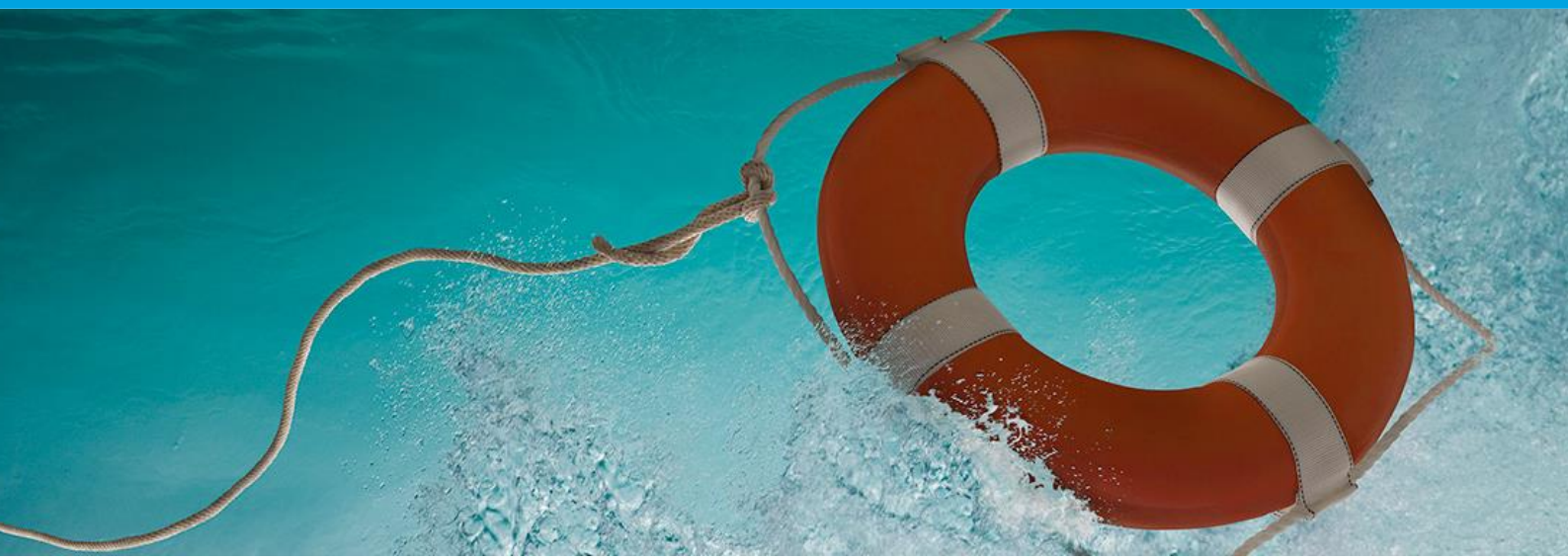
2022 personal injury forecast: trends and future risks

March 2022

Kennedys



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Foreword

If 2021 was the year of the vaccine, 2022 looks set to be the year for recovery. COVID-19 forced businesses to embrace home working and, for many, the benefits of remote operating have changed attitudes towards work forever.

Workplace culture will continue to inform boardroom agendas in 2022, along with the long-tail impacts associated with the pandemic, such as long-COVID and continued periods of short-term absences.

A drive towards environmental, social, and governance (ESG) metrics and strategies will similarly push employers' efforts to address physical and mental health in the workplace.

In addition to continuing pandemic impacts, the UK is facing a cost of living crisis. Energy bills are soaring, annual inflation is at a 30-year high and consumers are paying more for food, clothing and transport. All of these factors will impact consumer spending habits, damages awards for personal injury claims, along with an increased appetite to bring claims.

2021 was marked by ongoing tensions in the UK-EU relationship. The unfortunate reality is that 2022 does not offer much hope of a thawing in relations, with the Northern Ireland protocol remaining a continued source of dispute and the UK's accession to the Lugano Convention having been kicked into the political long grass last year.

Following the UK Government's announcement on 31 January 2022 that it would bring forward a new Brexit Freedoms Bill to make it easier to amend 'retained EU law' (REUL), 2022 may indeed be the year of former Brexit Minister Lord Frost's call to "… amend, replace, or repeal all the REUL that is not right for the UK".

Alongside regulatory and legal reform, digital transformation, remote justice and technology will continue to play a key role in the ongoing transformation of the UK justice system. HMRC is already in the midst of a digital overhaul, aiming to introduce online services and use video technology in court hearings.

However, the real challenge will now be to realise the benefit of a more long-term digitised justice system, and maintain the momentum once the UK adapts to the 'new normal' of hybrid or remote hearings.

Against this background, we highlight some key legal and regulatory developments, and provide an overview of 12 topics to watch under four main topic groups which insurers and corporates should consider as they plan for operational resilience in the new financial year.

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Legal and regulatory developments

2021 was an eventful year – not least in respect of new case law and legislation forging a path in the post-Brexit landscape.

'Build back better' was Prime Minister Boris Johnson's policy pledge to transform the UK's fortunes. As part of this campaign, the UK Government also committed to make the UK a safer place – from online safety to building safety and public safety.

We expect these trends to continue throughout 2022, along with a continued focus on the impact of, and recovery from the COVID-19 pandemic.

Legal landscape

Over the last year, the courts have considered a clutch of cases dealing with fundamental dishonesty (FD), kicking off with the much-publicised decision in *Mustard v Flower & Ors* [2021], which raised the question: to plead or not to plead fundamental dishonesty?

The key takeaway for defendants was that not entering a plea of fundamental dishonesty will not stop the trial judge from making such a finding, providing the claimant has been given adequate warning that FD is an issue. The exception to this is that if evidence comes to light at trial, a defendant can still ask for a finding of FD even without a warning.

Sudale v Cyril John Ltd [2021]

Of particular interest to defendants are the findings in *Sudale v Cyril John Ltd* [2021], where the court held that Section 57 of the Criminal Justice and Courts Act 2015 refers solely to the claimant's fundamental dishonesty.

As such, the defendant's conduct is not taken into account when considering the 'substantial injustice' test.

In an important case which relates to all expert evidence in civil litigation, not just 'holiday sickness' claims, the Court of Appeal in *Griffiths v TUI (UK) Ltd* [2021] ruled that there will no longer be a requirement to 'controvert' (or refute) a claimant's evidence.

As a result, it will again be open to a defendant to challenge an expert's report at trial, without adducing its own evidence. As a note of caution, the Supreme Court's decision as to whether an appeal will be granted is still awaited.

In *X v Kuoni Travel Ltd* [2021], which found in favour of the claimant after a reference to the

Court of Justice of the European Union (CJEU), the Supreme Court held that a broad approach should be taken to determining the scope of the services provided under a package holiday contract. The judgment also establishes a narrow ambit of the unforeseeable event defence available to tour operators.

FS *Cairo LLC v Brownlie* [2021]

Towards the end of last year, and in the absence of the UK acceding to the Lugano Convention, the Supreme Court handed down its much anticipated judgment in *FS Cairo (Nile Plaza) LLC v Brownlie* [2021].

The judgment will, in theory at least, make it easier for claimants involved in accidents abroad to bring their claims in England and Wales.

However, there will continue to be scope to challenge jurisdiction on the basis of forum conveniens and this is likely to be a fertile area of dispute in jurisdiction claims in the future.

In December 2021, the CJEU handed down judgment in *Tattersall v Seguros Catalana Occidente S.A* [2021], ultimately coming to the opposite conclusion to the UK's Court of Appeal.

In the CJEU's reasoning, the special rules on insurance under Article 13(2) of the Brussels recast regulation are to address an imbalance between the parties as an insurer is considered a stronger party. The claimant and the insured are seen as weaker parties, so there is no reason to allow a claimant to sue a defendant in their member state of domicile under the special rules.

This decision highlights how Brexit will shape the future legal system in England and Wales as, following the end of the Brexit transition period, this may well be the last matter that the courts of England and Wales refer to the CJEU.

This is highly significant, as such issues in the future will not have the benefit of consideration by the CJEU and the final decision will come from the UK's home courts, demonstrating the potential for divergence.

Regulatory and legislative developments

Following the European case of *Vnuk v Zavarovalnica Triglav dd* [2016], the Motor Insurers Bureau (MIB) was effectively required to meet claims for uninsured motor accidents occurring on private land.

However, one could be forgiven for thinking that following the end of the Brexit transition period on 31 December 2020, the issues arising from the decision in *Vnuk* might have drawn to a close… Unfortunately not.

UK Motor Vehicles (Compulsory Insurance) Bill

On 21 June 2021, the Motor Vehicles (Compulsory Insurance) Bill was introduced to Parliament and is currently working its way through the House of Lords.

The aim of the Bill is to remove the lasting effect of *Vnuk* and re-state the position under the Road Traffic Act 1988, where insurance policies are only required to cover the use of vehicles "on a road or other public place in Great Britain".

On 29 January 2022, new rules, alongside revisions to existing rules of the Highway Code came into force, placing a higher burden of responsibility on those in charge of vehicles, particularly vehicles more likely to cause harm such as HGVs.

The Building Safety Bill

As part of the UK Government's plans to place new and enhanced regulatory regimes for building safety, the Building Safety Bill represents a seismic shift in the regulation

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of every stage of a building, from design and construction to occupation.

The new Building Safety Regulator will have power to prosecute offences or use civil penalties under the Bill against any business that breaks the rules and compromises public safety. Royal Assent is expected to be given to the Bill no earlier than September/October 2022.

The Online Safety Bill

In a bid to make the UK "one of the safest places to be on the internet", the UK Government has been working on a new piece of sweeping legislation, known as the Online Safety Bill.

The Bill focuses on:

- Addressing illegal and harmful content online by imposing the duty of care.
- Protecting children from child sexual exploitation and abuse content.
- Protecting users' rights to freedom of expression and privacy.

The Online Safety Bill authorises Ofcom as regulator to issue a fine of £18 million, or 10% of annual worldwide turnover (whichever is greater).

Since its announcement, the Bill has attracted much publicity. For example, the Digital, Culture, Media and Sport Committee's January 2022 report on online harms and disinformation states that as currently drafted, the Bill is not clear or robust enough to tackle some forms of illegal and harmful content. As such, the Government prepared an amended Bill, which it introduced to Parliament on 17 March 2022.

Continuing on the topic of safety, following consultation last year, Home Secretary Priti Patel announced in January 2022 that legislation will be introduced this year with the aim of striking the right balance between public safety and not placing excessive burden on small businesses. The Protect Duty, previously known as 'Martyn's Law', will be a new piece of anti-terrorism legislation with a wide reach. The Home Office estimates that 650,000 UK businesses could be affected by the new Duty.

For all businesses operating in the public arena, this development means they should develop or revisit their counter-terrorism measures, paying specific attention to how best to manage and mitigate the identified risks. This will in turn impact decisions businesses make about insurance cover… Preparedness is vital.

Key topics to watch in 2022

Ongoing and future risks relating to the pandemic

The COVID-19 pandemic has been a global health and economic crisis, resulting in severe disruption and an uncertain claims environment for insurers.

Injuries relating to lockdowns and working from home

As a consequence of working at home, we expect an influx of claims relating to musculoskeletal injuries, visual issues from excessive screen time and stress-related claims.

The Health and Safety Executive's (HSE) December 2021 report on work-related stress, anxiety and depression, found that stress, anxiety and depression caused half of all work-related illness in the past 12 months.

> **According to the HSE's study, 850,000 workers suffered from a new case of work-related ill health in 2020/2021, with 451,000 reporting that this was due to stress, anxiety or depression.**

Naturally the HSE will be increasing its attention on how employers manage this increased stress in the workplace.

As life returns to a 'new normal', the claimants of the future may potentially be more vulnerable to adverse psychological consequences as a result of the impact of the pandemic on their long-term mental health.

Under the eggshell-skull rule, those claims for psychological injury resulting from an accident will be compensable, even if the underlying psychological vulnerability stemmed from the pandemic. As such, compensators may find themselves exposed to claims inflation resulting from the pandemic.

In a similar vein, emerging claims such as those relating to COVID-19 anxiety syndrome and 'injury to feeling' claims resulting from the 'policing' of COVID-19 related non-compliance, are likely to be tested within the courts. If defendants settle initial claims in an effort to save costs, this could have a floodgate effect, resulting in an overall greater spend.

Animal-related claims: the pandemic puppy explosion

With around 3.2 million households in the UK having acquired a pet since the start of the pandemic, according to the Pet Food

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Manufacturers' Association, both personal injury and property damage claims could be on the rise as employees, along with their pets, return to the workplace.

Whilst pets have brought joy to many during periods of lockdown, the lack of training or socialisation could lead to a growing danger of attacks. We may therefore see an increase in claims brought in negligence for injuries caused by animals.

Global approaches to long-COVID: an occupational disease?

The symptoms of long-COVID are wide-ranging, but include fatigue, muscle weakness and breathlessness, which can lead to an inability to be able to work.

> "We have not seen an influx of COVID-19 claims to date because of the complexity of the causation issues. If, however, the UK Government attributes long-COVID to occupational cause then claimants and their lawyers will undoubtedly consider such a move as a lowering of the causation hurdle and claims will inevitably follow.
>
> Whilst we anticipate the attribution may be limited to those in front line professions, there is potential scope for claims to extend to local authorities and private care providers. Insurers and their insureds should be alert to this issue in 2022."
>
> ***Philippa Craven, Partner, London***

There has been no judicial decision as of yet whether COVID-19 will be treated as a divisible disease for causation purposes and as such, whether claimants will simply have to prove the timing of the infection (as with Noise Induced Hearing Loss claims), rather than establishing a more certain cause.

In February 2022, the Chartered Institute of Personnel and Development (CIPD) published a research report about working with long-COVID.

The survey of 804 organisations, who represent more than 4.3m employees in the UK, found that a quarter of employers raised long-COVID as one of the main causes of long-term sickness absence among their staff.

A number of countries in Europe, as well as Canada and South Africa, have formally recognised long-COVID as an occupational disease, setting up compensation schemes for key workers, including those in the health industry.

Last year, the All Party Parliamentary Group on Coronavirus proposed that the UK should adopt the same approach. If accepted, this may be an indication of the beginning of a new breed of civil claims which may extend to future enforcement action by regulatory authorities, such as the Health and Safety Executive.

Fraud remains in the spotlight

In November 2021, the Public Accounts Committee (PAC) published a report detailing the cost of fraud and error for the Department for Work and Pensions (DWP). According to their report, the cost of fraud and error for the DWP during the pandemic was £8.3 billion (or 7.5% of the DWP expenditure).

> "Fraudsters attack (and thrive on) weak process. The scale of the process, and the range of users that a process needs to account for, will inevitably create more opportunities for fraudsters to exploit."
>
> ***Martin Stockdale, Partner, Manchester***

Furthermore, the pressure on any process created by a surge in demand or new/emerging risks will significantly increase the challenge of fraud prevention. For the DWP, the nature of the challenge posed by the pandemic created a surge in claims that put more pressure on those processes. This additional pressure inevitably exposed more weaknesses.

Fraud does not only cost money. The PAC report highlights how fraud also fuels criminal activity, impacts other users of a service and erodes trust. The report found:

- £68 million was lost to organised crime groups perpetrating fraud by identity theft.
- This caused 10,000 genuine claimants having benefits stopped and/or receiving demands to repay. This in turn causes additional stress for those claimants and on the DWP processes which then need to unpick the problem.
- There is little to no prospect of the losses incurred to fraud being recovered by the DWP.
- Trust in the process is eroded – both by the users and by ministers and tax paying public that manage and pay for the system.

More recently, the UK Government continues to come under pressure as it denies that it has written off £4.3bn of fraud losses relating to COVID-19 business support loans.

Fraud is not a problem that can be adjusted for on the balance sheet. The Government's experience demonstrates that both effective preventative measures and controls need to be in place, together with the Public Accounts Committee, in order to continue tackle fraud.

The UK COVID-19 Public Inquiry

2022 will see the Rt Hon Baroness Heather Hallett DBE as Chair of the forthcoming Public Inquiry into the COVID-19 pandemic, which is likely to be one of the most complex undertaken in legal history.

It is understood that some NHS Trusts have already been notified that they should start preparing to respond to the inquiry as they may be considered a 'Core Participant'. Other organisations such as care homes, government departments, education settings, general practitioners, small businesses and transport providers may also be included.

Earlier this month, the draft Terms of Reference (ToR) were published for consultation. These set out the areas to be examined, considered and reported upon regarding the preparation and response to the pandemic in England and the devolved nations.

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Given the likely number of Core Participants and wide ranging draft ToR, there is no doubt that the inquiry will be a lengthy process. It is likely that any lessons to be learnt or changes in public policy, or indeed legislation, will take months if not years to be implemented.

Post-Brexit landscape

Brexit continues to play an undeniable role in shaping our legal system for the future. Will 2022 be the year the UK accedes to the Lugano Convention? On the domestic front, along with The Motor Vehicles (Compulsory Insurance) Bill working its way through Parliament, 2022 is set to bring a review of retained EU law which is likely to have far-reaching consequences for those advising on English law.

Will the UK join the Lugano club?

Claimants and defendants are slowly starting to accept that acceding to the Lugano Convention 2007 is an unlikely prospect in the near future, albeit not impossible.

> "When reserving cases involving a foreign element, insurers now need to factor in the time and cost of potentially challenging jurisdiction against the background of an increasingly evolving, and less certain, common law on jurisdiction."
>
> ***Rachel Moore, Partner, London***

On 22 June 2021, the European Commission "representing the European Union" wrote to the Swiss Federal Council as the depositary of the Lugano Convention to say that "the EU is not in a position to give its consent to invite the United Kingdom to accede to the Lugano Convention".

Since then, the UK Government has expressed concern that it has not received an indication as to when to expect a final decision on the UK's application. In October 2021, Justice Minister Lord Wolfson reportedly acknowledged that the Government was continuing its lobbying for the UK to join the convention but that it was "not a disaster" if the UK were not admitted.

Meanwhile, on 16 July 2021, the European Commission recommended that the EU sign up to the Hague Judgments Convention 2019 (HJC), which is designed to provide a framework for the enforcement of judgments across different jurisdictions. However, the HJC excludes "the carriage of passengers and goods" from its scope and therefore, brings into question whether claims for damages brought by those injured in road traffic accidents, on ships, planes or trains would be covered.

If both the EU and the UK sign up to the HJC, it could help to facilitate the enforcement of certain judgments. That being said, the HJC will not come into force for any state until 12 months after ratification, and will not apply unless proceedings were commenced after the Convention was in force for both states.

A substantive review of retained EU law

The concept of retained EU law has been a major issue for the UK to navigate in leaving the EU. Last year, the previous Brexit Minister Lord Frost made a statement to the House of Lords suggesting that the time has come for a substantive review of retained EU law.

To mark the second anniversary of 'Getting Brexit Done', on 31 January 2022 the UK Government announced that it would bring forward a new Brexit Freedoms Bill to make it easier to amend retained EU law, that is EU-derived legislation, rights and principles preserved at the end of the Brexit transition period under the European Union (Withdrawal) Act 2018 (EUWA).

> **The Rome II Regulation (Rome II) is an example of retained EU law which provides a framework to allow the courts to decide what the applicable law is when injury arises out of non-contractual obligations.**

Although the Government has previously stated an intention to retain the core principles underpinning Rome II, which would probably suit many litigants, the application of this regulation has not been completely straightforward. The scope of the review exercise is not yet clear; nor is when it will be undertaken.

Until the Bill has been passed and brought into force, the position of retained EU law remains as per the EUWA.

Claims inflation

The impact of claims inflation on the personal injury space continues to be far-reaching and significant, with an ever-increasing number of influencing factors. This has been heightened by the economic hardship associated with the pandemic – much of which remains and will continue to be felt for months, if not years to come.

In addition to continuing pandemic impacts, the UK is facing a cost of living crisis. Energy bills are soaring, annual inflation is at a 30 year high and consumers are paying more for food, clothing and transport. All of these factors will impact consumer spending habits, damages awards for personal injury claims, along with an increased appetite to bring claims.

> **Care costs (often the largest element of a claim for serious injury) are rising. This is as a result of hourly rate increases, driven by a shrinking labour supply as a result of Brexit, COVID-19 vaccination requirements and by additional pandemic overheads, such as PPE.**

On the other hand, the claimants of the future may be more likely to consider technological alternatives to human care, especially in light of the acceleration in the use of telehealth over the past few years as a result of the pandemic.

Civil justice reform

As well as the ongoing impact of the pandemic on the way in which dispute resolution is conducted, and litigation arising from the Official Injury Claim (OIC) portal, one of the most significant developments expected this year is the extension of the fixed recoverable costs regime.

With a newly announced discount in Northern Ireland, and both the discount rates in Scotland and England & Wales to be reviewed by 2024, insurers should turn their attention to whether they need to allow for a change in the methodology and estimation of the rates within their reserves.

Official Injury Claim portal litigation

2022 will certainly see litigation arise from cases in the OIC portal launched on 31 May 2021. How will the courts process these cases? What will listing times be? How will hearings be conducted, and how much leeway will be given to litigants in person during a hearing? These are just a few of the many questions that will be answered, at least in part, over the course of this year.

Remote justice

"While COVID-19 has undoubtedly played a considerable part in launching justice systems around the world into a new digital era, it is still down to individual governments, justice systems and businesses to hone the technology to meet the demands and nuances of online court life.

The key will be to keep the momentum going; with success depending not only on the technology itself but also systematic and behavioural changes. It might also be felt that doing the same things but only more efficiently by using technology will be a

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missed opportunity to create 21st century justice systems. ”

Richard West, Partner, London

In November 2021, Kennedys responded to the UK Ministry of Justice's Call for Evidence on the future of dispute resolution in England & Wales, highlighting that technology has the potential to resolve disputes on a more efficient, humanised, simpler and inclusive basis.

> **Progression of access to remote justice and technological advancements in dispute resolution will assist the UK in establishing itself as a modern, resilient legal system.**

Continuing the theme of open justice, from Spring 2022 thousands of court and tribunal judgments will be available via The National Archives for the first time, increasing transparency and securing free access for all.

On 15 November 2021, the Civil Justice Council (CJC) published an interim report for consultation on the role pre-action protocols (PAPs) should play in an increasingly digitalised justice system. The report canvasses a number of reform options, including making all PAPs available online via portals, formally recognising that compliance with PAPs should be mandatory, along with requiring parties to complete a joint stocktake report/list of issues as a final step before the start of proceedings. The report also discusses strengthening the management of pre-issue disclosure. The CJC Working Group will draft a final report for consideration by the CJC, likely in the Spring of 2022.

Discount rates

It is important for insurers and compensators to consider what impact different rates and approaches to setting the rate may have on pricing risk, and whether localised pricing reflects the outcome sufficiently.

England and Wales

The discount rate in England and Wales is currently -0.25%.

> **The UK Government has said it will revisit the rate every five years, at most. The next rate review must start by 14 July 2024 at the latest and finish by no later than 10 January 2025 (180 days thereafter).**

Whilst this may seem a long time, many personal injury claims and in particular, catastrophic injury claims, can have significant life spans and therefore can expect to settle on a future discount rate.

> “The last discount rate review in England and Wales promised a consultation regarding dual rates, where a lower rate applies in the short term and a higher rate in the longer term. That alternative model offers various potential advantages, including to help protect the position of short term claimants with less opportunity to mitigate investment risks over a longer period.
>
> We would encourage a consultation on dual rates in England and Wales sooner rather than later, in good time for the next review deadlines.”
>
> ***Mark Burton, Partner, London***

Scotland

In Scotland, the discount rate is -0.75%. The rate is expected to be reviewed in the summer of 2024.

Northern Ireland

In Northern Ireland, rather than allowing the Damages (Return on Investment) Bill to pass through the Assembly as planned (before setting the rate), on 25 March 2021, the department proposed that secondary legislation should be used to change the discount rate under the *Wells v Wells* [1998] framework, and introduced an amended discount rate from +2.5% to -1.75% from 31 May 2021.

The Northern Ireland Damages (Return on Investment) Bill received Royal Assent on 2 February 2022, and on 21 March 2022 the Department of Justice confirmed that a new discount rate of -1.5% would come into effect on 22 March 2022.

This will result in Northern Ireland continuing to have the lowest discount rate in the UK.

According to the Department, “the discount rate remains low as a result of high expected inflation in the short to medium term, low expected interest rates in the longer term and the anticipated returns on bonds and equities remaining low”. This will be disappointing news for insurers and compensators, many of whom predicted the new rate would be -0.75% in line with the rate in Scotland.

The next review of the rate will be in July 2024.

Fixed recoverable costs

In September 2021, the UK Ministry of Justice confirmed that fixed recoverable costs (FRCs) will be introduced in the fast track for most civil cases worth up to £25,000. The fast track will also be extended (rather than the creation of a new separate intermediate track as originally thought) to include ‘intermediate’ cases valued between £25,000 and £100,000.

The new rules will include a greater emphasis on penalising delays in the resolution of cases. The Government will implement an uplift of 35% of FRC where Part 36 offers are beaten, and further, there will also be a 50% uplift on fixed costs where a party has engaged in ‘unreasonable behaviour’.

Based on the CPRC minutes from November 2021, it appears that October 2022 is when the extension of fixed costs should take effect.

Will this deadline be met? Only time will tell. However, with the direction of travel set, will £100,000 become £250,000 in the next five years?

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Key contacts | get in touch

If you would like to discuss any of the issues raised in this report in more detail, please reach out to your Kennedys client relationship partner or get in touch with any of the contacts listed below.

To find out more about our services, expertise and key contacts, go to kennedyslaw.com/personal-injury

Authors and key contacts

Mark Burton
Partner, London
t +44 20 7667 9356
e mark.burton@kennedyslaw.com

Fiona Hamilton-Wood
Corporate Affairs Lawyer, London
t +44 20 7667 9241
e fiona.hamilton-wood@kennedyslaw.com

Danny McShee
Partner, London
t +44 20 7667 9206
e danny.mcshee@kennedyslaw.com

Claire Mulligan
Partner, London
t +44 20 7667 9534
e claire.mulligan@kennedyslaw.com

Andrew Purdie
Senior Associate, London
t +44 20 7667 9077
e andrew.purdie@kennedyslaw.com

Martin Stockdale
Partner, Manchester
t +44 161 829 7456
e martin.stockdale@kennedyslaw.com

Richard West
Partner, London
t +44 1245 299 877
e richard.west@kennedyslaw.com

Philippa Craven
Partner, Birmingham
t +44 121 214 8012
e philippa.craven@kennedyslaw.com

Joe McManus
Partner, London
t +44 20 7667 9056
e joe.mcmanus@kennedyslaw.com

Rachel Moore
Partner, London
t +44 20 7667 9221
e rachel.moore@kennedyslaw.com

Deborah Newberry
Corporate Affairs Director, London
t +44 20 7667 9508
e deborah.newberry@kennedyslaw.com

James Shrimpton
Partner, Birmingham
t +44 121 214 8030
e james.shrimpton@kennedyslaw.com

Katherine Totty
Partner, Manchester
t +44 161 829 7485
e katherine.totty@kennedyslaw.com

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