

APIL CLINICAL NEGLIGENCE SIG MEETING

8 MAY 2019

APIL ACTIVITY UPDATE

GENERAL UPDATE

1. CEO RECRUITMENT AND ELECTIONS

By now you are probably aware that we have appointed Mike Benner as our new chief executive officer, after a robust election process. Mike joins us on 1 July but will be attending our AGM and spring conference next week, so you will be able to meet him there, if you're planning to come along.

Mike has almost 15 years' experience as a CEO for not-for-profit membership organisations, most recently with the Society of Independent Brewers (SIBA) and before that at CAMRA. He is an experienced campaigner and strategist and familiar with the challenges of dealing with change and ensuring an organisation's resilience for the future.

The election for the 5 APIL EC additional officer seats closed yesterday. But, if you missed the chance to vote, you can still appoint a proxy to exercise your rights to attend, speak and vote at the annual general meeting. A form of proxy was sent out with the final notice of AGM on 4 April and in an email sent on the same date. The form of proxy (or online equivalent) must be received in accordance with the instructions no later than 5pm on 14th May. If you want a proxy form and don't have one, please contact Helen Blundell at the APIL office.

2. CIVIL LIABILITY ACT

By way of recap, the 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.

What more can be done?

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.

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.

3. FIXED COSTS CONSULTATION (GENERAL)

After a long wait, the Government launched a consultation on its intentions to implement Lord Justice Jackson's recommendations on fixed costs at the end of March.

In a ministerial statement justice secretary David Gauke said: “In civil litigation in England and Wales, the winning party is generally entitled to recover their costs from the losing party. The legal costs of civil cases have, however, been too high and too uncertain for a long time, making litigation riskier and less accessible than it should be and thereby undermining access to justice.”

APIL provided evidence for Sir Rupert’s review, saying it is essential to consider the work involved in conducting litigation and calling for a focus on costs control rather than “costs limit”.

Jackson’s recommendations were published in a 2017 report and included fixed recoverable costs in cases up to the value of £100,000 and the introduction of a new intermediate track. The Government is not planning to set up a new intermediate track, however, because the costs would be prohibitive. An early meeting has been held with Government officials where, among other things, the issue of exclusions to the new regime was discussed. Jackson himself was vague on this point and although we understand some complex personal injury cases will be outside the scope of the reforms we don’t know any more than that at this stage.

APIL’s response is now being developed by a working group before the consultation closes on 6 June.

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. HEALTH SERVICE SAFETY INVESTIGATION BILL

- The Health Service Safety Investigation Bill was subject to a call for evidence in early June 2018.

- The most recent figures from NHS Improvement reveal that in 2016, there were 4,544 reported patient safety incidents resulting in death; 5,678 reported patient safety incidents which resulted in severe harm; and 501,633 patient safety incidents resulting in any degree of harm.
- APIL supports the principle of the proposals to create the Health Service Safety Investigations Body, but does have some concerns: -
 - The Bill includes a concept of ‘safe space’ which would allow participants in an investigation to provide information which would not be disclosed by the HSSIB, except in certain limited circumstances or by order of the High Court.
 - ‘Safe space’ undermines the Government’s belief in openness and transparency, and could add to the heartache of those who have already suffered because of negligence in the NHS.
 - We were concerned about a proposal for internal investigations rather than truly independent investigations.
- We have also said that the HSSIB’s powers must be extended to include private healthcare providers, if they can be managed properly.
- When the Joint Committee on the Draft Health Service Safety Investigations Bill published its report on the draft Bill it approved a facility for the proposed Health Service Safety Investigations Body to conduct ‘safe space’ investigations. The joint committee did, however, say that NHS trusts should not be allowed to conduct such investigations internally.
- A Bill will be introduced in Parliament in due course, and once the Government has reviewed the conclusions and recommendations of the committee, and published a response.

6. DEPARTMENT OF HEALTH AND SOCIAL CARE CONSULTATION: APPROPRIATE CLINICAL NEGLIGENCE COVER

In our response to this consultation we said:

- We share the Department of Health and Social Care's concerns about the current arrangements. With no obligation on insurers offering discretionary indemnity cover to honour the claim, or to demonstrate that they can meet the cost of a claim, injured people may be under compensated or not compensated at all.
- **State-backed indemnity scheme:** We believe that all providers of NHS services should be covered by a state-backed indemnity scheme. While we welcome the introduction of a state-backed scheme for GPs, we fail to see why any state-backed scheme should not cover all healthcare professionals providing NHS services, including, for example, dentists. This would ensure certainty for both the healthcare professional, and anyone who is injured by their negligence and needs to bring a claim for compensation.
- **Legislative change for private healthcare providers:** We support the Government's preferred option for legislative change for all private healthcare providers, including GPs and dentists providing services in a private capacity. APIL members report that they have experience of medical defence organisations exercising their discretion not to pay out for an insurance claim, and this leaves the injured person unable to seek redress. There should also be a requirement that those who hold private indemnity insurance are checked annually by their regulator, for example the General Medical Council, or Nursing and Midwifery Council, to ensure that the insurance that they hold is appropriate and will meet the cost of any claims brought.
- **Run-off cover:** Indemnity cover provided by the state backed scheme, and by regulated insurance contracts should also be required to include run-off cover.
- **Unlimited cover:** any cover provided should be unlimited, to ensure that regardless of the value of the claim, the injured person can obtain the compensation that they need to be put back, as closely as possible, to the position they were in before the negligence.

The Government will publish a summary of responses to the consultation (which closed in February) before any further action is taken.

Ends

Lorraine Gwinnutt

Head of Public Affairs

2 May 2019