

# The great divide

## Victoria Cargill untangles the threads of the ongoing referral fee debate

Since the publication of the Legal Services Board (LSB) report on referral fees there has been much debate on their role in the legal profession with a particular onus on their impact in personal injury claims (LSB economic analysis, May 17, 2010). It's an emotive subject and referral fees have been a dividing factor between the claimant and defendant sides of the profession since the ban on referral fees was lifted in March 2004. When this happened the battle lines were drawn and both sides have been entrenched ever since.

The problem with addressing the issue is that while the question looks simple to answer—does a referral fee provide any benefit to civil litigation?—the reality is more complicated. We are dealing with not just financial elements but issues

highlighted the worst side of claims management companies. Every personal injury lawyer, whether claimant or defendant, will have a tale of claims for paper cuts or the unfortunate person who managed to sustain separate injuries to each of their digits. Although the majority of these claims never made it through the validation process, the stories damaged reputations and added to growing concerns that there was a blossoming compensation culture.

As more costs decisions were published, the down side of receiving instructions from a claims management company came to light. It became clear that obtaining referred claims was not the risk free cash cow that defendants had convinced themselves was the case.

The issue of panel membership was raised in *Garrett v Halton Borough Council*

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such as consumer confidence, the alleged compensation culture and personal, and social responsibility. Referral fees cannot be looked at in isolation and that makes them a difficult problem to tackle.

The first hurdle is that both sides' arguments are clear and attractive.

- Claimants argue that referral sources provide firms with steady streams of work and income and provides claimants with a quick and simple way to instruct solicitors promoting access to justice.
- For defendants referral fees add nothing of value to litigation and only drive costs up.

### A history of animosity?

A lot of defendant animosity surrounding referral fees was caused back in 2000 when additional liabilities became recoverable between the parties. The decisions in the *Claims Direct Test Cases* and *Sharratt v London Bus Company* (the TAG litigation)

[2006] EWCA Civ 1017, [2007] 1 All ER 147 and *Andrews v Harrison Taylor Scaffolding and others* [2007] EWHC 90071. These cases made the level of control asserted by claims management companies clear. While firms were free to reject instructions with low chances of success or little supporting evidence, doing so could mean that they lost their place on the panel.

Many solicitors firms found themselves in an unenviable position. To maintain their levels of work they needed to take cases from claims management companies but some of these agreements saw them exposed to paying for low quality instructions that decreased their profitability and impacted on their professional reputation. If they chose to gain instructions by traditional methods they were left to try and market their services in an arena saturated by adverts for hassle free compensation claims. Whichever option was taken, the costs of bringing work in remained high.



### Legal costs

At the most basic level referral fees do increase legal costs. As the practice of paying referral fees grows so do solicitors overheads. The LSB report shows that lawyers who pay more in referral fees tend to receive more work. These costs are passed down to the consumer indirectly. Through no win, no fee agreements most claimants are not responsible for their own legal costs but defendants are bearing this expense. When the defendant is insured or a public body every policy holder and tax payer contributes to this. The fact that solicitors regularly pay referral fees was a factor when calculating the amount of fixed recoverable costs for road traffic accident cases. Overheads are taken into account when assessing the guideline rates for summary assessment published by the Senior Courts Costs Office each year. Since referral fees were allowed, the published guideline hourly rate for a grade C fee earner in Manchester has risen 24%. This may not be solely attributable to referrals but there is a link. If this continues for another six years, claimants and defendants will be paying £200 per hour for a fee earner to deal with low value fast track work. This is not something that can be sustained.

How would lawyers explain this level of fee to clients? The rise of conditional fee agreements has hidden the true cost of litigation from the public. It is important to engage people in the legal process and charges at this level make our profession seem expensive and remote rather than an affordable, user-friendly tool that they should have confidence in using.

Apart from the financial consequence we also need to look at what we are losing as a profession by relying on referral fees to bring in work. The legal profession has struggled with its image with stories of a compensation culture and frivolous

claims a regular feature in the media. No one would argue against increased access to justice for claimants. We do not want to return a Victorian image of being seen as elitist and only available to a small section of society as the law needs to be accessible and inclusive to protect the vulnerable. But in relying on claims management companies we are moving away from some of our biggest assets—a connection with our clients, local knowledge playing a role in our local communities. It is not uncommon for a claimant in Dorset to be directed to a firm in Hull.

A solicitor in a location remote from the claimant may have excellent technical abilities but these skills are only enhanced by knowledge of the area. The law is not predictable. An offer that may be instantly rejected in Dorset may be considered more closely in Hull and vice versa.

A claimant should not lose the benefit of this information merely because they have directed their claim through a claims management company.

### Combating fraud

A further, often overlooked, benefit of using local solicitors is their

effectiveness in combating potential fraud. An initial interview with a client can provide a level of information that a telephone call cannot.

While obviously fraudulent claims will be rooted out by any robust initial review procedure there are many cases with elements that should cause concern that do slip through this process. There are two aspects to this.

- Nuances that may be missed on the telephone are picked up in person. The claimant may be exaggerating elements of their injury or damages and a lawyer can pick up on that and deal with it appropriately. This is not always done maliciously and this is best dealt with informally. This avoids the costs and unnecessary litigation.
- Second, you cannot underestimate the level of claims intelligences solicitors build up without trying. Knowledge of local accident black spots, road lay outs and incident rates all create one of the best defences against fraud we have. That sense that something is not quite right with a claim can save thousands of pounds.

### Searching for a solution

We are faced with issues that won't go away. The LSB report finds that introducing reforms to referrals will be unlikely to bring any benefits. A ban is unlikely and caps may be circumvented. Both sides must come together and find a reasonable solution to the challenges we face.

We must accept that we are all legal consumers whether as the victims of an accident or facing increased insurance premiums or council tax bills due to the cost of claims.

It is in everyone's benefit to ensure that we maintain access to justice, protect vulnerable claimants, maintain high standards within the profession and keep costs at a reasonable, affordable level.

It's a big ask but the alternative is to face a future with spiralling legal costs, a disillusioned public and a bland, homogenised profession stripped of its intelligence and talent.

NLJ

**Victoria Cargill** is head of costs at Berrymans Lace Mawer LLP.  
E-mail: [victoria.cargill@blm-law.com](mailto:victoria.cargill@blm-law.com).  
Website: <http://www.blm-law.com>



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**Andrew Billingham**

A Billingham Forensic Consultant  
5, Old Hall Close,  
Pinner, Middlesex HA5 4ST  
Work 0208 428 2958  
Mob 077961 398 049  
Email: [andrew@abillingham.co.uk](mailto:andrew@abillingham.co.uk)  
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