Multi-Track Code Pilot Interim Report

APIL, FOIL and Insurers Proactively Working Together

March 2012

FOIL
FORUM OF INSURANCE LAWYERS
the voice of the wider public interest

Introduction

Since work began on the Multi-Track Code in 2005, the project has developed carefully and cautiously through the drafting and negotiation phases to the completion of the pilot. The pilot was designed to test and evaluate the concept at the heart of the Code for claimants, their lawyers and compensators. This report has been prepared following a review of the data generated by the pilot and, perhaps most important of all, feedback from practitioners who have been participating in the pilot.

The Steering Committee recently held a meeting with participants and stakeholders to review the progress of the Multi-Track Code. There were presentations to the group followed by lively debate. What was evident from those discussions was the clear support for the Code and its objectives, but also the level of greater consistency and effective collaboration between the parties. Whilst these may appear a high level aspiration, or just well-meaning words, the review provided hard evidence of how the project has developed these objectives.

This report will outline the debate on the day and the benefits that were identified from operating cases within the Code. Some participants also highlighted areas of concern for the Steering Committee, which were mainly misunderstandings about particular phrases or wording used within the description of the Code. This report also aims to address these concerns within the *"frequently asked questions"* summary which all readers ought to find helpful. It is thought that this section should dispel many of the reservations for parties both inside and outside of the pilot. However, the Steering Committee welcomes any other questions that have not been addressed here and will provide the necessary detail in response.

The Multi-Track Code has demonstrated an open, honest, trusting and cooperative relationship and that these types of claims can run smoothly with little input from the insurers' own legal team.

Paul Abel, RBS Insurers

From the outset I have felt my needs were at the centre of my claim. When I lost my job because of my injury I was unable to fund retraining. I have been able to get interim payments when I needed them. I have a good idea of what will happen in the case, and when, right up to settlement

Mr Graham Multi-Track Code Client of Marcus Weatherby at Pattinson & Brewer

Key benefits of the Code

The Multi-Track Code is a joint initiative between APIL, FOIL, representatives from various insurers and the MIB. It was developed with the objective of parties working more effectively together by allocating tasks, and narrowing the issues throughout the lifecycle of the claim. Not all cases will receive early admissions of liability but there is a common aim to attempt dispute resolution as early as practicable. The Code is aimed at high value claims where damages are over £250,000 and the accident occurred after 1 July 2008. The scheme currently excludes clinical negligence and disease claims.

Benefits to the injured person

The benefits of the scheme to the injured person are at the core of this Code, including early and continuing encouragement of rehabilitation and early interim payments.

Benefits to claimants have included a commitment to resolve liability within six months and for discussions to begin as early as possible to agree rehabilitation in the form of a care regime, accommodation and equipment where appropriate.

Benefits to the claimant's solicitor

There are also benefits for those advising on the claim. Claimant solicitors get binding admissions on liability when there is no allegation of fraud and no challenge to their retainer after 28 days of the letter of claim.

Benefits to the insurer

There have also been considerable benefits for the insurers; most notably there are potential cost savings to be made when running cases through the Multi-Track Code. Insurers are also able to reserve with accuracy, experience shorter and better managed life cycles, and proactive rehabilitation.

Benefits to the defendant's solicitor

Defendant solicitors have also reported positive feedback regarding the early and prompt release of records and information from the claimant side, as well as early notification of the claim in the first instance.

Benefits for all

On the whole, the aim of greater trust on both sides has been achieved. All of the benefits together have helped to create a smoother, less fractious claims process for those participating within it.

> ***There are issues over contributory negligence, but there has been a great deal of openness in dealings so far to the benefit of our client.***
>
> **Jeremy Taylor, Wace Morgan Solicitors**

> ***There has been easy and open dialogue with the insurers regarding my case, both by email and phone.***
>
> **Christine Chan, C W Law**

Frequently Asked Questions: FAQs

1. If an insurer or solicitor has 'signed-up' to the Code, must all appropriate claims be handled under the Code?

This is not compulsory, but if you have signed up to it, we would encourage all participants to deal with as many claims as possible under the Code.

2. Does this mean that the claimant is a 'guinea pig'?

No! Although the claimant would have to agree to their claim being dealt with under the Code, they are not a guinea pig and the available data and case studies have identified some very real benefits for claimants in respect of interim payments, rehab and earlier resolution of their claim.

3. Can I deal with claims in the 'spirit of the Code'?

Yes you can, but if both solicitor and insurer have signed up to the Code, we would strongly encourage that the claim is formally handled under the Code and recorded on the APIL monitoring database which can be found on the APIL website and at: http://www.apil.org.uk/surveys/MultiTrackCodeMonitoring.aspx. There is a possibility that the Code will be incorporated or annexed to the CPR in 2012/13 and the more practitioners who formally use the Code the fewer difficulties they will face (if and when) the Code is annexed to the Rules.

4. What is the Code all about?

The Code provides a framework that allows for the handling and resolution of larger cases in a more consensual and open manner. This helps deliver rehabilitation and compensation to claimants more quickly and for insurers to obtain information that will assist with accuracy of reserving more speedily. Where liability is not an issue, payments on account in respect of costs can also assist with cash flow for the claimant's solicitor. Central to the Code is the concept of 'route mapping' (see Q8 below) which sets out a framework and timetable for the resolution of the case or issues. In essence the Code is about behaviours as opposed to being prescriptive.

5. Is the Code just about resolving quantum?

No. The Code is a framework to promote dialogue and co-operation so as to resolve all aspects of a claim.

> ***What I thought would be a liability issue has not been and interim payments have been paid without even the initial admission of liability.***
>
> **Simon Roberts, Carpenters Solicitors**

> ***I have been running a case in the spirit of the Code as at the time we were not formally participating. We have still had good interim payments even though liability is contested as there is a seatbelt issue.***
>
> **Marcus Weathby, Pattinson & Brewer**

6. What if there is a liability in dispute?

Cases involving liability disputes are perfectly capable of being handled within the Code. The Code is about how both sides work together to solve problems – whether they relate to liability or quantum. The openness and ongoing dialogue that the Code encourages should enable both sides to better understand the case they face, risk assess more accurately and help them make appropriate decisions. Within the Code there is an expectation that liability issues will be resolved within six months and that a 'route map' (see Q8 below) and timescales will be agreed between the parties to ensure that liability is resolved as speedily as possible. Where liability issues cannot be resolved or where the expected time frame or other agreed period is not met, it may be necessary to consider other methods of resolving liability. These might include mediation, binding or non-binding arbitration, other methods of neutral determination or litigation.

Liability hasn't been resolved on two cases but all parties have been co-operative regardless of this.

David Tomlinson, Barratt Goff & Tomlinson Ltd

7. What if there are arguments in respect of contributory negligence?

The Code would expect the parties to develop a route map that will lead to a resolution of any issues in respect of contributory negligence. Whilst the parties are working towards resolving these issues, work in respect of quantum should proceed in tandem. Resolving quantum issues should not be 'parked' until contributory negligence has been fully resolved.

The trust that has been created between both sides should be applauded.

Rachel Moore, Kennedys and FOIL

8. Explain route mapping

The route map is essentially a high level plan as to how the parties are going to get to the resolution of the case. There is nothing complex about the process as such but it is central to the Code and requires a different mindset on the part of participants. When used properly it can build trust and assist in the resolution of the claim. However, it need not be overly formal; it is whatever works for the parties.

The route map should set out:

1. The way in which there is to be full and frank exchange of information – this is likely to happen as a matter of course at the initial meeting/telephone contact. This exchange may be ongoing as investigations progress, in which case agree a timetable as to when the parties will speak again and keep to it.
2. Who is going to do what and by when? This is simply an allocation of tasks with a view to reducing costs, sharing information and avoiding duplication. Examples might include who is going to obtain the police report, medical records, and whether any experts are to be instructed on a single agreed basis etc. Agreeing target timescales helps

develop trust and openness and leads to early resolution of issues.

3. Integral to the process is an agreed approach to case planning aimed at:

    i. Liability resolution
    ii. Maximising rehab opportunities
    iii. Early provision of interim payments
    iv. Early identification of issues in dispute
    v. A flexible approach to the resolution of those issues
    vi. Inclusion of restitution and redress as opposed to just compensation e.g. clinical and vocational rehabilitation.

The route map need not be complex, but we would recommend that it is documented. The level of detail required will depend on what works for the parties. Generally, concise bullet points of who is going to do what and by when is sufficient. Both sides should have a copy of such a record and we would advocate that there is always an agreed date or timescale when the parties will discuss again, ideally face to face.

The rehabilitation of my client has been consistent throughout and both parties are happy with how the case has progressed through the Code, especially my client who has benefitted from the process.

Christine Chan, C W Law

9. What happens if despite all of the route mapping meetings and openness we still cannot agree on an issue, whether liability or quantum?

Sometimes that may happen, but each party should have a clearer understanding of the issue(s) in dispute and have been able to carry out a risk assessment in respect of their case. The parties may wish to look at imaginative ways in which resolution of the issue can be achieved such as mediation, binding or non-binding arbitration, neutral evaluation or some other form of ADR.

In the rare instances where the behaviour of the other party seems to be the issue, the Code has an escalation process. See also Q14.

The improvements offered by the Code have been helpful to me in progressing claims and the ability to make interim payments and reserve with accuracy.

Danny Allen, Acromas

10. Why can't I make a Part 36 Offer under the Code?

You can! All the Code says is that Part 36 or Calderbank offers should not be made until the parties have tried to agree an issue through dialogue. However, making a Part 36 or Calderbank offer may change the tenor of the case and the behaviours of the parties. We would encourage making a Part 36 or similar offer only as a last resort and it should not come as a surprise to the recipient.

11. Are admissions binding?

Yes, unless there is evidence of fraud, admissions are binding.

The Code encourages early notification to an insurer (even where the claimant solicitor is not in possession of all the facts) and for liability to be resolved within six months. Maintaining a dialogue helps both parties understand where there might be a problem such as ongoing police investigation or delay in obtaining expert evidence. To reduce costs, once an admission has been made no further investigation into liability should be required except where it is necessary to obtain and preserve evidence. The parties should discuss and agree what steps might be required to achieve this.

12. Do the meetings have to be face to face?

No, but we would certainly encourage that the initial and early meetings are. As the case progresses and as trust builds, it is quite possible that some meetings could be held by phone.

There has been no need for face to face route planning meetings as it has all been done through telephone and email conversations.

David Tomlinson, Barratt Goff & Tomlinson Ltd

13. Who should attend? Does the insurer need to be there?

Although it is recognised that solicitors might be instructed by insurers on some cases, given the nature of the cases likely to be handled under the Code, we would strongly encourage the insurer to attend all meetings. The Code is between various claimant solicitors and insurers. Defendant solicitors act on their client's instructions and consequently cannot formally subscribe to the Code so it is advocated that the insurer is present.

14. What happens if I hit a log jam? For instance, the insurer never attends meetings and his solicitor's behaviours are not within the spirit of the Code, or the claimant's solicitor is not acting within the spirit of the Code?

The Code provides a list of trouble shooters for all subscribing organisations who can be contacted in the event of difficulty. However, we would encourage attempts to be made to sort out any difficulties before escalating as escalation might be seen as an aggressive step. Nevertheless, the role of the trouble shooters is to ensure that cases dealt with under the Code run smoothly.

Claimant solicitors will find, in my experience that insurers are more likely to engage positively to requests for interim payments and rehabilitation if they have been kept closely informed on the issues and developments generally. The Code is not about settlement of all cases but about efficient case planning to resolution, be it settlement or trial.

Concluding Summary

The pilot has produced a strong case for advancement of the Code for all participants.

Cases handled in accordance with the Code have seen the injured claimant moved to the centre of the process in all respects. The Code has worked in a way to build and maintain confidence between the parties.

Two core themes came through strongly from the feedback which are indicative both of the benefits of the process and the messages that the personal injury sector should draw from the pilot.

First, the central importance of collaborative route mapping. This process served to build trust and transparency between the parties, to help manage expectations (on both sides), and to encourage the identification of the core issues between the parties to which resources should be applied. A structure that usually might not be seen until judicial case management has been brought to the claim very early in the process. The single most effective tool promoted by the Code is the discipline of the route planning dialogue.

The second theme was that of "attitudes". If the "right" attitudes are adopted from the start then cases generally ran much more smoothly, even when issues of disagreement arose. There was an acceptance by participants that they would not agree on every issue; that is after all the very nature of an adversarial system. However an issue of disagreement ought not to mean antagonistic litigation or point scoring, but instead an agreed process on how to resolve the point in issue. Issues in dispute can and should be resolved in parallel with issues on which both sides agree. By way of example, a case where there was a claim for a spinally injured party was resolved within 12 months of the letter of claim; liability, rehab and evidence control was dealt with in tandem in an open and collaborative manner over two or three route mapping meetings.

At the core of this sort of success is a positive, collaborative, and above all creative approach.

All in all it is the firm view of the Steering Committee that the Multi-Track Code is a significant advancement in the field of higher value claims and should deliver a far more effective dispute resolution process to the benefit of both sides. This is best achieved through the support of the Rules Committee as outlined by Lord Justice Jackson on the day.

By providing a firm background of trust between the parties, innovative solutions can be discussed and tried without compromising each party's interests were a full trial to ensue. This brings a negotiated settlement into view much earlier, but, more importantly, ensures that the injured person receives the right assistance from the very outset.

Simon Davis, Kester Cunningham John

Without doubt, the winner has been my client, first and foremost.

Helen Shaw, Potter Rees

Whilst we operate in an adversarial system, this does not mean that the parties cannot work together to identify the issues and agree a process (and timeline) by which those issues will be resolved. Some of those issues might require litigation to resolve them; however that does not mean that every issue has to be resolved by the same route or the same manner. Litigation is but one tool in the claim resolution process.

We close this report with one thought. The vast majority of higher value cases settle without a trial. In those circumstances why is it that in many cases the first occasion that the parties engage in joint case planning is when they are required to do so at the first case management conference? Surely the consumer in the personal injury process deserves a more constructive, proportionate, and above all focused level of debate and discussion right from the start of the case.

By all accounts the Multi-Track Code, which has been piloted since July 2008, is proving successful. I support the aims of the Code and welcome the progress that has been made in that regard.

Lord Justice Jackson, Review of Civil Litigation Costs

The Co-ordinating Group

The co-ordinating group is made up of the following members:

- Amanda Stevens, Past President of APIL and partner at Irwin Mitchell LLP
- Andrew Underwood, Past President of FOIL (Forum of Insurance Lawyers) and partner at Keoghs Solicitors
- Laurence Besemer, FOIL
- Jon Ramsey, RBS Insurers
- Suzanne Trask, Bolt Burdon Kemp

We would like to thank all of those who have participated in the pilot and have supported the Code in the early stages. Additional thanks go to the following people for the provision of case studies:

- Ann Allister, Carpenters Solicitors
- Christine Chan, CW Law Solicitors
- David Fisher, AXA Insurance
- Helen Shaw, Potter Rees Serious Injury Solicitors LLP
- Marcus Weatherby, Pattinson & Brewer
- Paul Abel, RBS Insurers

Day to day management and co-ordination of the Code has been administered by Abi Jennings and Katherine Elliott of APIL.

The Multi-Track Code has the benefit from the outset that you are speaking with a senior case handler at the insurers, who understands that interim payments and treatment are made readily available on these types of cases, especially those where liability is not a major issue.

Ann Allister, Carpenters Solicitors

The Code has been successful in ending the retainer challenges, which have dogged the industry for the last decade.

Julian Chamberlayne, Stewarts Law