

RUPERT JACKSON'S HANDOUT FOR THE LEGAL ACTION GROUP ANNUAL LECTURE ON 29TH NOVEMBER 2010 (laghandout3)

Professor Fenn's analysis

Following publication of the Civil Litigation Costs Review Final Report, Professor Fenn has done some further calculations re the cumulative effect of the following reforms:

- End recoverability of success fees and ATE premiums.
- Introduce one way cost shifting
- Increase general damages by 10%.

Professor Fenn has analysed a sample of 63,998 personal injury cases. These range from low value fast track claims to high value multi-track claims. However, the majority of all PI claims and therefore the majority of claims in Professor Fenn's sample are lower value.

It can be seen from Professor Fenn's graphs on the following pages that 61% of claimants will be better off and 39% of claimants will be worse off, if the above reforms are implemented.

My analysis of combining the above measures with other reforms recommended in the Final Report

The next question to consider is what will be the consequence of two further reforms, viz (i) de-regulating success fees and (ii) banning referral fees.

At the moment success fees in PI cases are fixed at the levels set out in CPR Part 45. If those success fees are (a) de-regulated¹ and (b) payable by the clients rather than opposing parties, the effect will be to create competition between solicitors on the basis of which firms charge the lowest success fees. The effect will be to drive down success fees below their present levels.

The Law Society strongly recommends that the payment of referral fees should be banned. At page 31 of its Response to my Final Report the Law Society states:

“The Law Society's view is that referral fees should not have a place in legal work for the reasons that Jackson LJ indicates in his report. We believe that they add costs and place incentives on solicitors to

¹ Subject to an upper limit of 25% of damages, excluding damages referable to future losses

provide a lower level of service to their clients. The Society believes that they should be prohibited for all involved in the process, including solicitors, other legal service providers and anyone else involved in the claims process. The Society relaxed the rules under pressure from the OFT and remains uncomfortable with that decision.”

At the moment a large part of the costs paid to PI claimant solicitors (sometimes more than 50%) are sucked up in referral fees. This not a sensible proportion of gross income to devote to marketing. The referrers add no discernible value to the claims process. Once solicitors are freed from the burden of paying referral fees, funds will be freed up enabling them to charge lower success fees. Thus the beneficiaries of competition between solicitors will be the injured claimants, rather than referrers (claims management companies, BTE insurers etc) as at present.

In my view, the combined effect of all the proposals in the Final Report will be to drive down success fees to significantly lower levels than those prescribed in CPR Part 45.²

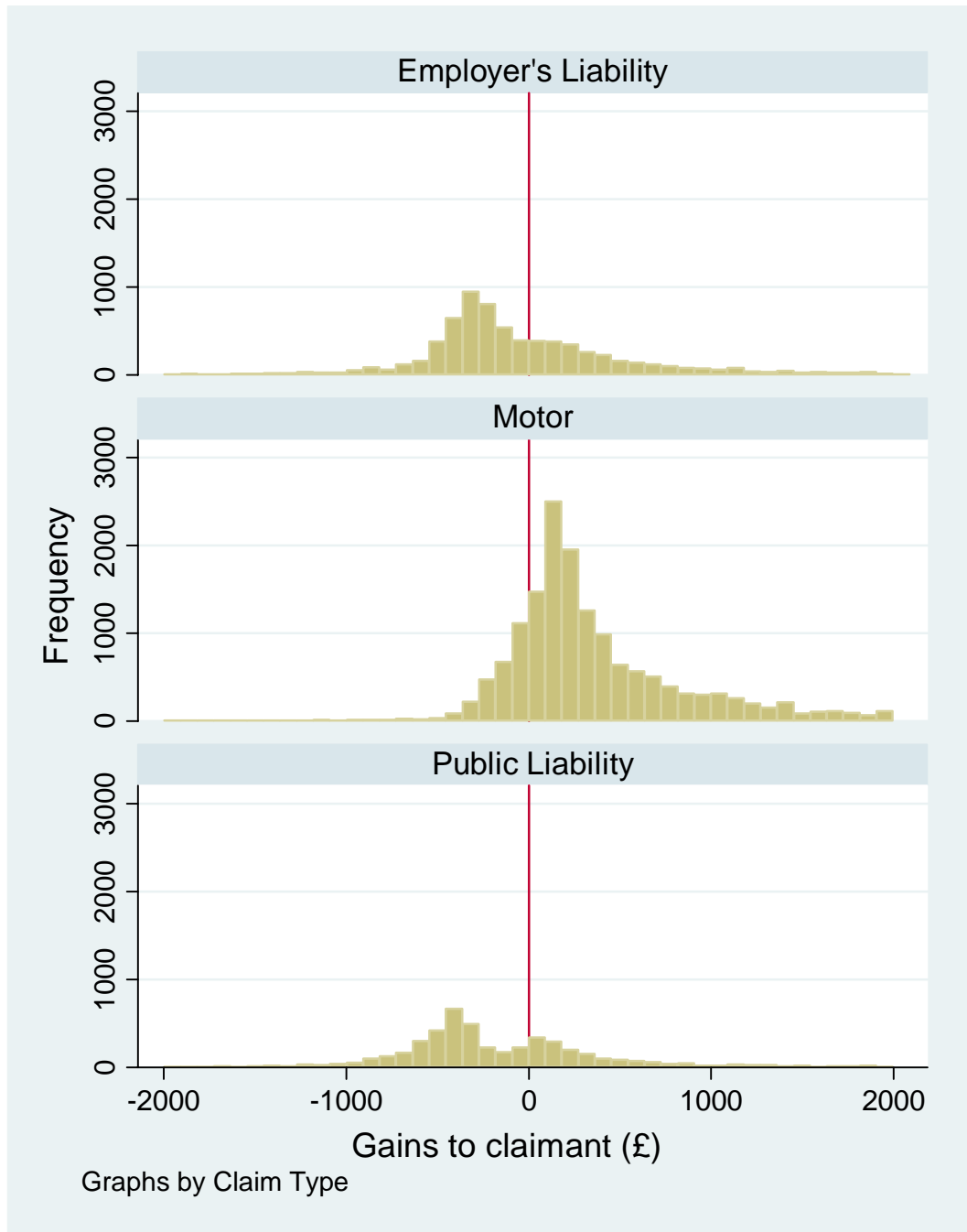
Thus if the whole package of recommendations in the Final Report is implemented, far more than 61% of all PI claimants will benefit as a result of the reforms and far fewer than 39% will be lose out as a result of the reforms.

Rupert Jackson

29th November 2010

² See the reasoning in chapter 17 of the Costs Review Final Report

Gains and Losses arising from the combination of an additional 10% on damages, one way cost shifting, and non-recoverable success fees/ATE premiums³



³ ATE premiums for disbursements only (estimated)

Total RTA, EL and PL combined

