

MEETING NOTES

DATE: 24 March 2010

SUBJECT: APIL East Anglian Regional Meeting

LOCATION: Holiday Inn, The Havens, Ransomes Europark, Ipswich

ATTENDEES: Ian Bradford, Howard Bush, Tom Cook, Simon Davis (speaker), Anna Foster, Richard Foyster, Robert Gair, Stephen Green, Victoria Harvey (EC Member), Liam Hastings, Debbie Holmes, Tim Humpage, Adrian Mundell (speaker), Jan Parry, Hannah Rutterford (Regional Co-ordinator), Linda Trembath, Mick Upton (MU)(Regional Secretary), Alison Taylor (speaker).

1. INTRODUCTION:

Hannah Rutterford (HR) introduced Simon Davis (SD) and Adrian Mundell (AM), both of Kester Cunningham John, who spoke about the effective management of a PI Claim from a legal and financial perspective.

HR also introduced Alison Taylor of Frenkell Topping, who gave a talk on periodical payments and the pitfalls from the perspective of an IFA, and Victoria Harvey (VH) who provided an EC update.

HR invited attendees to let MU or HR know if they had any suggestions regarding meeting venues or times which they think could improve the meetings.

2. EFFECTIVE MANAGEMENT OF A PI CLAIM FROM A LEGAL AND FINANCIAL PERSPECTIVE – WHAT IS THE LITIGATION SOLICITOR'S ROLE (SD)

SD provided an interesting talk which gave some useful pointers on how to manage a PI case effectively to achieve the best outcome for the client and to avoid common pitfalls such as acting too late when trying to set up a care package for a seriously injured client. He emphasised the importance of anticipating the client's needs and to try and get in early and set up help early so that assistance is in place when the client is discharged from hospital. He stressed the importance of the lawyer driving the claim rather than taking a reactionary approach which is dictated by the client's injury. SD emphasised the importance of establishing PI trusts at an early stage, to safeguard entitlement to means-tested benefits, and also the importance of considering whether an IFA report should be commissioned if periodical payments looked like being appropriate.

SD outlined the relevant considerations when a client lacks capacity, when to consider putting in place a professional deputy and he underlined that the costs of the deputy's work should be included as part of the claim.

The effective management of such claims relies on constant dialogue between various professionals including the solicitor, the insurers, the experts, the Deputy and the IFA.

Kester Cunningham John are happy for anyone to get in touch if they want to discuss any of these issues with them (01842 752401).

3. EFFECTIVE MANAGEMENT OF A PI CLAIM FROM A LEGAL AND FINANCIAL PERSPECTIVE – THE DEPUTY'S ROLE (AM)

AM provided an overview of the Mental Capacity Act 2007 (MCA) including the principles established by the MCA and in particular the presumption of capacity and the fact that capacity is decision specific. He outlined the process for considering whether a client has capacity and when to consider engaging the services of a deputy. AM stressed that it can take months to get a Deputy appointed so he advised dealing with making arrangements as soon as liability is admitted and concerns have been identified regarding capacity. Discussions should be held with the client's family about the implications of a Deputy being appointed and also to explain the Deputy's role.

AM then outlined why in valuable cases a professional Deputy will almost always be appropriate. He advised that when appointing the Deputy and preparing the application, the order appointing the Deputy should cover all of the appropriate issues and provide the Deputy with the appropriate scope of authority, such as to be able to purchase a house and to deal with investment.

In terms of recovering the cost of Deputyship, AM advised putting as much in place as possible before settlement so that there is less scope for the Defendant to dispute the costs.

AM had experienced some difficulty with the Court of Protection. The C of P was understaffed so he had experienced several time delays and the C of P was providing differing, inconsistent advice.

A hand out containing the slides from AM's talk is available upon request from APIL.

4. POTENTIAL PITFALLS FROM THE PERSPECTIVE OF AN IFA – THE FINANCIAL PERSPECTIVE, LOCAL AUTHORITY FUNDING AND WELFARE BENEFITS (ALISON TAYLOR, FRENKEL TOPPING)

Alison provided a talk outlining the pitfalls of PPOs from an IFA's perspective.

Alison's view is that solicitors deal with the "but fors" but IFAs deal with the "what ifs."

She reminded everyone that indexation of PPOs is now linked to ASHE. She advised that ASHE will now be split between public and private sectors.

Alison stressed that importance of ensuring that any award made under a PPO is guaranteed and retains its purchasing power as this can be eroded over the years as, for example, tax rules change. If the PPO is arranged correctly it can be successful. She referred to one of the first Periodical Payment cases where the claimant was only given a life expectancy of 10 years yet that was 20 years ago and the claimant is still alive with a significant sum of money still available.

Not all heads of loss go into the PPO but damages for care, future loss of earnings and court of protection costs usually would.

Alison outlined how local authorities are taking inconsistent approaches as to whether they will take into account PPOs when deciding whether to fund care. She named two authorities who took completely different approaches, one taking the PPO into account so refusing to fund care and the other did not take it into account and therefore agreed to fund care.

She advised that PPO's established pre-Thompstone need to be checked to see if they provide for the indexation to be varied. If not, the PPOs may not perform well.

Alison can provide a full email handout of her talk upon request. She can be contacted at alison.taylor@frenkeltopping.co.uk.

5. EC UPDATE (VICTORIA HARVEY)

VH provided attendees with an update on the new RTA Process which was due to come into effect on 30 April 2010. The rules are available on the MOJ and APIL websites. VH said that insurers had initially been pressing for the scheme but do not now seem to be as keen about the scheme as they realise that it may cause them cash flow problems. VH encouraged members to try and make the scheme work.

VH also outlined that it was unclear what would happen regarding implementation of the recommendations made as a result of the Jackson Review and that the extent to which the recommendations may be implemented would probably depend on the outcome of the general election. The review was supposed to look at litigation costs as a whole but he seemed to focus on PI litigation. Jackson's focus seems to have been on fixed costs in fast track cases which he felt was a good idea.

VH advised that APIL had walked away from discussions as they felt that the review had not looked at the problems with the process, but were only concerned about the facts and figures. The review did not listen to APIL's concerns that the litigation process itself was flawed as it allowed insurers to string lawyers along and make work which really should not need to be done.

The Jackson Review suggested that ATE premiums and success fees should not be recoverable from the Defendant but that general damages would be increased by 10% to cover this change. APIL viewed this as a white elephant as they said general damages should have been increased anyway.

One attendee asked whether APIL would be producing a formal response to the Jackson Review. VH confirmed that APIL would be but it was not yet clear who would be doing this or when. Any members with comments should feel free to forward them to Abi Jennings at APIL.

APIL are still keen to hear from people with examples of third party capture. Please contact Lisa Wardle at APIL with examples, particularly if you know of clients who have been contacted directly by insurers and harassed to accept low offers but who received help from legal representatives. They would like to use examples, where possible, where clients are happy to be named and for their location to be disclosed.

The Jackson Review was an emotive issue which sparked a lively and relatively heated debate. It was expressed that there was no longer a level playing field for lawyers and that the Government had performed a 100% about turn by withdrawing Legal Aid and the ability to stipulate your own success fee and replacing this with fixed fees.

MICK UPTON (Taylor Vinters, Cambridge)
Associate

14.05.2010