



# Referral Fees

## WHAT WILL BE THE EFFECT OF LASPO ON CLAIMANT PI PRACTICE

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# I DONT KNOW

- Although LASPO comes into effect on 1<sup>st</sup> April 2013, the interpretation of the Act and its potential effect on the Claimant PI world is not clear and we may not know for certain even by APRIL 2013
- To say this is unsatisfactory is an understatement
- I declare an interest . For the last 9 years my firm has had an arrangement with one of the biggest and most highly respected referral organisations, National Accident Helpline. In this period, NAH has referred us thousands of clients, for whom we have obtained millions in compensation. Clients have not had to pay any costs and almost without exception have been delighted with the service received.





# History

- 2004 The Law Society lifts ban on Referral Fees
- The OFT was pleased as it had long considered that the legal market had unsatisfactory restrictions on information which would enable consumers to locate appropriate providers
- New regulations introduced. Referral arrangements come out into the open and became regulated by the Law Society and later by the MOJ
- 2009 The Law Society reversed their policy (at the behest of conveyancers?), declaring that all referral arrangements were bad. The reversal was not based on any new evidence or any evidence at all.
- But no immediate effect as SRA now made the rules
- The Law Society supported LJ Jackson and the government for a ban on referral fees





# Civil Wrong

- Tort
- Causing injury and loss through negligence or breach of duty





# Civil right

- The ability to obtain redress from the courts for a civil wrong
- Article 6 ECHR
- *Everyone is entitled in full equality to a fair and public hearing by an independent and impartial tribunal, in the determination of his rights and obligations*
- 37% of those who had a trip and 27% of those injured at work did not get legal advice (LSB research)





# Exercising Article 6 rights

- To exercise Article 6 rights , a person in a personal injury claim a claimant is likely to need a suitably qualified legal expert and a suitable funding system to be able to access the courts and enforce their rights.
- A restriction on information enabling someone to find a such lawyer could be a fetter on their rights





# Research by the LSB 2009 2010

- In 2009 2010 the Legal Services Board carried out research into the operation and effect of referral fees
- It concluded that the effect on consumers of RFs was **beneficial**. The LSB Consumer Panel said “ the marketing and handholding role performed by claims management companies... has widened access to justice”
- That legal fees were lower and quality of work higher in conveyancing matters where a referral fee was involved
- That there was no evidence that RFs effected the independence or quality of legal work done
- That RFs did not effect increase fees paid by consumers





## That it would offend the governing principles of the LSB to bring in a ban on RFs

- *There is therefore an argument to be made that completely banning referral fees would not be consistent with the legal services regulatory objective of "improving access to justice".*
- *The SRA Board has confirmed that a return to a ban on solicitors paying referral fees alone is not appropriate and the SRA looks forward to working with the LSCP, the LSB and the government in debating further any cross-sector proposals.*







# Referral Fees – Access to Justice or Road to Hell?

- Crispin Passmore – Strategy Director LSB
- Alex Roy – Research Manager
- *Our research has failed to demonstrate that referral fees damages the operation of legal services or causes detriment to consumers. Questions remain whether better disclosure would help consumers but there seems at this stage **little sense in contemplating banning a market mechanism within legal services that appears to be working***



- 2012 LASPO bans referral fees for PI work only with effect from 1/4/2013





# How then did we get a ban?

- Lord Justice Jackson plus
- Intensive lobbying by insurers through the ABI to a receptive government who hoped that a ban would reduce the cost and number of PI claims brought
- Many fallacies and paradoxes
- LJ Jackson thought that a ban would reduce the legal costs of claimants even though RFs are not recoverable costs
- Liability Insurers currently receive £150 million pa in RFs
- Recent evidence linking the cost of car hire and repairs to the rise in the cost of insurance claims has led to a referral to the OFT





# The Poisoned Chalice

- Are we about to embark upon a time consuming , costly and futile regulation which the LSB plainly did not want or believe in and which may only cause detriment to consumers and smaller law firms?





# Why only PI RFs banned

- No logic
- If RFs are bad for consumers and legal practice we should ban the lot but
- Insurers have no interest in a ban outside the PI world
- And it is insurers who have been driving PI policy inside no 10 for the last two years





# What is banned

- See S56 – 60 Legal Aid, Sentencing and Punishment of Offenders (LASPO) Act 2012
- Prohibits the payment and receipt of referral fees in personal injury cases by regulated persons (ie solicitors, barristers, CMCs and insurance companies)
- A referral is the provision of information that a regulated person would need to make an offer to the client to provide legal services





# What Does LASPO say

- A referral fee (RF) can be any form of consideration other than reasonable hospitality
- Regulators (the SRA) must have arrangements in place to monitor and enforce the prohibition
- Regulators can make rules providing that payments will be treated as RFs unless the regulated person can show that the payment was for a service
- The Lord Chancellor can make regulations specifying the maximum that can be paid for certain services





# What is affected

- According to the SRA:
  - 25% of solicitors firms handle PI work
  - £1.8 billion pa in fees
  - 7% of the profession's income
- So the ban has the potential to harm the economic interests of a significant sector of the legal profession who handle PI claims as well as affecting the market in information about legal services which could be to the detriment of consumers.







# SRA and LASPO

- Is there a referral?
- Is there a payment?
- Is the payment for the referral?
- No 3 is problematic say the SRA where the introducer is providing services such as marketing, vetting or other claims management activities





# It was not the intention of the government

- to ban joint advertising by groups of solicitors
- National Accident Helpline was assured in correspondence with the Minister, Mr Djanogly and officials that their scheme would not be affected
- Mr Djanogly said: “This is an issue to which I and my officials have given very careful consideration; it is not the government’s intention to prohibit or interfere with legitimate commercial contracts lawyers may enter into with other organisations for the purpose of advertising. It is and will remain legitimate for businesses to market themselves with reasonable marketing costs.
- But the wording of the Act is unhelpful





# Structure of PI business

## 1. Legal Expenses Insurance

- Legal Expenses Insurance Captive clients. Liability insurers expanded this market since 2000 to get round success fees and ATE. These clients are 'owned' by the insurers who currently sell them on to solicitors in the private sector in return for £150 million pa (Neil Rose)

What difference will LASPO make? The insurers will now retain the £150 million profit by running the claims themselves either with an in-house legal department or by buying a legal practice and putting it inside an ABS wrapper. All perfectly legal.

Losers will be solicitors in private practice who purchased this work in the past.





# WHAT IS GOING TO HAPPEN POST LASPO?



# Structure of the business

## 1. Trade Union Work

- Trade Unions have a long and commendable history of helping injured workers to get compensation. They have captive clients who receive free legal services as a chief perk of membership. The work is referred to a few firms such as Thompsons. Arrangements are varied and complicated
- Sometimes fees are paid per case
- Free employment work is provided by some practices in return for getting the work





# Trade Unions PI work what will happen post LASPO?

- I dont know
- Looks like Trade Unions will lose the fees they have been receiving for sending on cases
- What about the employment cases? That is something for the SRA to grapple with
- Trade Unions will be weakened by loss of income which a Tory Government would welcome.
- But for Society this is a very bad thing in my view. Trade Unions are a critical group who help to redress the imbalance of power between individuals and their employers or the state. Their role in Pi cases has been admirable – why change it?? Lower trade union membership over the last 10 years has been accompanied by rising inequality which is now seen to be very bad for the economic well being and growth of a country





## Structure of the business

### 3. CMCs

- There are many CMCs who simply sell on their work which has been acquired by advertising and internet marketing
  - Such activity will be caught by the ban.
  - They will
    - Shut up shop
    - Sell themselves to a law firm and join an ABS structure eg Claims Direct
    - Set up a law department and do the claims themselves
- There will be less consumer information and choice as a result





## Structure of the business

### 4. Joint marketing schemes

- Examples, Injury Lawyers for You, National Accident Helpline
- What happens here is still anyone's guess
- This is a massive market affecting many consumers and law firms
- Great uncertainty about what LASPO means for such schemes







# Outcomes focused approach

- The SRA are apparently not going to clarify the meaning of LASPO and will not pre-approve schemes eg as to what schemes do not breach LASPO because payments are a reasonable price for services
- This is a disaster in my view





# SRA examples 1

- *a group of SRA regulated firms get together to advertise their services. They set up a separate not for profit company, which is wholly owned by the regulated firms/persons, to carry out the advertising under the flag*
- *“Midlands Law”. Enquiries are made to a call centre, details of potential clients are passed to member firms on a rota basis and each firm pays an equal share of the costs of advertising and operating the scheme.*
- *This is unlikely to involve an unlawful referral fee.*
- *(is this Injurylawyers for U?)*





# SRA Examples 2

- *On the other hand, if the advertising/marketing was carried out by a commercial entity and the fees paid by the regulated firms depended on the number of clients referred rather than the cost of the advertising/marketing campaign, this would suggest that the payment was for the referral.*
- The NAH scheme is commercial
- But if the price per case accurately reflects the cost of the advertising how is this a breach ? (cost per case = cost of advertising and web site divided by admin, vetting, profit , nos of clients generated)





# Illustration – The NAH Model

- 140 firms on the panel
- Each contracts for some postcodes
- NAH pays for TV and internet advertising
- All calls go to an NAH call centre where they are vetted
- If they pass the tests, they are passed on to the firm which has contracted for the post code for that client
- The firm is billed per call transferred
- The cost reflects the cost of advertising, admin and profit divided by the number of calls which are generated
- This is an equitable and sensible way of allocating the cost





# Price per lead

In marketing terms, this is the most important indicator of the success of a scheme

NAH leads work out at about £350 each

Everyone would like to generate leads at a lower cost

But this is not easy and you need considerable experience and expertise in web design, web site optimisation and a deep pocket





# HJA Post Laspo

- We need 100-150 leads per month to sustain our PI department
- If the NAH model is considered a breach of LASPO will be told pre April 2012 or will we press on and later have an inquisition with the SRA as to whether it is a breach?
- If we consider remaining with NAH is too risky, we must replace the leads but how and at what cost and how futile to have to do this





# Why NAH is not a breach of LASPO

- This is a classic shared marketing scheme
- Solicitors on the panel outsource their marketing to NAH because NAH are good at it and give reliable quantities of leads for the price
- It is a profit making scheme and not a charity
- LASPO says nothing about shared marketing having to be in the charitable or not for profit sector
- The price paid for the services is a fair price for the cost of the marketing and vetting



# Price per lead – challenge for the SRA

- If the service is charged for as a price per lead, this is not a breach of LASPO if the price reflects the fair cost of marketing/advertising/admin and profit for generating that lead
- How else would you price?
- The SRA needs to understand how internet marketing works





# Payments for marketing

- SRA “the onus will be on firms to evidence that payment made for marketing/advertising services remain reasonable. Clear attempts to hide such fees in complex or hidden arrangements will present a risk to our regulatory objectives. Should this become prevalent then it is likely that we will ask the Legal Services Board (LSB) to recommend that fees paid for marketing/advertising are set by the Lord Chancellor for such services as allowed for in the Act. “





# Back to the Minister

This is an issue to which both I and my officials have given very careful consideration; it is not the Government's intention to prohibit or interfere with legitimate commercial contracts lawyers may enter into with other organisations for the purpose of advertising. It is and will remain legitimate for businesses to market themselves with reasonable marketing costs.

- Note that the Minister refers to commercial contracts which must include a profit





# Possible outcomes

- 1. SRA permits existing group schemes , recognising that the payments made are a fair contribution to advertising and vetting
- But we may not know this until March 2013
- 2. SRA declares that existing group schemes are caught by the ban
- But we may not know this until March 2013
- If so, solicitors without a plan B will be stuffed
- There will be an incredible scramble by the industry to come up with revised models





# Will internet marketing get cheaper after the ban?

- Unlikely - Many CMCs may disappear but the majority of existing advertisers may remain but in a different form eg an ABS
- Solicitors firms will have to spend to maintain work flow but the outcome and cost of such spending will be uncertain
- Smaller firms are likely to give up PI work as they will not have access to clients at modest cost and will lack marketing expertise





# Market realignment – my predictions

- Insurers will keep all their captured work in house and private practice will be the loser
- If SRA bans group schemes:
- Mega firms will spend big to retain market share
- Some ABSs will be formed lawfully tying in CMCs to solicitors firms
- Medium sized firms will have to spend and acquire marketing expertise or give up PI work
- Smaller firms will close their pi departments
- Consumers will be inconvenienced and will have less choice





# What the government wants from a ban

- The intention of the government is to make it harder for people to find a lawyer so that there are fewer claims (good bad or indifferent)





# Will there be fewer weak , spurious or fraudulent claims?

- No – just fewer claims of all kinds
- Weak cases are weeded out by both sides at present
- Claimant firms do not want to waste time on them
- Defendants don't want to pay out for them . ATE means that defs recover if they win. QOCS means that they wont.
- The basket of cases will always contain a mixture of good , big, small, bad , spurious and a few fraudulent cases. Our job to weed the basket and run the better cases
- In the future , the basket may be smaller if consumers find it harder to find their way to a lawyer. But the smaller basket will contain the same proportions of cases





# The job of the SRA

- It must police LASPO but the LSB must also stick to its regulatory principles and it has already decided that a ban on referral fees will interfere with access to justice
- How to square? There is a choice in approach
- The Act must be interpreted in a way that will not cause difficulties for consumers who need to find a lawyer to help them with a personal injury claim
- And
- Which does not cause legitimate and successful law firms who help such claimants to close
- That is the public interest





