

**APIL NORTH WEST  
REGIONAL FORUM**

**Manchester  
2 September 2010** 



---

---

---

---

---

---

---

---



**WELCOME  
Denise Kitchener  
Chief Executive, APIL**



---

---

---

---

---

---

---

---



**PRACTICE DEVELOPMENTS  
- Latest on procedure**

**John McQuater  
Immediate past president, APIL**



---

---

---

---

---

---

---

---

**APIL Manchester Forum**  
**2 September 2010**  
**Latest on Procedure**  
**John McQuater**



---

---

---

---

---

---

---

---

**Part 36**

- **Gibbon -v- Manchester City Council**
- **[2010] EWCA Civ 726**



---

---

---

---

---

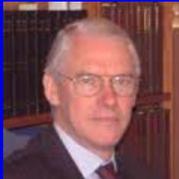
---

---

---

**Introduction**

**“The central question raised on this appeal is whether Part 36 embodies a self-contained code or is subject to the general law of offer and acceptance insofar as it fails expressly to provide otherwise.”**



---

---

---

---

---

---

---

---

### Gibbon

- The claimant suffered injury in a playground for which the defendant admitted liability.
- The claimant made Part 36 offer of £2,500.
- The defendant responded with an offer of £1,500. The claimant rejected that offer and invited an improved offer from the defendant but did not withdraw the claimant's earlier own Part 36 offer.

---

---

---

---

---

---

---

---

### Gibbon

- The defendant then purported to accept the original Part 36 offer of £2,500 made by the claimant.
- The claimant contended that offer was no longer open for acceptance so the defendant applied to the court for a declaration the offer had remained open for acceptance and for judgment in those terms.

---

---

---

---

---

---

---

---

### Gibbon

- The district judge allowed the defendant's application.
- The circuit judge dismissed the claimant's appeal, holding that Part 36 required an offeror to take positive steps to withdraw any existing offer, which otherwise remained open for acceptance.

---

---

---

---

---

---

---

---

### L G Blower Limited

- The claimant carried out construction work for the defendant but a dispute arose as to the quality of that work and hence what should be paid for it.
- The claimant claimed £15,793.06, with a counterclaim from the defendant of £9,160.60.
- In May 2007 the defendant made a Part 36 offer of £8,023.14.

---

---

---

---

---

---

---

---

### L G Blower Limited

- The defendant then made further, and improved, Part 36 offers but in January 2008 all were withdrawn apart from the May 2007 offer of £8,023.14.
- In June 2009 the claimant obtained judgment for £8,375.94 exclusive of interest.

---

---

---

---

---

---

---

---

### L G Blower Limited

- The district judge, who tried the case, ordered the defendant to pay half the claimant's costs.
- On appeal to the circuit judge the defendant contended the judgment obtained by the claimant for £8,375.94 was not "more advantageous" than the May 2007 offer, of £8,023.14 (given that meanwhile the defendant had paid the claimant £649.36).

---

---

---

---

---

---

---

---

### L G Blower Limited

- Dismissing the appeal the circuit judge held the May 2007 offer was superseded by the February 2008 offer, so it was not necessary to compare the May 2007 offer with the judgment. The Claimant had emerged as the winner and the order as to costs made by the district judge was not “seriously wrong”, hence should not be interfered with on appeal.

---

---

---

---

---

---

---

---

### Court of Appeal: Introduction

- Moore-Bick LJ:  
“In my view, Part 36 ... is to be read and understood according to its terms without importing other rules derived from the general law, save where that was clearly intended.”

---

---

---

---

---

---

---

---

### Court of Appeal: Gibbon

- The claimant argued it was relevant the claimant’s offer had been rejected by the defendant and that, subsequently, the claimant had rejected the defendant’s offer in the same sum, making it clear she was unwilling to accept that amount (which amounted to an implied withdrawal of her Part 36 offer).

---

---

---

---

---

---

---

---

### Court of Appeal : Gibbon

- However, that could not be reconciled with the clear language of Part 36 that such an offer might be accepted at any time unless withdrawn by service of notice of withdrawal.

---

---

---

---

---

---

---

---

### Court of Appeal : Gibbon

- Moreover, such an offer can be accepted under Part 36 whether or not the offeree has subsequently made a different offer, a provision contrary to the common law, and the offer will not lapse or become incapable of acceptance on rejection, again as would apply at common law.

---

---

---

---

---

---

---

---

### Court of Appeal : Gibbon

- Part 36.3 (7) requires withdrawal of an offer by written notice. That gives no room for the concept of implied withdrawal, requiring express notice in writing "in terms which bring home to the offeree that the offer has been withdrawn".

---

---

---

---

---

---

---

---

### Court of Appeal : Gibbon

- Although there is no form of notice this, to avoid uncertainty, should include:
  - . An express reference to the date of the offer and its terms.
  - . And some words making it clear that this offer is withdrawn.

---

---

---

---

---

---

---

---

### Court of Appeal : Gibbon

- The letter from the claimant's solicitors rejecting the defendant's offer, in the terms of her own earlier offer, did not amount to notice of withdrawal.

---

---

---

---

---

---

---

---

### Court of Appeal: LJ Blower Ltd

- The ability to make several offers in different terms, open for acceptance at any one time, reflects both the language and purpose of Part 36.
- Thus, there is no reason why a party should not make more than one offer and leave it to the other to decide which, if any, to accept.

---

---

---

---

---

---

---

---

### Court of Appeal: LJ Blower Ltd

- Alternatively, a party may change the terms of the offer which then continues to stand in its varied form as from the date it was originally made.
- Accordingly, the circuit judge, on the first appeal, was wrong to disregard the May 2007 offer.

---

---

---

---

---

---

---

---

### Court of Appeal: LJ Blower Ltd

- However, it was still necessary to determine whether the claimant's judgment was "more advantageous" than the defendant's offer when that offer fell short of the judgment by £661.38.
- Was that judgment "more advantageous", applying the principles set out in Carver -v- BAA plc [2008] EWCA Civ 412?

---

---

---

---

---

---

---

---

### Court of Appeal: LJ Blower Ltd

- In a case where the offer was beaten by a very small amount and there was clear evidence the successful party suffered adverse consequences as a result of pursuing the case to judgment, those factors might be sufficient to outweigh success in purely financial terms.

---

---

---

---

---

---

---

---

### Court of Appeal: LJ Blower Ltd

- However, such cases were likely to be rare and in most cases obtaining judgment for an amount greater than the offer were likely to outweigh all other factors.

---

---

---

---

---

---

---

---

### Court of Appeal: LJ Blower Ltd

- Thus, the district judge was right to work on the basis the judgment was more advantageous to the claimant than the defendant's Part 36 offer.
- The district judge was also right to take account of the claimant's dismissive approach to sensible offers made by the defendant at an earlier stage and hence the order for costs was well within the ambit of his discretion.

---

---

---

---

---

---

---

---

### Question 1

- When is a judgment "more advantageous" than an offer for the purposes of Part 36.14?

---

---

---

---

---

---

---

---

### Question 2

- What if the offer has terms other than payment of money?

---

---

---

---

---

---

---

---

### Question 3

- Does the law of contract apply to Part 36 offers?

---

---

---

---

---

---

---

---

### Question 4

- How far can the law of contract be imported in Part 36?

---

---

---

---

---

---

---

---

### Question 5

- If you make a new offer do you have to withdraw earlier Part 36 offers?

---

---

---

---

---

---

---

---

### Question 6

- What is necessary to withdraw a Part 36 offer?

---

---

---

---

---

---

---

---

### Question 7

- Can a Part 36 offer which has not been withdrawn always be accepted?

---

---

---

---

---

---

---

---

### Question 8

- What are the costs consequences of withdrawing a Part 36 offer?

---

---

---

---

---

---

---

---

### Question 9

- When will the costs benefits under Part 36.14 apply?

---

---

---

---

---

---

---

---

### Question 10

- Does a party have to comply precisely with the terms of Part 36 to make an effective Part 36 offer?

---

---

---

---

---

---

---

---

### Question 11

- Can a Part 36 offer be made inclusive of costs or otherwise excluding the terms provided for in part 36.10?

---

---

---

---

---

---

---

---

### Question 12

- Is it better not to use Part 36 at all?

---

---

---

---

---

---

---

---

### Final Thought

- Moore-Bick LJ:  
"Certainty is as much to be commended in procedural as in substantive law, especially, perhaps, in a procedural code which must be understood and followed by ordinary citizens who wish to conduct their own litigation."
- !

---

---

---

---

---

---

---

---

## Costs: Pre-Action Applications

- Connaughton -v- Imperial College Healthcare NHS Trust
- [2010] EWHC 90173 (Costs)



---

---

---

---

---

---

---

---

## Introduction

This was the determination, in an application for pre-action disclosure, of a costs issue, namely whether the claimant's retainer gave an entitlement to recover costs from the defendant in respect of the application (for which purposes the matter was referred to the Supreme Court Costs Office).

---

---

---

---

---

---

---

---

## Background

- The claimant was injured whilst visiting her husband who has an in-patient at Charing Cross Hospital.
- The claimant slipped on a patch of wet floor and fractured her ankle.

---

---

---

---

---

---

---

---

### Background

- The claimant made an application for pre-action disclosure seeking documents discloseable under the Pre-action Protocol, in particular documents establishing what system of cleaning the defendant employed.
- The order of the district judge recorded that on the material before the court it was appropriate, under Part 48.1(3) CPR, to order, in principle, the defendant to pay the claimant's costs of the application.

---

---

---

---

---

---

---

---

### Background

- However, the judge referred on to the SCCO the issue of the retainer and hence the claimant's entitlement to recover those costs from the defendant.

---

---

---

---

---

---

---

---

### The Issue

- The claimant's solicitors were acting under a conditional fee agreement replicating the Law Society model CFA.

---

---

---

---

---

---

---

---

### The Issue

- The claimant submitted the court should adopt a broad interpretation to the words "your claim", on the basis an application for pre-action disclosure was a fundamental part of the claim as part and parcel of the relevant Protocol.

---

---

---

---

---

---

---

---

### The Issue

- The defendant submitted the CFA specifically provided for a claim for damages whilst the application was not for damages but for disclosure, furthermore obtaining an order for pre-action disclosure did not come within the definition of "win".

---

---

---

---

---

---

---

---

### Judgment

- It was necessary to construe the contract, in the form of the CFA, entered into between the claimant and her solicitors.
- A purposive approach to interpreting the CFA, in accordance with the overriding objective.

---

---

---

---

---

---

---

---

### Judgment

- The agreement provided the solicitors were entitled to costs if, on the way to winning or losing, costs were awarded. Hence a “win” was not required to recover costs
- It did not matter the claimant was now proceeding against a different party, namely the defendant’s cleaning contractor, as the claimant was still demanding, at the time, damages for personal injuries from the defendant.

---

---

---

---

---

---

---

---

### Judgment

- A reasonable interpretation of the scope of the retainer was that non-compliance with the Pre-action Protocol, which was part of the pre-litigation process and necessitated an application to the court, would be covered by the terms of the CFA.

---

---

---

---

---

---

---

---

### Practice Point: 1

- This decision confirms the Law Society model CFA allows recovery of costs in pre-action applications.

---

---

---

---

---

---

---

---

### Practice Point: 2

- The decision, in principle, by the district judge reflects what should be the normal approach to costs on a pre-action application where the defendant has failed to comply with the protocol: that the defendant should pay the costs given the terms of Part 48.1(3) CPR.

---

---

---

---

---

---

---

---

### Practice Point: 2

- The situation may be different where there is no protocol, in such circumstances the starting point is that the party making the application should bear the costs, but that ignores the protocol and the specific terms of Part 48.
- Cases sometimes relied on by defendants such as SES Contracting Limited -v- UK Coal Plc [2007] EWCA Civ 791 therefore need to be treated with caution.

---

---

---

---

---

---

---

---

### Practice Point: 3

- The case is also a reminder that it is not necessarily a problem if the CFA refers to the claim being directed against a party who is not eventually sued.
- The decision followed the approach, in this respect, taken in Brierley -v- Prescott (SCCO 0504178 31 March 2006).

---

---

---

---

---

---

---

---



**PRACTICE DEVELOPMENTS**  
**- Latest on damages**

Edwina Rawson  
Coordinator, APIL damages SIG

---

---

---

---

---

---

---

---



**Quantum Update**

Edwina Rawson, Partner  
August 2010

---

---

---

---

---

---

---

---



**INTERIM PAYMENTS**

---

---

---

---

---

---

---

---

### INTERIM PAYMENTS

- Cobham v Benjamin Eeles, (March 2009)

Facts

- Young boy, brain damaged in RTA when baby
- Had interim payment of £450,000
- Wanted to buy property
- Sought further interim payment of £1.2m

---

---

---

---

---

---

---

---



---

---

---

---

---

---

---

---

### INTERIM PAYMENTS

- Cobham v Benjamin Eeles

First Instance



- Yes, £1.2m
- Valued case at £3.5m if won at trial (nothing for PPO)
- £1.2m would not exceed a reasonable proportion of final award

---

---

---

---

---

---

---

---

Field Fisher Waterhouse

### INTERIM PAYMENTS

- Cobham v Benjamin Eeles, (March 2009) C/A Court of Appeal



---

---

---

---

---

---

---

---

Field Fisher Waterhouse

### INTERIM PAYMENTS

- Cobham v Benjamin Eeles, (March 2009) C/A
- **ASK**

1. Is it likely that trial judge will want to make PPO? Here, yes.
2. What would the trial judge award as lump sum? (or capitalised value) – separate out likely lump sum from periodicals

- Lump sum: General damages, past losses, interest, accommodation
- Possibly others from future losses if confidently predict that trial judge would award higher than above as lump sum. And, a real need.
- Tension

---

---

---

---

---

---

---

---

Field Fisher Waterhouse

### INTERIM PAYMENTS

- Cobham v Benjamin Eeles, (March 2009) C/A
- Value of lump sum = £590,000
- Already had £450,000
- Reasonable house anyway

---

---

---

---

---

---

---

---

INTERIM PAYMENTS

*Life after Eeles*

---

---

---

---

---

---

---

---

INTERIM PAYMENTS

- Preston v. City Electrical Factors (November 2009)
- FP v Taunton & Somerset NHS Trust (2009)
- Johnson v Serena Compton-Cooke (2009)
- Patel v. Patel (September 2009)
- Kirby v. Ashford & St. Peter's Hospital (2009)
- Harris v. Roy (February 2010)
- Jessica Brown v. Liam Emery (March 2010)
- Muhammed Ali v. Frimley Park (2010)
- Best v Smyth (June 2010)

---

---

---

---

---

---

---

---

INTERIM PAYMENTS

1. Preston v City Electrical Factors/Stockham (November 2009)



- £100,000 requested for interim payment (already had £100,000)
- Is trial judge likely to want to make PPO? No, as amount would be low and C didn't want one

---

---

---

---

---

---

---

---

### INTERIM PAYMENTS – POST EELES

#### 2. Brown v Emery (March 2010)

- Sought £800,000 for property
- Is the trial judge likely to want to make a PPO? Yes.
- Accommodation situation unclear, so not taken into account
- Other future losses? Is it likely, with high confidence, that trial judge would include other payments in lump sum? Yes
- Future loss of earnings, only age 15
- And, is there a real need? Yes, but only £250,000

---

---

---

---

---

---

---

---

### Interim payments

- Best v Smyth (June 2010)
- RTA, rented bungalow up for sale
- C sought £800,000
- Contributory negligence argued at 50%
- Judge said 30% and with interim payments
- £650,000 under 4 heads of Eeles
- Argued to draw down from other heads
- Refused – didn't need to make adaptations

---

---

---

---

---

---

---

---

### Enhanced interest

- Andrews v Aylott (March 2010)
- Liability trial, C won 75% with damages to be assessed
- Court orders interest at 5% above base rate on 33% of damages, to reflect def's failure to beat a P36 offer
- Later, settles for lump sum and ppo
- Interest applied only to lump sum

---

---

---

---

---

---

---

---

# FATAL ACCIDENTS

---

---

---

---

---

---

---

---

## FATAL ACCIDENTS ACT 1976

- Watson v Cakebread Robey Ltd (2009)
- Mesothelioma at work
- Claim during life
- Funeral expenses claimed. C said whilst alive he should be able to step into shoes of estate



- LR(MP)A 1934 made it clear claim arose on death
- Otherwise, any C with reduced life expectancy could claim

---

---

---

---

---

---

---

---

# CARE

---

---

---

---

---

---

---

---

### CARE

- D's noisy about care – private vs state



#### Review

- Sowden v Lodge (2004), C/A  
Recover only to extent necessary to 'top up' state care by private care
- Crofton v NHSLA (2007), C/A  
State funding for care should be taken into account.  
Discounted **multiplier**

---

---

---

---

---

---

---

---

### CARE

- Chantelle Peters (March 2009), C/A
- Congenital rubella syndrome
- Care home costs shared between LA and LHA, costing about £132,000 per annum

---

---

---

---

---

---

---

---

### CARE

- Chantelle Peters (March 2009), C/A

**BIG QUESTION:** Was C obliged to make use of state care or could she claim full cost of care privately?




---

---

---

---

---

---

---

---

### CARE

- Chantelle Peters (March 2009), C/A

Having looked at statutory framework and principles of tort ...

“There was no reason in policy or principle why a C who wished to opt for self-funding and damages in preference to reliance on the statutory obligations of a public authority should not be entitled to do so as a matter of right, provided there was no double recovery.”

---

---

---

---

---

---

---

---

### CARE

- Chantelle Peters (March 2009), C/A
- Not a question of mitigation but who bears the cost
- £4m for her residential care needs
- But, is the fight over?

---

---

---

---

---

---

---

---

### CARE

- Sklair v Haycock (December 2009)
- C had Asperger's Syndrome, pre-existing
- Cared for by family
- RTA
- Mobility impaired and big psychological deterioration
- Claims now 24 hour care
- D argues

---

---

---

---

---

---

---

---

### CARE

- 1) C only claim difference in care
  - Judge disagreed. Where care is given by love and affection before the accident and, but for the accident, this would have continued, no reason why has to put a value on it and give credit for it.
- 2) C should get care from the state
  - Judge disagreed. Applied Peters

---

---

---

---

---

---

---

---

### Care

- (1) Drake (2) Starkey (executors) v Wheeler (Aug 2010)
- Novel claim for hospice costs
- Donation
- £10,000, running costs over what given by PCT
- Allowed, no floodgates because only if "lingering and painful dying period"
- Consistent with principles because if had paid for, could have claimed

---

---

---

---

---

---

---

---

### Care

- Warner v (a firm) (July 2010)
- Professional negligence
- Settled at an undervalue of about £1.2 m
- Failed to instruct a case manager in accordance with care expert
- Failed to obtain care statements and up to date assessment

---

---

---

---

---

---

---

---

# EARNINGS

---

---

---

---

---

---

---

---

## EARNINGS

- Palmer v Kitley (November 2008)
  - Blamire awards
- Where loss of earnings/pension subject to imponderables, court would approach case by "impression" rather than "precise calculation"



---

---

---

---

---

---

---

---

## EARNINGS

- Collett v Smith (July 2009), C/A
- Budding footballer for championship level
- Strong evidence
- Reduced by 15%, reasonable



---

---

---

---

---

---

---

---

### EARNINGS

- Hion v Morrison Supermarket (May 2010)
- Leg injury, would improve over time
- 'Drifted on' doing some casual work and benefits
- No mathematical basis
- £25,000
- To reflect the fact that a person with a leg such as his was disadvantaged in getting work



---

---

---

---

---

---

---

---

### EARNINGS

- Cedric Abbs v Somerfield (April 2010)
- Self-employed plumber, worked alone
- Age 56
- Hip injury
- Orthopaedic experts both said fine for desk work
- Neuropsychological expert some underperformance in reading/writing
- Joint Employment expert said should learn basic computer skills



---

---

---

---

---

---

---

---

### EARNINGS

- BUT Cedric says ...

---

---

---

---

---

---

---

---

Field Fisher Waterhouse

### EARNINGS

- For last 5 years, I have not looked for work
- I do not intend to look for work
- If I did look for work, I wouldn't get a job anyway
- Never used a computer and didn't want to
- Only ever worked on my own
- Have "an aversion to paperwork, reading, routine or repetitive work and to working with people"

---

---

---

---

---

---

---

---

Field Fisher Waterhouse

### EARNINGS



**MITIGATION**

---

---

---

---

---

---

---

---

Field Fisher Waterhouse

### EARNINGS

- Judge says .....

---

---

---

---

---

---

---

---

### EARNINGS

- Cedric was not unreasonable and had not failed to mitigate
- Ingrained attitude, age, lack of qualification, lack of aptitude in reading, studying, made him incapable of finding work

---

---

---

---

---

---

---

---

### Earnings

- Clarke v Maltby (May 2010)
- C solicitor in banking
- RTA, recovers from physical
- Cognitive impairment
- Approach is to consider a number of scenarios (i.e. equity in local firm, medium city firm, large city firm) and to give each scenario a % chance that would earn over a basic level

---

---

---

---

---

---

---

---

### OGDEN TABLES

---

---

---

---

---

---

---

---

### OGDEN TABLES

- Tinkering at the edges of Ogden 6
- Peters, according to Tables/guidance discount by 32 per cent. Increased to 40 per cent pre-trial and 50 per cent post-trial to reflect C's family background culture of relying on benefits.

---

---

---

---

---

---

---

---

### HOLIDAYS

- Divergence in approach
- Objective rather than subjective
- Usually modest
- Pankhurst v (1) White (2) MIB (2009)  
Test is one of reasonableness  
Rejected multiplier/multiplicand  
Lump sum £160,000  
Rejected C's evidence



---

---

---

---

---

---

---

---

### DISCOUNT RATE

- Rumour had it.....

---

---

---

---

---

---

---

---

### CASES, CASES, CASES

- Laura Davies v Direct Line Insurance 2010
- RTA
- 35 year old woman. Whiplash and bruising to her knee and thigh. Bruising resolved after one to two weeks and the neck injury was expected to resolve fully by 9.5 months after the accident.
- £2,876, which comprised £2,250 for pain and suffering, and remainder for treatment and miscellaneous costs.

---

---

---

---

---

---

---

---

### CASES, CASES, CASES

- Lisa Bennett v Sophie Wentworth 2010
- RTA
- C 42 year old woman
- Multiple injuries. Had below-the-knee amputation and was left significantly disabled, with limited mobility, permanent phantom limb pain and psychiatric problems (including suicide attempts).
- Required combination of wheelchair and prosthesis.
- Just over £1m (less 20% for contrib)
- Breakdown included £120,000 for PS&LA, future loss of earnings £320,000, care/treatment/transport £147,000, and £175,000 for prosthetics

---

---

---

---

---

---

---

---

### CASES, CASES, CASES

- G v The Royal Bournemouth and Christchurch Hospitals NHS Foundation Trust 2010
- Med neg case
- 27 year old man
- Failure by hospital to diagnose that he was suffering from appendicitis, which resulted in a ruptured appendix, unnecessary pain and suffering, and prolonged recovery.
- £35,000
- Estimated that PS&LA was £34,000 with specials of £1,000.

---

---

---

---

---

---

---

---

### CASES, CASES, CASES

- T v London Underground 2010
- 57 year old woman
- Damage to her upper right central incisor sustained when her head became trapped in the carriage doors when alighting from a London Underground train. Suffered fractured root, which was removed and subsequently replaced with a dental implant and crown.
- Door malfunction. Liability admitted.
- £6,500, comprising £2,000 PS&LA, and dental treatment.

---

---

---

---

---

---

---

---

### CASES, CASES, CASES

- E v The Estate of Witold Kmiot 2010
- 37 year old man. Had hernia operation which left him with sexual problems and numb genitalia. Alleged negligence was that the D failed to refer C to a surgeon who could have carried out the procedure by laparoscopy, and that the surgeon had failed to obtain an appropriate consent. Numbness was likely to resolve within 1 year.
- C was a model and had reduced earnings as he was not able to do body shots.
- £15,000

---

---

---

---

---

---

---

---

### Reform

- Proposals to reform the law for wrongful death were published for consultation – July 2010 – in Scotland (reconsidering parts of Scottish Law Commission paper Damage for Wrongful Death, published in September 2008). Apil has welcomed this and responded.
- Pleural plaques former claimants payment scheme announced on 2 August 2010 – those who had already begun litigation one-off payment of £5,000

---

---

---

---

---

---

---

---

Field Fisher Waterhouse

In the news ...

- 'Drunk sues the lorry driver who ran over him' (Daily Telegraph, 6 August 2010)
- 'E-teacher gets £640k payout after traffic light car smash that left her without two front teeth' (Daily Mail, 12 June 2010)
- '£82m bill for residents tripped up by pavements' (Daily Mail, 1 July 2010)
- 'Three-quarters of accident claims are made by women' (Daily Mail, 30 June 2010)

---

---

---

---

---

---

---

---

Field Fisher Waterhouse

**THANK YOU!!**

---

---

---

---

---

---

---

---

apil

**SPOTLIGHT ON A SPECIALISM**  
**- Brain injury**

**Matthew Stockwell, APIL EC**

---

---

---

---

---

---

---

---



---

---

---

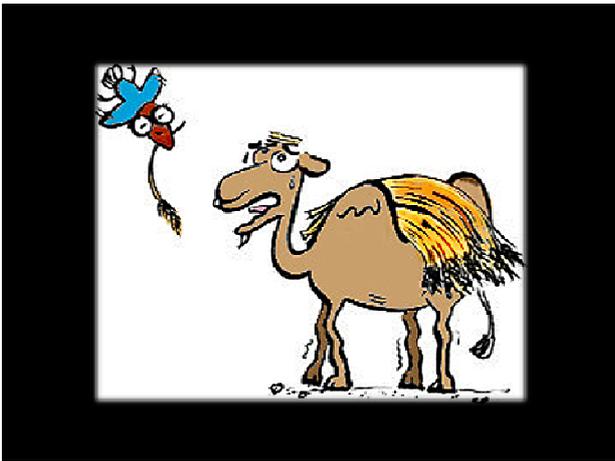
---

---

---

---

---



---

---

---

---

---

---

---

---



---

---

---

---

---

---

---

---



---

---

---

---

---

---

---

---



---

---

---

---

---

---

---

---



---

---

---

---

---

---

---

---



---

---

---

---

---

---

---

---



---

---

---

---

---

---

---

---



---

---

---

---

---

---

---

---



## **COSTS AND FUNDING - the latest**

**Brett Dixon  
Secretary, costs and funding SIG**

---

---

---

---

---

---

---

---

## **Costs and Funding Update**

North West Regional Forum  
Manchester 2 September 2010  
Brett Dixon © 2010

---

---

---

---

---

---

---

---

## **The RTA Claims Process**

- Economics
  - Can we afford to stay the same?
  - What will we have to change?
  - The cost of change
- Pragmatism
  - 75% of personal injury work potentially covered
  - Bricks and mortar
- The injured person



---

---

---

---

---

---

---

---

## Economics

- What is caught?
  - Up to £10,000
  - General Damages, Special Damages
  - Not hire or vehicle damage
  - RTA post 6/4/10



---

---

---

---

---

---

---

---

## Economics

- Exclusions
  - MIB untraced
  - Breach of duty by non road user
  - Defendant in a non UK vehicle
  - Bankrupt Claimant
  - A deceased or protected party



---

---

---

---

---

---

---

---

## Economics

- Additional Liabilities
  - CFA
    - 12.5% pre-quantum hearing
    - 100% on costs at paper or oral hearing
  - ATE Insurance
    - Still allowable
    - But how relevant?



---

---

---

---

---

---

---

---

## Economics

- 3 costs possibilities
  - Fixed costs under the process
  - Predictable costs where the claim settles pre-issue but has dropped out of the process (e.g. Liability at issue)
  - Costs on a standard basis where the claim has fallen out of the process and been issued




---

---

---

---

---

---

---

---

## Economics

- Costs under the process
  - Stage 1
    - No CFA uplift
    - £400 if liability is admitted or a seatbelt issue only
  - Stage 2
    - £800 exclusive of VAT and success fee
  - Stage 3
    - If you succeed on quantum
      - £250 for a paper hearing less VAT and success fee
      - £500 for an oral hearing less VAT and success fee

---

---

---

---

---

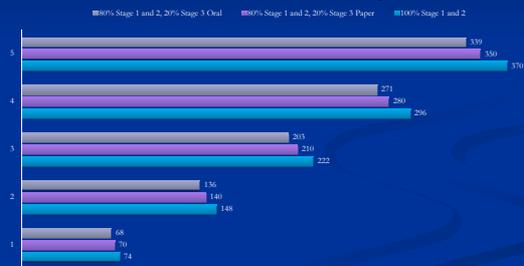
---

---

---

## Economics

Settled Cases Per Year vs. Fee Target




---

---

---

---

---

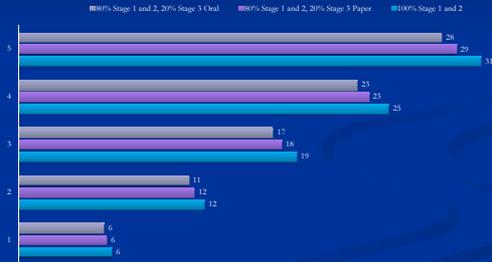
---

---

---

## Economics

Settled Cases Per Month vs. Fee Target



---

---

---

---

---

---

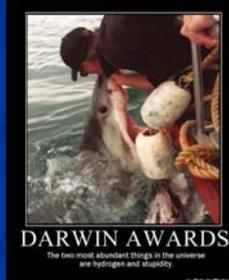
---

---

## Economics

### Conclusions

- If we work within the process there is no great wheeze to make more money
- The only way to maintain profitability is to adapt the way we work
- Economies of scale become relevant as it involves investment in systems and IT



---

---

---

---

---

---

---

---

## Economics

### Options

- “Dumbing down” of fee earners
- Reduction in service levels
- Focus on systems and IT – Quicker and Slicker
- Increase files
- Shorten case life and reduce overheads per case
- Pay the referrer less?

---

---

---

---

---

---

---

---

## Economics



- Food for thought
  - Diversification sounds good, but not as an industry as 75% of pi cases are in this scheme
  - We are in triage mode for us and the claimant:
    - If we abandon this area we lose business and the claimant eventually is left to the insurer or opportunists
    - If we stay we likely make less money and the claimant gets a lower level of service albeit an adequate one

---

---

---

---

---

---

---

---

## Economics

- Cut overheads
  - Current costs per case:
    - £250 purchase
    - £50 per month to run
    - Average life of case 9 months
    - £250 + £450 = £700
  - Profit under new system is :
    - £1650 at best (£2350-£700)
    - £650 at worst (£1350-£700)

---

---

---

---

---

---

---

---

## Economics

- Cut overheads
  - Purchase costs
    - £50 reduction is £50 profit
      - Not a huge change
      - Risks
  - Cost of running per month
    - £25 reduction is £225 profit
  - Average life of case
    - 9 months to 4 ½ months could be £225 profit




---

---

---

---

---

---

---

---

## Wishful Thinking



Disclaimer: No Judges were hurt in the creation of this picture

---

---

---

---

---

---

---

---

## Quick Costs Update

- Pre-Action Disclosure Hearings
- Indemnity costs on late acceptance of Part 36 offers
- Part 36 after Gibbon v MCC

---

---

---

---

---

---

---

---

## Connaughton v Imperial College [2010] EWHC 90173 (Costs)

- Where a Claimant seeks costs on a pre action disclosure hearing where the funding is a CFA the Defendant's routinely run indemnity issues
- This is based on an interpretation of certain clauses in the Law Society Model CFA:
  - Does the CFA cover PAD hearings?
  - Can you recover costs as you have not yet "won"?

---

---

---

---

---

---

---

---

### Connaughton v Imperial College [2010] EWHC 90173 (Costs)

- The words “your claim” are to be given a broad interpretation which would include a PAD hearing
- The PAD was a natural consequence of the Defendant’s failure to comply with the protocol
- It did not matter that you had not yet “won”
  - “If on the way to winning or losing you are awarded any costs.....we are entitled to payment of those costs”

---

---

---

---

---

---

---

---

### Connaughton v Imperial College [2010] EWHC 90173 (Costs)

- Roche v Newbury Homes [2009] EW Misc 3 (EWCC) expressly rejected
- A horrible ill considered decision by a DDJ




---

---

---

---

---

---

---

---

### Fitzpatrick Contractors v Tyco (No 3) [2009] EWHC 274 (TCC)

- If a Part 36 offer is accepted out of time by a Defendant do you get indemnity costs?
  - No. The usual basis is the standard basis and CPR 36.10(4) and (5) are silent as to the basis
- What can you get?
  - By agreement – whatever you can get them to agree to
  - By order – Conduct under CPR 44.3 is the only route to indemnity costs in the circumstances

---

---

---

---

---

---

---

---

### Fitzpatrick Contractors v Tyco (No 3) [2009] EWHC 274 (TCC)

- What would be relevant conduct?
  - A Defendant is entitled under CPR 36 to accept the offer out of time so that is not something they should be criticised for
  - Who really won? Shades of Carver v BAA
  - Is there a reason that the claim could not be evaluated earlier by the Defendant?
  - This case was high value and complex
- The court ordered interest on costs already paid by the Claimant to their solicitors

---

---

---

---

---

---

---

---

### Gibbon v Manchester City Council [2010] EWCA Civ 726

- Forget contracts
- Part 36 is a self contained code
- CPR 36.9(2)
  - An offer may be accepted at any time unless the offeror has withdrawn the offer by serving notice of withdrawal on the offeree



---

---

---

---

---

---

---

---

### Gibbon v Manchester City Council [2010] EWCA Civ 726

- Carver v BAA corrected?
  - A golden opportunity to provide clarity was missed
  - The decision in Carver is binding on us, but it should be recognised that what may be more important than the factors to be taken in to account is the weight that is to be attached to them and that remains a matter for the judge in each case - Moore-Bick LJ
  - Success in financial terms will be the governing consideration – Carnworth LJ

---

---

---

---

---

---

---

---

## Final Thoughts

- We have to adapt to succeed
- Things will change and they have changed before
- We survived legal aid being removed for the majority of personal injury work

---

---

---

---

---

---

---

---



## REGIONAL NEWS - practice issues

Bridget Collier  
Coordinator, north west REG

---

---

---

---

---

---

---

---



## KEEPING YOU IN THE KNOW

Muiris Lyons  
President, APIL

---

---

---

---

---

---

---

---

**KEEPING YOU IN THE KNOW**  
**APIL North West Forum**  
**Manchester 2 September 2010**

Muiris Lyons  
President, APIL

stewartslaw

---

---

---

---

---

---

---

---



stewartslaw

---

---

---

---

---

---

---

---

**BACK TO SCHOOL**



stewartslaw

---

---

---

---

---

---

---

---

Overview

- Jackson's Final Report
- Lord Young's review
- Other EC matters
  - RTA Claims Process
  - EL Compulsory Insurance
  - Damages/Draft Civil Law Reform Bill
  - Third Party Capture
  - Clinical Negligence
  - Protocols



stewartlaw

---

---

---

---

---

---

---

---

Jackson

"In some areas of civil litigation costs are disproportionate and impede access to justice. I therefore propose a coherent package of interlocking reforms, designed to control costs and promote access to justice."



stewartlaw

---

---

---

---

---

---

---

---

Initial Response



stewartlaw

---

---

---

---

---

---

---

---

Headlines

Three core themes

- Access to justice for defendants as well as claimants
- Giving claimants a stake in the justice system and an interest in costs
- Shifting liability for the funding of claims from unsuccessful defendants to successful claimants
- End of “No win – No Fee – No cost”



stewartslaw

---

---

---

---

---

---

---

---

Recommendations (1)

- Abolition of recoverability of additional liabilities (success fees and ATE premiums) from defendants
- Return to pre-April 2000 CFA regime with client paying success fee capped at 25% of damages (excluding future losses)
- Increase in general damages of 10%
- Qualified one way costs shifting in PI
- Abrogation of the indemnity principle

stewartslaw

---

---

---

---

---

---

---

---

Recommendations (2)

- Ban referral fees
- Introduce “Ontario” model regulated contingency fees
- Enhanced Part 36 provisions
- No change in small claims limit
- Introduction of fixed costs in all fast track cases
- Abolition of ACCC
- Establishment of a Costs Council

stewartslaw

---

---

---

---

---

---

---

---

Recommendations (3)

- Neutrally calibrated software for general damages up to £10,000
- Costs budgeting (pre and post issue)
- Revisions to Pre-Action protocols
- Review of hourly rates

stewartslaw

---

---

---

---

---

---

---

---

Implementation



stewartslaw

---

---

---

---

---

---

---

---

Implementation

- Initial responses
  - Senior Judiciary/MR – warm welcome
  - CJC – enthusiastic support but...
  - MOJ ?
- Role of the MR
- Role of Jackson LJ
- Requirements
  - Economic assessment
  - Primary legislation
  - Statutory instruments
  - CPR revisions
  - The "spirit" of the Jackson reforms
- Political dimension
  - Change of Government
  - Priorities

stewartslaw

---

---

---

---

---

---

---

---

Implementation

- Referral fees
  - LSB response
  - View of OFT
- Costs budgeting
  - CN pilot
- CN Protocol
  - CPR 53<sup>rd</sup> update
  - Revisions 01.10.10
  - 3 months to 4 months
  - Copy Letter of Claim to NHSLA

stewartslaw

---

---

---

---

---

---

---

---

Implementation

- Costs of implementation
- Initial cuts this year
- Longer term 23%

**MoJ to cut £325m**



stewartslaw

---

---

---

---

---

---

---

---

Implementation

- MoJ Consultation
  - Djanogly - "CFAs have played a role in giving access to justice to a range of people. However, high costs under the existing arrangements have now become a serious concern, particularly in clinical negligence cases against the NHS Litigation Authority and in defamation proceedings."
  - Consultation will not deal with fixed costs in the fast track or referral fees
  - Judicial steering group
  - September 15 but now Oct/Nov?
  - MoJ continuing to consult re data and form
  - Separate review of legal aid (£2bn)

stewartslaw

---

---

---

---

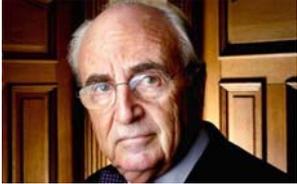
---

---

---

---

BUT...



stewartslaw

---

---

---

---

---

---

---

---

Review of Health and Safety

- Lord Young
- Appointed by David Cameron as Special Adviser
- Official Title: Health and Safety and the Compensation Culture
- Cabinet office, 4 staff
- Report due September 8/14?
  - Health and safety
  - Compensation culture
  - Referral fees
  - Advertising
  - CMCs
  - Jackson
  - NHS claims

stewartslaw

---

---

---

---

---

---

---

---

Lord Young

- Announcement with David Cameron
- Plenty of publicity
- His views and recommendations will undoubtedly be taken into account in MoJ consultation
- Other views – Adam Smith Institute

stewartslaw

---

---

---

---

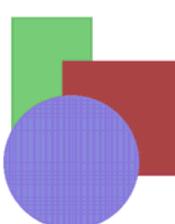
---

---

---

---

Overlap



stewartslaw

---

---

---

---

---

---

---

---

APIL Response

- Detailed response – 3 prong
  - Modelling
  - Economic impact assessment
  - Alternatives
- Articles and speeches
- Lobbying

stewartslaw

---

---

---

---

---

---

---

---

Other EC Issues

- RTA Claims Process
- EL Compulsory Insurance
- Damages/Draft Civil Law Reform Bill
- Third Party Capture
- Clinical Negligence
- Protocols

stewartslaw

---

---

---

---

---

---

---

---



---

---

---

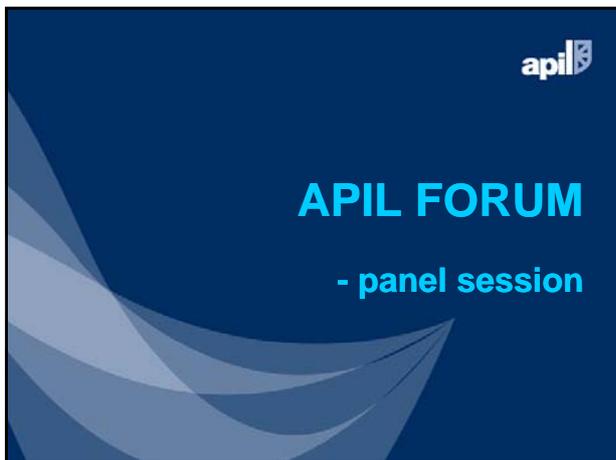
---

---

---

---

---



---

---

---

---

---

---

---

---



---

---

---

---

---

---

---

---



## Fighting for rights of injured people

Hard focussed campaigning with key themes running through all that we do

- Freedom of choice
- Access to justice for all
- Protecting the rights of injured people
- Maintaining the right to independent legal advice

---

---

---

---

---

---

---

---



## APIL key campaigns – England

- Jackson
- Young review
- Clinical negligence – setting the record straight and practical dialogue
- ELIB
- Damages
- Freedom of choice

---

---

---

---

---

---

---

---



## Public information campaign

- Stronger campaigning personality
- Amplifying our messages
- Creating a trust mark brand for our accreditation scheme

---

---

---

---

---

---

---

---



## APIL's political lobbying

- Targeting key players
- Building alliances wherever possible
- Gaining ammunition for counter-attacks against Government and insurers
- Practical dialogue with specific objectives
- Radical and joined-up thinking
- Working with members – different hooks, case studies, local lobbying

---

---

---

---

---

---

---

---



## BUFFET AND DRINKS

---

---

---

---

---

---

---

---