APIL OCCUPATIONAL HEALTH SIG MEETING

30 APRIL 2019

APIL CAMPAIGN ACTIVITY UPDATE

1. CIVIL LIABILITY ACT

Introduces:

- 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

- Government call for evidence on discount rate closed in January – APIL responded
- Lord Chancellor started discount rate review 19 March – must conclude by 5 August. We still don't know when the new rate could be implemented after that.
- 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.

APIL is heavily involved in the Ministry of Justice/stakeholder group to try to make sure the system will work; at the same time, we are seeking to show that a system which actively discourages legal representation will be an overwhelming burden on the charities litigants in person will turn to for help.

What more can be done?

We will continue to make arguments about the need for fair compensation at every opportunity – because you just never know what could happen in politics, especially at the moment.

Both the new discount rate and 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.

2. 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

In February, 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.

It was, at least, recognised that DBA regulations would benefit from additional clarity and certainty. 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.

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.

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.

4. FIXED COSTS FOR CLINICAL NEGLIGENCE

- The Civil Justice Council set up a core working group and a wider group to discuss a new procedure and fixed costs for clinical negligence cases up to the value of £25k. The group is chaired by Andrew Parker; the vice chair is David Marshall. All key stakeholders are involved in feeding in information. The group's terms of reference are:
    - To consider and recommend an improved process for clinical negligence claims, where the claim has a value of £25,000 or less;
    - To draw up (i) a structure for FRC for such cases to attach to the new process, (ii) figures for FRC in the proposed structure, and (iii) figures for the cost of expert reports;
    - To have regard to how any improved process or scheme of FRC might affect issues of patient safety, including the way in which case outcomes are reported back to healthcare providers for learning purposes;
    - To consider how expert reports should be commissioned and funded, including the feasibility of single joint experts for at least some claims, as part of the improved process;
    - To report with recommendations by the end of 2018.

- The core group had reached some provisional conclusions - BUT there was a setback last October when Andrew Parker produced an alternative scheme because he was concerned that front loading the work as proposed would make the process too costly. The alternative suggested scheme includes:

    - Claimant obtains a scoping report from an expert, to be served (without prejudice) with a letter of notification: it would simply indicate whether there is a case to be answered;

- Defendant then investigates and a short form response would also produce without prejudice a scoping report from their expert. This is no more than an indication of an arguable defence;
- Fees for scoping reports should be limited to as few hundred pounds;
- If liability remains in dispute, the claimant produces a letter of claim and a full expert report, along with information on quantum and liability;
- The letter of notification could contain the statement of truth, but the scoping report to be disclosable by the defendant;
- After this stage, the process would reflect the Law Society scheme;
- There would be sequential exchange of experts' scoping reports, but on a without prejudice basis;
- ATE insurance to be considered separately.

Further meetings were held last month, but exemptions and sanctions have not yet been agreed. Nor, crucially, have costs, so work is ongoing.

The Department of Health has confirmed that there will be a public consultation once the CJC has finished its work.

5. SECTION 2(4) LAW REFORM (PERSONAL INJURIES) ACT 1948

- At the end of 2017 the House of Commons Public Accounts Committee reported on its inquiry into the management of clinical negligence in Trusts. Among the issues discussed was the need to reform section 2(4) so that the costs of ongoing care are calculated on the basis of NHS costs and not private health care costs.

- The issue has been raised again during debate about the discount rate, and in meetings with ministers about the Civil Liability Bill. This does appear to be on the Government's agenda.

- Our concerns were expressed direct to the then-health minister, Lord O'Shaughnessy, at a private meeting last October. We said

- Treatment on the NHS is slow
- NHS does not always have access to the latest medications/treatment
- Delays affect the injured person's rehabilitation
- Lack of trust in the NHS (due to the harm already caused) is a serious issue
- Repeal of section 2(4) could not be confined to clinical negligence cases, but would apply across the board, and this would place an impossible burden on the NHS

6. Campaign to extend the mesothelioma scheme

Before, during and since the passage of the Mesothelioma Act 2014 and the establishment of the Diffuse Mesothelioma Payment Scheme APIL has called for more support for sufferers of other asbestos-related diseases.

Lord Freud, the minister who introduced the scheme, acknowledged that this issue needs to be addressed during debate in 2013, but nothing has been done since.

The scheme was due to be reviewed last year. According to recent parliamentary answers, a review will take place 'in due course' (which could mean anything/nothing) and the Government has no intention of extending it (or something similar) to other diseases.

We are in the very early stages of developing a campaign to address this issue. We are also discussing it with the Forum of Asbestos Victim Support Groups. We'll keep you informed.

Ends

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24 April 2019