APIL INTERNATIONAL SPECIAL INTEREST GROUP MEETING

14 MARCH 2019

APIL ACTIVITY UPDATE

1. 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.

2. DISCOUNT RATE

- Among other things, the Civil Liability Act (which received royal assent in December) will introduce changes to the way the discount rate is calculated to assume that injured people are not considered entirely risk averse.

- According to the terms of the Act the first review must start within 90 days (ie 20 March). Once it begins, the review must be completed within 140 days. We have responded to the Government's call for evidence to inform this review. This will be subject to the negative resolution procedure which means it **will** go through, unless the opposition can secure a debate in Parliament, which it then wins. The snag is that it is up to the Government to determine if there can even be a debate. The last time a negative resolution was defeated was in 1979.

- Legislation to change the discount rate is also going through the Scottish Parliament, where the Government has said it is aiming for a discount rate of 0%. We don't yet know what the Westminster Government's aim is, but it may be possible for us to exert some influence with parliamentary contacts north of the border. It's also worth noting that the UK Government Actuary has a significant role in the Scottish legislation.

- It is also interesting to note that Direct Line is now assuming that future personal injury claims will settle at a discount rate of 0 per cent.

3. 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”.

Ends

Lorraine Gwinnutt
Head of Public Affairs
6 March 2019