**APIL MEETING 14.09.2017 18.30 to 20.00**

**MINUTES**

**Venue: Trethowans offices**

**Opening**

The meeting was opened by John Hall who welcomed the delegates to the meeting. John introduced himself as the newly appointed co-ordinator and Matthew Claxson as the newly appointed secretary. John also welcomed the speakers to the meeting, Helen Nugent and David Pipkin. An apology was offered on behalf of Gavin Lane who had been called away.

John confirmed the fire safety rules for the evening, and the running order. Matthew would deliver a summary of the EC activities, followed by David giving an update on the current state of the ATE market, and finishing with Helen briefing on Jackson. In terms of the Deputy issues that was to be the subject of a talk by Gavin Lane it was proposed that the Group have a discussion of points at the end.

**Matthew Claxson: APIL Campaign activity at a glance**

Matthew Claxson talked through the update from the EC. (refer to briefing paper).

**David Pipkin: The Current state of play in the ATE funding market. (No handout/power point)**

A lot has been going on but ATE has been quiet. Things have been bubbling along on a slower period. A recent case occurred that encapsulated the issues over the last four years. In Clinical Negligence you can still recover premiums from the defendant so this remains a key area. There are key areas of change.

The case concerns an Allianz policy. A first challenge since Laspo. Mitchell -v- Gillingsmith, 2017. Allianz were successful in resisting a challenge because Master Leonard decided it was reasonable and proportional. Master Leonard was quite robust – recoverability of premiums for Allianz of £10,000. A matrix rate charged to reflect the value of damages in the case but the damages recovered were £200,000. They were recovering £3500 from the client and £10,000 from the defendant. Reasonably high premium with high damages.

Defendant said proportionality test applies to additional liabilities. The main media case BNM is due for appeal in October. Cost Judge, Gordon Sakker, says that proportionality test should also apply to ate premiums. Other cost judges take a different view.

Master Leonard decided that it was reasonable to take out policy early. Defendant was saying claimant was wrong to do so. The indemnity was £100,000. The cover was for one or more reports on breach of causation. The normal process was to obtain those reports early but the policy needed to be in place. This was a block rates policy whereby the solicitor could purchase the policy on-line through delegated authority. Higher the damages higher the premium typically.

There is a matrix as to how the premium is set that would be difficult for Judges to understand as set by actuaries. The pre-laspo case law is irrelevant so you need to consider post. QOCS raised the question of whether you need ATE but disbursements is what is left so you need ATE to indemnify against that risk.

Master Leonard – is this a reasonable premium and does proportionality apply. Decided it was reasonable, and proportionate. David thinks it would have been reasonable had the premium been much lower. David thinks that it has to be very low damages to become a problem – there is a case where there were low damages. In that case a cost judge considered it was disproportionate and applied the proportionality case in BNM but David believes that case stands on its own.

David thinks whatever happens in BNM you should still be able to recover the premium unless the damages is significantly low. Should check that the ATE policy has a premium guarantee whereby it is recoverable from the defendant but any shortfall is not recovered from the client.

Temple have 250 or more premium challenges around the country. Taking ages to get to assessment. ATE is being squeezed as not getting the income once secured. The ATE industry is becoming more nervous about whether they will recover their money at all.

October BNM will be heard. Hoping premiums will not be lumped into proportionality test.

Ressick case run by Thompsons – costs reduced significantly due to small damages.

BNM will provide guidance on profit costs and premiums. Court of Appeal decision. If they don't then ATE industry will need to go back to the model and revise.

David had today attended Westminster Forum Seminar where future of clinical negligence was discussed but uncertainty of progress and next steps. Nothing changed – still adversarial. AVMA were saying don't bring in fixed costs as it will force lawyers out and create chaos. There is still a number of bodies seeking increased limit of fixed costs to £250,000. The key messaging was that it is too expensive. National Audit Office saying can't afford the significant increase of costs – quadrupling of costs in the last four years apparently. However, not seen the benefit of the last cost rule changes. NHS is apparently the second biggest drain on the government budget where it will

rise to a point where it simply cannot be paid. Calls for what they do in Sweden with other types of mediation – redress process for birth cases.

MDU want to take away the right to claim damages at all – they feel emboldened that they can even say that at all. They want to cut all of the costs and cut us out. No suggestion legal aid would be reintroduced. ATE industry will hopefully remain competitive industry.

Other issues that affect ATE generally:-

- QOCS After four years still grey.
- Fundamental dishonesty. Unlikely ATE insurer will pay a claim. Gosling -v- Screwfix 2014: dishonest case, exaggerated symptoms, ordered to pay second defendants costs on an indemnity basis. Rouse -v- Aviva insurance; could have gone to fundamental dishonesty but claimant discontinued before trial – a motor case – defendant took a synicle view – claimant discontinued three days before trial. A view taken defendant seeks finding of fundamental dishonesty. A judge said no need to draw those conclusions. Appeal before a circuit judge that held where claimant discontinued and defendant makes application for fundamental dishonesty then it is entirely up to the Judge on the day.
- Jeffery's -v- Commissioner of police against the Metropolis [2017]. Detained on harassment, The police were found to have been misfeasance and malicious prosecution. Lost claim. They said not personal injury case at all but misfeasance and court agreed. On Appeal it was determined that in principally it has to be a personal injury case to get QOCS protection. Need direct affect – injury and loss.
- Dereney – 2017 Central London Court. Claimant brings personal injury claim, discontinued, and deemed cost order in favour of defendant. QOCS cannot enforce. Defendant applies to set aside notice of discontinuance and declaration of FD. D application dismissed. D ordered to pay C costs of £4,000. J sets costs off against discontinuance. CJ says cannot set off and Claimant receives £4,000.
- Howe -v- MIB.
- Need to ensure ATE protects you against multiple defendants. A dialogue needs to be had.
- Keep up to date with the policy terms to ensure that they remain suitable for your needs.

ATE insurers will start to review their pricing now at 4 years post Laspo. Some premiums may increase whilst others reduce. Higher cost risk. Is the indemnity level adequate. Standard indemnity for Temple is increasing to £150,000 and in some cases £200,000.

Funding guide is provided by Temple. Up to date view on funding. If above £100,000 damages provide funding and charge 10%. Cheapest in the market. Client borrows the money but comes off the law firm balance sheet. All insured. This helps cash flow.

Abbey are providing funding for court fees. This can be done by Temple. Funding is great but there is a cost. Need to work out cost to client or to the firm. If you can still borrow cheaper or client has funds then that is best.

A closer review of cases being underwritten. Same as NHS Resolve are doing with their own panel which is being fed back to hospital trust. We are all learnings something.

**Helen Nugent – Jackson Part 2 : Review of costs (see handout and power point)**

A discussion through the handout and slides.

Focus to reduce costs associates with litigation.

To impose discipline (feels punitive) to control costs and to give parties exposure certainty.

Modifying procedure rules.

Rule 44.35 new proportionality test.

Cost management and cost budgeting.

Rule 44.35. Starting point 44.35. Sums are proportionate if the costs bears some similarity to the sums in issue in the proceedings. What is being claimed – what are the damages – as opposed to how you arrive/character of the litigation. Conduct of the paying party. Consider of reputation and public importance.

The lowest amount reasonably expected to spend to conduct case to secure appropriate outcome. What result do you want to achieve and how do you arrive.

The Fast Track – new intermediate track and then later clinical negligence.

History of the costs given starting from Lord Woolf in 1996 where only advocate fees were fixed in the fast track.

Rule 26.5 Fast Track is usual track for those cases fall within criteria. Did not try to amend LJ Jackson regime.

"The current fixed cost scheme is working satisfactory" Jackson LJ.

In Fast Track cases a court may seek a witness statement in support of care claims within the portal hearings.

Budgeting for Fixed costs impacts on the evidence collated and put forward.

Broadhurst -v- Tan looked at indemnity costs in the Fixed cost regime. Percentage uplift on damages preferred by Jackson LJ.

Existing fixed cost regime should be updated periodically with reference to the service price index. Lump sum costs only.

NIHL considered entirely separately in fixed costs.

Reference and explanation on the proposed fixed cost bands 1 to 4 of the handout.

It is intended that you agree which band you fall within which will be difficult because uncertainty over claimant recovery. Difficulty to reallocate later on. Will need to set out within letter of claim, and defendant should respond with their proposal. If not agreed then Judge will agree at the allocation stage which is likely to be done on paper administratively by the Judge which is likely to be appealed (rule 3.3. on paper to change their mind).

Case Management

Language adopted in the review. All seems to be working very well. LJ Jackson is now looking at incurred cost and estimated costs. You either have a prescriptive system or you have a cost budgeting system.

Fixing of costs looking at Fast Track and Intermediate Track but also looking at Multi Track. The Court may record its comments on the costs which may later be reviewed.

Review says no longer required to develop fixed costs on the scale raised in 2016. Now suggesting in terms of incurred cost might want to consider whether a grid for recoverable costs can be introduced and a pre-action procedure for exceeding those fixed costs within the grid.

Helen believes likely will be looking at how Multi Track cases fit within the process.

The Intermediate Track.

Development of a new track. Value is not alone. It is relevant generally. Case must also be suitable for stream lined process. Experts are envisaged to be two experts oral only at trial per party. Does not cover joint experts or desk top reports.

Asbestos and Part 8 claims excluded.

Envisaged a band system will operate to divide into complexity. Likely fit into a particular band and not exercise discretion.

Access to justice did not appear too frequently but will consider in the allocation to track.

New PD introduced for intermediate track and power for the court to take out.

Streamlined processes.

- Statements of case limited to 10 pages
- Core documents listed (claimant relies upon and necessary for defendant to understand case they are facing)
- Expert reports limited to 20 pages (not include appendix etc)
- Time limits to be set for oral evidence.
- Judgment handed down does not necessarily need personal attendance
- Cut down on court time and make things much swifter
- Proposed disclosure rules but PI is exempt
- No restriction on number of witnesses.
- Bands are subject to complexity of the case
- Proposal to develop of fixed costs for experts
- CPR Part 36 offers – likely a percentage increase 30 to 40%
- Would uncertainty feed into tactics?

Clinical Negligence – to work in conjunction with Dept of Health to develop a process up to £25,000. Can see this cap being increased quite considerably.

21 years from Lord Woolf to arrive at this position!

**John Hall: close**

John Hall brings the matter to a close. Any thoughts on deputy issues? Any issues being encountered in the current cases. No views expressed therefore meeting brought to a close.