Civil Procedure Rules Committee
Consultation on extension of the RTA scheme to include employers' and public liability claims up to the value of £25,000

A response by the Association of Personal Injury Lawyers
November 2012

The Association of Personal Injury Lawyers (APIL) is a not-for-profit organisation with a 20-year history of working to help injured people gain access to justice they need and deserve. We have around 4,400 members committed to supporting the association's aims and all of which sign up to APIL's code of conduct and consumer charter. Membership comprises mostly solicitors, along with barristers, legal executives and academics.

APIL has a long history of liaison with other stakeholders, consumer representatives, governments and devolved assemblies across the UK with a view to achieving the association's aims, which 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;
- To provide a communication network for members.

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Introduction

APIL welcomes the opportunity to comment upon the draft protocols for the extension of the RTA scheme to include employers' and public liability claims up to £25,000. We do not, however, consider this consultation of the protocols sufficient to discharge the Government's commitment to consult with key stakeholders to agree the details of the scheme before timings for implementation are confirmed[1]. Limiting consultation to the protocols alone does not provide a joined up approach to reform in this area as there are other interlocking changes to the rules. Practice directions and forms should be considered in conjunction with the protocols. We understand that the forms that will accompany the protocols have been finalised and will not be formally consulted upon; this is an error in our view as the two are fundamentally linked.

Our comments follow on from our earlier response to the call for evidence and to the Solving Disputes in the County Court consultation. We understand that the former will now be provided to the Civil Procedure Rules Committee (CPRC) for consideration, however, it is our understanding that stakeholders responses to the Solving Disputes paper have not been provided to the CPRC. A copy of our response to this paper is also provided for completeness.

Whilst we are in agreement with some of the changes and adaptations to the protocol, especially those changes made to improve the streamline process, APIL believes that there are several issues with the draft protocols in their current form. Many of the problems and suggested amendments pointed out in our early responses have not been taken into account. One of the biggest issues of concern is a lack of clarity.

General comments

Advice from counsel

It is essential that the protocols are re-written to ensure that advice on quantum can be obtained from the Bar. A claimant should be allowed access to advice from the Bar at stage two of the process to ensure that an independent advice on quantum can be obtained. The proposal to attack cost levels in this type of work further could result in a reduction in the quality of service, quality of case handlers and potentially result in a reduction in damages. Allowing advice from counsel at stage two will protect damages from being driven down. CPR part 45.30 will also need amending to allow advice from counsel to be a recoverable disbursement. We have proposed before that for RTA cases under £10,000 the disbursement would only become payable on the basis of an "added value trigger", namely if

[1] See Government's response to Solving disputes in the county court paragraph 16.

the quantum advice received from counsel produces a higher settlement on negotiation or award at stage three than the insurer's initial offer.

For all EL and PL cases and for RTA cases over £10,000 the trigger should be where the difference between the claimants and defendants offer is five per cent or more. The appropriate fixed fees for the disbursement could be agreed with the Personal Injury Bar Association.

Stage 3

This will need revising for higher value cases. There is currently no provision within the rules for the client to give oral evidence at Stage 3. This will be even more important in higher value cases as there is every possibility that further evidence will be required to prove the claimant cases. This in turn will have a knock on effect to the level costs that should be permitted.

Getting it right

Rushing changes through for April 2013 implementation is unrealistic and, more worryingly, damaging to access to justice. We know from experience that rushing the development of the portal software results in additional cost and confusion to users. Implementation of the RTA process under tight timeframes imposed by the MoJ last time means that claimant and insurer representatives are still working collectively to make the portal reflect the current protocol. These modifications will not be fully in place by April 2013 meaning that inefficient workarounds have been in place for three years whilst software changes have been written.

Tackling fraud

The streamline process developed and implemented in 2010 removed a number of the check and balances previously in the system that combated fraud and ensured accurate compensation for genuine claimants. Insurers see fraud as a major problem in low value claims. However, there are a number of reforms to the system that APIL has recently suggested for whiplash claims[2] that will ensure compensation is delivered to genuine claimants. The plan calls for effort and commitment from all parties concerned, and is based on the need for proper evidence, the sharing of information about fraudsters and consistently ethical standards from all those involved in the process. The key changes needed to this process are:

[2] APIL's ten point plan for eliminating fraud in whiplash cases see appendix 1

- Free and prompt exchange of information between the Road Traffic Accident (RTA) claims portal and the Insurance Fraud Bureau to facilitate identification of fraudulent behaviour at the earliest possible opportunity.

- Claimants to be subject to a standard, written statement of truth which must be explained to them by their solicitors. A document to be signed by either the claimant or the solicitor to confirm that the claimant understands the commitment behind the statement of truth. Breach of the statement may amount to fraud and may make the claimant liable to prosecution.

- Insurers to be banned from making offers of compensation before a medical report has been seen: the medical report is a critical factor in ensuring a claim has merit and that accurate compensation is paid.

- Any party who instructs an expert to give the other party a list of the names of one or more experts he considers are suitable to instruct beforehand, to ensure the expert is accepted as credible by both sides.

- Photographic identification of the claimant to be required by the medical expert: if this cannot be produced, the omission will be included in the expert's report.

- The claimant's solicitor to organise access to relevant medical records where a medical expert is to be instructed.

Our comments on the draft protocols are provided below.

Pre-action protocol for low value personal injury claims in road traffic accidents

SECTION I- INTRODUCTIONS

Definitions

Paragraph 1.1(2) defines a claimant. This requires re-wording to ensure that subsequent references throughout the protocol relate to both the person bringing the claim and their representative.

Aims

Paragraph 3.1 should include “to ensure that the right level of compensation is paid in the event of a successful claim” as a stated aim of the protocol.

SECTION II- GENERAL PROVISIONS

Communication by the parties

Paragraph 5.1 of the draft protocol is altered, which changes how the parties are required to communicate, by stating that there has to be contact via the portal: “information…must be sent via www.rtapiclaimsprocess.org.uk.” Any written communications not required by the protocol must be sent by email. This change to the protocol could pose a real problem for litigants in person. Currently unrepresented claimants are unable to access the portal as all users must be registered but it is understood that this is going to change. If this is the case this is an issue that must be resolved. Secondly, we question whether all litigants in person will have access to the internet to enable them to utilise the portal.

“Email” is not defined in the protocol, the lack of definition coupled with the fact that email is not always secure and there could be sensitive personal data sent in this manner give rise to data protection issues.

SECTION III- THE STAGES OF THE PROCESS

Stage 1

Whilst we have not seen the forms that accompany these changes, which in our view is a serious error, it is important that the statement of truth referred to at paragraph 6.6 should include confirmation that the statement of truth has been explained to the claimant by their solicitors and that they understand the legal commitment behind the statement of truth namely that a breach of the statement may amount to fraud and may make the claimant liable to prosecution. This could be signed by either the claimant or his solicitor.

Rehabilitation

Paragraph 6.7 does not adequately protect the needs of the injured person. The paragraph states “the claimant must set out details of rehabilitation in the CNF.” Rehabilitation is something which all parties should have to consider throughout the life of the claim. We suggest that the Rehabilitation Code should be attached to this protocol.

The current wording at paragraph 6.7 requires rephrasing. The paragraph, as drafted, reads as though rehabilitation has been identified and/or arranged. The solicitor filling out the form may not know exactly what rehabilitation will be required at this stage. The solicitor will only

be able to detail here, what rehabilitation the claimant has undergone so far. Without seeing the revised CNF we cannot be sure what information the claimant is being asked to provide and whether or not it will be adequate for more serious cases.

In cases up to £25,000, the injured person could have serious rehabilitation needs. In more serious cases an Initial Needs Assessment (INA) may be required and the protocol should provide provision for this. We suggest that an INA should take place for claims over £10,000, unless the claimant lawyer identifies that it is not required. This assessment would then detail the exact extent of the injuries sustained and would unlock the way for treatment to be paid for by the defendant. Presenting an insurer with the information in an initial needs assessment can make them more cooperative, as this enables them to see evidence of the extent of injuries. If provision for an INA is not felt necessary by CPRC, there needs to be consideration regarding the need for substantial rehabilitation in higher value cases. For example it may be necessary for the protocol to make provision for cases requiring substantial rehabilitation to exit the process to ensure the appropriate investigation is carried out by the claimant solicitors.

Given that rehabilitation is extremely likely in higher value cases, the provision for interim payments within the protocol is insufficient to allow a request for payment towards these.

Failure to complete the claim notification form

The revised forms are not being consulted upon as part of this consultation exercise, yet it is important to see the content of these to ensure that the changes to the protocol and the changes to the forms dovetail. Specifically with regard to paragraph 6.8, the forms need to be considered in conjunction with this section to ensure that the form is appropriate both for represented and unrepresented claimants. It may not be appropriate for some sections of the form to be mandatory for the latter.

Stage 1 fixed costs

Paragraph 6.18 is amended to state that the "defendant must pay the Stage 1 fixed costs in rule 45.29…within 10 days after receiving the Stage 2 Settlement Pack", instead of, as it now reads "within 10 days after sending the CNF response to the claimant." This amendment is aimed at stopping the prevalence of the "£400 club", where solicitors get information about clients from insurers and enter their details into the portal, thus getting £400 for completing Stage 1. Whilst the "£400 club" is an issue which needs to be dealt with, changes in the draft protocol regarding the requirement that a statement of truth can only be signed by the claimant or a legal representative that has been approved by the claimant (detailed in paragraph 6.6), are surely enough to stop this practice. The legal representative will have to

be authorised by the claimant to sign the CNF on their behalf, which will mean that details are not entered onto the portal without a claimant's consent. We suggest that it is not therefore necessary to delay Stage 1 costs, as proposed in the draft protocol at paragraph 6.18: paragraph 6.6 would already prevent the "£400 club" practice. Delaying payment of Stage 1 fixed costs would be detrimental as it would create cash flow issues for firms of solicitors.

More importantly, the way in which these changes have been worded at paragraph 6.18 means that where the defendant makes a pre-medical offer which the claimant accepts, Stage 1 costs will not be paid because a settlement pack will not have been generated.

We know that an incidence of pre-medical offers is high, anecdotal evidence suggests that 25 per cent of cases within the portal settle without a medical report.

APIL recommends that this practice is prevented altogether. Ensuring a claimant is examined in every case would go some way to preventing fraud in lower value RTA cases, something both insurers and claimant lawyers want to tackle. However, simply preventing lawyers from being paid costs in cases where a pre-medical offer is made and accepted will only drive insurers to make more of them and whilst solicitors are under an obligation to ensure that the claimant is given proper advice about all offers, many will accept initial offers without being examined against lawyers advice. One suggestion for tackling this would be to amend paragraph 7.1A to make it mandatory for at least one medical report to be obtained before settlement can be considered. Alternatively, paragraph 7.37 will require amendment to include stage 1 costs.

Stage 2

Medical Reports

In this process claimants no longer have to nominate experts before instruction to see if the defendants object. In our view this requirement should be re-instated in the protocol. Any party who instructs an expert to give the other party a list of the names of one or more experts he considers are suitable to instruct beforehand, to ensure the expert is accepted as credible by both sides. This would go some way to tackle the criticism from insurers as to the type of expert that claimant lawyers are instructing in low value RTA cases.

What we do not agree with, however, is paragraph 7.2A which requires the claimant to disclose medical records which any medical expert considers relevant. APIL questions why it is necessary for medical notes to be disclosed alongside the expert's report. Currently pre-action disclosure of medical records is limited. Records are not usually disclosed where the

defendant has made an application for pre-action disclosure; there is no obligation for the claimant to do so under the pre-action protocol[3] . They will only usually be disclosed in cases where there is a low velocity impact argument.

It is important that there is a balance, however, in our view, this is achieved providing records are obtained and reviewed by the medical expert instructed at the request of either party or the expert himself. The independence and integrity of the medical profession ensures that any relevant entries are referred to bearing in mind the overriding duty of the expert to the court. It would be unnecessary, and disproportionate, to have to disclose all records the expert has seen. This also runs flat against cases such as *Lucas v Barking, Havering and Redbridge Hospitals NHS Trust*[4] (disclosure will not be ordered and documents that form part of the "instructions" to the expert).

In our view there is no need to disclose confidential medical notes unnecessarily as contained in *Bennett v Compass Group*[5]*,* which states that medical records are by their very nature private and confidential and as such their disclosure should be restricted. Therefore, we would suggest that paragraph 7.2A is removed.

Paragraph 7.2B also raises questions, stating that in most claims with a value of no more than £10,000, it is expected that the medical expert will not need to see any medical records. In our view this should be amended to allow for the claimant to organise access to relevant medical records where a medical expert is to be instructed. This is another check that was removed from the process when it was being developed. This will allow the expert instructed to consider the claimant's medical history applicable to the claim. For example whether they presented to A and E or their GP for treatment or advice on their injury. The protocol would need to be amended to allow for this as would the accompanying part 44 rules on costs to ensure the cost of the disbursement were recoverable.

Paragraph 7.2C allows for "any relevant photographs" of the claimant's injuries to be disclosed with the medical report. This is too wide a description, and it could be left open to abuse by defendants. The wording should instead be "any relevant photograph(s) upon which the claimant seeks to rely."

We further suggest that the protocol should stipulate that the instructed expert must request to see photographic identification of the claimant at the examination. This will go some way

[3]OCS Group Limited v Wells [2008] EWHC 919 (QB).
[4] [2003] EWCA Civ 1102
[5] [2002] EWCA Civ 642

to tackle fraud in lower value cases. If this is not available the expert should confirm this is the case in the report produced. This would allow the defendants to make further enquiries if necessary.

Subsequent medical reports

Subsequent medical reports "must be justified", according to paragraph 7.6. "Must be justified" is wider than the current provision and allows for more flexibility. However, we feel that the list detailing when subsequent medical reports may be justified needs extending to include at paragraph 7.6 (2) "the claimant is receiving continuing treatment or *such treatment is recommended",* and a further subsection should be added to include situations where the first medical report recommends further investigation, such as an MRI scan or an X-ray. Whilst further *treatment* would be covered under paragraph 7.6(2), further investigation would not.

A further issue is that there may be confusion regarding when an additional medical report from an expert of a different discipline, e.g. a neurologist as opposed to an A and E consultant, is permitted. Paragraph 7.1A permits a report from an expert of a different discipline to that originally instructed to examine the claimant. Paragraph 7.6 goes further to list situations in which subsequent reports may be permitted, but does not expressly incorporate paragraph 7.1A reports from experts of different disciplines. This could result in real confusion as to what reports are and are not justified thus resulting in challenges over what disbursements will and will not be paid.

It maybe that the qualifications in 7.6 only apply to subsequent medical reports obtained from the same practitioner. If this is the case it needs to be made clearer and could be amended to read "subsequent medical reports from the same expert."

Stay of process

We raise the point that with regard to paragraph 7.7, it is not clear what happens if a party does not agree a stay of process. Whilst it is assumed that if this occurs, the claim will fall out of the portal, we feel that additional clarity is required here.

Request for an Interim payment

The current wording in the protocol allowing for access to interim payments does not resolve issues APIL has highlighted before. Often interim payments can be required before a medical report has been obtained, especially where there is an on-going loss of earnings claim which is resulting in financial hardship for the claimant. It is unfair to the claimant to deny them interim payments until a medical report has been obtained. This may take a

significant amount of time, yet the claimant may have needs as a result of their injury making earlier interim payments necessary. In higher value claims, the need will be more prevalent and the claimant may require interim payment towards treatment or medication. This is linked to our previous comments on rehabilitation, see above, page 6.

We note that in the draft protocol for employers' liability and public liability claims, paragraph 7.19 provides for the claimant to request more than one interim payment. We would suggest that this provision is also drafted into the new RTA protocol to ensure that claimants in higher value cases, suffering more complex injuries, can obtain the continuing financial assistance that they require.

Costs of expert medical and non-medical reports obtained without recommendation

Paragraph 7.24(2) requires the claimant to explain why they have obtained more than one medical report. In the previous protocol, this was only required if the medical expert had not recommended it. Therefore, the requirement is now more onerous. If an expert has recommended that a second report be obtained or that a report from an expert of a different discipline is required, this should be sufficient to ensure that the disbursement is paid by the defendant. The words "except where a medical expert has recommended" should not be removed from the latest draft protocol.

Failure to reach agreement –general

The protocol as currently drafted does not allow for additional information to be raised in the court proceedings pack that has not been raised in the stage 2 settlement pack. Paragraph 7.57 will require amendment for those more complex cases valued up to £25,000, where evidence is continuing to develop and there are on-going losses such as loss of earnings for future care claims that are continuing at the time of the settlement pack being drafted.

Stage 3

Whilst there are no changes to paragraph 8.1, we have not seen any proposed changes to the practice direction or forms as they have not been included as part of this consultation exercise. As with comments regarding the forms, the two changes dovetail, and there are likely to be changes required to practice direction 8 B to deal with more complex cases up to £25,000, for example oral evidence at stage 3 hearing. As mentioned above, we are concerned that the forms accompanying the protocol have already been finalised and are not being consulted on. We believe that failure to consult on the practice direction and forms is an error as these are fundamentally linked to the protocol. Also, this is a departure from recent precedent. When the Pre-Action Protocol for Low Value Personal Injury Claims in

Road Traffic Accidents was approved prior to introduction in April 2010, forms were specifically approved under the authority of the CPRC through its drafting sub-committee. Changes in the protocol needed to be reflected in the accompanying forms - yet how can this be ensured if the protocol is still in a draft phase and the forms have already been finalised. Whilst not ideal since the protocols and forms should be viewed together, a practical solution may be for the protocols to be finalised, and then the forms drafted and then subsequently subject to a short consultation before being finalised.

Pre-action protocol for low value personal injury employers' liability and public liability claims

SECTION I- INTRODUCTION

Definitions

Our comments above regarding the definition of claimant, paragraph 1.1 (2) of the protocol apply equally here.

It is essential that the definition of employers' liability is as clear as possible. Great care was taken when drafting the RTA protocol to ensure that the definition of RTA avoided uncertainty as to what cases would be within that protocol and those that would not.

Whether someone is employed has always been a difficult concept in law. There are many borderline cases where it is difficult to identify whether a person is working under a contract for services (and so is a self-employed contractor) or a contract of service (and so is an employee). Doubts have been cast, for example, on the status of couriers working for a company (as demonstrated in the case of *James v Redcats Brands*[6]*,* and those who work on a casual, as required basis (*Carmichael v National Power*[7]). *O'Kelly v Trusthouse Forte*[8] is a case that demonstrates how complex the concept of "employee" actually is. Here, there were several people who worked as waiters at a hotel on a casual basis, and they were known as "regulars". The case was appealed several times, with the court to-ing and fro-ing as to whether the people were employees or not.

If a person makes a claim against a person who is not their employer, this will be classed as a "public liability claim", as defined in paragraph 1.1(12)(a) "public liability claim means a claim for damages for personal injuries arising out of a breach of a statutory or common law duty of care made against a person other than the claimant's employer." Different time

[6] [2007] IRLR 296
[7] [1999] UKHL 47
[8] [1983] ICR 728

scales and different fixed costs are set to apply depending on whether the claim is an employers' liability or a public liability claim. The fine and complex distinction between those who are legally defined as employees and those who are not could lead to unfairness, and similar cases having very different outcomes.

Aims

Our comments in relation to the Aims section of the RTA protocol equally apply here.

Scope

What is the definition of insolvent at paragraph 4.3 (4)?

Paragraph 4.3(5) states that the protocol does not apply to a disease claim where there is more than one defendant. We feel that all multiple defendant cases should be kept out of the portal, not just those regarding disease, as they are too complex. We do not see the justification in treating accident claims any different to disease claims in this circumstance. Excluding multiple defendants or multiples of the same company from the portal scheme will also prevent confusion on how to proceed where one defendant admits liability but the other does not.

Having not seen the fixed costs that the MoJ is proposing for cases that fall out of the protocol, we question if disease cases should be included in the portal at all. The MoJ is working on the premise that cases that fall out of the portal will attract fixed fees as detailed in the table annexed to the Ministers letter dated 19 November. We know that the data provided to Professor Fenn did not include disease cases, the data provided was only in respect of employers' liability accidents.

We question whether the definition at paragraph 4.3 (7) for abuse cases outside the remit of the protocol hits its intended target. For example, on the basis of the definition provided an adult psychiatric patient who assaults a carer will not be caught by the definition, nor will the teacher who is assaulted by his pupil. In our view these cases should be excluded from this process too.

Paragraph 4.3 (8) does not include a definition for clinical negligence; in our view one should be provided.

Cases involving asbestos related injury (which almost always include issues as to provisional damages, save in terminal or fatal cases) and those where the claimant intends to apply for provisional damages should be excluded from the scope of this protocol as they are unsuitable for a streamline process.

SECTION II- GENERAL PROVISIONS

Communication between the parties

Our comments above regarding litigants in person apply equally to this section.

Paragraph 5.2 is, in our view, ambiguous and needs further clarification over what is meant by a "wrong defendant". There are very real possibilities of CNF's being sent by a claimant to what they believe to be a genuine defendant. For example, in a building site accident the CNF may be sent to a contractor who may then indicate they do not believe they are the correct defendant. In this case it may not be clear who the defendant is. Where there is a reasonable belief on the part of the claimant, that the defendant the CNF was sent to was the genuine defendant, or where the case involves multiple defendants, the case should come out of the process unless the parties agree otherwise.

We believe there is a drafting error at 5.5 (3) which refers to paragraph 7.29 (the further consideration period) when in fact the correct paragraph is 7.33.

SECTION III- THE STAGES OF THE PROCESS

Stage 1

Completion of the Claim Notification Form

APIL has concerns about how locating a defendant's details or their relevant insurer's details will work in practice for EL and PL cases.

There is no search facility for public liability policy and the requirement for such a policy is not even compulsory.

Whilst there is a database for current EL policies, the ELTO database, there is not a 100 per cent success rate and not all insurers are signed up to the scheme as it is not currently compulsory. At present, there is a lack of access to HMRC data, particularly employer reference numbers, which means that employers can be difficult to find[9]. Anecdotal evidence suggests that the population of the ELTO database is currently at 50 per cent but it is expected that this will rise to 80 per cent within the next five years.

Although ELTO is intending to include all insurers, it is not intending to cover all employers, so how can they be traced? Some employers self employ for instance and will never be found on the ELTO.

[9]Brodie C, 2012, Insurance Chief urges HMRC to open up records to boost EL tracing hit rate, *Post Magazine* 1/11/2012 p.4

In addition, how will the portal cope with defendants in PL cases? How will potential defendants register and how will claimants be able to determine if the defendant is registered? There is also a risk of satellite litigation because of the use of “reasonable attempt.” This phrase is used both in relation to the claimant’s attempts to identify the insurer in paragraph 6.1 (3), and with regard to completing those boxes that are not marked as mandatory” in paragraph 6.3. It is not clear what a reasonable attempt amounts to.

Rehabilitation

Our comments above apply equally to this protocol.

Failure to complete the claim notification form

Our comments above apply equally to this protocol.

Response

The time limits stipulated in paragraph 6.12 give defendants disproportionately generous amounts of time to gather information. In most EL accident cases the defendant also has, or should have, knowledge of the accident before notice of the claim is received. If the insurer does not respond in the time limit currently provided and the cases exits into the personal injury protocol, the defendant is allowed over five months to investigate the claim. This is wholly unacceptable. Any delay increases the risk of evidence being lost. Also we know from current insurer practices that insurers allow cases to exit to buy them extra time. The objectives of the claims process was to deliver quicker compensation at reduced cost forcing a culture of change from ‘delay and routinely defend’ to ‘analyse quickly, admit and, where appropriate, settle’.

As with EL accident cases there is an evidential difficulty if the defendant is allowed substantially more than the 15 days stipulated under the RTA protocol to investigate liability, and if the claimant is not allowed to preserve the evidence in his case immediately. We know from our members that in around 80-90 per cent of PL claims, liability is denied. The claimant must not be reliant upon the defendant preserving and producing documents to prove the claimant’s claim. We know currently that defendants fail to record the exact location of a defect or the date of repair. Failing to preserve this evidence will prejudice the claimant’s case.

In addition to giving defendants generous amounts of time to gather information, the defendant then, if he wishes to deny liability under paragraph 6.15, only has to give very brief reasons why he is doing this. If the generous timeframes remain for EL and PL cases,

there is no reason why the defendant should give only brief reasons why liability is denied. There should be a detailed response and disclosure of relevant documents to ensure the case then progresses swiftly and without further delay. The requirements on defendants in terms of reasons and documents when denying claims should be no less than that which is required in the current applicable pre-action protocols. Time limits should be as for the Pre-Action Protocol for Low Value Personal Injury Claims in Road Traffic Accidents.

We would also like to point out the drafting error in this protocol: there are currently two paragraph 6.16's.

The first of these needs further clarification similar to that given in the RTA protocol. Claimants and defendants need to be clear where a claim exits this protocol where it enters the corresponding PI protocol or disease and illness protocol as appropriate. Without this certainty there will be procedural challenges.

Stage 1 fixed costs

Our concerns noted above equally apply here.

Stage 2

Medical reports

Our comments above are also relevant here.

Subsequent medical reports

Our concerns noted apply here too.

Interim payment of £1,000

APIL questions why, in paragraph 7.16(2), respiratory disease claims are excluded from the requirement that the defendant must pay £1,000 within 10 days of receiving the interim settlement pack. We cannot see a justification for this. In addition, it is unclear what "respiratory diseases" are included in this exemption. For example, does this only include conditions such as asthma, asbestos related illnesses, or does it also include Reactive Airways Dysfunction Syndrome (RADS), which presents symptoms similar to asthma (and is a form of occupational asthma) but which is actually classed as an accident? Why should RADS not be excluded, but asthma is?

Expert's reports fees

Our comments above equally apply to paragraph 7.27.

Failure to reach agreement-general

Our comments above apply to paragraph 7.47.

General provisions

Paragraph 7.57 could be re-worded to cover the multiple defendant point made earlier (paragraph 4.3 (4) of the protocol). We suggest using the following “Where the claimant gives notice to the defendant that the claim is unsuitable for this Protocol (for example, because there are complex issues of fact or law or where there are multiple defendants or claimants, and product liability cases) ...” It is hoped that this re-wording would then deal with multi-party action and product liability cases.

APPENDIX ONE - ELIMINATING FRAUD IN WHIPLASH CLAIMS

APILs 10 point plan calls for:

- Free and prompt exchange of information between the Road Traffic Accident (RTA) claims portal and the Insurance Fraud Bureau to facilitate identification of fraudulent behaviour at the earliest possible opportunity.

- Claimants to be subject to a standard, written statement of truth which must be explained to them by their solicitors. A document to be signed by either the claimant or the solicitor to confirm that the claimant understands the commitment behind the statement of truth. Breach of the statement may amount to fraud and may make the claimant liable to prosecution.

- Insurers to be banned from making offers of compensation before a medical report has been seen: the medical report is a critical factor in ensuring a claim has merit and that accurate compensation is paid.

- The rules governing the conduct of solicitors, insurers and claims management companies to be amended and standardised to prevent offers of gifts or cash inducements being made to potential clients.

- Robust enforcement of the imminent ban on the sale of claimants' personal details by the defendants' insurers.

- Any party who instructs an expert to give the other party a list of the names of one or more experts he considers are suitable to instruct beforehand, to ensure the expert is accepted as credible by both sides.

- Development of guidance to assist medical experts to identify and understand whiplash claims. The guidance should be developed in conjunction with the relevant medical organisations.

- Photographic identification of the claimant to be required by the medical expert: if this cannot be produced, the omission will be included in the expert's report.

- The claimant's solicitor to organise access to relevant medical records where a medical expert is to be instructed.

- 'Spam' or 'cold' texting to be banned.

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