

## **Association of Personal Injury Lawyers Scotland**

### **Accredited Accidents and Illnesses Abroad Specialist**

An Accredited Accidents and Illnesses Abroad Specialist is a person who has achieved APIL Senior Litigator status and who has demonstrated further competence in the specialist field of accidents and illnesses abroad. He or she is able to manage and progress a claim arising from an accident or illness abroad, and/or which involves consideration of another jurisdiction and/or a foreign applicable law, so as to establish, assert and enforce, in an effective and efficient manner, the rights of a client damaged or disadvantaged by the negligence or breach of another party. He or she is competent to take, without supervision, key decisions on accepting cases, assessing risks, evaluating offers and issuing proceedings in the UK or out of jurisdiction.

A person meets the Standard for accreditation if they meet in full the competence requirements for Senior Litigators. In addition, they must demonstrate, by reference to cases handled, the knowledge, understanding, know-how and skills listed below, and that they are able to apply this so as to demonstrate the additional outcomes of effective performance for accredited personal injury specialists.

#### **KNOWLEDGE AND UNDERSTANDING**

To meet the Standard you need to have the knowledge and understanding required for Senior Litigator status, and also knowledge and understanding of the following:

##### **1. The law as it applies to personal injury as a result of an accident or illness acquired outside the UK and in cross-border cases within the UK**

- The law relating to limitation, negligence, breach of duty, causation and contract with reference to UK and foreign laws
- Substantive and procedural law and its application to a given case
- The Package Travel, Package Holidays and Package Tours Regulations 1992 and The Package Travel and Linked Travel Arrangements Regulations 2018
- The law governing jurisdiction, including the gateways to jurisdiction referred to in the Civil Jurisdiction and Judgments Act 1982 and EC Regulation 1215/2012 (Brussels 1a)
- The law governing applicable/choice of law and the assessment of damages, including EC Regulations No 593/2008 and 864/2007 (Rome I and II)
- Direct actions against insurers for motor and non-motor liability
- International Conventions, notably the Montreal Convention and the Athens Convention and its Protocol
- The Motor Vehicles (Compulsory Insurance) Regulations 2003
- The six European Motor Insurance Directives
- Claims against the MIB for accidents in the EU
- Engaging local lawyers and legal experts to advise on substantive and procedural law as appropriate in a given claim
- Keeping abreast of forthcoming changes, in particular new Directives as and when they are introduced

## **2. Rules of procedure, etc**

- Procedures relating to methods of presenting expert evidence
- Procedure relating to service
- Procedure relating to assessment of damages
- Engaging a local lawyer to assist with any procedural issues as appropriate
- Advising on the distinction between procedural and substantive law and its impact on a given claim

## **3. The travel, tourism and holiday sector**

- The legal identity of those involved in providing holidays, including: organisers, retailers, agents and any other parties
- The role and obligations of the parties to the holiday contract
- The role of travel insurance and public liability insurers
- The complaints procedures of holiday providers and regulators
- The roles and identities of different parties involved in other types of claims e.g. transport operators, contracting and performing carriers and booking agents
- Which party to sue, where and when, including the availability and exercise of a direct right of action against liability insurers in non-RTA cases

## **4. Holiday industry ethics**

- Whether the holiday provider is a member of a regulatory body such as The Travel Association, in which case the ABTA Code of Conduct will be applicable
- Local and international standards, including the standards set by the Federation of Tour Operators, ABTA, and other key industry organisations and regulators

## **5. Legal knowledge**

- Knowledge of the Regulations and Directives detailed above in order to determine the potential jurisdiction(s) and applicable law(s) in a given claim
- Knowledge of the law and customs in other jurisdictions sufficient to understand how to bring proceedings in relation to the injuries that have been sustained outside of Scotland
- An understanding of the relevant local standards, regulations and guidelines applicable to the country in which the accident occurred or how to go about establishing the relevant local standard
- Knowledge of the substantive and procedural issues relating to the assessment of damages in cases involving a foreign applicable law

## **THE OUTCOMES OF EFFECTIVE PERFORMANCE**

The outcomes of effective performance for the Senior Litigator Standard are grouped into eleven units, based broadly on the sequence of events in progressing a case. Each unit is made up of a number of elements, each of which in turn reflects a specific function or a group of related functions.

Set out below are additional elements relating to personal injuries sustained outside of the jurisdiction, in respect of which competent performance must be demonstrated. They should be read in conjunction with the units of the overall Senior Litigator Standard, competence in all of which is required to be an Accredited Accidents and Illnesses Abroad Specialist.

## 1. Taking initial instructions

To meet the Standard, you must be able to:

- a) Quickly identify whether a foreign limitation period might apply to the claim and establish what that limitation period is;
- b) Establish the purpose of the client's visit abroad;
- c) Establish whether the client was in the course of employment when their accident occurred;
- d) Establish the type of claim; illness, road traffic accident, package holiday contract, accommodation contract, occupier's liability, employers liability, tortious liability, travel by air, travel by rail, travel by sea, military or environmental and whether anyone else (other than the client) has been injured and the appropriateness of a group action;
- e) Establish whether the client and/or the defender was insured at the time of the accident, the extent of any liability insurance and any limitations or exclusions of relevance under the policy;
- f) In road traffic claims, establish the insurance details and vehicle registration number of the defender driver and the steps to be taken if the driver is untraced or the vehicle is uninsured;
- g) Establish the client's habitual residence;
- h) Identify the correct defender. For example, if the client is involved in a road traffic accident where the defender is insured (the claimant may issue proceedings against the foreign third party insurer in the Scottish Courts or against the defender driver in the country in which the accident occurred. However, if the defender was not insured, the claimant may issue proceedings in the Scottish Courts against the Motor Insurers' Bureau);
- i) Establish the defender's ties to Scotland, if any;
- j) Establish what the client wishes to achieve, in addition to any compensation;
- k) Establish whether there was a contract in place and the terms and contents of the contract;
- l) Establish whether there were any witnesses to the accident and their identities;
- m) Establish liability (both breach of duty and causation) and potential parties for a breach of duty claim;
- n) Establish whether the client's concern has been submitted via a complaints procedure and, if so, the stage it has reached;
- o) Establish the relevant local standards, regulations, customs and practice; identify a potential breach and its relevance to causation in a given claim (for example, most hoteliers will accept that the international hazard analysis and critical control points (HAACP) system should be used as the applicable international standard for food preparation);
- p) Establish the exact nature of the client's illness or injuries;
- q) Establish any need for rehabilitation, and whether any rehabilitation is in progress;
- r) Satisfy yourself that the matter is within your expertise/that of your firm, and if not, make arrangements for the matter to be referred elsewhere (this may be the case in accidents involving foreign applicable law or procedure, where a different discount rate to that prevailing in Scotland may be relevant, claims involving the armed forces and accidents involving multiple claimants).

## 3. Advising the client and managing their expectations

To meet the Standard, you must be able to:

- a) Effectively advise the client on the issues outlined at Part 2 of the Knowledge and Understanding section (Rules of procedure, etc) above having taken initial instructions and throughout the lifetime of the claim, notably managing expectations in relation to:-
  - establishing liability; and

- the assessment of damages where considerations of foreign law or local standards are relevant;
- b) Identify any entitlements available to the client (for example, in road traffic accidents to a reasoned response and possible interim funding, for claimants in accidents by rail travel (within the European Union) are entitled to advance payments to cover their immediate needs following an accident within 15 days of identification of the person entitled to the compensation and in certain circumstances under the Athens Convention/Protocol advance payments must be made by the carrier to the injured passenger);
- c) Advise on notification requirements and ensure any pre-limitation deadlines or timescales are adhered to, including advising on periods for investigation the defender may enjoy as a result of a claim arising from an accident or incident overseas;
- d) Identify and advise on the most appropriate means of funding where there are different options depending on jurisdiction and procedural rules applicable to a given claim, bearing in mind the issue of proportionality of costs to damages.

#### 4. Planning the case, gathering evidence and making the claim

To meet the Standard, you must be able to:

- a) Identify the documents presented to the client before and after the provision of the service; the brochure, the offer and the contents of any holiday package;
- b) Review documents relating to the contract between the client and the holiday provider in determining whether the circumstances of the accident fall within the provision of services under the relevant contract;
- c) Review the contents of the holiday package; transport, accommodation and other services accounting for a significant proportion of the package etc;
- d) If the client is injured in the course of their employment, check their contract of employment in order to ascertain whether it contains a jurisdictional clause. In any other event, identify if the client was an employee of a company registered in Scotland or has its place of central administration in Scotland. Alternatively, identify if the accident arises out of the operations of a branch, agency or other establishment situated in Scotland. In such cases, the client should usually be able to pursue the claim in the Scottish Courts. If the client was working for a foreign company identify the competent jurisdiction and advise the client on the options for pursuit of their claim in accordance with their best interests. There will be a need to identify the most advantageous forum: most commonly, there will be a need to identify the country where the company in control was based or the country having jurisdiction due to the accident location;
- e) Determine the applicable law in the assessment of damages. For example, where the claimant is involved in an accident abroad by a car driven by an uninsured native driver of the country in which the accident happened, the damages are no longer assessed under the law of Scotland but under the law of the country where the accident occurred;
- f) Arrange for the collection, preservation and accurate recording of evidence such as accident records, photographs of the accident scene, any vehicle damage and photographs of the injuries;
- g) Liaise with the local authorities to obtain any other official documents or records of the accident e.g. the Public Prosecutor;
- h) Make appropriate use of letters before claim;
- i) Identify any unique requirements in bringing a particular action;
- j) Where there is a road traffic claim and the claim is against the Motor Insurers' Bureau, identify the additional notice requirements;
- k) In a road traffic claim where the defender driver was insured at the time of the accident, obtain details of foreign third party insurer's representative in the UK from the motor insurer's information centre and send this representative a letter of claim. If there is no response within three months, advise the client on pursuit of their right of action against Motor Insurers' Bureau;

- l) Identify and instruct other expert witnesses (this may involve the instruction of local experts specifically in relation to breach of duty) and, where proceedings have been issued, consider making an application to adduce expert evidence on the issue of local standards, foreign applicable law or other specialist areas required to establish breach and causation;
- m) Consider whether it is proportionate to interview witnesses such as hotel staff and pre-accident and post-accident visitors and collate any witness evidence in support of the claim on both liability and quantum;
- n) Formulate appropriate questions to witnesses to enable their evidence to be interpreted in the light of the law;
- o) Review evidence to ensure it is consistent with the account you have been given of the injury and review any discrepancies with your client.

## **6. Issuing proceedings, the allocation stage and case management conferences**

To meet the Standard, you must be able to:

- a) Identify and deal with any limitation and jurisdictional issues and decide when, within the appropriate time limit, proceedings should be issued to protect the client's rights and interests. In particular, identify when a foreign limitation period will apply or whether doing so would cause undue hardship to either of the parties involved;
- b) Follow the correct procedures to ensure service is effected, taking account of jurisdictional issues and the possible need to serve outside the jurisdiction;
- c) Pay particular attention to whether evidence on local standards or foreign applicable law is necessary and early disclosure of evidence;
- d) Ensure medical and non-medical experts deal with the relevant issues in their evidence, for example where the client's injuries fall to be assessed in accordance with both 'hard' and 'soft' provisions of foreign law or legal systems;
- e) Provide foreign medical and non-medical experts with effective guidance to ensure their evidence is acceptable to the Scottish Courts;
- f) Consider Specifications of Documents and Letters of Request to secure specific disclosure of documents e.g. insurance contracts to address any outstanding indemnity issues following commencement of proceedings;
- g) Select counsel with the experience and expertise to deal with the case, at open record, pre-proof or jury trial meeting and proof stage as appropriate;
- h) Consider the possibility of a split proof or jury trial to determine liability before proceeding with the assessment of damages;
- i) Progress the case to proof or jury trial, giving due consideration to the means of ADR best suited to the claim and the parties involved throughout;
- j) At the successful conclusion of a claim, effectively deal with expenses negotiations and the possibility of a motion for additional fee where justified in terms of the Court Rules.