

Marketing and referral fee costs after Jackson

Simon Gibbs discusses the Ministry of Justice's proposal to significantly reduce fixed fees that apply to RTA portal claims

Claimant representatives have understandably expressed concerns as to the reasonableness of the new proposed fees. Karl Tonks, president of the Association of Personal Injury Lawyers, recently wrote: "The consultation is proceeding on a false premise that the incoming ban on referral fees will result in a saving from the [current] fixed fee. But referral fees were never included in the original fee negotiations and many firms do not even pay them."

This is one of those interesting half-truths that require a little more light to be thrown on them to achieve a full picture.

It is no doubt correct that when the negotiations over the current fixed fees were ongoing there was no additional amount included specifically referable to the payment of referral fees. Instead, the fees were calculated based on an assumed average amount of time necessary to handle such claims multiplied by guideline hourly rates (GHRs) for the appropriate level of fee earner.

Calculation

To fully understand the position as to whether referral fee payments were included in the current fixed fees calculations it is necessary to understand how the GHRs have been calculated.

In 2010 the Advisory Committee on Civil Costs, which was responsible for advising on the setting of the GHRs, investigated the reasons behind the fact that the hourly rates charged by defendants' solicitors were some 20-35 per cent below those charged by claimants' solicitors, which were close to the existing GHRs. The Association of

British Insurers (ABI) were arguing that the rates charged by defendants' solicitors reflect the unfettered interplay of market forces and these rates should be used when setting GHRs.

The committee noted: "A significant proportion of PI [personal injury] cases taken on by claimants' solicitors are generated by advertising or by paying referral fees to claims management companies (CMCs). The general consensus is that the excess marketing/costs referral fees paid by claimants' versus defendants'

savings therefore appears to be an entirely legitimate position.

Agree to disagree

The real issue here is how claimant solicitors will be able to generate work if the fixed fees are reduced to a level whereby it is no longer possible to incur significant costs through the payment of referral fees or through direct marketing. It is, of course, only relatively recently that there has been widespread advertising of legal services to the public. There are those who would

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solicitors are between 20 per cent and 40 per cent of total income generated which accounts for the entire gap."

It concluded: "So in the PI sector, the gap between claimants' and defendants' solicitors' rates can be entirely accounted for by extra marketing costs/referral fees, which are additional costs which claimants' solicitors appear to find it necessary to incur. One may conclude from this that if defendants' solicitors are not making excess profits from the system, then neither are claimants' solicitors... We are not persuaded by the ABI analysis that we should move GHRs down to some point closer to defendants' solicitors rates."

From this it can be seen that the GHRs used to calculate the current fixed fees do indeed allow for a significant referral fee element. The Ministry of Justice's position that the ban on referral fees should lead to

argue that there is no need for saturation advertising to enable those who have been genuinely injured to find a lawyer willing to act for them. On the other hand, the aggressive marketing that has taken place in the personal injury field in recent years has coincided with a dramatic increase in claim numbers. The Ministry of Justice would no doubt see a reversal of that trend as being no bad thing.

Whether society would be better or worse off as a result is an issue that claimants' lawyers and defendant insurers are strangely unable to agree on.



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