Scottish Civil Justice Council

Information gathering exercise on pre-action protocols

A response by the Association of Personal Injury Lawyers
May 2014

The Association of Personal Injury Lawyers (APIL) was formed by claimant lawyers with a view to representing the interests of personal injury victims. The association is dedicated to campaigning for improvements in the law to enable injured people to gain full access to justice, and promote their interests in all relevant political issues. Our members comprise principally practitioners who specialise in personal injury litigation and whose interests are predominantly on behalf of injured claimants. APIL currently has around 4,000 members in the UK and abroad who represent hundreds of thousands of injured people a year.

The aims of the Association of Personal Injury Lawyers (APIL) are:

- to promote full and just compensation for all types of personal injury;
- to promote and develop expertise in the practice of personal injury law;
- to promote wider redress for personal injury in the legal system;
- to campaign for improvements in personal injury law;
- to promote safety and alert the public to hazards wherever they arise; and
- to provide a communication network for members.

Any enquiries in respect of this response should be addressed, in the first instance, to:

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Introduction

APIL welcomes the opportunity to provide comment on the current voluntary pre-action protocols. We welcome the implementation of Lord Gill's recommendation that the protocols should become compulsory, as this will increase their effectiveness. We suggest that alongside the implementation of compulsory protocols, other improvements could be made to the pre-action process. The protocols could include wording which would prevent pre-medical offers, and the law surrounding expenses should be clarified. We support the proposal that there should be a medical negligence protocol, based on the current clinical disputes protocol in England and Wales.

Q1. 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?

We believe that the stated aims and purposes of the current voluntary pre-action protocols are adequate to comply with the recommendations of the Scottish Civil Courts Review. As is the case currently, compulsory pre-action protocols should aim to put parties in a position where they *may* be able to settle cases fairly and early without litigation. It is important, however, that this aim of the protocol is not interpreted to mean that litigation should be avoided at all costs. Whilst earlier, fairer settlements should be encouraged, litigation should still be available to the parties if necessary. If litigation is not available as a potential route, insurers will prolong negotiations, knowing that the pursuer is unable to litigate if they continue to offer low settlements.

Q2. Does anything else need to be changed to make them more effective?

Disclosure of evidence

One important aspect of the pre-action process is the disclosure of evidence. Early disclosure is important to allow the pursuer's solicitor to identify whether a potential case has any merit. Under the current protocol, the requirement that insurers disclose evidence early is currently contained at paragraph 3.8. The degree of compliance with paragraph 3.8 is variable. If the protocol is made compulsory, this would be an opportunity to put in place effective sanctions, to ensure that documents are disclosed in a timely manner. The Scottish Civil Justice Council must think carefully about suitable sanctions for failure to disclose. One suggestion is to mirror the process in England and Wales, where if the insurer does not disclose documents on time, the process is to apply for a pre-disclosure application. This goes before the court, with a judge deciding which documents must be disclosed. This may not be the most favourable approach however, as it may be seen as an unnecessary burden on the courts. Another approach would be to implement an expenses sanction for non-compliance with the time limits for disclosure.

Premature issuing of proceedings

A further issue is how the compulsory pre-action protocols would deal with premature issuing of proceedings. The protocol must contain a reasonable timetable for the parties to comply with. This should be made clear so that each party knows where they stand. If one party fails to abide by the timetable, the other should be able to issue proceedings without fear of negative repercussions. Currently, the decision as to whether a party has issued

proceedings prematurely and should be penalised for doing so, is left with the court. The court is entitled to look at the whole circumstances when deciding whether to award expenses, and at what level any expenses should be awarded. We believe that this is the fairest approach, and should remain in place when the protocols become compulsory.

Pre-medical offers

We suggest that the implementation of the compulsory protocols should be used as an opportunity to ban pre-medical offers. The insurer practice of offering an arbitrary amount of money to settle a claim for injury, before there has been any medical examination of that injury, is a huge problem. An outright ban of pre-medical offers is the only way to prevent them. They contribute to fraud, with insurers offering money in cases where there may not even be an injury. At the other end of the spectrum, they leave genuinely injured people gravely undercompensated, because without a medical report, pursuers are unaware of the true extent of their injuries. They settle for the set sum of money offered by the insurer, only to realise later on that their injuries are much worse than they originally thought.

The Ministry of Justice is currently reforming the law surrounding whiplash claims in England and Wales. APIL has recommended that as part of these reforms, measures are introduced to ban pre-medical offers. A similar approach could be taken if the pre-action protocols become compulsory in Scotland. We recommend that there should be a complete ban on offers to settle being made within the pre-action protocols before the defender has received the pursuer's medical report. There should be financial penalties for parties who make pre-medical offers within the pre-action protocols.

Q3. Are changes required to ensure that pre-action protocols better reflect the needs of party litigants?

There should be a requirement within the compulsory protocol that the insurer should explain the pre-action process to any party litigant who makes contact with them. The insurer should not make a pre-medical offer to the party litigant, and it is also important that the insurer refers the party litigant to an independent solicitor.

Q4. Should a compulsory pre-action protocol apply to higher value cases involving fatal or catastrophic injury? If not, what should the threshold be?

Most cases falling into the category of fatal or catastrophic injury involve difficult and time-consuming issues - such as wage loss and future care calculations. As such, the progression of these cases does not sit well with the protocol timetable. We suggest that for fatal and catastrophic injuries, the position should reflect that in England and Wales – whereby cases over £25,000 (the cut-off value between fast track and multi-track cases) follow the spirit of the protocol, but not necessarily the letter. APIL's research has indicated that around 85 per cent of cases settle for under £30,000 – therefore the vast majority of cases would still be subject to the compulsory pre-action protocol.

Q5. Is it necessary to consider any additional protocols, or maintain exceptions, for specific types of injury or disease claim, for example, mesothelioma?).

Most disease cases currently start off in the protocol but fall out quickly because they are ill-suited to the strict timetables prescribed. As such, it would be counter-productive to produce specific protocols for different types of disease.

In particular, we do not believe that there should be a specific protocol for mesothelioma claims. In England and Wales, a dedicated mesothelioma protocol has been suggested on numerous occasions. This was rejected in favour of the introduction of a mesothelioma practice direction (PD 3D) in 2008. This is designed to ensure a common approach to the judicial case management of mesothelioma claims throughout England and Wales. Annexes C and D of the Disease and Illness Pre-action Protocol in England and Wales contain specific provisions relating to the pre-action process in mesothelioma cases. Standard early notification letters allow cases regarding mesothelioma sufferers to be flagged with insurers at an early stage to ensure, in theory, prioritisation of those cases and a quicker progression through the process.

This approach would be preferable to a dedicated protocol for mesothelioma claims, which (if produced along the lines of the proposed mesothelioma pre-action protocols for England and Wales), would provide a host of problems. A dedicated protocol would most likely contain a requirement that the claimant must provide a signed witness statement to the defendant at a very early stage. This would provide the insurers with a way to "fish" for information about potential pursuers. Further, this would result in delays to the claims process as the pursuer's solicitor would be unable to start a claim against the defender, until they had all the information required by the protocol, including expert medical reports and full work histories.

Q6. How successful has the use of separate pre-action protocols for professional negligence and industrial disease claims been?

The industrial disease pre-action protocol has not been successful.

Q7. Should a pre-action protocol for medical negligence claims be developed?

APIL has previously suggested that a medical negligence protocol should be developed, based around the Pre-Action Protocol for the Resolution of Clinical Disputes which is currently in use in England and Wales. The protocol would bring about significant financial savings by reducing unnecessary delays and reducing the need for cases to be litigated. It is long overdue. The field of clinical negligence in Scotland is notable for its lack of a Pre-Action Protocol to cover Clinical Negligence cases. This is in stark comparison to Personal Injury and even Professional Negligence (non-clinical cases). The need for a proper protocol has become increasingly widely recognised by various groups, including Professor Sheila MacLean's Working Party on No Fault Compensation. The need for a protocol is referred to in the subsequent Scottish Government Recommendations for No-Fault Compensation in Scotland for injuries resulting from clinical treatment April 2014 (Para 5.17.4, page 28).

Whilst England has had a re-action protocol for a number of years, Scotland has been slower to follow suit. A Voluntary Pre-Action Protocol was introduced on 1st January 2006 in respect of Personal Injury cases and a voluntary Pre-action Protocol in Professional Negligence (non-medical) cases is also now in place in Scotland. Unlike in

England and Wales, there is no statutory basis for these voluntary pre action protocols however they are widely used and followed in other areas of law in Scotland.

Q8. If you answered yet to question 7, what should the key features be?

The detailed contents of any compulsory pre-action protocol for clinical negligence should be a matter for detailed discussion amongst those involved in the day-to-day handling of clinical negligence claims. There are certain key features that any medical negligence protocol should include:

- An early and detailed disclosure as to the basis of the claim;
- A list of relevant documents sought included with the letter of intimation;
- Claims should only be intimated if there is supportive evidence (from records or where there is an appropriate report from an expert);
- There should be early identification of any rehabilitation or treatment needs of the injured party. The present arrangement is inadequate, as it is assumed that any treatment needs will simply be met through the NHS in the normal way. In reality, those injured through clinical negligence rarely, if ever, receive the level of focussed rehabilitation and treatment which a claimant injured in a road traffic accident will receive (where the defender's insurers take proactive steps towards obtaining treatment and rehabilitation for the injured party, to mitigate losses).
- Early exchange of copy medical records, statements and treatment information (recognising that for example, hospitals do not have access to GP records and GP defenders will not have access to hospital records);
- Early identification of relevant medical issues;
- Clearly agreed timescales for investigation and responses by each side. There will need to be a cultural change within Health Boards and Scottish Health Service Central Legal Office if the protocol is going to work. The traditional approach of health boards has been very reactive. It will be essential to have some strict time limits in order to drive these changes forward. Defenders have an agreed window of time within which to provide a substantive response. No court proceedings should be raised by the claimant within that window of time (unless there is an impending triennium);
- Exchange of expert reports;
- Timescales for resolution;
- An agreed scale of costs/expenses;
- Given that clinical negligence cases frequently involve consideration of non-financial issues, (such as reassurance that steps have been taken to prevent recurrence of the substandard treatment), mediation, either formal or informal.

Q9. Are there any issues relating to the operation of Pre-action Protocol for the Resolution of Clinical Disputes in England and Wales that should be taken into account?

The main issue relating to the operation of the pre-action protocol for resolution of clinical disputes in England and Wales is that the defendant hospital trusts tend not provide a letter of response within the prescribed protocol time frame, and there is no real sanction on them to do so. The timely disclosure of medical records is also an issue.

Q10. Should a new pre-action protocol regime be introduced in advance of the creation of the specialist Personal Injury Court?

In principle, there is no reason why a new pre-action protocol regime could not be introduced in advance of the creation of the specialist Personal Injury Court. The pre-action protocol is concerned with the process pre-litigation, so there is no need to delay its introduction in-line with the creation of the Personal Injury Court.

Q11. Are you or your organisation aware of variations in awards of expenses where the pre-action protocol has not been adhered to?

We are aware of variations in awards of expenses where the pre-action protocol has not been adhered to. The approach of the courts should become more consistent if the protocols become compulsory. If a party refuses to comply with the compulsory protocol, this will be a clear breach and the other party will be entitled to full expenses should they raise an action as a result of the breach. The current position is far from clear and consistent, because the party refusing to comply with the protocol is perfectly entitled to do so.

In some cases, the defender refuses to comply with the protocol, and when the pursuer raises an action as a result, they are entitled to full judicial expenses. In *Durie v Sabre Insurance* [1]*,* the insurers made an admission of liability but did not agree to the claim being conducted under the protocol. The defender moved that expenses be dealt with on a "no expenses due to or by either party" basis. The pursuer refused to accept this and once the solicitors had received a medical report, they raised an action. The sheriff held that the pursuer had acted reasonably in raising the action without giving defenders the opportunity to consider the medical report on the pursuer. The pursuer was awarded full expenses. In *Brown v Sabre Insurance*[2]*,* Lord Boyd pointed out that where the defender chooses not to abide by the protocol, they cannot "have it both ways". Lord Boyd commented that "(i)f the defender declines to be bound by the terms of the protocol, they cannot expect the pursuer's agents to be bound by it". As such, the pursuer's agent is entitled to raise an action in the absence of agreement to negotiate under the protocol.

In some cases, however, the pursuer may raise an action as a result of the defender's lack of compliance, but the court may hold that they are only entitled to lesser expenses when doing so. This was the case in *Lawson v Sabre Insurance*[3]*.* The defendants offered to negotiate settlement on production of medical and other relevant evidence, offering to meet the solicitors' fees on the basis of former chapter 10 expenses. Once solicitors had obtained a medical report, they raised an action without further intimation or correspondence. The sheriff restricted expenses to 40 per cent of the summary cause scale. The sheriff held that the protocol was not mandatory and the initial onus was on the pursuer to justify an award of expenses then to justify the amount payable. The sheriff went on that "until Lord Gill's recommendation on the mandatory use of the pre-action protocol is implemented, the defender's refusal to agree the protocol was perfectly legitimate".

This inconsistency and confusion in approach would hopefully be removed if the protocols are to become compulsory. A refusal by the defender to comply with the protocol would be a

[1] Perth Sheriff Court – 27 June 2012
[2] [2013] CSOH 51
[3] [2013] Scot SC63

clear breach, which should then allow the pursuer to raise an action and be entitled to full judicial expenses in doing so.

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