

CLINICAL NEGLIGENCE SIG MEETING

5 FEBRUARY 2020

APIL CAMPAIGN ACTIVITY UPDATE

1. CLINICAL NEGLIGENCE AND LAWYERS' COSTS

You may have seen or heard media coverage a couple of weeks ago about lawyers' costs in clinical negligence claims. The press team at head office were besieged with requests for interviews about the story based on Fol information published by the BBC. Suzanne White and John McQuater did some great work reminding journalists that claims are generated by negligence and that most people feel obliged to litigate to make the NHS listen to their concerns. Interviews ran on BBC TV all day, as well as Radio 4's Today programme, the Jeremy Vine programme on Radio 2 and numerous local stations.

This was followed up last Thursday with a comment in The Times (online) from our president Gordon Dalyell, who said that the amount spent on compensation was a drop in the ocean of the NHS budget, and that action must be taken to eradicate needless injury. He said it is disheartening to note the NHS's focus on cutting the cost of negligence rather than cutting the cause of it.

Meanwhile, we're still waiting for the Government's consultation on fixed costs for clinical negligence cases up to £25,000....

2. APIL STRATEGY

Mike Benner started as our new CEO in July and, since then, he has been working very closely with APIL's senior management team and the executive committee to develop a new strategic vision for the organisation.

The completely new strategy is now in its advanced stages and will be presented to members firstly at the annual conference in spring and then through meetings like this, as well as written communications, of course.

The strategy will be based on APIL's core principles of ensuring injured people have access to justice, prevention of needless injuries, and driving excellence in legal representation.

In addition to that, we will be grasping the nettle of improving public trust in personal injury law, because it is fundamentally a mistrust of the law in this area, of personal injury lawyers, and of injured claimants themselves which is such a barrier to the work we are trying to do. It won't be easy to achieve, and it won't happen overnight, but we want to attack the issue and work is underway on the planning of that campaign.

To ensure the strategy continues to reflect the views of our members we asked the whole membership for volunteers to sit on our informal membership engagement panel, which now numbers 150 members. We're delighted that the panel is fully behind our strategic approach, agreeing that APIL should lead the sector in rebuilding trust, that we should be working to prevent needless injury, striving for excellence in the practice of personal injury law and championing the role that PI lawyers play in helping injured people.

3. CIVIL LIABILITY ACT

Key changes (by way of recap):

- rigid tariffs for whiplash damages
- change in the way the discount rate is calculated – it is now based on the assumption that injured people will take some risk when investing lump sum compensation
- independently, but linked, is the increase of the small claims limit to £5,000 for all RTAs and to £2,000 for Employers Liability (EL)/ and Public Liability (PL) claims. (NB: this move does not require primary legislation.)

Update – discount rate

- Discount rate set at minus 0.25% on 15 July. Came into effect 5 August. A much lower rate than expected. Insurers very angry, claiming they were led to believe it would be 1%. APIL gave it a cautious welcome – it is better than we expected, but it is still based on the wrong premise (because it forces injured people to take some risk with their investments). This will be reviewed in five years.
- 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 calculated by the Government Actuary, not

by a minister. Discount rate in Northern Ireland remains at 2.5%. We have been lobbying for change and will press for this again now the change has been announced in Scotland.

- Can you help us with a research project which will inform the next discount rate review? If you run claims affected by the rate your participation is essential if we are to have persuasive evidence which ensures the next rate is fair for claimants.
- If you feel you can take part in this project you will need to provide a few key pieces of information on each claim affected by the discount rate. This will include the life expectancy of the claimant, the sums awarded for loss of earnings and care, and whether a PPO was offered by the defendant. This data is likely to be key to the calculation of the next rate.
- How this data is provided is up to you. Members taking part in the project could send data each time they close a claim affected by the discount rate, or could provide data periodically, for example every six months.
- The project will run until just before the next discount rate reviews for England & Wales and Scotland, both of which are expected to take place in 2024. This means that members and firms taking part will be asked to provide data on claims which are closed over the coming four years.
- If you are interested in getting involved or if you have any questions, please email john.mcglade@apil.org.uk.

Update – small claims reform

- Whiplash tariffs and small claims reform still due to be introduced in April, although you'd be hard pressed to find anyone who thinks that will happen, especially now we've had a General Election. We have written to Lord Keen and MoJ officials to say implementation should be delayed: while work on developing the system was permitted under election rules, that work took place behind closed doors, resulting in lack of transparency and collaboration. This needs to be resolved before the process can continue.

- 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 the MoJ is really digging its heels in on this so we're reiterating our concerns about that as well.
- No clarity about how alternative dispute resolution (ADR) will work. Rehabilitation specifically excluded from the system – is this, then, the 'minimum viable product' we've heard about? If so, is it really fit for purpose? We don't think so.
- The MoJ is working with the Civil Procedure Rules Committee to sort out the rules in time for implementation in 2020.
- 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. **Civil servants are now saying publicly that ministers are reviewing the timetable.** We will have to see.

4. INDEPENDENT INQUIRY INTO CHILD SEXUAL ABUSE (IICSA)

EC member Kim Harrison has made compelling arguments for the removal of the limitation period for historical child sexual abuse cases to the (IICSA) on behalf of APIL, which has been made a core participant in the inquiry.

Kim drew on APIL's role in debate around reform in Scotland, telling the inquiry that "the current limitation law, and the hurdles overcoming it, represents a significant percentage of potential cases that are rejected by firms at the new enquiry stage".

She said a balance needs to be struck between the sides to ensure fairness, but the current system is weighted too heavily in favour of the defendant.

Limitation is routinely raised as a defence which makes a big impact on the claimant's ability to bring a claim or proceed to trial or full settlement.

Judicial discretion in applying the three year limitation period, causes huge uncertainty for survivors. They often have to decide between settling their claims with a reduction in

damages in case a judge decides not to disallow the limitation period; or proceeding to trial and taking the risk that a judge will refuse to allow the case to proceed out of time, resulting in the claimant losing and receiving no compensation whatsoever.

She also said the Association of British Insurers' (ABI) proposal for a pre-action protocol would not be enough to redress the balance on its own, and that any scheme proposed should be supplemental to court proceedings.

Kim delivered her closing remarks to the Inquiry today [5 FEBRUARY!] and our final written submission is to follow.

5. APIL MANIFESTO

Education of new MPs about the needs of injured people started before the General Election, with our own manifesto for parliamentary candidates, based on the principles of injury prevention and fairness for injured people.

The aim was to persuade candidates that the lives of people who suffer serious and needless injuries can be changed forever. These are often vulnerable people who will need compensation to help them pay for the care they need. They should not have to take financial risks to try to make ends meet, or live in the constant fear of their money running out.

Straight after the election, a personalised email was sent to all new MPs and an advert placed in The House, a weekly magazine delivered to every parliamentarian, which reiterated the key messages from our manifesto. Face to face meetings will be sought with all new MPs to discuss the issues in person.

Meanwhile, the Queen's Speech outlined a legislative programme which included proposals on patient safety, injured holidaymakers, and military veterans.

A Bill to establish a new compensation scheme for injured Thomas Cook customers provides an excellent opportunity for APIL to revisit our campaign for compulsory public liability insurance. The Government has said the scheme will help those "facing the most serious

hardship as a result of life-changing injuries” who have been unable to receive compensation because the company had insured itself.

We will continue to oppose a proposed 10-year time limit on claims by military personnel and their families for personal injury and/or death which happen outside the UK. This will be included in the Armed Forces (Legal Protections) Bill. Our president, Gordon Dalyell, has accused the Government in the press of treating veterans as a “burden it wants to shake off as quickly as possible”.

Lorraine Gwinnutt

Head of Public Affairs

January 31 2020