

## **Direct Line Insurance Group plc**

Direct Line Insurance Group plc (Direct Line Group) is headquartered in Bromley, Kent; It also has operations in various countries including the UK, Germany and Italy.

Through its number of well known brands Direct Line Group offers a wide range of general insurance products to consumers. These brands include Direct Line, Churchill and Privilege. It also offers insurance services for third party brands through its Partnerships division. In the commercial sector, its NIG and Direct Line for Business operations provide insurance products for businesses via brokers or direct respectively.

In addition to insurance services, Direct Line Group continues to provide support and reassurance to millions of UK motorists through its Green Flag breakdown recovery service.

### **Executive Summary**

Direct Line Group (DLG) welcomes the opportunity to respond to Scottish Civil Justice Council's information gathering exercise on pre-action protocols.

We consider that a range of mandatory pre-action protocols would, if implemented, lead to improvements in pre-action conduct and enable equality of arms between the parties, which in turn will reduce the burden upon the courts as litigation will be an action of last resort.

Our responses to the questions posed in the information gathering exercise, which relate to the pre-action protocols in personal injury cases and disease cases are given below. Whilst our responses contain high level proposals, DLG would welcome the opportunity to participate in any further information gathering exercises or consultations on the issues raised.

**INFORMATION GATHERING EXERCISE  
QUESTIONNAIRE**

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? (Please tick as appropriate)**

Yes

No

No Preference

**Comments**

Direct Line Group (DLG) believes that the current pre-actions protocols are not adequate, if made compulsory, in their existing form.

There have been substantial changes to the Scottish litigation landscape and significant technological advancements since the Voluntary Pre-Action Protocol was first introduced in 2006. A modern, accessible, effective and streamlined mandatory protocol is needed that will deliver access to justice at a proportionate cost and will support the Scottish Government's 'Making Justice Work' strategy.

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?**

**Comments**

Our view is that a mandatory protocol must place greater emphasis upon pre-action conduct between the parties through increased pre-action contact, better and earlier exchange of information and better investigation. This will encourage pre-action settlements so that only claims with genuine disputes litigate, which is a more efficient use of the court's resources.

DLG believes that a process similar to the Low Value Protocols in England and Wales should be introduced and makes the following proposals to achieve these aims:

**Mandatory Information**

Inclusion of mandatory information in a standard format to replace the letter of claim will drive consistency and enable better and earlier investigations.

Information must include the pursuer's full name, date of birth, NI number and full

residential address (to include postcode), details of injuries sustained, details of any financial losses incurred, details of time off work, employers name and address, name and address of any hospital attended, details of treatment received, identification of material witnesses, copies of any witness evidence and a clear summary of the facts of the accident including allegations of negligence.

### **Fixed Expenses and Liability Response Time Periods**

A new fixed expenses scheme should be introduced to support the mandatory protocols. Our view is that the expenses should be set at a level that reflects the amount of work that will be required once the new mandatory protocols are in place, taking into account the fact that more cases should be settled earlier and with less need for the time and expense of litigation.

We propose a two-tier scheme in conjunction with the introduction of fixed time periods for defenders to provide a liability response.

The first tier expenses would apply to claims where the defender makes an admission (including admission but with allegations of contributory negligence due to failure to wear a seatbelt). The second, higher tier would apply where the claim starts within a mandatory protocol but exits as the defender does not admit liability or makes an admission but alleges contributory negligence (save for contributory negligence allegations relating to a failure to wear a seatbelt).

Admissions would be binding but subject to causation, except where fraud is subsequently raised as a defence.

The introduction of fixed time periods for defenders to provide a liability response will provide certainty for pursuers. In addition, it allows pursuers to invest appropriate resource in disputed claims, which attract the higher second tier fixed expenses.

Payment of first tier expenses should be subject to three phases. The first phase payment would be made by the defender upon receipt of a Statement of Valuation and all relevant supporting documents. Phase two payable upon settlement of the matter, where no proceedings raised, and phase three is payable upon settlement where proceedings issued. Tier two expenses should be paid in full upon settlement of the claim in the usual fashion.

### **Medical Reports**

DLG proposes the adoption of a standard template for medical reports obtained under the mandatory protocols, to drive clarity and consistency. The medical expert should identify within the report, any medical records that have been obtained and reviewed. The latter 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. Fees for medical reports should be proportionate and fixed.

### **Settlement**

In order to improve the efficiency of the new mandatory protocols, we suggest fixing the time period for the negotiation of damages, commencing from the date that the Statement of Valuation and relevant supporting documentation are received by the defender.

Where settlement is agreed between the parties within the fixed time period, the second phase of tier one expenses would be paid by the defender and in addition any outlays reasonably incurred.

Where settlement is not agreed, we propose 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.

Regardless of determination on the papers or via an oral hearing, the third phase of fixed expenses will be awarded to the pursuer if they are awarded damages in excess of the defender's final offer. Where the award does not better the defender's final offer, the defender will receive an expenses award.

#### **Sanctions**

To ensure compliance we suggest the introduction of appropriate rules and sanctions where either party fails to comply with the protocols, 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 pursuer has provided all the required mandatory information to the defender. This would prevent cases moving to tier two and attracting higher costs simply because a pursuer fails to supply enough information to enable the pursuer to make a liability decision.

#### **Electronic Based Portal**

We suggest 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, to enable notification of claims, submission of medical reports, Statements of Valuation and all necessary communication.

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

Yes

No

No Preference

#### **Comments**

DLG do not consider that party litigants will be adversely affected by mandatory protocols. In fact, mandatory protocols should offer extra protection by their very nature. In addition, defenders' processes for handling claims from party litigants must contain appropriate safeguards, for example, in line with the ABI Code of Conduct: Third Party Assistance.

Defendants would need to explain how the relevant protocol operates by way of a plain English fact sheet that is sent upon receipt of a claim. In particular, the fact sheet should:

- Outline protocol timescales
- Contain no requirement for the party litigant to use the electronic portal
- Make it clear that the party litigant can seek independent legal advice at any time
- Indicate the usual financial losses that may be claimed and what supporting evidence is required
- Expect defenders to obtain the required medical and,
- Require defenders to make reasonable offers in the Statement of Valuation

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

Yes.

No. If not, what should the “cut off” threshold be?

No Preference

**Comments**

DLG agrees that there should be a compulsory pre-action protocol for higher values cases, which includes fatal or catastrophic injury claims.

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

We suggest 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 and,
- Commitment by both sides to share evidence as soon as practicable
- Early articulation and evidencing of matters relevant to the consideration of appropriate awards for fatal claims

In addition, we believe there is scope to increase the value of claims brought within the pre-action protocols for personal injury and disease claims from £10,000 to a value of at least £25,000 and the personal injury protocol should apply to all claims which involve personal injury. We suggest that separate fixed expenses scheme rates apply to claims valued between £1,000 and £10,000 and to claims valued between £10,001 and £25,000 to reflect the complexities of claims valued over £10,000.

Increasing the value of claims within both protocols and introducing a new high value protocol (all must be supported by proportionate sanctions that encourage pre-action settlement), will deliver access to justice at a proportionate cost.

**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

Comments  
DLG's view is that disease claims should have a specific protocol with a separate protocol for mesothelioma claims. We believe that a mesothelioma protocol should have particular focus on encouraging early payment of damages to provide sufferers, and their families, with much needed financial support.

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

Comments  
DLG has no view to offer.

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

Yes.  
 No                       No Preference

Comments  
DLG has no view to offer.

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

Comments  
DLG has no view to offer.

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

Comments

DLG has no view to offer.

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

Comments

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 with a broad acceptance of Taylor's recommendations to deliver greater predictability and certainty around the cost of litigation. In addition, the Scottish Government has commenced further legal reform in the shape of the Courts Reform (Scotland) Bill, which is currently progressing through the Scottish Parliament. Our proposals will supplement and support the Scottish Government's reform programme.

Ideally, we believe 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 day one.

However, to take advantage of the benefits the new protocol regime will bring, we suggest introducing the regime in advance should creation of the specialist court be subject to any significant delay.

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

**Comments**

DLG are not aware of any variations in pre-action protocol awards of expenses however, a fixed expenses scheme in the manner we have set out will provide absolute certainty over expenses.