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Insurance POST

Claims

Mandatory personal injury protocol in Scotland

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- Rules for the long-awaited new pre-action protocol for personal injury cases in Scotland have been published
- Pre-medical offers are now specifically permitted
- The response to a settlement offer must now be "reasoned"

The new protocol rules provide opportunities for insurers to avoid more litigation than before, but robust procedures for adhering to deadlines will be necessary to avoid any breach.

Rules for the long-awaited new pre-action protocol for personal injury cases in **Scotland** have been published and will have effect for circumstances arising from 28 November.

For the first time in Scotland, the protocol will be mandatory for claims with values of £25,000 or less with the exception of disease and clinical negligence. Notable changes include:

Pre-medical offers

Although not explicitly forbidden in the existing protocol, **pre-medical offers** are now specifically permitted but only in claims where the claimant has not sought any formal medical treatment. It will no doubt be a matter of debate as to whether any attendance at a GP amounts to 'formal medical treatment'.

The voluntary protocol did not provide the opportunity for any questions to be asked or clarification sought. The new protocol makes specific provision for further information to be requested either by an insurer following receipt of the claimant's statement of valuation of claim or by the claimant following an offer to settle.

In both cases, the information should be requested promptly and should be necessary to allow proper consideration of a party's position. A response is required within 14 days. This will help insurers to challenge spurious heads of claim but when responding, the 14-day time limit may prove to be short, especially where input is required from the insured.

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Claimant's response to offer

The response to a settlement offer must now be 'reasoned' and include explanation for an outright rejection or a reasoned counter-proposal within 14 days of the offer. A claimant was not previously under an obligation to explain their position, opting simply for immediate unnecessary litigation. The inclusion of specific reference to counter-offers in the rules will encourage dialogue and a failure to engage may be viewed as inconsistent with the aims of the protocol and result in a cost penalty.

Where an offer is rejected, a claimant must wait a further 14 days before litigation is commenced to allow parties to reconsider their respective positions and negotiate further. While such negotiations are not obligatory, a claimant who refuses to discuss a claim further prior to litigation is unlikely to be viewed favourably. For the first time, a period for negotiation is incorporated into the protocol and this is a significant development.

Protocol costs

The protocol scale costs are being revised. Generally fees will increase but for claims that settle for over £1500 but less than approximately £6000, fees will actually decrease slightly. This should include the bulk of whiplash type claims and is, therefore, good news for volume motor insurers.

The court rules now set out an obligation on parties to have complied with the protocol where applicable, prior to litigation and setting out the consequences for failure to do so. The new rules allow the sheriff to take such steps as "necessary to do justice between the parties" with costs being the main suggestions.

Where considering matters, the sheriff will consider that nature of any breach of protocol, the conduct of the parties and the extent to which their conduct is consistent with the aims of the protocol being "fair, just and timely settlement"; "early and full disclosure; investigation; and the narrowing of issues in dispute."

Awards of costs have always been at the discretion of the court but these provisions now provide a structured benchmark against which pre-litigation conduct can be measured.