance with rule 45.29I incurred in any period for which costs are payable to them.

Costs consequences of acceptance of a Part 36 offer where Section VIII of Part 45 applies

36.20A

(1) This rule applies in a clinical negligence claim to which Part 45 Section VIII applies.

(2) Where a Part 36 offer is accepted within the relevant period, the claimant is entitled to the fixed costs in Table 7A in Section VIII of Part 45 for the stage applicable at the date on which notice of acceptance was served on the offeror.

(3) Where—

a defendant's Part 36 offer relates to part only of the claim; and

(b) at the time of serving notice of acceptance within the relevant period the claimant abandons the balance of the claim,

the claimant will be entitled to the fixed costs in paragraph (2).

(4) Where a defendant's Part 36 offer is accepted after the relevant period—

the claimant will be entitled to the fixed costs in Table 7A in Section VIII of Part 45 for the stage applicable at the date on which the relevant period expired; and

the claimant will be liable for the defendant's costs for the period from the date of expiry of the relevant period to the date of acceptance.

(5) Fixed costs shall be calculated by reference to the amount of the offer which is accepted.

(6) Where the parties do not agree the liability for costs, the court must make an order as to costs.

(7) Where the court makes an order for costs in favour of the defendant—

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- (a) the court must have regard to; and
- (b) the amount of costs ordered must not exceed,

the fixed costs in Table 7A in Section VIII of Part 45 applicable at the date of acceptance, less the fixed costs to which the claimant is entitled under paragraph (4).

- (8) The parties are entitled to disbursements allowed in accordance with rule 45.50 incurred in any period for which costs are payable to them.

Costs consequences following judgment where section IIIA of Part 45 applies

36.21.

(1) Where a claim no longer continues under the RTA or EL/PL Protocol pursuant to rule 45.29A(1), rule 36.17 applies with the following modifications.

(2) Subject to paragraphs (3), (4) and (5), where an order for costs is made pursuant to rule 36.17(3)—

the claimant will be entitled to the fixed costs in Table 6B, 6C or 6D in Section IIIA of Part 45 for the stage applicable at the date on which the relevant period expired; and

the claimant will be liable for the defendant's costs from the date on which the relevant period expired to the date of judgment.

(3) Subject to paragraphs (4) and (5), where the claimant fails to obtain a judgment more advantageous than the defendant's Protocol offer—

the claimant will be entitled to the applicable Stage 1 and Stage 2 fixed costs in Table 6 or 6A in Section III of Part 45; and

the claimant will be liable for the defendant's costs from the date on which the Protocol offer is deemed to be made to the date of judgment; and

in this rule, the amount of the judgment is less than the Protocol offer where the judgment is less than the offer once deductible amounts identified in the judgment are deducted.

("Deductible amount" is defined in rule 36.22(1)(d).)

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(4) In a soft tissue injury claim, if the defendant makes a Part 36 offer or Protocol offer before the defendant receives a fixed cost medical report, paragraphs (2) and (3) will only have effect in respect of costs incurred by either party more than 21 days after the defendant received the report.

(5) In this rule “fixed cost medical report” and “soft tissue injury claim” have the same meaning as in paragraph 1.1(10A) and (16A) respectively of the RTA Protocol.

(6) For the purposes of this rule a defendant’s Protocol offer is either—

defined in accordance with rules 36.25 and 36.26; or

if the claim leaves the Protocol before the Court Proceedings Pack Form is sent to the defendant—

the last offer made by the defendant before the claim leaves the Protocol; and deemed to be made on the first business day after the claim leaves the Protocol.

(7) A reference to—

(a) the “Court Proceedings Pack Form” is a reference to the form used in the Protocol; and

(b) “business day” is a reference to a business day as defined in rule 6.2.

(8) Fixed costs must be calculated by reference to the amount which is awarded.

(9) Where the court makes an order for costs in favour of the defendant—

the court must have regard to; and

(b) the amount of costs ordered shall not exceed,

the fixed costs in Table 6B, 6C or 6D in Section IIIA of Part 45 applicable at the date of judgment, less the fixed costs to which the claimant is entitled under paragraph (2) or (3).

(10) The parties are entitled to disbursements allowed in accordance with rule 45.29I incurred in any period for which costs are payable to them.

Costs consequences following judgment where section VIII of Part 45 applies

36.21A

(1) In a clinical negligence claim to which section VIII of Part 45 applies, rule 36.17 applies with the following modifications.

(2) Where an order for costs is made pursuant to rule 36.17(3)—

the claimant will be entitled to the fixed costs in Table 7A in Section VIII of Part 45 for the stage applicable at the date on which the relevant period expired; and

the claimant will be liable for the defendant's costs from the date on which the relevant period expired to the date of judgment.

(3) Fixed costs must be calculated by reference to the amount which is awarded.

(4) Where the court makes an order for costs in favour of the defendant—

the court must have regard to; and

the amount of costs ordered shall not exceed,

the fixed costs in Table 7A in Section VIII of Part 45 applicable at the date of judgment, less the fixed costs to which the claimant is entitled under paragraph (2).

(5) The parties are entitled to disbursements allowed in accordance with rule 45.50 incurred in any period for which costs are payable to them.

Draft rules for fixed costs for Clinical Negligence claims

Part 45 Section VIII Fixed recoverable costs in clinical disputes

Scope and interpretation	Rule 45.45
Application of fixed costs	Rule 45.46
Amount of fixed costs	Rule 45.47
Reduction in fixed costs for early admission	Rule 45.48
Claim disposed of at trial	Rule 45.49
Allowed disbursements	Rule 45.50
Structure for defendants' costs	Rule 45.51
Limitation and protective issue	Rule 45.52
Claims for an amount of costs exceeding fixed recoverable costs	Rule 45.53
Failure to achieve costs greater than fixed recoverable costs	Rule 45.54
Costs of the costs-only proceedings or the detailed assessment	Rule 45.55

Scope and interpretation

45.45

(Definition of cases within scope of fixed costs)

(1) Subject to paragraph (2), this section applies to claims within the scope of the Pre Action Protocol for the Resolution of Fixed Cost Clinical Disputes ('the relevant Protocol'). -

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(b) the total value of the agreed damages does not exceed [£250,000⁷];

(Exceptions, to include transitional provisions)

(2) This section does not apply where-

(a) INSERT TRANSITIONAL PROVISIONS – SEE CONSULTATION PAPER PARAGRAPHS 3.7 AND 3.8 ;

(b) the claim has been allocated to the small claims track; or

(c) if a claim had been issued for the amount of the agreed damages, the small claims track would have been the normal track for that claim.

(Definition)

(3) For the purposes of this section-

(a) "clinical negligence claim" has the same meaning as in paragraph 1.1(8) of the relevant Protocol

(b)...

Application of fixed costs

45.46

Subject to rules [45.53 to 45.55], the only costs allowed are—

(a) the fixed costs in rule [45.47];

(b) disbursements in accordance with rule [45.50].

Amount of fixed costs

45,47

(1) Subject to paragraph (2), the amount of fixed costs is set out in Table [7A].

(2) Where the claimant—

(a) lives or works in an area set out in Practice Direction 45; and

(b) instructs a legal representative who practises in that area,

the fixed costs will include, in addition to the costs set out in Table [7A], an amount equal to 12.5% of the costs allowable under paragraph (1) and set out in Table [7A].

(3) Where appropriate, VAT may be recovered in addition to the amount of fixed recoverable costs and any reference in this Section to fixed costs is a reference to those costs net of VAT.

TABLE 7A

⁷ All references to the proposed limit of £250,000 and to separate bands of damages throughout these draft rules are illustrative and will be revisited following consultation.

⁸ Numbering still to be completed following consultation

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A. If Parties reach a settlement prior to the claimant issuing proceedings under Part 7				
Agreed damages	At least £1,000, but not more than £25,000	More than £25,000, but not more than £50,000	More than £50,000, but not more than £100,000	More than £100,000, but not more than £250,000
Fixed costs	TO BE COMPLETED	TO BE COMPLETED	TO BE COMPLETED	TO BE COMPLETED
B. 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 the date of trial	
Fixed costs	TO BE COMPLETED	TO BE COMPLETED	TO BE COMPLETED	
C. If the claim is disposed of at trial				
Fixed costs	TO BE COMPLETED.			
Costs not fixed	Costs of attendance at trial, including trial advocacy fee			

[OPTION Reduction in fixed costs for early admission⁹

45.48

Where the defendant makes an admission of liability within 4 months of receipt of the letter of claim, the applicable fixed costs set out in Table [7A] will be reduced-

- (a) By [X %] if the claim is settled before the issue of proceedings; and
- (b) By [Y %] if the claim is settled after the issue of proceedings, including cases disposed of at trial.

(2) For the purpose of this rule 'admission of liability' has the meaning in paragraph 1.1(10) of the relevant Protocol]

Claim disposed of at trial

⁹ This option is considered at paragraphs XX to XXX in the consultation paper

¹⁰ Numbering still to be completed following consultation

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45.49

In this section-

- (a) a reference to trial is a reference to the final contested hearing or to the contested hearing of any issue ordered to be tried separately;
- (b) a reference to a claim being disposed of at trial is a reference to a claim concluding by settlement after the trial has commenced or by judgment at trial; and
- (c) "trial advocacy fee" includes reasonable costs payable to the trial advocate in respect of the trial, whether the fee for advocate is for solicitor or counsel.

Disbursements

45.50

(1) Subject to paragraphs (3) to (5), the court—

- (a) may allow a claim for a disbursement of a type mentioned in paragraphs (2); but
- (b) will not allow a claim for any other type of disbursement.

(2) The disbursements referred to in paragraph (1) are—

- (a) the cost of obtaining medical records;
 - (b) the cost of any expert reports;
 - (c) court fees;
 - (d) any expert's fee for attending the trial where the court has given permission for the expert to attend;
 - (e) expenses which a party or witness has reasonably incurred in travelling to and from a hearing or in staying away from home for the purposes of attending a hearing;
 - (f) a sum not exceeding the amount specified in Practice Direction 45 for any loss of earnings or loss of leave by a party or witness due to attending a hearing or to staying away from home for the purpose of attending a hearing;
 - (g) where they are necessarily incurred by reason of the claimant being a child or protected party as defined in Part 21-
 - (i) the reasonable cost of a written opinion from counsel or solicitor in support of any settlement; and
 - (ii) the attendance of an advocate at any settlement approval hearing;
 - (h) reasonable travelling expenses for attendance on the client; and
 - (i) any other disbursement reasonably incurred due to a particular feature of the claim.
- (3) the only sums (exclusive of VAT) that are recoverable in respect of the cost of experts' reports are as follows—
- (a) where the damages agreed do not exceed £25,000, the total sum of
 - (b) where the damages agreed exceed £25,000 but do not exceed £50,000, the total sum of £
 - (c) where the damages agreed exceed £50,000 but do not exceed £100,000, the total sum of £ ;

(D) where the damages agreed exceed £100,000 but do not exceed £250,000, the total sum of £ 11;

(e) the reasonable cost of providing an answer to questions under Part 35.

(4) The sums in paragraph (3) include the cost of all experts' reports on any issue of liability or quantum but do not otherwise limit the number of reports the claimant may obtain, subject to the permission of the court under Part 35;

(5) Where appropriate, VAT may be recovered in addition to the cost of any report

Structure for defendants' costs

45.51

(1) In this rule—

(a) paragraphs (8) and (9) apply to assessments of defendants' costs under Part 36;

(b) paragraph (10) applies to assessments to which the exclusions from qualified one way costs shifting in rules 44.15 and 44.16 apply; and

(c) paragraphs (2) to (7) apply to all other cases under this Section in which a defendant's costs are assessed.

(2) If, in any case to which this Section applies, the court makes an order for costs in favour of the defendant—

(a) the court will have regard to; and

(b) the amount of costs order to be paid shall not exceed,

the amount which would have been payable by the defendant if an order for costs had been made in favour of the claimant at the same stage of the proceedings.

(3) For the purpose of assessing the costs payable to the defendant by reference to the fixed costs in Table [7A], "value of the claim for damages" and "damages" shall be treated as references to the value of the claim.

(4) For the purposes of paragraph (3), "the value of the claim" is—

(a) the amount specified in the claim form, excluding—

(i) any amount not in dispute;

(ii) interest;

(iii) costs; and

(iv) any contributory negligence;

(b) if no amount is specified in the claim form, the maximum amount which the claimant reasonably expected to recover according to the statement of value included in the claim form under rule 16.3;

(c) [£250,000], if the claim form states that the claimant cannot reasonably say how much is likely to be recovered.

(5) Where the defendant—

(a) lives, works or carries on business in an area set out in Practice Direction 45; and

¹¹ The damages bands are illustrative and will be revisited following consultation.

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- (b) instructs a legal representative who practises in that area, the costs will include, in addition to the costs allowable under paragraph (2), an amount equal to 12.5% of those costs.
- (6) Where an order for costs is made pursuant to this rule, the defendant is entitled to disbursements in accordance with rule [45.50]
- (7) Where appropriate, VAT may be recovered in addition to the amount of any costs allowable under this rule.
- (8) Where, in a case to which this Section applies, a Part 36 offer is accepted, rule 36.20A will apply instead of this rule.
- (9) Where, in a case to which this Section applies, upon judgment being entered, the claimant fails to obtain a judgment more advantageous than the defendant's Part 36 offer, rule 36.21A will apply instead of this rule.
- (10) Where, in a case to which this Section applies, any of the exceptions to qualified one way costs shifting in rules 44.15 and 44.16 is established, the court will assess the defendant's costs without reference to this rule.

Limitation and protective issue

45.52

- (1) Where the expiry of a limitation period may occur before the end of the 4 month period provided for the defendant's Letter of Response in the Protocol, the claimant may start proceedings in accordance with paragraph (2).
- (2) The claimant must state on the claim form that –
- (a) the claim is for damages; and
 - (b) a stay of proceedings is sought in order to comply with the Protocol.
- (3) The claimant must send to the defendant the claim form together with the order imposing the stay.
- (4) Where proceedings are started under this part and the claim is settled before the stay is lifted, the figures for settlement pre-issue in part A of Table [7A] will apply.

[? Need for further provisions relating to the lifting of the stay]

Claims for an amount of costs exceeding fixed recoverable costs

45.53

- (1) If it considers that there are exceptional circumstances making it appropriate to do so, the court will consider a claim for an amount of costs (excluding disbursements) which is greater than the fixed recoverable costs referred to in rule [45.47].

For the purposes of this rule, "exceptional circumstances" means circumstances which are exceptional in the context of a clinical negligence claim of equivalent value.

- (2) If the court considers such a claim to be appropriate, it may—
- (a) summarily assess the costs; or
 - (b) make an order for the costs to be subject to detailed assessment.
- (3) If the court does not consider the claim to be appropriate, it will make an order—

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- (a) if the claim is made by the claimant, for the fixed recoverable costs; or
 - (b) if the claim is made by the defendant, for a sum which has regard to, but which does not exceed the fixed recoverable costs,
- and any permitted disbursements only.

Failure to achieve costs greater than fixed recoverable costs

45.54

(1) This rule applies where—

- (a) costs are assessed in accordance with rule [45.53(2)] and
- (b) the court assesses the costs (excluding any VAT) as being an amount which is in a sum less than 20% greater than the amount of the fixed recoverable costs.

(2) The court will make an order for the party who made the claim to be paid the lesser of—

- (a) the fixed recoverable costs; and
- (b) the assessed costs.

Costs of the costs-only proceedings or the detailed assessment

45.55

(1) Where—

- (a) the court makes an order for costs in accordance with rule [45.53(3)]; or
- (b) rule [45.54] applies,

the court may—

- (i) decide not to award the party making the claim the costs of the costs only proceedings or detailed assessment; and
- (ii) make orders in relation to costs that may include an order that the party making the claim pay the costs of the party defending those proceedings or that assessment.