



Informing Progress - Shaping the Future

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The Compulsory Pre-Action Protocol for Personal Injury Claims in Scotland: Technical Considerations and Industry Impact

Introduction

The Scottish Personal Injury Pre-Action Protocol was introduced on 28 November 2016 by the Act of Sederunt (Sheriff Court Rules Amendment) (Personal Injury Pre-Action Protocol) 2016.

The Protocol applies to certain personal injury claims valued at £25,000 or less. It was designed to encourage the fair, just, and timely settlement of disputes, as well as to promote good practice regarding disclosure, investigation, and narrowing of issues before litigation.

Prior to this, a voluntary Pre-Action Protocol existed for personal injury and industrial disease claims in Scotland, but it had significant limitations - it was only applicable to claims with a value of up to £10,000 and both parties had to agree to follow the protocol. The compulsory protocol addresses at least some of the voluntary protocol's shortcomings and applies to a wider range of personal injury cases.

As further compulsory protocols are finalised, we look at the existing protocol and its operation to date.

Detailed Protocol Requirements

The protocol structures the claims process into several distinct stages, each with specific technical requirements and timelines:

1. Letter of Claim: The claimant must send a detailed letter of claim to the defender (or their insurer), providing comprehensive information about the injury, including the nature and extent of the injury,

allegations of fault, the claimant's condition and prognosis, financial losses, and relevant records and documents. This letter must comply with the protocol's prescribed format and content requirements.

2. Acknowledgement: The defender must acknowledge the claim within 21 days and indicate whether the case is suitable for the protocol. Failure to acknowledge the claim within the specified timeframe may result in sanctions.

3. Liability Admission: The defender must provide a liability decision within three months of receiving the claim form. If liability is admitted, the defender must do so by way of a binding admission, which cannot later be withdrawn. If liability is denied, the claimant is entitled to raise proceedings without disclosing any further information. .

4. Medical Evidence and Valuation: If liability is admitted, the claimant must gather medical evidence, such as expert reports, and submit a detailed statement of valuation of claim valuation to the defender. The protocol sets out specific requirements for the content and format of this evidence.

5. Settlement Offer: The defender must respond with a settlement offer within 5 weeks of receiving the claimant's statement of claim valuation. The claimant then has 14 days to accept or provide a reasoned response to the offer.

6. Litigation: If settlement is not reached, the claimant can then proceed to litigation. However, the court will consider the parties' conduct during the protocol when determining expenses (costs). This may incentivise both parties to engage constructively in the pre-action process.

Impact on the Legal and Insurance Sectors

The protocol has largely been received positively by those representing claimants and defenders. Issues do arise in relation to compliance and what could be termed as following the letter rather than the spirit of the rules. The Sheriff Court, where most claims for £100,000 or less must be litigated, has shown a willingness to sanction claimants for premature litigation where the requirements of the protocol has not been met.

In many higher value claims, parties will voluntarily agree to follow the protocol in order to manage the claim and this can work well.

A claimant who settles a claim in terms of the protocol is entitled to costs and outlays, this was not previously the case for pre-litigation claims. The protocol also introduced a fee structure for pre-litigation claims. As a result of these changes, the protocol has reduced the number of claims which litigate because of costs disputes and has brought predictability and reduced the scope for disagreement on costs when settling claims under £10,000.

Ongoing Developments: Clinical Negligence and Disease Claims

The Scottish Civil Justice Council (SCJC) approved new pre-action protocols for both clinical negligence and disease claims back in 2022. The protocols are with the SCJC Costs and Funding Committee for the development of suitable fee structures that have yet to be published.

Nevertheless, in the SCJC's Annual Programme for 2023-24, it is stated that the protocols are a priority to be progressed during the 2023-24 planning period.

Conclusion

The compulsory Pre-Action Protocol for personal injury claims in Scotland represented a significant reform to the pre-litigation process. By introducing strict timelines, disclosure requirements, and cost consequences, the protocol was intended to encourage early settlement, reduce the need for court proceedings, and promote a more collaborative approach to dispute resolution.

The actual operation of the protocol has been somewhat mixed, but it does offer a clear framework for the management of pre-litigation claims, and with the introduction of QOCS to Scotland in 2021, the ability to seek costs sanctions for failure to comply with the protocol can be a useful tool.

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