

EXPLANATORY MEMORANDUM TO
THE CIVIL PROCEDURE (AMENDMENT NO. 2) RULES 2018
2018 No. 479 (L. 5)

1. Introduction

- 1.1 This explanatory memorandum has been prepared by the Ministry of Justice and is laid before Parliament by Command of Her Majesty.

2. Purpose of the instrument

- 2.1 This instrument amends the Civil Procedure Rules 1998 (S.I. 1998/3132) (“the CPR”), which apply to civil proceedings in the Civil Division of the Court of Appeal, the High Court and the County Court.
- 2.2 The amendments to the CPR covered by this instrument relate to two changes: the jurisdiction that may be exercised by a legal adviser in the County Court; and (b) a fixed recoverable costs regime in package travel claims is introduced.
- 2.3 The amendment which inserts new Rule 2.4A provides for certain functions to be undertaken by a legal adviser as well as a District Judge.
- 2.4 The amendments set out in Section IIIA of Part 45 of the CPR relate to fixed costs. The rules set the amounts which, unless the court orders otherwise, are to be allowed in respect of a legal representatives’ charges. This amendment will make package travel claims, specifically claims for gastric illness suffered abroad, subject to a fixed recoverable costs regime, corresponding to their domestic equivalent. Consequential amendments are made to Part 36 of the CPR with regard to the fixed costs recoverable in respect of offers to settle personal injury claims.

3. Matters of special interest to Parliament

Matters of special interest to the Joint Committee on Statutory Instruments

- 3.1 None.

Other matters of interest to the House of Commons

- 3.2 As this instrument is subject to the negative procedure and has not been prayed against, consideration as to whether there are other matters of interest to the House of Commons does not arise at this stage.

4. Legislative Context

- 4.1 The Civil Procedure Act 1997 established the CPR Committee and gave it power to make Civil Procedure Rules, which are rules governing practice and procedure in civil proceedings in the County Court, High Court and Court of Appeal (Civil Division). The first CPR were made in 1998. The intention behind the CPR was to create a single procedural code for matters in the Civil Division of the Court of Appeal, the High Court and the County Court replacing the old County Court Rules (CCR) and Rules of the Supreme Court (RSC). The CPR had a number of policy objectives, two of the more prominent being to improve access to justice through transparent straightforward procedure and reduce, or at least control, the cost of civil litigation in

England and Wales. The changes were made, and continue to be made, in response to the report ‘Access to Justice’ (1996) by Lord Woolf. References below to a rule, or Part, by number alone are references to the rule or Part with that number in the CPR.

5. Territorial Extent and Application

- 5.1 The extent of this instrument is England and Wales.
- 5.2 The territorial application of this instrument is England and Wales.

6. European Convention on Human Rights

- 6.1 As the instrument is subject to negative resolution procedure and does not amend primary legislation, no statement is required.

7. Policy background

- 7.1 Jurisdiction that may be exercised by a legal adviser in the County Court. Rule 2.4A is introduced to provide for those instances where a legal adviser may exercise the jurisdiction of the County Court, as specified in a new Practice Direction 2E. Legal Advisers are court officers, who are qualified solicitors or barristers, employed by Her Majesty’s Court and Tribunals Service. The amendment will enable legal advisers in the County Court Business Centre and the County Court Money Claims Centre to deal with items of “box work”, usually allocated to a District Judge. The changes are part of the wider court reform plan which aims to reduce costs and delays, and to free up judicial resources which can be used for more complex court work. The 22 functions are listed in new Practice Direction 2E, together with any limitations that may apply, and include, for example, an application to extend time for service of the claim form, in respect of money claims under £10,000; an application to set aside a judgment made in default of a response to a claim, limited to the parties consenting; and an application for a certificate of judgment to be used by a judgment creditor to enforce a County Court Judgment abroad. Any decision of a legal adviser may be reconsidered by a District Judge, as of right, on application by a party to the proceedings. The 22 functions are currently set out in Practice Direction 51Q: The County Court Legal Advisers Pilot Scheme <https://www.justice.gov.uk/courts/procedure-rules/civil/rules/practice-direction-51q-the-county-court-legal-advisers-pilot-scheme>, which will be replaced by Practice Direction 2E when the rules come into force.
- 7.2 Fixed Recoverable Costs regime in respect of gastric illness claims in package travel claims. Legal representatives’ costs incurred in respect of claims for gastric illness suffered while abroad, where such claims are subject to the Package Travel, Package Holidays and Package Tours Regulations 1992, are not fixed. This means that the amount of legal costs that a representative can recover are not set in advance, as they would be if the injury occurred in England and Wales. The travel industry expressed concern that this apparent loophole has led some sections of the claimant representative industry to target package holidaymakers to bring personal injury claims, for gastric illness in particular, against their tour operator. This has implications for the travel industry in terms of both increased costs and reputational damage with overseas providers (hoteliers etc). The Association of British Travel Agents (ABTA), a body representing travel agents and tour operators, reported that since 2013 there was a 500 % increase in the number of claims.
- 7.3 The Government undertook extensive stakeholder engagement between October 2017 – January 2018 to seek views from stakeholders on the proposed amendments to the

CPR and Pre- Action Protocol. During this time, the Government first held a Call for Evidence (between October and November 2017) and then, at the request of the CPR Committee, the Government sought further views from stakeholders in January 2018 in relation to the steps both claimants and defendants should take before commencing proceedings. In light of the responses received, the Government has decided to move forward with its plans to bring gastric illness claims within the existing fixed recoverable costs regime, as would be the case if the injury occurred in England and Wales. The new provisions in Part 45 extend the existing fixed recoverable costs regime for public liability personal injury claims (to be found in rule 45.29A, Table D and, in limited cases, rule 45.18, Table 6A) to such claims. Consequential amendments to Part 36 of the CPR have been made to ensure that the current fixed recoverable costs provisions in that Part will apply to the costs of these claims.

- 7.4 The fixed recoverable costs regime applies to claims both before and after court proceedings are commenced. The amendments are supported by a new bespoke pre-action protocol for package travel claims, the scope of which is currently limited to gastric illness claims, which will come in to force at the same time as the amending rules. (Pre-Action Protocols set out the conduct and steps the court would normally expect parties to take before commencing proceedings for particular types of civil claims. They are made by the Master of the Rolls and annexed to the CPR.)

Consolidation

- 7.5 No further consolidation of the rules is planned at present.

8. Consultation outcome

- 8.1 The Civil Procedure Rule Committee must, before making Civil Procedure Rules, consult such persons as they consider appropriate (section 2(6)(a) of the Civil Procedure Act 1997). The Rule Committee consults, as it considers appropriate to the rules or amendments to rules in question, in a number of other ways of differing degrees of formality, including specific correspondence with bodies considered appropriate to be consulted; involving representatives of interested organisations in the work of sub-committees reviewing particular aspects of the Rules; inviting and reviewing suggestions and observations solicited by its members from among the groups from which each is drawn; and inviting and reviewing suggestions from relevant Government departments and other authorities affected by rules of civil procedure.
- 8.2 The Committee did not consider that any of the proposals for rules in respect of use of legal advisers required formal or informal consultation by the Committee.
- 8.3 In relation to Fixed Recoverable Costs regime in respect of gastric illness claims in package travel claims, on 9 July 2017, the then Secretary of State for Justice announced a package of measures to address the issue concerns about gastric illness claims. These measures included a request to the CPR Committee to consider changes to bring package travel claims within the existing fixed recoverable regime and a Call for Evidence¹ to inform the associated policy decisions. The Call for Evidence ran from 13 October to 10 November 2017 and invited views from stakeholders on the proposed amendments to the CPR and Pre- Action Protocol. The Government received 43 responses in total to the Call for Evidence which were used to identify

¹ <https://www.gov.uk/government/consultations/personal-injury-claims-arising-from-package-holidays-call-for-evidence>

most effective response. Following the Call for Evidence, the CPR Committee requested that the Government seek further views from stakeholders on the proposed changes to the Pre-Action Protocol. A similar number of responses were received to the further information request. The Government's response to the Call for Evidence on package travel claims will be published shortly.

9. Guidance

- 9.1 Amendments to the Civil Procedure Rules are drawn to the attention of participants in the civil justice system by correspondence addressed by the Committee secretariat to members of the judiciary, to other relevant representative bodies (for example the Law Society, Bar Council, advice sector) and to the editors of relevant legal publications; as well as by publicity within HM Courts and Tribunal Service. News of changes to the Rules, together with the consolidated version of the rules, are published on the Ministry of Justice website at <https://www.justice.gov.uk/courts/procedure-rules/civil>.

10. Impact

Fixed Recoverable Costs regime in respect of gastric illness claims in package travel claims

- 10.1 This policy will have minimal impact on charities, public sector or voluntary bodies.
- 10.2 The Association of British Travel Agents (ABTA) projected there were around 41,000 gastric illness claims across the whole industry in 2016. All these claims will be subject to the proposed FRCs.
- 10.3 Extending the fixed recoverable costs regime for package holiday sickness claims may reduce the overall cost of litigation because claimant legal representatives may recover less in costs than they would have done, if the costs were not fixed. This will benefit defendants such as travel agents and tour operators, who will pay less adverse legal costs even where the claim is successful. However, this represents a cost to claimant lawyers and claimant representatives, e.g. claims management companies as their income is likely to be reduced. As a result, there is a risk that some claimant lawyers might be less willing to take on cases which are relatively more expensive to process, meaning some claimants may be unable to obtain legal representation in such claims. However, whilst some claimant lawyers might not be willing to take on some cases, we believe others will enter the market or existing providers may expand to meet demand.
- 10.4 Anecdotal evidence suggests the vast majority of cases settle out of court and prior to commencing any court proceedings, so there should not be a big impact on the court system. However, if the number of cases in court decreases, there will be a loss in court fee income, though anecdotal evidence suggests very few claims go to trial.
- 10.5 An Impact Assessment has not been prepared for this instrument.

11. Regulating small business

- 11.1 The legislation applies to activities that are undertaken by small business.

12. Monitoring & review

- 12.1 These rules will form part of the Civil Procedure Rules 1998 that are kept under review by the Civil Procedure Rule Committee.

13. Contact

- 13.1 Jane Wright at the Ministry of Justice, jane.wright@justice.gov.uk, direct telephone line 020 3334 3184, can answer any queries regarding this instrument.