



The Law Society

**EXTENSION OF THE RTA PI SCHEME:
PROPOSALS ON FIXED RECOVERABLE COSTS**

**RESPONSE BY THE LAW SOCIETY
OF ENGLAND AND WALES**

supporting
solicitors

4th January 2013

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1 INTRODUCTION

A) Background

The Law Society is the representative body for over 155,000 solicitors in England and Wales. It negotiates on behalf of the solicitors' profession, lobbies regulators, Government and others. It also works closely with stakeholders to improve access to justice for consumers and businesses.

The Law Society seeks to represent all solicitors and strives to protect access to justice for all, whether individuals or large corporations, who, for whatever reason, wish to rely on their basic rights to make or defend a claim in the civil courts.

This is the Law Society's response to the recent letter seeking views on proposals for the amount of Fixed Recoverable Costs (FRCs) in the current road traffic accident (RTA) portal scheme and in the proposed extended portal, to cover higher value RTA claims as well as Employer and Public Liability claims (EL/PL). The letter further goes on to explain that the proposed new costs regime 'reflect[s] the forthcoming ban on referral fees'.

On 14th February 2012 the Government issued a press release in which it stated that the Prime Minister had given a commitment to reduce the £1200 small personal injury claims fee which has been widely assumed to be a reference to FRCs. The Society was concerned that this announcement was made before any meaningful consultation had taken place on the appropriate level for such fees.

The Society is also concerned that the levels proposed by the Government are too low, are not adequately evidenced and do not take into account factors such as the real cost of inflation, marketing costs and solicitors' practice costs as well as the recommendations of Professor Paul Fenn and his analysis of the data compiled by him for Lord Justice Jackson and the Ministry of Justice (MoJ). They are also based on the incorrect assumption that the ban on referral fees will lead to a reduction in costs.

The current RTA portal process and fixed recoverable costs (FRCs) were the subject of a significant debate and consultation process in which experts from all sides of the

personal injury field took part and which involved research and negotiation. We recognise that those fees needed to be reviewed, but the lack of similar consultation and involvement here of industry representatives is extremely disappointing.

B) Referral Fees

The following points need to be understood:

- Referral fees were never built into the recoverable fixed costs system when they were initially formulated, so it would be quite wrong to now use their removal as a basis for re-calculation.
- Once referral fees are again prohibited solicitors will have to look to other methods of marketing their perfectly legitimate personal injury practices. These methods are likely to cost most firms just as much, if not more, than they have been paying in referral fees but, unlike referral fees, do not guarantee any return on that investment. The information that we have from solicitors suggests that those firms which do not pay referral fees pay very similar, if not greater amounts, for other forms of marketing. We have never heard the Government suggest that marketing is, of itself, wrong.

The Society made these points in its responses to Lord Justice Jackson's original review and in subsequent consultations by the MoJ but there has been no challenge or convincing evidence to indicate that the Law Society's arguments are flawed. Indeed, there has been no engagement on the question at all.

Since the Law Society lifted its ban on referral fees in 2005 insurers have received significant income from such payments when referring their own policyholders to solicitors to make a personal injury claim. Despite this, insurers support the ban on referral fees, as does the Law Society, but clearly they will need to make up for this loss so as to maintain shareholder profits. They have therefore chosen, erroneously, to claim that the RTA Portal and other fixed and guideline recoverable costs must be reduced by removing the referral fee element when the ban is implemented.

However, this is irrational since referral fees were never built into such costs in the first place.

All fixed, predictable and guideline recoverable costs are based upon Guideline Hourly Rates (“GHRs”) which were first introduced in 2000 with the implementation of the Woolf reforms. This was at a time when referral fees were prohibited and the GHRs have only been increased by inflation since 2000. They were not increased to include the cost of referral fees when the prohibition was lifted in 2005.

In any business, including insurance, the price of providing services has to take account of marketing costs. Solicitors are no exception and referral fee arrangements are merely a form of marketing which guarantees certain leads, unlike other forms of marketing (e.g. national/local press, radio and television) where there is no guarantee of any leads.

Any changes to the FRC regime should coincide with implementation of the ban on referral fees. We understand there is a possibility that the Solicitors Regulation Authority and the Claims Management Regulator may have some difficulty in implementing the referral ban on the 1st April 2013 as originally proposed. If that proves to be the case then the date of commencement of the revised FRCs should, consequentially, also be delayed.

C) Research and Data

a) Inflation

Based upon the consumer price index (CPI) the rates of inflation from 2008 and 2009 to date are 12% and 10% respectively.

b) The Fenn Data

- i) In 2008 Professor Paul Fenn compiled data concerning the costs of personal injury claims and which were embodied in Jackson’s Table B. Whilst the non-portal FRCs based on Jackson’s Table B were published in 2009 they were in

fact based upon 2008 figures. Therefore the figures contained in that table need to be increased by 12% to allow for inflation.

The current RTA portals FRCs, although applying from April 2010, were agreed in 2009 and therefore, in today's terms, the amounts should be increased by 10%.

It should be noted that there was widespread support of all of the recommendations of Lord Justice Jackson (the Jackson Report)¹, particularly by the ABI.

- ii) In July 2012 the MoJ published the report which they had commissioned Professor Fenn to prepare and which was an evaluation of the existing RTA Portal process. In that report he concluded that the existing process had driven down damages by up to 6%. He also recommended that any extension of the RTA process to higher value claims ***"would need to take into account the extent to which incentives for solicitors to act in the client's interest are diluted with flat rate fixed costs, particularly in relation to claims where the calculation of quantum is more complex."***

c) Referral Fees/Marketing Costs

In December 2012 the Law Society conducted a survey of its members who undertake personal injury work. We are able to say that of those who responded:

- 68% paid referral fees
- 83% paid other marketing costs
- 76% stated that other forms of marketing would cost them more after the referral fee ban
- 7% stated their marketing costs would be the same
- 64% paid £800 or less referral fee per case
- 46% paid £500 or less referral fee per case

d) Solicitors' Costs

The Law Society's Law Management Section Financial Benchmarking Survey 2012 has produced the following statistics for solicitor firms:-

Median cost of employed fee earner	£40,860 p.a.
Median support staff costs	£12,624 p.a.
Median spend on non-salary overheads per fee earner	<u>£37,992 p.a.</u>
Break even point	£97,348 p.a.

It would be usual to calculate that a fee earner's billable hours at 1100 per annum. This would result in a break even hourly rate of £88.00 approximately (i.e. £97,348/1100). This is cost only and does not allow for any profit. Using a mark up of 50% (which brings a rate of return on investment of 33%) the corrected rate would be £132 per hour (i.e. £88 plus 50%).

In May 2012 we responded to the "Extension of the RTA Scheme – Call for Evidence". We set out in that response details of a survey of our members which we had undertaken earlier that month. We consider that it would be appropriate to set out again in this paper the results of that survey. These were as follows:-

"The cost of an RTA Portal claim"

*A survey of Law Society members has indicated that an average RTA portal claim involves approximately 10 hours of work and that, when applying a Grade D guideline hourly rate, the **base** cost is £886.33 including marketing costs. It should be noted that this is the cost price and not the selling price and is before any allowance is made to compensate the owners for the commercial return to cover the risk of running, or funding, as there would be in any business. It has long been accepted that guideline hourly rates for solicitors should be based on a profit margin of 33%² and in order to achieve this a mark up on base costs of 50% has to be applied. This would equate to a selling price of £1329.50 without any compliance compulsory supervision or*

¹ Review of Civil Litigation Costs Final Report – December 2009.

allowance for any work undertaken on a case by a fee earner above the level of Grade D.

"The costs of extended portal claims

The survey also showed that the average hours which it would take to complete.....would be between 24 hours and 27.2 hours for an EL/PL case with a value between £1,000 and £25,000."

e) RTA Portal Costs

The current recoverable costs of £1200 for stages 1 and 2 were fixed by agreement of all the stakeholders concerned. The ABI was represented throughout those negotiations by senior representatives of several major insurers who frequently stated that the resulting saving in costs would be passed onto consumers by lower insurance premiums. In fact, vehicle insurance premiums have continued to rise, despite those assurances.

The current FRC for Portal claims (£1200 as agreed in the latter part of 2009) equates to approximately £1320 at today's rate when applying the appropriate rate of inflation.

Our survey results, and those of other legal representative organisations, have shown that the existing RTA Protocol takes an average of 10 hours billable time to complete. Survey data also shows that an hourly rate of £132 would be the most appropriate rate which would include marketing and the associated costs of running a business and which would provide a reasonable rate of return on investment. On that basis the current RTA Portal fixed recoverable costs should be approximately £1,320 when taking into account inflation. This could be rounded down to £1,300. Consequently there is substantial evidence to justify that the current RTA Portal costs should be as follows:-

² This is the rate which has traditionally been used to calculate solicitors' Hourly Rates by the Senior Courts Costs Office and the Advisory Committee on Civil Court Costs.

Stage 1	£450
Stage 2	<u>£850</u>
	£1300

We note that the Government is proposing that the Portal FRCs for the higher value RTA claims should be £800 which is approximately 62% higher than the proposed FRC of £500 for claims up to £10,000. As there is no empirical evidence available to suggest what the appropriate rate should be we will use the figure of 62% as a guide (but not accepting that it is accurate). On that basis, and the fact that the current RTA Portal FRC should be costed on the basis of 10 hours work, the flat rate for the higher value claims would be, say, £2,100. Consequently there is also substantial evidence to justify that the RTA Portal FRCs for higher value claims should be as follows:-

Stage 1	£450
Stage 2	<u>£1650</u>
	£2100

f) EL/PL Portal costs

We note that the proposed FRCs for these claims suggests that the higher value claims warrant an increase of approximately 80% more than the lower value cases. Using the same basis for calculation as above we therefore arrive at the following conclusions:-

EL/PL claims - £1k to £10k

Stage 1	£600
Stage 2	<u>£1300</u>
	£1900

EL/PL claims - £10k to £25k

Stage 1	£600
Stage 2	<u>£2,900</u>
	£3500

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A RTA Portal Fixed Recoverable Costs – £1k to £10k

The proposed two stage FRC for these claims of £500 is unjustifiable and will be unsustainable as this would equate to an equivalent rate of £50 per hour or less than four hours work at £130 per hour. We do not see how claimant personal injury solicitors will be able to undertake the work to a competent level on that basis. We would add that, to the best of our knowledge, even those solicitors who are members of an insurance company panel, and therefore instructed to defend these claims, expect to be paid an hourly rate of at least £100. They can only afford to do this because of the bulk work which insurers provide resulting in certainty of work and, consequentially, very low marketing costs. Even if, as insurers have frequently suggested, claimant solicitors should be remunerated on a similar basis, this would equate to an FRC of £1,000 per RTA case (based upon 10 hours work). There is no reason why consumers should be expected to pay less for their lawyers than a powerful bulk purchaser. FRCs should not, therefore, be below that level.

Based on median solicitors costs data (see above), the proposed FRCs for these lower value RTA claims equates to less than 4 hours work on every case. It would be impossible for solicitors to undertake every claim properly in accordance with the RTA Protocol and their professional conduct requirements in that amount of time. To do so will result in consumers receiving a less than adequate service.

B RTA Portal Fixed Recoverable Costs – £10k to £25k

We have no way of knowing how the proposed FRC of £800 has been calculated as this information has not been provided. We think it is surprising and unacceptable that stakeholders have not been provided with sufficient evidence which would enable them to provide constructive comments on the proposals.

These higher value cases are not as straightforward as the lower value RTA claims as they can involve much more complexity. There is no rule of thumb or, indeed any, calculation that can be used to ascertain what a reasonable rate would be. To our

knowledge there has been no consideration by industry experts of what additional work may be involved in these higher value claims. The current RTA Portal FRCs were agreed by leading stakeholders and after detailed negotiations which involved full consideration of the actual work that would be reasonably required to run such a claim. This has not been the case for the vertical extension of the RTA portal to £25,000 which is extremely disappointing.

We are also disappointed to note that the Government has ignored the advice of their own adviser, Professor Paul Fenn, in that they have not applied any “incentive” to the costs in the higher value claims. This is likely to result in further injustice for consumers in that damages are likely to be driven down even further as has happened under the current RTA protocol process (see report of Professor Fenn referred to above).

Another crucial factor is that, until the new RTA Protocol has been published, we have no way of knowing what additional procedural requirements have been included by the CPRC. It is therefore impossible to calculate what the appropriate FRCs should be for these higher value claims other than to say that there should be a link to the amount of damages agreed/awarded as an incentive as proposed by Professor Fenn. This is reflected in the proposed FRCs for claims which fall outside the RTA and EL/PL Protocols (as set out in Annex B to letter from Helen Grant MP).

C EL/PL Claims Portal Fixed Recoverable Costs – £1k to £25k

As referred to in section 1 (C) (d) above, it is likely that these claims will take between 24 and 27 hours. There has been no challenge to those findings and we can only, therefore, conclude that they are correct. On that basis, taking 27 hours as a reasonable time and using a similar hourly rate to the current FRC, plus inflation, we can only conclude that the FRC for EL/PL claims with a value of £10k to £25k should be £3,500 (approximation). We are more than willing to review these conclusions if the Ministry of Justice provides us with the evidence which we have requested.

D Stage 3 Costs

The current stage 3 costs are £250 (paper hearing) and £500 (oral hearing). It is proposed that these amounts should remain the same for the higher value RTA claims (£10k to £25k) and for the EL/PL claims (£1k to £25k).

We have no objection to the FRCs for all stage 3 hearings to be the same across the board initially but we suggest that the Stage 3 costs for higher value RTA claims EL/PL claims are reviewed after 12 months to see if they are still reasonable rates.

However, the current rates need to be increased for inflation. It is clear from the letter from Helen Grant MP dated 19th November 2012 that the Government is keen to take inflation into account when reviewing fixed costs. These costs were first agreed by stakeholders in 2009. We therefore propose that the stage 3 costs for Portal claims should be **£275** (paper hearing) and **£550** (oral hearing) when taking into account inflation at 10%.

3 FRCs FOR RTA, EL AND PL CLAIMS OUTSIDE THE PROTOCOLS

A) Trial Advocacy Fees

We understand that the proposed costs (set out in Annex B to the letter from Helen Grant MP) reflect the figures contained in Jackson's Table B plus inflation less referral fees. Again, we have no way of knowing what inflation rate has been applied or the amount of referral fee which has been deducted. However, we note that the Trial Advocacy Fees have not been increased for inflation.

As the Fenn data which was used for Table B was gathered during 2008 the fees need to be increased by 12% at least as follows:-

MoJ Proposed fee	Adjusted Fee for inflation
£485	£545
£690	£775
£1035	£1160
£1650	£1850

See Table 1 at appendix A

B) Professor Fenn Figures Adjusted for Inflation

As referred to previously, the figures provided by Professor Fenn and which are set out in Table B to the Jackson report were based on data collected in 2008. These figures need to be adjusted for inflation to the present day (12%). The adjusted figures are set out in Table 2 of the appendix attached to this paper.

C) Referral Fee Reductions

In order to calculate the amount in relation to referral fees, which we have to assume the Government has deducted, the proposed FRCs need to be deducted from the Fenn inflation adjusted figures. We have undertaken this exercise and set out the results in Table 3 in the appendix attached to this paper.

From the resulting figures we can calculate that, bizarrely, referral fees ranging from £350 to £1075 have been deducted. This in itself is irrational in that in usual circumstances solicitors will currently pay a referral fee for a lead and that fee will **not** be based upon the value of the claim or the stage the case has reached when settlement is agreed.

Whilst we accept that referral fees can be very high they are not necessarily the “norm” and many firms pay much lower amounts. Deducting such unacceptably high amounts will also remove the ability of solicitors to legitimately market their practices. We believe that it is entirely wrong for the prohibition on referral fees to be taken into account at all in these calculations but, if there is to be some reduction because of this, it is bizarre and irrational for different figures to be used for different parts of the process. If a single amount, say £350, were to be used then the proposed FRCs could be revised as set out in Table 4 in the attached appendix.

4 CONCLUSION

The implementation of the RTA Portal process, and the Portal fixed recoverable costs, were the culmination of lengthy stakeholder negotiations. The process for the RTA Portal was formulated and agreed by the representatives of the stakeholder

organisations who had considerable experience in such claims. The success of the current RTA portal process has been achieved because of the amount of involvement of all stakeholders and the negotiations which took place between them. We deeply regret that this has not happened in this case despite our repeated suggestions to the contrary.

The Government is seeking to implement a number of wide-ranging and substantial changes to the civil litigation funding regime. Many of these changes will have a significant effect not only on the economic feasibility of many law firms but also, by consequence, on the ability of members of the public to access justice and the quality of the legal service they will receive.

The issue of fixed recoverable costs is a complex area. There has been no evidence provided to substantiate the FRCs which the Government proposes and there has been a lack of transparency regarding the decision making process in this respect. This is evidenced by the fact that in February 2012 the Government stated its intention to reduce the Portal FRC despite stating that it would be undertaking an early evaluation of the scheme³ before making any decision in that respect. This announcement was made prior to any consultation and without the benefit of any significant research and it is inherently wrong that the Government should be fettering its discretion in this way.

The Law Society is very concerned that the proposed level of fees will have consequences for access to justice that will be little short of disastrous. It is likely that such rates will result in many solicitors simply being unable to carry out the work if these proposals are adopted. This will have the associated effect that many people will not be able to secure legal help or advice in advancing their legitimate claims for personal injury.

The Society accepts that it is right to review the fixed recoverable costs regime occasionally and that, to reflect changing circumstances, fee levels may go down as well as up. This is, however, a very complex area and we recognise that there are significant difficulties in obtaining evidence. However, a cut of 60% in the current

³ Solving disputes in the county courts: creating a simpler, quicker and more proportionate system - A consultation on reforming civil justice in England and Wales – CP6/2011- paragraph 71

FRCs needs, in our view, very substantial evidence, particularly given the robust process that was followed in setting the fees originally.

The Society finds it very difficult to understand how Government reached its decision. It would help us to engage properly in responding to the document to see the information on which Government based its proposals. We would also wish to be provided with more detailed reasoning as to why the Government believes that the proposed figures represent reasonable costs for the amount of work involved. Without this, the submissions that we can make will inevitably be less helpful.

Table 1 - TRIAL ADVOCACY FEES ADJUSTED FOR INFLATION (12% approx.)

	Trial - Advocacy Fee		Proposed Trial - Advocacy Fee
			With inflation at 12% (i.e. Fenn figures + inflation)
Road Traffic Accident			
Fixed Costs	£485 (to £3,000) £690 (£3-10,000) £1,035 (£10- 15,000) £1,650 (£15,000+)		£545 (to £3,000) £775 (£3-10,000) £1160 (£10-15,000) £1850 (£15,000+)
Escape	na		
Employers Liability			
Fixed Costs	£485 (to £3,000) £690 (£3-10,000) £1,035 (£10- 15,000) £1,650 (£15,000+)		£545 (to £3,000) £775 (£3-10,000) £1160 (£10-15,000) £1850 (£15,000+)
Escape	na		
Public Liability			
Fixed Costs	£485 (to £3,000) £690 (£3-10,000) £1,035 (£10- 15,000) £1,650 (£15,000+)		£545 (to £3,000) £775 (£3-10,000) £1160 (£10-15,000) £1850 (£15,000+)
Escape	na		

Table 2 - PROFESSOR FENN PRE-TRIAL FEES ADJUSTED FOR INFLATION (12% approx.)

	Pre issue £1,000- £5,000	Pre Issue £5,001- £10,000	Pre Issue £10,001- £25,000	Issued – Post issue Pre Allocation	Issued – Post allocation pre listing	Issued – Post listing pre trial
Fixed Costs	£900 + 20% of Damages	£2010 +15% of Damages over £5k	£2850 + 10% of Damages over £10k	£2010 + 20% of Damages	£2800 + 20% of Damages	£3650 + 20% of Damages
Escape	+ 20%	+ 20%	+ 20%	+ 20%	+ 20%	+ 20%
Fixed Costs	£1790 + 17.5% of Damages	£2770 +12.5% of Damages over £5k	£3440 + 10% of Damages over £10k	£3600 + 20% of Damages	£4400 + 25% of Damages	£5400 + 30% of Damages
Escape	+ 20%	+ 20%	+ 20%	+ 20%	+ 20%	+ 20%
Fixed Costs	£1790 + 17.5% of Damages	£2770 +10% of Damages over £5k	£3300 + 10% of Damages over £10k	£3420 + 17.5% of Damages	£4090 + 22.5% of Damages	£4870 + 27.5% of Damages
Escape	+ 20%	+ 20%	+ 20%	+ 20%	+ 20%	+ 20%

Table 3 – ESTIMATED REFERRAL FEE REDUCTIONS

	Pre issue £1,000- £5,000	Pre Issue £5,001- £10,000	Pre Issue £10,001- £25,000	Issued – Post issue Pre Allocation	Issued – Post allocation pre listing	Issued – Post listing pre trial
	Case Settles before Issue	Case Settles before Issue	Case Settles before Issue			
Adjusted Fixed Costs (as above)	£900	£2010	£2850	£2010	£2800	£3650
MoJ Proposed Fixed Costs	£550 or £100 + 20% of damages	£1100	£1930	£1160	£1880	£2655
Estimated Referral Fee Reduction	£350	£910	£920	£850	£920	£995
Adjusted Fixed Costs (as above)	£1790	£2770	£3440	£3580	£4400	£5355
MoJ Proposed Fixed Costs	£950	£1855	£2500	£2630	£3350	£4280
Estimated Referral Fee Reduction	£840	£915	£940	£950	£1050	£1075
Adjusted Fixed Costs (as above)	£1790	£2770	£3300	£3420	£4090	£4830
MoJ Proposed Fixed Costs	£950	£1855	£2375	£2450	£3065	£3790
Estimated Referral Fee Reduction	£840	£915	£925	£970	£1025	£1040

Table 4 – PRE-TRIAL FEES ADJUSTED FOR INFLATION LESS £350 REFERRAL FEE

	Pre issue £1,000- £5,000	Pre Issue £5,001- £10,000	Pre Issue £10,001- £25,000	Issued – Post issue Pre Allocation	Issued – Post allocation pre listing	Issued – Post listing pre trial
	Case Settles before Issue	Case Settles before Issue	Case Settles before Issue			
Fenn Adjusted Fixed Costs (as above)	£900	£2010	£2850	£2010	£2800	£3650
Adjusted FRC taking referral fee into account	£550 or £100 + 20% of damages	£1660	£2500	£1660	£2450	£3300
Referral Fee Reduction	£350	£350	£350	£350	£350	£350
Fenn Adjusted Fixed Costs (as above))	£1790	£2770	£3440	£3580	£4400	£5355
Adjusted FRC taking referral fee into account	£1440	£2420	£3090	£3230	£4050	£5005
Referral Fee Reduction	£350	£350	£350	£350	£350	£350
Fenn Adjusted Fixed Costs (as above)	£1790	£2770	£3300	£3420	£4090	£4830
Adjusted FRC taking referral fee into account	£1440	£2420	£2950	£3070	£3740	£4480
Referral Fee Reduction	£350	£350	£350	£350	£350	£350