MINUTES OF MEETING OF SOUTH AREA MEETING OF APIL – 23 OCTOBER 2008

We had a good attendance of 21 people including the speakers at the above meeting.

The meeting consisted entirely of 2 very informative talks by Barristers from 9 Gough Square, leading set for Claimant Personal Injury speakers.

These minutes will be kept very brief because the 2 speakers, Tara Vindis and Daniel Lawson produced very comprehensive handouts which they have kindly agreed to put on the APIL Website next to these minutes.

Please therefore cross reference those handouts with these minutes.

The Ogden Tables

Tara explained the background to the Ogden Tables and discount rates and then went through the chief differences relating to the 6th edition.

It is the treatment of contingencies other than mortality that constitutes the most radical departure from previous editions of the Ogden Tables namely whether a Claimant is employed and disabled and also looking at educational attainment.

Tara went through several examples which are included in her handout to show us how the new tables can produce quite different results as compared to the old Ogden Tables.

She also went through some helpful Case Law which is again referred to in the handout concerning interpretation on disability.

Special mention should go to the Connor-v-Bradman case and also the McGhee-v-Diageo Plc case.

The Mental Capacity Act

Again reference is made to Daniel's comprehensive handout.

Daniel emphasised the point that we should all be aware of the question of whether a Claimant has capacity pursuant to the Mental Capacity Act regardless of what type of work we do. It does not just apply to big head injury cases.

He ran through the new procedures for the new Court of Protection.

He also ran through the Code of Practice and referred to the examples that are on the Public Guardianship Office Website.

Under the new act there is much more emphasis on the obligations of us as Lawyers in determining what constitutes mental capacity.

The statutory definition must be applied. See Saulle-v-Nouvet, one of few cases decided since 2007.

He reminded us often a potential conflict with the Claimant and with the Defendant as to whether there is likely to be capacity or not.

Defendants may argue the question of capacity both ways.

They may resist an argument that a Claimant lacks mental capacity because this may suit them financially.

However, in cases where for example liability is in dispute and the Claimant may be heavily reliant on the Claimant's account, they could actually financially argue for lack of capacity.

He reminded us that it is possible for a Claimant to be capable of managing their own affairs but incapable of coming to informed decisions with regard to litigation eg discussed in Bairley-v-Waven.

That old chestnut costs is relevant even in relation to the Court of Protection!

There have not be any decisions yet with regard to the question of the costs of determining whether a Claimant has capacity or not – watch this space.

In terms of the threshold if the value of the claim is in excess of £30,000.00 one must appoint a deputy.

One thing we must factor in to any claim on behalf of a mental patient is the deputy's costs so it will probably be very rare for any case where a Claimant lacks capacity, for the Court of Protection not to become involved.

It is obviously important that we include in our schedules the costs of appointing a Deputy and the deputy's costs for future.

Needless to say we must get accurate costings at the earliest possible stage.

We should also consider claiming the cost of professional advice even though previous Case Law may indicate that this is not recoverable.

We must also consider in boarder line cases the possibility of a Claimant having non capacity in the future and accordingly claiming the costs of the same.

Generally

Members are reminded that the Regional Forum will be on 11 December 2008 in Southampton.