APIL NORTH WEST REGIONAL GROUP/BRAIN INJURY SIG MEETING

14 MARCH 2019

APIL ACTIVITY UPDATE

1. LASPO PART 2 REVIEW

Last September APIL responded to the Government review of part 2 of LASPO. We pointed out that lawyers had worked hard to adapt to difficult situations arising out of the reforms and have, to a large extent, made the reforms workable. BUT some issues do remain and the whole package of reforms still needs time to bed down properly. In summary, we said:

- The indemnity principle remains an issue in cases outside the fixed costs regime, and should be abrogated. It is causing issues in relation to damages based agreements, and leading to overly confusing conditional fee agreements
- Qualified one way costs shifting is working well, and should be extended to cases where there is an imbalance of power between the parties (applying the rationale for QOCS in personal injury cases to a wider selection of cases).
- It is vital that ATE premiums remain recoverable in clinical negligence claims.
- Damages based agreements are not often used in the PI sector at present, and must be reformed if they are to provide a viable alternative method of funding. The percentage cap must be revised, and the success fee model must be introduced.
- Part 36 is generally working well. It drives good behaviour and gives the provision teeth, preventing cases from going to court unnecessarily. There must, however, be an incentive to encourage early acceptance of a claimant's Part 36 offer by the defendant.
- Costs budgeting is generally getting more consistent, and judicial training has improved substantially.
- Further guidance is required on fundamental dishonesty, particularly in light of the likely increase in litigants in person as a result of the impending increase in the small claims court limit.
- This review must include a review of fixed costs

We had a meeting with civil servants to discuss our thoughts last November.

Last month, the MoJ published its response to the review, concluding that LASPO is pretty much achieving its objectives. Specifically, the response said:

- the Part 2 reforms have been successful in achieving the principle aim of reducing the costs of civil litigation;
- the objective of promoting access to justice at proportionate cost has been met; the Government does recognise that many claimant lawyers feel that it has become more difficult and challenging to bring some claims due to the Part 2 reforms;
- the objective of encouraging early settlement has been met;
- the combined effects of the Part 2 reforms have had an impact on reducing the number of unmeritorious cases. While there are concerns from liability insurers and defendants that QOCS may encourage more weaker claims, there has been no reliable or conclusive evidence that supports that theory. There are stronger measures in place to deter unmeritorious claims such as the qualification of fundamental dishonesty for QOCS, the ban on referral fees for PI and there is also anecdotal evidence of claimant lawyers looking for higher prospects of success before taking on a case.
- There will be no further substantive changes to the Part 36 regime for some time.

Two main areas of concern have been identified:

1) DBA regulations would benefit from additional clarity and certainty. The Government accepts this argument. An independent review of the drafting of the regulations is being undertaken by Professor Rachael Mulheron and Nicholas Bacon QC. This report is expected later in 2019.
2) QOCS should be extended beyond PI. There are clear attractions for claimants and their lawyers in being able to litigate at no or reduced costs risk. However, there is also a clear risk that by extending costs protection that some of the benefits of the Part 2 reforms would be undermined: the shifting of costs back to the defendants, an overall increase in costs and the potential for prolonging rather than settling litigation. The Government would wish to be satisfied that these risks have been addressed before considering the case for extending costs protection further.

Our president, Brett Dixon, welcomed the prospect of DBA reform but was otherwise unimpressed with the Government's response. In a press statement he said:

"We remain concerned about fundamental dishonesty being misused by, and not applying to, defendants. The Government's assertion that the test of fundamental dishonesty is one of the things which 'suggest there has been an overall decline in unmeritorious claims' is incredibly short-sighted.

"Fairness should apply all round, and the whole defence should be able to be struck out if there is fundamental dishonesty in part of the claim. This issue is set to become a major concern when more and more people are forced to represent themselves and are at the mercy of a one-sided system where the defendant holds all the cards".

2. BREXIT

Last year APIL formed a working group of members to help identify key priority areas for personal injury law, relating to Brexit. The group also helped define APIL's general policy lines on each issue which will be developed further and expanded upon as required. Essentially, they are about preservation of key rights and protections. They are:

- Health and safety
    - Health and safety standards must be maintained in line with the EU as a minimum
- Motor insurance
    - Rights conferred by the Motor Insurance Directive must be preserved
- Consumer protection
    - UK consumer law should keep pace with EU law; Package Travel Regulations to be maintained
- Product liability
    - Consumer Protection Act should be maintained
- Judicial co-ooperation and cross-border claims
    - Judicial collaboration between the UK and EU should be maintained; UK residents should not lose the right to claim in the UK
- Fundamental rights
    - Legislative changes as a result of Brexit should not weaken the rights of individuals

We are monitoring directives and regulations that are being transposed into UK law, and the working group is being consulted regularly to ensure there are no unintended consequences arising from the transposition.

We have recently succeeded in persuading the Government that the Motor Vehicles (Compulsory Insurance) (Amendment etc.) (EU Exit) Regulations 2019 should be debated in Parliament as they could deny compensation to UK residents who are injured in road traffic accidents in the EU. There was opposition to the statutory instrument which will bring in these regulations, both in the House of Lords and the Commons. Unfortunately, though, because of the arcane parliamentary procedure for this type of debate, the Government was always going to win the day. It is, nevertheless, really important that issues are raised with the Government so it can be held to account should the need arise in the future. During debate in committee in the House of Commons last week, transport minister Jesse Norman told MPs, “if it turns out to be a material issue, the Government will of course look closely at how people claiming abroad can be supported in that environment”.

This assurance could be very helpful to us in the future.

3. LEGAL AID FOR INQUESTS

A Government call for evidence on a review of legal aid for inquests took place last summer. APIL took part in a series of consultative group meetings, where it was pointed out that:

- Hardly any clinical negligence cases trigger Article 2, so it is an unsuitable trigger for legal aid in these cases;
- There is inequality of arms in inquests involving deaths in both State and private healthcare;
- Families are not kept informed about what is going on;
- There should be healthcare-specific coroners;
- Procedure for making legal aid applications takes too long;
- Legal aid for inquests should not be means-tested.

The Government has now published its response which said:

- There is a need to do more to ensure that inquests do not become adversarial, and that the coroner is fully in control – guidance literature needs to be improved;

- Government will not introduce non-means tested legal aid for inquests, but will conduct a review into the thresholds for legal aid entitlement;
- A comprehensive review of the legal aid eligibility regime will be completed by Summer 2020.
- The Government will look into further options for the funding of legal support at inquests where the state has state-funded representation;
- The Government will simplify the exceptional case funding (ECF) scheme to ensure it works as effectively as possible;
- The Government will introduce a campaign to improve awareness of how people can gain access to legal support, including legal aid, by Autumn 2019
- The Government will consult on introducing a provision for the backdating of the legal help waiver, so that all such payments can be backdated to the date of application, should a waiver be granted.
- The Government will consult on proposals to provide separate guidance for families which sets out the inquest process and legal aid system in lay terms.
- A new edition of the *Guide to Coroner Services,* which is shorter, simpler and focused on the bereaved families and which answers the questions they are likely to ask, is being produced at the moment, and will be published by Spring 2019.
- A separate piece of guidance for families will be produced, which sets out the legal aid system, including the existing definitions and criteria for funding, in a way that is easy to understand.
- 2019/2020 will see a major round of training for coroners and coroners' officers. The training will cover issues such as the vulnerability of bereaved people and witnesses, communication with families and other interested persons, the use of language, the behaviour of counsel, generally controlling the court room.

Ends

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6 March 2019