

CLINICAL NEGLIGENCE SIG MEETING

2 OCTOBER 2019

APIL CAMPAIGN ACTIVITY UPDATE

1. APIL STRATEGY

The EC is working with our CEO Mike Benner to develop a strategy for APIL's future development. Mike is taking the opportunity to lead a root and branch examination of the organisation, its objectives, what it does and how it operates. The strategy will be presented to members at the AGM next year, and disseminated more widely among the membership for those who can't attend.

2. CIVIL LIABILITY ACT

Introduces (by way of recap):

- rigid tariffs for whiplash damages.
- Government's own definition of whiplash
- uplift on tariffs in exceptional circumstances
- ban on pre-medical offers
- changes to the way the discount rate is calculated to assume that injured people are not considered risk averse.
- independently, but linked, is the increase of the small claims limit to £5,000 for all RTAs and to £2,000 for EL/PL claims. (NB: this move does not require primary legislation.)

Update

- Discount rate set at minus 0.25% on 15 July. Came into effect 5 August. A much lower rate than expected. Insurers very angry. APIL gave it a cautious welcome:

"We welcome the Lord Chancellor's decision to set the discount rate at minus 0.25 per cent, after uncertainty about the impact of the Government's new approach of setting the rate on the basis that injured people should be considered 'low risk'

investors. The Government has faced sustained pressure from the insurance industry to set a rate which would not be appropriate for injured people, who should not be forced to take any risk with their investments. We must remain vigilant that this new rate does provide them with the fair compensation they need and deserve.”

- Discount rate in Scotland announced on 30 September as minus 0.75%. One of the key differences between the jurisdictions is that the calculation for the rate in Scotland is set out in the legislation and is calculate by the Government Actuary, not by a minister.
- Whiplash tariffs and small claims reform still due to be introduced in April 2020, although many commentators cannot see how a workable system could be ready in time.
- The MoJ has announced that children and protected parties will be exempt from the small claims limit increase to £5,000 for RTAs. BUT they are still not exempt from the whiplash tariffs, and there is no suggestion that this is likely.
- Alternative Dispute Resolution (ADR) is not part of the new portal process, and neither is rehabilitation – is this, then the ‘minimum viable product’?
- The MoJ is working with the Civil Procedure Rules Committee to sort out the rules in time for implementation in 2020. They are expected to be laid in January.
- What are the chances of an April 2020 implementation? Lord Keen has repeatedly said that he wants it to be ‘done right’. The MIB is also saying that if the system can’t be made to work properly, it will advise the MoJ. Are they getting their excuses in early? We will have to see.

What more can be done at this stage?

APIL has been involved in stakeholder group meetings set up by the Ministry of Justice – our aim has been to try to make sure the system will work, but we are concerned that there have been no meetings in recent months, while development of the new system has continued. We have been drawing attention to this publicly.

We're very concerned that our members who will continue to do this work won't have enough time to develop their business models if reform is still to be implemented next April.

We're also concerned about the way the system is to be tested, and the impact the reforms will have on the charity sector (the MoJ predicts that there will be 150,000 unrepresented litigants in the system).

We have raised many of these concerns with the Bob Neill, chairman of the Justice Select Committee, who has taken them up directly with Lord Keen, who is responsible for steering the reforms through. As more information comes to light, we will inevitably have more issues to raise with the committee.

The whiplash tariffs will be debated in committee at some point, and we will make further representations when that happens. It is almost unheard of for legislation to be overturned in these committees because the procedure is set up in the government's favour. But we will try.

3. FIXED COSTS CONSULTATION

The consultation on fixed costs closed in June and the Government's response is expected by the end of the year.

In APIL's response to the consultation:

- We warned against simply fixing costs above £25,000 in an extended fast track. We support the need to control the costs of litigation, but believe the best way to do this above the fast track level is through costs management and budgeting.
- Argued for a dedicated "intermediate" track, as proposed by Lord Justice Jackson. Cases should not be allocated to the track based on value – allocation should be based on whether the case meets a set of specific criteria. There must also be clear exclusions for clinical negligence, child abuse, product liability, employers' liability disease and international personal injury claims, due to their complexity. Flexibility in the approach to allocation is also a necessity.

- We strongly disagreed with the MoJ's proposal that solicitors should receive 10 per cent of their fee for the principal claimant, for every additional claimant where the claims arise from the same facts. The same facts do not mean that every claimant has suffered the same losses and an arbitrary additional 10 per cent does not reflect the work that needs to be carried out to ensure that the claimant solicitor fulfils their professional obligations towards each client.
- We said that indemnity costs are an important tool for controlling defendant behaviour where claimants are subject to fixed costs, and should be awarded where the defendant is late in accepting a part 36 offer.

4. BEREAVEMENT DAMAGES

APIL has long campaigned for the Scottish system of bereavement damages to be adopted in the rest of the UK. So when the MoJ published a draft remedial order to allow couples who have cohabited for more than two years to be awarded bereavement damages, we took advantage of the opportunity.

We submitted evidence calling for wider reform to both the MoJ and the Joint Committee on Human Rights which is scrutinising this issue. The committee has taken up the point and recommended wide-spread reform.

The joint committee said “the current list of eligible claimants is unprincipled, discriminates against other family members in analogous positions to existing eligible claimants, and stigmatises children”. It said the law on bereavement damages “as currently drafted risks further legal challenge”. The joint committee recommended the Government “undertake a consultation with a view to reforming” bereavement damages.

In its evidence, APIL also expressed its disappointment that it had taken the Government 20 years to extend eligibility to cohabiting couples, which had been recommended by the Law Commission in 1999. The Government must now respond to the report, but it is not required to accept the recommendations of the joint committee.

To support our work on this issue, a new report is being drafted to highlight the differences between the laws on bereavement damages across the United Kingdom. It will also include polling on public attitudes by YouGov.

5. REGISTER OF MEDIATORS

A register of specialist personal injury and clinical negligence mediators is now available, exclusively, to APIL, FOIL and MASS members.

The APIL FOIL MASS (AFM) register, developed by the three organisations with support from the Civil Mediation Council, is free to use for members of APIL, FOIL and MASS. Find the register on the 'for professionals' section of the APIL website and clicking 'search', then 'mediators'.

The initiative was co-ordinated by specialist personal injury and clinical negligence mediator Tim Wallis to help ensure members of the three organisations have the necessary information to select the right mediators for their cases.

Mediators must demonstrate that they are either registered on an individual basis with the Civil Mediation Council or their business is a CMC registered mediation provider. They must also demonstrate that they have relevant experience in the fields of either personal injury and/or clinical negligence claims.

Lorraine Gwinnutt

Head of Public Affairs

30 September 2019