Association of British Insurers

SCOTTISH CIVIL JUSTICE COUNCIL:
INFORMATION GATHERING EXERCISE ON PRE-ACTION PROTOCOLS

RESPONSE OF THE ASSOCIATION OF BRITISH INSURERS

The UK Insurance Industry

The UK insurance industry is the third largest in the world and the largest in Europe. It is a vital part of the UK economy, managing investments amounting to 25% of the UK's total net worth and contributing £10.4 billion in taxes to the Government. Employing around 320,000 people in the UK alone, the insurance industry is also one of this country's major exporters, with 26% of its net premium income coming from overseas business.

Insurance helps individuals and businesses protect themselves against the everyday risks they face, enabling people to own homes, travel overseas, provide for a financially secure future and run businesses. Insurance underpins a healthy and prosperous society, enabling businesses and individuals to thrive, safe in the knowledge that problems can be handled and risks carefully managed. Every day, our members pay out £148 million in benefits to pensioners and long-term savers as well as £58 million in general insurance claims.

The ABI

The ABI is the voice of insurance, representing the general insurance, protection, investment and long-term savings industry. It was formed in 1985 to represent the whole of the industry and today has almost 300 members, accounting for some 90% of premiums in the UK.

The ABI's role is to:

- Be the voice of the UK insurance industry, leading debate and speaking up for insurers.
- Represent the UK insurance industry to government, regulators and policy makers in the UK, EU and internationally, driving effective public policy and regulation.
- Advocate high standards of customer service within the industry and provide useful information to the public about insurance.
- Promote the benefits of insurance to the government, regulators, policy makers and the public.

Are the stated aims and purposes of the current voluntary pre-action protocols adequate to comply with the recommendations of the Scottish Civil Courts Review if made compulsory?

1. The ABI welcomes the use of compulsory pre-action protocols. However, the ABI believes that the current pre-actions protocols are not adequate, if made compulsory, in their existing form.

2. The problems identified with the voluntary pre-action protocols are:

    - It does not achieve its aim in encouraging both parties to negotiate a settlement in order to avoid litigation;

- There is a lack of sanctions for non-compliance which leaves the protocol open to abuse;
- Frequently there are issues with regards to correspondence not properly reaching insurers, particularly when an insurer has had a number of addresses;
- The fees which are allowed to be awarded are excessive and not proportionate, especially in relation to the majority of low value road traffic accidents;
- The system currently in place in England and Wales secures a faster settlement to the benefit of the claimant than the timescales involved in the current voluntary pre-action protocols in Scotland.

3. There have been substantial changes to the Scottish litigation system and significant technological advancements since the voluntary pre-action protocol was first introduced in 2006. The current voluntary protocols leave a distinct difference between pre-litigation behaviours and what occurs when a case litigates.

4. A modern, accessible, proportionate, effective and a more streamlined mandatory protocol is needed, which will be to the benefit of consumers and all stakeholders. This will also improve access to justice at a proportionate cost and will support the Scottish Government's 'Making Justice Work' strategy.

If not, what changes, if any, should be made to the voluntary pre-action protocols to make them more effective in achieving their stated aims and purposes?

5. The ABI believes that a mandatory pre-action protocol should be introduced and a greater emphasis should be placed upon pre-action conduct between the parties. This can be achieved through encouraging increased pre-action contact, better and earlier exchange of information and better pre-action investigation. This will ultimately increase pre-action settlements to ensure that only claims with genuine disputes litigate, allowing more efficient use of the court's time and resources.

6. The overriding objective of the parties should be to enter in to negotiations as early as possible in an attempt to genuinely resolve the matter, with litigation being a last resort.

7. A process similar to the Low Value Protocols in England and Wales should be introduced to include the following provisions:

Mandatory Information

8. The Scottish Civil Justice Council (SCJC) should look to include mandatory information either in the form of the Letter of Claim or in a standard format, such as a Claims Notification Form which is used in England and Wales, as this will drive consistency and enable earlier and better investigations.

9. The following mandatory information which should be included:
    - The pursuer's full name, date of birth, NI number and full residential address (including postcode);
    - Details of injuries sustained;
    - Details of any financial losses incurred;

- Details of time off work;
- Their employers name and address;
- The name and address of any hospital attended;
- Details of treatment received;
- Identification of material witnesses, with copies of any witness evidence; and
- A clear summary of the facts of the accident including allegations of negligence.

10. Providing defenders with a sufficient level of information from the outset will allow for better pre-action investigation. This will in turn allow for earlier settlement of cases and an overall reduction in costs.

Fixed Costs

11. The ABI considers that a fixed costs scheme should be introduced to support the compulsory protocols. The costs should be set at a level that reflects the amount of work that will be required once the new protocols are in place. This takes into account that more cases should be settled earlier and with less need for time and expense of litigation.

12. The value of claims brought within the pre-action protocols for personal injury and disease claims should be increased to include claims valued from £10,000 to a value of at least £25,000.. As per the RTA and Employers' and Public Liability protocols currently in place in England and Wales, these should be separated in to stage 1 and stage 2 costs to reflect the stage in which the claim has settled.

Medical Reports

13. In order to drive clarity and consistency, the SCJC should adopt a standard template for medical reports obtained under the compulsory protocols. The medical expert should identify within the report, any medical records that have been obtained and reviewed which must be disclosed by the pursuer if they are deemed relevant, as should any photographs that the pursuer intends to rely upon, in conjunction with the medical report.

Settlement

14. A rigid time frame in the compulsory pre-action protocols should be applied. By fixing a time frame for the period of negotiation of damages will improve the efficiency of the protocols. It is recommended that this should commence from the date that the Statement of Valuation and relevant supporting documentation are received by the defender.

15. Where settlement has been explored, negotiations exhausted and settlement is not agreed, a streamlined litigation procedure that allows determination of damages based on both sides' final offer and the Statement of Valuation, and relevant supporting documentation (the papers) by a Sheriff or, a short oral hearing in front of a Sheriff. This prevents incurring unnecessary costs of litigation in cases that are capable of settlement.

Sanctions

16. To ensure compliance, where either party fails to comply with the protocols, we suggest the introduction of appropriate rules. For example a rule is needed to make it clear that

the time limit for a defender's response on liability should not commence until the claimant has provided all the required mandatory information to the defender.

17. Clear sanctions for non-compliance, inappropriate behaviour and where settlement has been unfairly delayed should be incorporated in to the new compulsory protocols.

18. We would propose the following:

- A breach by the defendant entitles the pursuer to litigate without penalty;
- If the pursuer litigates in breach of the compulsory pre-action protocol they should only be entitled to pre-action protocol expenses, or nil in more serious breaches, at the Court's discretion (unless there are limitation issues);
- If the pursuer fails to subsequently beat a defenders pre-litigation offer, their expenses should be limited to pre-action protocol expenses;
- If the pursuer beats a defenders pre-litigation offer, their damages should attract a 10% uplift;
- In the case of unreasonable conduct by the pursuer and/or their agents, the defender will be entitled to recover the expenses of the litigation;
- Pre-litigation admissions of liability should be binding in claims worth under £25,000, with the exception of fraud/fundamentally dishonesty cases.
- Additional heads of claim added once the litigation commences should be at the Sheriff's discretion and in exceptional circumstances only.

Electronic Based Portal

19. The ABI suggests the development of an electronic based portal, similar to that in use in England and Wales for low value RTA and Employers' and Public Liability claims. This will enable notification of claims, submission of medical reports, Statements of Valuation and all necessary communication.

20. There is a similar portal already in operation in England and Wales – here are the Pre-Action Protocols:

    Low Value Personal Injury claims in RTA:
    http://www.justice.gov.uk/courts/procedure-rules/civil/protocol/pre-action-protocol-for-low-value-personal-injury-claims-in-road-traffic-accidents-31-july-2013

    Low Value Personal Injury Claims (Employers & Public Liability):
    http://www.justice.gov.uk/courts/procedure-rules/civil/protocol/pre-action-protocol-for-low-value-personal-injury-employers-liability-and-public-liability-claims

21. An electronic based portal would be used by both sides to:

Action	*Who carries out the action?*	*Timescale (working days)*
Intimate the claim with allegations and heads of claim	Pursuer	no timescale – within limitation period
Response on liability	Defender	Motor - 15 days, EL – 30 days and PL – 40 days
Submission of medical evidence	Pursuer	no timescale – within

and supporting evidence of all other heads of claim with a statement of valuation which would be acceptable to the Pursuer		limitation period
Consideration of evidence and response with counter offers	Defender	20 days
Negotiation period if required	Pursuer & Defender	15 days
If agreement is not reached, proceed to litigation on areas of disagreement – using the evidence already gathered	Pursuer	no timescale – within limitation period

Are changes required to ensure that pre-action protocols better reflect the needs of party litigants?

22. By ensuring that the protocols are compulsory this should offer extra protection to litigants. The ABI does therefore not consider that party litigants will be adversely affected by compulsory protocols.

23. If an electronic portal is implemented to deal with the Low Value Pre-Action Protocol then it should be made accessible to unrepresented litigants.

24. The ABI has published a code of practice for dealing with unrepresented litigants which recommends that unrepresented claimants should be able to seek independent legal advice or representation at any time.

Should a compulsory pre-action protocol apply to higher value cases involving fatal or catastrophic injury?

25. The ABI agrees that there should be a compulsory pre-action protocol for higher values cases, which includes fatal or catastrophic injury claims. This will ensure consistency and encourage better pre-action conduct.

26. The protocol must emphasise a collaborative approach by both sides to provide tangible benefits and to encourage earlier settlement of claims.

27. The ABI believes that such a protocol, which should be similar to the multi-track code, includes provision for:
    - Early discussions over the issue of liability with a view to determination within six months;
    - Admissions to be binding unless there is evidence of fraud;
    - Willingness to make interim payments;
    - Early discussions over appropriate care regimes;
    - Appointment of an independent clinical case manager;
    - Commitment by both sides to obtain evidence that avoids duplication of effort and cost;
    - Commitment by both sides to share evidence as soon as practicable; and
    - Joint consideration of appropriate rehabilitation.

28. Should a new high value protocol be introduced it must be supported by proportionate sanctions that encourage pre-action settlement to ensure that access to justice is delivered at a proportionate cost.

Is it necessary to consider any additional protocols, or maintain exceptions, for specific types of injury or disease claim, for example, mesothelioma?

29. The ABI believes that there is a benefit to disease claims being subject to a pre-action protocol. There is a disease protocol in use in England and Wales and the ABI would suggest that the SCJC look to adopt a similar disease pre-action protocol in Scotland, with a separate protocol for mesothelioma claims.

General Disease Protocol

30. The current disease pre-action protocol in England and Wales is however at a disadvantage by the lack of any fixed fee provision. As a result insurers have seen a large increase in Noise Induced Hearing Loss (NIHL) claims in recent years which attract disproportionate legal fees. If the SCJC is to adopt a disease pre-action protocol, consideration should be given to implementing a fixed fee regime for legal fees.

31. The involvement of multiple insurers and/or defenders is a regular feature in disease claims. It can take time to identify and liaise with all the relevant parties. Any disease protocol that is adopted should therefore reflect this.

Mesothelioma Protocol

32. The ABI believe that there should be a separate pre-action protocol for mesothelioma cases as this should be tailored to the specific needs of the sufferer and their families. However, a shorter timetable than in the currently voluntary disease protocol would be required to enable settlement within a victim's limited lifetime.

33. It is recognised that claims for mesothelioma are a 'special case' and there is need for improvement in the claims handling process particularly due to the length of time that has usually elapsed between exposure to asbestos and the first manifestation of symptoms. By implementing a dedicated mesothelioma pre action protocol there would be a prompter, standardised and more structured process that would allow all defending parties to establish liability sooner. This in turn would enable earlier payment of damages to provide sufferers, and their families, with much needed financial support.

34. Some insurers already participate in a voluntary arrangement in Scotland which accounts for a large majority of mesothelioma claims. They have allowed for a shorter timetable with voluntary exchange of key information, particularly the claimant's witness statement which allows insurers to investigate liability at the outset to avoid any unnecessary delay.

How successful has the use of separate pre-action protocols for professional negligence and industrial disease claims been?

35. Despite there being a considerable number of claims which are suitable and would benefit from the voluntary industrial disease pre-action protocol, the ABI believes that it is rarely used.

36. Some insurers have developed an informal framework agreement for the handling and settling of pleural plaques claims as this encourages co-operative behaviour between the parties and early exchange of evidence. This reduces the need for costly and time consuming litigation and supports the proposal for a compulsory disease pre-action protocol. This has successfully avoided litigation in the majority of cases.

37. The ABI also understands that the voluntary pre-action protocol for professional negligence claims is also under used, with the complexity of the cases being a primary reason for it underuse.

38. Should a compulsory pre-action protocol be developed for professional negligence claims, a significant degree of flexibility will be required to enable the parties to use the protocol for a wide variety of claims which are seen in this practice area.

Should a pre-action protocol for medical negligence claims be developed?

39. The ABI has no view to offer.

If you answered yes to Question 7, what should the key features be?

40. N/A

Are there are any issues relating to the operation of the Pre-action Protocol for the Resolution of Clinical Disputes in England and Wales that should be taken into account?

41. The ABI has no view to offer.

Should a new pre-action protocol regime be introduced in advance of the creation of the specialist Personal Injury Court? Please give reasons for your answer.

42. The Scottish Government released its response to Sheriff Principal Taylor's 'Review of Expenses and Funding of Civil Litigation in Scotland' on 3 June 2014. They have expressed a broad acceptance of Taylor's recommendations to deliver greater predictability and certainty around the cost of litigation. The Scottish Government have also commenced further legal reform, the Courts Reform (Scotland) Bill, which is currently progressing through the Scottish Parliament.

43. Ideally, it would be beneficial to introduce both the new pre-action protocol regime and the specialist Personal Injury Court at the same time. The new court will be staffed by specialist judges who will be able to ensure compliance and consistency with the new

protocol regime from the offset. This will also discourage poor pre-litigation behaviour from both sides from the beginning.

44. However, should the creation of the specialist Personal Injury Court be subject to any significant delay, the SCJC should give consideration to introducing the new pre-action protocols in advance as the introduction of the compulsory pre-action protocols is for the benefit of the injured claimant. As such, any progress to streamline, simplify and enhance the process should be implemented at the earliest available opportunity.

45. The ABI believes that compulsory protocols will discourage premature and unnecessary litigation and will allow the Sheriffs and parties in the new Court to have clarity from the outset as to what constitutes reasonable pre-action conduct. Our preference would be for the protocols to effectively prepare cases for the Courts prior to litigation to ensure that injured claimants get access to justice, quicker resolution of their cases and proportionate use of resources is expended by the parties throughout.

46. Where the protocol process has not been followed pre-litigation, the SCJC may wish to consider allowing the Court the power to stay proceedings until the pre-action protocols have been complied with. This will ensure that unnecessary litigation costs are not incurred as it allows the parties to attempt to settle the matter.

Are you or your organisation aware of variations in awards of expenses where the pre-action protocol has not been adhered to?

47. The ABI is aware that different Courts and/or Sheriffdoms have taken different approaches in this area. Some of the main cases include:
    - McIlvaney v A Gordon & Co Ltd, 2010 CSOH 118
    - Thomson v Aviva, unreported, Livingston Sh Ct, 10 June 2010
    - Ewan Graham v Douglas Bain, unreported, Cupar Sh Ct, 17 September 2012
    - McDeade v Skyfire, unreported, Glasgow Sh Ct, 21 August 2013
    - Ross Brown v Sabre Insurance Company, 2013 CSOH 51
    - Emma Lawson v Sabre Insurance Company, 2013 PD4/13

48. The wide range of decisions taken by different Sheriffdoms include: modification to nil, modified significantly by a large percentage, modified by a lower percentage, restricted to a lower scale or not modified to any extent.

49. Most decisions are given orally. If there are written decisions, then they are infrequently reported. If so required, the ABI would be happy to provide copies of decisions if requested showing the wide range of outcomes.

50. The ABI considers that greater certainty is required which could be achieved through a compulsory pre-action protocol with clear sanctions for non-compliance.

51. Clearly a compulsory pre-action protocol would take away any uncertainty about whether or not a voluntary pre-action protocol should be followed in any given case.

Association of British Insurers
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