



**THE LAW SOCIETY
of SCOTLAND**
www.lawscot.org.uk

Consultation Response

Information Gathering Exercise on Pre-Action Protocol

The Law Society of Scotland's response

May 2014

Introduction

The Law Society of Scotland aims to lead and support a successful and respected Scottish legal profession. Not only do we act in the interests of our members, but we also have a clear responsibility to work in the public interest. That is why we actively engage and seek to assist in the legislative and public policy decision making processes.

We welcome the opportunity to comment on the Scottish Civil Justice Council Consultation Paper entitled Information Gathering Exercise on Pre- Action Protocols.

This response has been prepared on behalf of the Society by a working party under the auspices of the Civil Justice Committee. The working party is comprised of senior and specialist lawyers (both pursuers and defenders) with considerable experience of personal injury work.

1. 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?

Yes No No Preference

We agree that the stated aims and purposes of the current voluntary pre-action protocols are adequate, if made compulsory, to comply with the Scottish Civil Courts Review.

2. 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?

N/A

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

Yes No No Preference

Party litigants are almost unknown in personal injury cases due to the cost and complexity of the claims. In addition good representation is readily available.

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

Yes No No Preference

We agree that a compulsory pre-action protocol should apply to higher value cases involving fatal claims however this would not be appropriate for mesothelioma.

In cases where there has been a catastrophic injury it is more difficult to agree that there should be a compulsory pre-action protocol because there is frequently a claim for an interim payment.

Higher value cases are often complex and require lengthy investigation. A long period of investigation would defeat the timescales set by a compulsory protocol.

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

Yes No No Preference

We do not think there is a need to consider any additional protocols.

We are aware that the Ministry of Justice considered and then rejected the idea of a mesothelioma protocol. We agree that asbestos claims should be excluded from a compulsory protocol. We envisage problems in tracing both employers and their insurers. Currently very few of these cases are dealt with without the need for litigation.

If the pursuer has a short life expectancy there would normally be an attempt to take his or her evidence on Commission. A Commission will only be possible by order of the court after the action has been raised.

Many mesothelioma cases settle prior to the death of the pursuer. If the investigation is front loaded, in relation to liability, there would be a period of delay which cannot be afforded by some pursuers.

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

We think that the use of separate pre-action protocols for professional negligence and industrial disease claims has been very successful.

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

Yes No No Preference

Currently the majority of medical negligence claims are dealt with by the Central Legal Office (CLO) who often delay in responding.

We would welcome a protocol which encouraged dialogue in medical negligence claims.

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

We would welcome anything which encourages meaningful responses to claims correspondence and an early decision on liability and causation.

9. Are there 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?

Yes No No Preference

10. 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.

Yes No No Preference

At the moment there are conflicting Shrieval decisions from different courts across Scotland. We think that a specialist Personal Injury Court should be in place prior to the introduction of a new pre-action protocol regime. This should ensure the development of a consistent body of jurisprudence in relation to personal injury claims.

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

Yes No No Preference

There is currently an inconsistency in relation to judicial decisions on awards of expenses where the pre-action protocol has been used. Some decisions emphasise the importance of following the letter of the protocol whilst others seek to rely on whether or not there has been an attempt to follow the spirit of the protocol.

Conclusion/Additional Information

We suggest that the Council may obtain more information in relation to the operation of the protocols in Scotland from a couple of articles which were published in the Law Society Journal. We accept that some of these articles are old however we consider that they remain valid and that they continue to reflect current experience. The Articles are –

[A Colossus in the room - Settlement negotiations in personal injury cases, and the Pre-Action Protocol, are being undermined by insurers relying on a software program designed to reduce their costs](#)

Ronnie Conway

<http://www.journalonline.co.uk/Magazine/53-1/1004873.aspx>

[A breach of Protocol - Why the Voluntary Pre-Action Protocol for Personal Injury Cases is not working as it should to encourage early settlement of claims](#)

Graeme Garrett

<http://www.journalonline.co.uk/Magazine/53-2/1004970.aspx>

and

No protocol – what expenses?

Peter Crooks

<http://www.journalonline.co.uk/Magazine/59-3/1013714.aspx>

For further information and alternative formats, please contact:

Fiona J Robb

Solicitor – Professional Practice

DD: 0131 226 8883

E: fjrobb@lawscot.org.uk

The Law Society of Scotland

26 Drumsheugh Gardens

Edinburgh

EH3 7YR

www.lawscot.org.uk