

Response to the Ministry of Justice's consultation on the Extension of the RTA PI Scheme: Proposals on Fixed Recoverable Costs

4 January 2013

Executive Summary

- Spencers Solicitors are deeply concerned at the speed and manner at which the MOJ is seeking to implement sweeping changes to the structure and fees of the RTA Portal.
- The current rates of FRC were negotiated and agreed by all parties in only 2010 after a considerable amount of discussion. The Portal should be left alone and allowed to operate better before a fuller assessment is made in the future. An average of 50% of RTA claims exit the Portal currently, largely as a result of insurers.
- The proposed reduction in costs appears to be based upon the fundamentally flawed belief that the figures agreed in 2010 included an element to account for referral fees or marketing costs; they did not and the agreed figures related purely to work and supervision required on cases. The proposed costs would also disproportionately impact over half of personal injury firms that do not pay referral fees.
- The proposed costs in the consultation appear to be based on no credible evidence and certainly no methodology has been provided for consideration alongside this consultation.
- The proposed vertical extension of the Portal to include serious, complex and life-changing injuries worth up to £25,000 will have extremely serious consequences for all concerned. Many law firms will find it economically unviable to undertake such cases, seriously undermining access to justice, or will be forced to recover up to 25% of costs directly from damages awarded to the victims.
- Extending the Portal to encompass more labour intensive and complicated EL/PL claims makes absolutely no sense when the Portal currently only deals with around 50% of RTA claims to which it is significantly better suited.
- Whether for RTA or EL/PL claims, the proposed fees are fundamentally inadequate to provide a full professional service to the injured and will lead to the denial of justice to victims or inadequate legal representation.

Background to Spencers Solicitors

1. Spencers Solicitors (www.SpencersSolicitors.com) is one of the UK's leading firms of personal injury solicitors. Based in Chesterfield, Derbyshire, Spencers is committed to protecting its clients' best interests by putting duty before profit, and campaigning for justice for those affected by negligence and statutory breach, and for the improvement of professional standards and business practices within the personal injury system.

Proposed reduction in fixed recoverable costs in RTA claims

2. The current fixed recoverable costs matrix in relation to the MOJ RTA Portal was negotiated between Insurers and Claimant representatives only 2 years ago in 2010 prior to the implementation of the MOJ RTA portal. Following discussions facilitated by the Civil Justice Council a level of fees was reached by consensus between both parties.
3. In negotiating these fixed costs, consideration was given to the amount of work that was required by law firms to process claims under the RTA portal from inception to conclusion. The fixed costs agreed upon by the parties represented the average cost of cases rather than the lowest possible level.
4. Contrary to some reports, the agreed figures **did not include any element of referral fee or marketing costs** and related purely to work required and appropriate supervision on such cases.
5. In no circumstances can the current recoverable costs levels be viewed as generous with average time spent of RTA portal cases often far outweighing the costs recoverable at the conclusion of the claim. From an internal review of completed RTA portal cases, there is a sizeable disparity between the actual average time taken to complete a claim within the portal when compared with the costs recoverable at the conclusion of the case.
6. We are deeply concerned that the MOJ is seeking to tear up this negotiated, binding agreement and impose a hugely reduced figure of costs entitlement in such cases.
7. This is a further example of an approach to public policy making on civil law that is biased in favour of the defendant and insurer sector and against the claimant community. No claimant representatives were invited to the so-called "Insurance Summit" at Downing Street on 14 February 2012 when important matters were discussed of direct relevance to claimants and the legal sector. We believe that the rights and interests of injured individuals are being undermined by Government listening to one side of the argument from powerful interests representing defendants and the insurance sector.
8. It appears to us that the proposed arbitrary reduction of £700 in respect of fixed costs is a reaction to the perceived levels of referral fee that some personal injury solicitors are reportedly paying.
9. It must also be borne in mind that whilst referral fees appear to be the driver of this proposed reduction, **over half of personal injury firms do not pay referral fees** and therefore this unsolicited reduction will disproportionately affect these firms hugely.

10. In our view not only is this course of action misconceived, it is also unnecessary given that next April the payment of referral fees for personal injury claims will be unlawful under the terms of the LASPO Act 2012.
11. Professor Paul Fenn, a leading expert in the interpretation of data from the RTA portal, has concluded that it is too early to glean any meaningful data from the portal and has advised that a further period is allowed to gather further data. Yet the Government has chosen to disregard his findings entirely.
12. For the avoidance of doubt, the fixed recoverable figure contained in the consultation of £500 for RTA claims up to £10,000 will result in extremely serious consequences that cannot be in the best interests of either an injured individual, the legal profession dealing with RTA claims or the Government as a whole.

Vertical Extension to the RTA Portal

13. Not only is the MOJ seeking to decimate the costs recoverable for RTA claims worth up to £10,000, it is also seeking to extend the scope of the scheme to include injuries worth up to £25,000.
14. The proposed fixed costs for dealing with injuries between £10,000 and £25,000 are £800, which is a third less than the current recoverable costs on injuries between £1,000 and £10,000. Again, for the avoidance of doubt, these are costs which were considered and agreed by insurers and claimant representatives prior to the introduction of the RTA portal.
15. Quite simply, these revised figures are based on no credible evidence and the precise methodology used to determine them remains a mystery. With such an important proposed change to the personal injury costs regime, the failure to fully disclose the evidence, studies or methodology behind the proposed figures is both insulting and arrogant.
16. An injury valued at £25,000 is a very serious one and likely to be permanent and long lasting. Such cases routinely require multiple medical reports, extended periods of treatment and often have a multitude of losses such as past and future loss of earnings, handicap on the labour market and considerable treatment costs.
17. By illustration, below are a selection of quantum reports involving cases where the award for pain, suffering and loss of amenity was around £25,000.

SEAWARD v SHEPHARD

PSLA: £17,500 (£24,447.49 RPI)

Total award: £76,242.64

Trial date: 11/7/2001

Court: County Court (Milton Keynes)

Age at injury: 38

Sex: Male

Smith v Manchester award: £8,226

Judge: HH Judge Serota

Type of Award: Court Award

Age at trial: 42

Occupation: manager

Most significant injury: Fractures to right femur and four ribs. Surgical scarring. Blood clots in both lungs. Head injury. Brief period of unconsciousness. Laceration to left shin. Post-traumatic stress disorder.

Duration of injury: Permanent limp. Increased risk (20 per cent) of future right hip replacement surgery. Surgical scars prone to irritation. Symptoms of post-traumatic stress disorder resolved within two years. Blood clots treated for six months.

PURKIS v REHMAN

PSLA: £16,000 (£24,716.68 RPI)
Total award: £66,535.46
Trial date: 25/9/1997
Court: Hull County Court
Age at injury: 40
Sex: male

Smith v Manchester award: £15,000
Judge: Judge Davies
Type of Award: Court Award
Age at trial: 43
Occupation: Not Applicable

Most significant injury: Compound comminuted fracture of right lower tibia, comminuted fracture of lower third of right fibula. Degenerative changes of right ankle joint.

Duration of injury: Permanent stiffness and swelling in ankle, restriction of ankle movement and loss of mobility, increasing pain and stiffness expected

PHEASANT v LOWREY

PSLA: £16,000 (£25,793.96 RPI)
Trial date: 21/5/1996
Court: County Court (Chichester)
Age at injury: 32
Sex: male

Total: £37,600 (£63,988.01 RPI)
Judge: Judge Viner
Type of Award: Court Award
Age at trial: 34
Occupation: baggage handler

Most significant injury: Severe soft tissue injury to left thigh, injury to medial meniscus of left knee, wound to left calf.

Other injuries: Soft tissue injury to groin,

Duration of injury: Permanent aching in left thigh, permanent unsightly 7cm scar on calf, permanent pain, stiffness and weakness in left knee, pre-existing degenerative right knee condition would have limited activities within 10 years

HOGG v SMITH & ANOR

PSLA: £14,000 (£24,622.56 RPI)
Total award: £28,298.78
Trial date: 9/10/1992
Court: County Court (Colchester)
Age at injury: 38
Sex: Male

Smith v Manchester award: £2,000
Judge: Judge Brandt
Type of Award: Court Award
Age at trial: 47

Most significant injury: Fractured Leg

Duration of injury and prognosis: Permanent The claimant suffered a permanent limp due to shortening of leg by 2 cm bowing of the femur and operational scarring. Unable to play football or take children for long walks. Fitted with a plate.

WEAVER v HOCKING

PSLA: £13,000 (£24,009.14 RPI)
Total award: £115,401.22
Trial date: 24/4/1991
Court: Lincoln, High Court
Age at injury: 39
Sex: male

Smith v Manchester award: £8,000
Judge: Hutchinson J
Type of Award: Court Award
Age at trial: 46
Occupation: lampman

Most significant injury: Dislocated left ankle; laceration to lateral aspect of left knee with exposure of quadriceps tendon. Damage to gastrocnemius muscle; tearing of lateral popliteal nerve causing foot drop; fracture of medial malleolus in left ankle.

Duration of injury: Marked crepitus around patello-femoral compartment of left knee cartilage. Problems in right knee. Osteo-arthritis developing in left ankle joint. Possibility of arthrodesis in future. Intermittent pain and mobility impairment.

18. As demonstrated in the above examples, such cases involve serious, complex and life changing injuries. To ensure that these claims are professionally and correctly pursued requires aptitude, expertise and experience.

19. To suggest that these cases can be dealt with adequately where costs of £800 are awarded is simply unconceivable. The number of hours of work required in such a case bears absolutely no correlation to the proposed recoverable costs and amounts to less than 4 hours of a Grade B fee earner's charging rate.
20. Given such proposed levels of costs, we genuinely believe that many law firms will simply find it economically unviable to practice personal injury law and will either withdraw from this segment of the market or in some circumstances be forced to close down their operations entirely. We believe that this is not hyperbole or a scare-mongering but a genuinely informed view about the impact of these proposed measures. They will cripple personal injury law and consequently access to justice for many vulnerable individuals.
21. Any firm that does seek to remain continue offering a personal injury service will at the very least have to make wholesale changes to their operations so that this work is even remotely viable.
22. We have grave concerns that one unavoidable change will be to reduce the qualification and experience of fee earners conducting such work. Another unavoidable consequence of the unsustainable level of fixed costs will be that law firms have to utilise the full 25% recoverable from damages in order to meet the massive shortfall in costs.
23. Again, this will severely impact upon the injured person who will be faced with a stark choice of either losing a quarter of their compensation even if they are able to find a solicitor willing to take on their case or take their chances and seek to settle their claim with the Defendant insurer directly.

Horizontal Extension of the Portal

24. As if the vertical extension and completely unacceptable fixed costs reduction was not enough of a barrier to justice, the problem will be compounded by extending the portal to encompass EL/PL claims.
25. The simple fact is that on **average 50% of RTA claims exit the portal**, with by far the biggest rejection reason being that insurers fail to either acknowledge claims submitted or adhere to the prescribed time limits.
26. Based upon this fact alone, it is unknown why the RTA portal is being triumphed as a resounding success by insurers.
27. If insurers are not able or willing to conduct RTA claims, which lend themselves to a portal environment, how will they deal with EL/PL claims that by their very nature are more labour intensive and do not sit comfortably within a portal regime?
28. Of particular concern is that although full details of how much work and what form the EL/PL portal claims will take has yet to be confirmed, the MOJ have already been able to fix a proposed fee for this work. This notion is simply absurd.

Fixed Recoverable Costs on EL/PL Claims

29. The proposed level of costs for EL/PL claims both in and outside the portal is also a cause for considerable concern. In the same way that costs of £500 for an RTA claim

of below £10,000 is manifestly unjust, £900 costs for an EL/PL case is simply unsustainable.

30. EL/PL cases often involve lengthy investigations into the correct identity of the tortfeasor, complex issues of causation and allegations of contributory negligence.
31. A hugely important consideration is that the amount of work undertaken by a Claimant lawyer on an EL/PL case is driven almost entirely by the stance and conduct of the Defendant lawyer. All too often Claimants are held to strict proof on issues that ultimately could and should have been agreed. This results in increased costs.
32. Again, drawing from reliable internal statistics, the average time spent on an EL/PL case is in excess of 30 hours. This figure starkly illustrates how the proposed portal costs of £900, which amounts to 5 hours of a Grade B Fee Earner's time, are fundamentally inadequate.
33. In the same way that we believe the proposed revised costs for RTA claims are prohibitive, we consider that the figures suggested for EL/PL claims will have the consequence of preventing law firms from being financially able to deal with such claims.
34. Whether this is incidental or by design, the net result will be the same. Injured individuals will be faced with a considerable barrier to justice in pursuing a personal injury claim. Whereas in RTA claims the third party insurer is likely to seek to settle the claim directly, in EL/PL claims we believe that insurers will simply do nothing and see whether a claim eventually materialises.

Concluding Comments

35. In conclusion, the common thread within the MOJ consultation document is that in the pursuit of reducing existing fixed costs, the proposed costs are commercially unrealistic.
36. It appears that this objective is being pursued at the expense of the most important part of any injury claims – the individual who has been genuinely hurt as a result of the negligence of another. The proposed fixed fee costs will have an entirely negative impact upon the genuine claimant.