DEPARTMENT FOR CONSTITUTIONAL AFFAIRS

PART 36 OF THE CIVIL PROCEDURE RULES: OFFERS TO SETTLE AND PAYMENTS INTO COURT.

Consultation paper CP 02/06

A RESPONSE BY THE ASSOCIATION OF PERSONAL INJURY LAWYERS

(APIL03/06)

March 2006

The Association of Personal Injury Lawyers (APIL) was formed by claimant lawyers with a view to representing the interests of personal injury victims. APIL currently has around 5,200 members in the UK and abroad. Membership comprises solicitors, barristers, legal executives and academics whose interest in personal injury work is predominantly on behalf of injured claimants.

The aims of the Association of Personal Injury Lawyers (APIL) are:

- To promote full and just compensation for all types of personal injury
- To promote and develop expertise in the practice of personal injury law
- To promote wider redress for personal injury in the legal system
- To campaign for improvements in personal injury law
- To promote safety and alert the public to hazards wherever they arise
- To provide a communication network for members

APIL's executive committee would like to acknowledge the assistance of the following members in preparing this response:

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Executive Summary

- APIL is very concerned about the recent Court of Appeal judgments which allow NHS Trusts and other defendants to avoid guaranteeing their Part 36 offers with a payment into court. If a defendant believes that it will be liable to compensate a claimant, APIL believes the defendant should show its willingness to do so by putting that amount of money into the court. Part 36 is designed to end the action with no further escalation in costs. If a defendant's judgment is sound, the claimant is likely to accept the money and if it is already in court, then no further obstacles lie in the claimant's way in order to bring the action to a prompt end.

- APIL is concerned about the suggestion at paragraph 17 of the consultation paper, that public bodies, and NHS trusts in particular, are more 'socially worthy' than other defendants and should be given preferential treatment when it comes to compensating those injured by their negligence.

- The potential bankruptcy of the defendant or its insurer is a serious issue for the claimant. Independent Insurance, Chester Street Insurance and Trinity Insurance were all apparently 'good for the money' insurers and they all became insolvent. In addition, foundation hospitals are also at financial risk, as described in paragraph six and thirteen of this response paper.

- Requiring defendants to pay money into court to back up their pre-issue part 36 offers forces them and their insurers to think hard about any offers they make pre-issue and to ensure they are sensible ones. Removal of the requirement to make actual payment in support of offers would mean that the imperative for defendant/insurers to think about the case pre-issue would be lost.

- It will be important to identify those defendants who would be allowed to make financially unsupported offers.

- APIL agrees that the court should be able to extend or abridge the time for accepting as suggested.

- There is a good deal of sense in allowing acceptance of Part 36 offers out of time without needing the court's permission. It would also be useful to have some deemed costs provisions where this applies.

- Parties should not be required to give reasons for rejecting offers. These are not currently required and being required to do so potentially add fuel to any possible disputes still outstanding in the claim. This is an issue which relates more to costs penalties for failing to engage in alternative dispute resolution (ADR) than under Part 36.

- Offers should be open for a certain period to avoid the risk that the option to withdraw early would encourage scurrilous activity, and satellite litigation.

- A withdrawn offer should not continue to influence costs. The preferable approach is that adopted by the Court of Appeal in *Capital Bank Plc v Stickland*[1] which appeared to adopt pre-CPR authority to the effect that an offer would only be effective for costs purposes for as long as it remained extant.

- There may be legitimate reasons not to accept an offer as it stands, especially if later evidence has changed aspects of the claim. The court should exercise its discretion and in any event, not order indemnity costs, which are a windfall to the defendant's solicitor. Penalties such as enhanced interest are more appropriate. See paragraphs 22 and 23 for details on this view.

- APIL agrees with the comments in paragraph 53 of the consultation paper. All offers and notices between the parties under Part 36 should be subject to the same requirements. APIL believes that the 'when actually received' option is the better one, rather than triggering the effectiveness of the notice upon service. The onus should be on the recipient to acknowledge receipt.

- Notifying the court of a payment into court is an additional safeguard for all concerned in the litigation process. It is in effect an independent proof of the fact that a payment has been made, in case, for some reason, the notice to the opposing party goes astray. In addition, knowledge of the offer assists the case management process at court. See paragraphs 25 and 26 for more detail.

- Amending CPR 36.21 so that (like defendants) claimants who equal their own offer receive Part 36 costs benefits: APIL views the decision of Mr Justice Bell in the case of *Read v Edmed*[2] as a definitive statement of how the rules should be interpreted and implemented.

- APIL makes further additional comments including a recommendation that Part 36.21 should be followed, whether or not there has been a hearing, effectively overruling the cases of *Petrograde Inc v Texaco Ltd*[3]). See also *Dyson Appliances Ltd v Hoover Ltd* (no.3)[4].

[1] Capital Bank Plc v Stickland: Court of Appeal: [2004] EWCA Civ 1677; [2005] 1 W.L.R. 3914; [2005] 2 All E.R. 544; [2005] C.P. Rep. 15.
[2] [2004] EWHC 3274; [2005] P.I.Q.R. P16.
[3] [2002] 1 WLR 947
[4] [2003] EWHC 624 (Ch) , [2003] 2 All ER 1042

Preliminary comments on part 36 payments into court

1. The introduction of Part 36 as a means to promote early settlement of claims has been a vital part of the Woolf reforms. The original Part 36 framework was useful, principally because of the requirement on the defendant to make a Part 36 payment, rather than just an offer. This meant that the defendant had to think hard about the value of the claim as early as possible and show commitment to the offer made, by providing a guarantee the offer by depositing the cash in court with which to pay it. This is particularly the case in relation to the requirement for the defendant to repeat a pre-action offer by means of a Part 36 payment within 14 days of service and the real difficulties faced by a defendant who seeks to withdraw or reduce a Part 36 payment once made, to ensure the certainty of the offer. For an example, see the case of *Flynn v Scougall*[5], in which the defendant applied (and failed) to reduce a Part 36 offer part way through the 21 day period, as the claimant sought to accept it.

2. APIL recognises that, given recent Court of Appeal decisions, some of these advantages might be seen as having been lost already. Nevertheless, preservation of some of the advantages of the original rules, should be attempted for the reasons set out in our response to the consultation paper, below. APIL is particularly concerned about the suggestion at paragraph 17 of the consultation paper, that public bodies, and NHS trusts in particular[6], are more 'socially worthy' than other defendants and should be given preferential treatment when it comes to compensating those injured by their negligence.

3. The introduction to the consultation paper contains useful background on Part 36, but APIL disputes the assertion made in paragraph eight of the consultation paper, that prior to the introduction of the CPR 'there was no provision for claimants to make offers that would give them comparable protection in respect of costs', should be addressed. The case of *McDonnell v Woodhouse & Jones*[7] allowed claimant offers, in the form of *Calderbank*-type offers[8] as early as 1995 and indemnity costs could in principle be awarded by the court if the offer was rejected by the defendant and the claimant subsequently 'beat' his own offer.

4. The consultation paper background section states the current state of the CPR as follows: 'If the party making the offer is a defendant to a money claim, it must take the form of a payment into court'.[9] This is very important to claimants and the reason for this, APIL submits is that whilst paper offers can be made by defendants, in order to take the offer

[5] Flynn v Scougall: Court of Appeal: [2004] EWCA Civ 873; [2004] 1 W.L.R. 3069; [2004] 3 All E.R. 609, The Times [July 21, 2004].
[6] Paragraph 13 of the consultation paper.
[7] The Times, [May 25, 1995].
[8] *Calderbank v Calderbank* [1976] Fam 93
[9] Consultation paper, paragraph 10.

seriously, the claimant needs to know that the money is there and ready to take if necessary. It places considerable pressure upon the claimant to consider settling the claim, which can only be a good thing, provided the offer is reasonable. It also accords with the ethos of the Woolf reforms in that it encourages early settlement without, if possible, protracted proceedings.

Question 1. Do you agree that defendants who can be assumed to be 'good for the money' should not be required to make actual payments in support of offers as provided in recent case law?

Being 'good for the money'

5. There is the serious issue of the potential bankruptcy of the defendant or its insurer to take into account. Independent Insurance, Chester Street Insurance and Trinity Insurance were all apparently 'good for the money' insurers and they all became insolvent. Solicitors dealing with claims which now rely upon payments from these defunct insurers know that it takes up to eighteen months for the Financial Services Compensation Scheme (FSCS) to pay out on claims and there is no provision for costs. This means the claimant is penalised if the insurer becomes insolvent and even more so if the defendant, who may be self insured, goes bankrupt, as there is no FSCS to cover such claims.

6. Not only insurers and their defendant policy holders run the risk of not being 'good for the money'. It has recently been demonstrated in relation to the newly enacted provisions relating to periodical payments that there is also a problem with foundation hospitals. Where periodical payments are contemplated against an NHS body which is a member of the CNST there is a question mark over the reasonable security of continuity of payment under section 2(4) (c) of the Damages Act 1996. This is because the NHS (Residual Liabilities) Act 1996 ceases to apply to any NHS body which becomes, either prior to or following an order of the Court, a NHS foundation trust and means that foundation hospitals can be allowed to 'go to the wall' by the Government. They cannot, therefore, be considered 'good for the money'. An order has been made by Forbes J for this issue to be tried out now in two clinical negligence actions (one where the defendant is an NHS foundation trust and the other where it has applied to be so). He has also ordered that the Secretary of State for Health be joined in the action. It is hoped that this will provide definitive guidance on this difficult issue.

7. The security of the money actually being paid into court, guarantees that it is available and is not dependent on further actions of the defendant or the court, such as: 'cheque run' glitches on the insurers' parts; Foundation Trust hospitals running out of money; the impecunious self-insured defendant; cases where there is more than one defendant (and they are in

dispute among themselves, over apportionment on liability, for example) or delayed orders of the court.

8. The complex procedures described in the latter part of paragraph 25 of the consultation paper, which relate to the Third Parties: Rights Against Insurers Act 1930, can be completely avoided if only the defendant backs up the offer to settle with an actual payment into court.

9. There is also the problem of no binding contract between the third party insurer and the claimant. How would the agreement to make the payment be enforced if the insurer subsequently reneged on the agreement? This has not been addressed by the proposals in this consultation paper.

Making actual payment in

10. CPR 36.10 (3A) requires that pre-issue part 36 offers made by the defendant must be validated by a payment into court within 14 days of the commencement of proceedings. This requirement forces defendants and their insurers to think hard about any offers they make pre-issue and to ensure they are sensible ones. Removal of the requirement to make actual payment in support of offers would mean that the imperative for defendant/insurers to carefully and sensibly quantify the case pre-issue would be lost. The ethos of the Woolf reforms is to encourage pre-issue settlement where at all possible and this suggestion would dilute the levers which currently facilitate that ethos.

11. An additional advantage of having the sums offered actually paid into court is that in the more serious personal injury cases, the court can be told that there has been a payment in and can order interim payments out of it. See CPR 25.7 (4) for example. This is particularly so if the interim payment will be used to fund care needs. It is immediately available (see our comments in paragraph seven above) if the court so orders.

12. APIL's claimant practitioners, see in their day to day practice that psychologically, in the minds of claimants, there is a real difference between a payment into court, and an offer (no matter what title or consequences be given to the offer). This is probably because claimants can understand that the money is being held by a body with no financial interest in the case (the court) and which is wholly independent from the person who injured the claimant. Another important factor is that acceptance is wholly within the power of the claimant, who need not rely on the actions of others to obtain the funds. In APIL's judgement, these factors facilitate settlement in a very significant number of cases.

Question 2. If so, do you agree that so far as possible those categories of defendant should be defined in the rules to increase certainty for defendants making, and claimants accepting, offers unsupported by payments?

13. Bearing in mind our comments about those who might not be so 'good for the money' set out in paragraphs five, six and nine above, then if the rules relating to Part 36 payments are to be relaxed, it will be important to identify those defendants who would be allowed to make such unsupported offers.

Question 3. If so, do you agree that the categories defined in the draft rule are appropriate? What other categories would you include or exclude and why?

14. Our comments in paragraphs five, six and nine above outline our concerns about insurers who may become insolvent, foundation trust hospitals and impecunious defendants. Health service bodies would have to have their offers underwritten by the Department of Health or the NHSLA, for example if they were to be included in the list of 'approved' defendant categories. In order to address the lack of a contractual link between claimants and the defendant's insurers, the insurers would have to produce confirmation of indemnity.

Question 4. Should the court be allowed to (a) extend and/or (b) abridge the time for accepting a Part 36 offer? If so, what factors or criteria would be relevant?

15. APIL agrees that the court should be able to extend or abridge the time for accepting as suggested. It should be made certain as to in which circumstances this can be allowed to happen, with the usual factors for relief from sanction. In child injury cases, for example, it may not be possible to assess the value of the claim at the time the offer is made, due to an uncertain prognosis, or due to the need to wait until the child has grown a little more before further operations can be considered or carried out. In such circumstances the court would be unable to approve any settlement in any case if prognosis was uncertain and the court's ability to extend the time for accepting the Part 36 offer would be very useful indeed.

Question 5. If the court has the power to extend then should the offeror also have the right to make an offer beyond 21 days in the first instance?

16. APIL's view is that there is nothing to prevent the offeror from taking this course of action already. The length of time for which the offer is to be open should be clearly stated, to avoid confusion and any further satellite litigation.

Question 6. Do you agree that the requirement to obtain the court's permission to accept a part 36 offer out of time should no longer apply? If you disagree, please explain what purpose permission serves

17. There is a good deal of sense in allowing acceptance of Part 36 offers out of time without needing the court's permission. It would also be useful to have some deemed costs provisions where this applies (e.g. payment of costs until the last date the offer could have been accepted but thereafter paying the costs of the offeror), otherwise this may end up being argued about in any event. Refer also to our comments relating to extant offers in answer to question 8 below (paragraphs 19, 20 and 21).

Question 7. Should parties refusing an offer be required to give reasons?

18. Definitely not. Reasons for rejecting offers are not currently required and being required to do so potentially add fuel to any possible disputes still outstanding in the claim. Clamant lawyers are always wary of rejecting offers to avoid the sort of arguments which arose in the *Pitchmastic*[10] case. (In this case, the offer made by the defendant was rejected by the claimant who then, within the original 21 days, applied to accept the offer, contending that the offer was still open for 21 days despite the rejection part way through the period. This argument was rejected by the court). This is an issue which relates more to costs penalties for failing to engage in ADR than under Part 36.

Question 8. Should withdrawal of offers be permitted:

- **a. during the period for acceptance with the courts permission and thereafter by serving a notice of intent to withdraw; or**
- **b. at any time by serving a notice to withdraw; or**
- **c. at any time only with the court's permission; or**
- **d. only after the end of the period for acceptance and with the court's permission; or**
- **e. only after the end of the period for acceptance, without requiring the court's permission?**

during the period for acceptance with the courts permission… or at any time…. with or without court permission….

19. Part 36 payments can be accepted inside the period for acceptance, the claimant being confident that it is possible to do so without any interference or further actions by the defendant. To remove this possibility can only be detrimental to the claimant, introduces an element of uncertainty – what would happen if the defendant withdrew on the same

[10] *Dew Pitchmastic Plc v Birse Construction Ltd (Compromise):* QBD: [2000] 97(23) L.S.G. 41, Times Law Report, [June 21, 2000].

day as the claimant attempted to accept? Further satellite litigation would be inevitable.

20. If offers are not available and certain for a minimum period, then there is the risk that the option to withdraw early would encourage scurrilous activity, such as that already described in this response at paragraph one in the case of *Flynn v Scougall*[11]. In that case the defendant applied (and failed) to reduce a Part 36 offer part way through the 21 day period, even as the claimant sought to accept it. It could also encourage early tactical offers which will then be withdrawn but continue to cast a shadow over the case in relation to costs. A withdrawn offer should not continue to influence costs. We understand the rationale for the decision in *Stokes Pension Fund Trustees v Western Power Distribution (South West) Plc*[12] but would have thought the preferable approach was that adopted by a different division of the Court of Appeal in *Capital Bank Plc v Stickland*[13] which appeared to adopt pre-CPR authority to the effect that an offer would only be effective for costs purposes for as long as it remained extant. It is a little surprising that case is not referred to at all in the consultation paper when it provides a useful analysis of the costs impact offers ought to have where these are no longer open for acceptance.

only after the end of the period for acceptance with or without the court's permission…

21. There is no real need to seek the court's permission to accept a Part 36 offer or payment as it is extra work for the court. In reality, all the court needs to know is that the offer or payment is accepted. APIL would therefore support **option 8e** in the consultation paper.

Question 9. Should defendants normally be entitled to (a) indemnity costs and (b) enhanced interest where a claimant fails to beat the defendant's offer at trial?

22. There may be legitimate reasons not to accept an offer as it stands, especially if later evidence has changed aspects of the claim. The court should exercise its discretion and in any event, not order indemnity costs, which is a windfall to the defendant's solicitor, but perhaps order the penalty to be in the form of enhanced interest. The question remains, which is not resolved in the consultation paper, as to what that enhanced interest should be charged upon. Is it to be interest on the money already paid into court? Or on the difference between the amount offered and

[11] [2004] EWCA Civ 873; [2004] 1 W.L.R. 3069; [2004] 3 All E.R. 609, The Times [July 21, 2004].
[12] Stokes Pension Fund Trustees v Western Power Distribution (South West) Plc: Court of Appeal: [2005] EWCA Civ 854; [2005] 1 W.L.R. 3595; [2005] 3 All E.R. 775; [2005] C.P. Rep. 40; (2005) 102(30) L.S.G. 28.
[13] Capital Bank Plc v Stickland: Court of Appeal: [2004] EWCA Civ 1677; [2005] 1 W.L.R. 3914; [2005] 2 All E.R. 544; [2005] C.P. Rep. 15.

finally ordered? Or on costs (which again would be a windfall to the defendant's solicitors rather than the defendant itself)?

23. This issue has been considered by the court in cases such as *Reid Minty v Taylor*[14] and *Kiam v MGN Limited*[15], which suggest the defendant should not have such an entitlement unless the claimant has behaved unreasonably. Any such provision could, for example, lead to an early, nominal, offer by the defendant which would allow the defendant, if successful, to recover indemnity costs.

Question 10. Should Part 36 offers and notices be served or simply given?

24. APIL agrees with the comments in paragraph 53 of the consultation paper. All offers and notices between the parties under Part 36 should be subject to the same requirements. APIL believes that the 'when actually received' option is the better one, rather than triggering the effectiveness of the notice upon service, as the latter option is unfair to the party who may not, for some reason, receive the notice at all. The onus should be on the recipient to acknowledge receipt.

Question 11. Do you agree that the requirement to file a notice of a Part 36 payment with the court should be removed?

25. Notifying the court of a payment into court is an additional safeguard for all concerned in the litigation process. It is in effect an independent proof of the fact that a payment has been made, in case, for some reason, the notice to the opposing party goes astray. Bearing in mind, especially, APIL's comments in connection with question ten, that acknowledging receipt of an offer should be the recipients' obligation, then acknowledgment to the court should also be made.

26. In addition, knowledge of the offer assists the case management process at court: the judge should not be ignorant of the fact that a Part 36 payment has been made (but not the amount). At the moment, some district judges will be aware of such offers, and some will not. Knowledge will assist the judiciary especially where mediation is ordered or may in fact encourage the judge to encourage the parties to mediate if it is known that offers are 'on the table' already.

Question 12. Do you have any views on these [additional] proposals [other changes in paragraph 56 of the consultation paper] or do you have any other amendments to Part 36 that you feel are necessary? If so, please specify

[14] *Reid Minty v Taylor*: Court of Appeal: [2001] EWCA Civ 1723; [2002] 1 W.L.R. 2800; [2002] 2 All E.R. 150; [2002] C.P. Rep. 12; [2002] C.P.L.R. 1; [2002] 1 Costs L.R. 180; [2002] E.M.L.R. 19
[15] *Kiam v MGN Ltd* (Costs): Court of Appeal: [2002] EWCA Civ 66; [2002] 1 W.L.R. 2810; [2002] 2 All E.R. 242; [2002] C.P. Rep. 30; [2002] E.M.L.R. 26

Amending CPR 36.21: so that (like defendants) claimants who equal their own offer receive Part 36 costs benefits:

27. APIL views the decision of Mr Justice Bell in the case of *Read v Edmed*[16] as a definitive statement of how the rules should be interpreted and implemented. He says at paragraph 34 of his judgment:

> "as a matter of general principle, where in a relatively uncomplicated claim for damages for personal injury and consequential losses such as this, the claimant makes a valid Part 36 offer or other admissible offer to settle an issue of liability at a given proportion of his or her claim, and the defendant refuses that offer and the court gives judgment for precisely that proportion of the claim, the claimant should be entitled to the benefit of an award of indemnity costs from the time of expiry of the offer and some interest on those costs just as he or she would if Part 36.21 had applied to the matter, in order to ensure, so far as possible, that she is not out of pocket, unless there is some particular circumstance, for instance a significant change in the complexion of the case or some unreasonable conduct by or on behalf of the claimant, which would make that conclusion unfair."

28. We strongly support this proposal which would be a major change to the rules and would enhance the effect of offers.

Amending CPR 36.20 to include the criteria that appear in rule 36.21(5)

29. This suggested amendment would have the effect of giving a wider discretion to the court to take into account factors such as the defendant's conduct. APIL is content that the list of factors currently included in CPR 36.21(5) could be appropriately considered within the context of CPR 36.20 and we suspect that they are already applied by analogy in any event.

Extending the period for making a payment upon receipt of a certificate of recoverable benefit from seven to 14 days

30. APIL takes the view that incompetence by defendants or their lawyers for failing to obtain the Compensation Recovery Unit figures in time should not be encouraged by including this amendment. It is important that the provisions in Part 36.23 continue to apply, if necessary, for Part 36 offers. A really useful case, not referred to in the consultation paper, is *Williams v*

[16] [2004] EWHC 3274; [2005] P.I.Q.R. P16.

Devon County Council [17] which seems to go as far as saying that inadequate CRU information would make the offer ineffective.

Amending Part 36 and Part 52 to clarify that fresh offers are required to have effect in appeals

31. APIL has no comments on this amendment, as it takes the view that this is current practice in any event.

Inserting a cross-reference in Part 27 to clarify that, exceptionally, the court has discretion to apply Part 36 in small claims

32. APIL has no comments on this amendment.

Additional comments: successive Part 36 offers and/or Part 36 payments

33. APIL would like to highlight a potential problem which may occur if Part 36 offers without payments are to be allowed in the future. Imagine that the defendant makes a Part 36 payment of £10,000. Later in the case, the defendant makes a Part 36 offer of a further £5,000 but does not make a payment in. The potential problem in this scenario is that allowing subsequent offers following Part 36 payments will encourage defendants to not pay full attention to the valuation of the claim at the earlier stage, safe in the knowledge that if they have it wrong, they can make a cash-free further offer at a later stage. Once again, as highlighted in paragraph eight of this response, it removes much of the imperative currently laid upon defendants and their insurers to think hard about any offers they make and to ensure they are sensible ones. The ethos of the Woolf reforms is to encourage early settlement where at all possible and this suggestion would reduce the pressure on the levers which currently guide that ethos.

Additional comments: summary judgment and settlements without hearings.

34. CPR 36.21 does not apply where judgment is entered otherwise than at a hearing, nor on summary judgment (*Petrograde Inc v Texaco Ltd*[18]). See also *Dyson Appliances Ltd v Hoover Ltd* (no.3)[19]. For the Part 36 sanctions to apply as envisaged in this paper, to these two types of events, the court must, at the moment, have decided on the damages at a hearing. This does not encourage settlement. APIL suggests that the cure for this problem should be that Part 36.21 should be followed, whether or not there has been a hearing, effectively overruling these two cases. ■

[17] Williams v Devon CC: [2003] EWCA Civ 365; [2003] C.P. Rep. 47; [2003] P.I.Q.R. Q4: Times Law Report, [March 26, 2003].
[18] [2002] 1 WLR 947
[19] [2003] EWHC 624 (Ch) , [2003] 2 All ER 1042