Issue: October 2016

bto Insight

Insurance News

Mandatory personal injury protocol in Scotland

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 28th November 2016. 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.

The protocol aims to achieve "fair, just and timely settlement… prior to proceedings" and to encourage good practice, as regards early and full disclosure; investigation; and the narrowing of issues in dispute.

Much of the procedural process of the mandatory protocol is very similar to that of the existing voluntary protocol. The initial letter of claim is replaced with a standardised claim form which an insurer must acknowledge within 21 days. The three month period within which liability is to be investigated remains unchanged as do the obligations on a claimant when liability is admitted to obtain medical evidence and to disclose that within 5 weeks of receipt with a Statement of Valuation of Claim.

Notable changes include:-

Pre-medical offers

Although not explicitly forbidden in the existing protocol, these 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".

Requests for further information

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 parties' 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.

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.

Stocktaking period

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. Whilst such negotiations are not obligatory, a claimant who refuses

Continued over page

In this edition

www.bto.co.uk

48 St. Vincent Street Glasgow G2 5HS
T: 0141 221 8012 F: 0141 221 0288

One Edinburgh Quay Edinburgh EH3 9QG
T: 0131 222 2939 F: 0131 222 2949

Continued:
Mandatory personal injury protocol in Scotland

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 £1,500 but less than approximately £6,000, fees will actually decrease slightly. This should include the bulk of whiplash type claims and is therefore good news for volume motor insurers.

Litigation

The Court rules now set out an obligation on parties to have complied with the protocol where applicable, prior to litigation. The rules also set out the consequences for any failure to do so. The new rules allow the sheriff to take such steps as "necessary to do justice between the parties" with costs sanctions being the main suggestion. When considering matters, the sheriff will consider the 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.

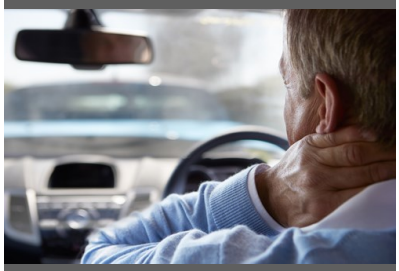
Summary

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. There remains no provision for "fixing" a breach of protocol once it has occurred so unwary insurers may still be caught out if they inadvertently miss a deadline. However, claimant solicitors might be a little more wary of "jumping the gun" straight into litigation if that could be interpreted as being against the aims of the protocol.

Stephen Bryceland sbr@bto.co.uk

Update:

Whiplash Reforms



The insurance industry may be disappointed to have seen the recent news that The Ministry of Justice (MOJ) have confirmed that the government's proposed whiplash reforms have been put on hold.

The proposals were first announced in November 2015 and included the removal of general damages from low value soft tissue injury claims.

The proposals for reform arose from the Government's own Insurance Fraud Taskforce. The MOJ has stated that the proposals are *"certainly not off the agenda"* and have insisted that it is still committed to reducing the cost and volume of whiplash claims.

Various stakeholders including the ABI have, in response, relaunched campaigns to persuade other Cabinet members that the reforms are urgently required.

Sanction, Asbestos and the ASPIC

With the coming into force of the Court reforms and the creation of the All-Scotland Personal Injury Court (ASPIC) the role of Counsel has been hotly contested, particularly in Asbestos related actions. With the ASPIC having recently celebrated its first birthday on the 22 September 2016, it is an appropriate time to take stock of the view the new Court has been taking over the issue of sanction for Counsel.

So far this has been the subject of three reported judgments: ***Dow v M & D Crolla Ltd***, ***V on behalf of J v M & D (leisure) Ltd*** and ***Cumming v SSE PLC***. The first two, *Dow* and *V*, both dealt with injuries caused by slipping. The third, *Cumming*, was a pleural plaques action. Unfortunately for the defenders, sanction was granted in all three cases. It is worth highlighting that the *Cumming* case is being appealed by the defenders. For the purposes of this article we intend to consider the particular issues raised in asbestos related cases.

Asbestos cases in the ASPIC

Post-reforms the majority of pleural plaques actions are raised in the ASPIC. From 1 March to 31 May 2016 ***10%*** of the cases raised related to pleural plaques. These cases are not sisted in the ASPIC and consequently the expenses of even an expeditiously managed action can rise quickly. This is compounded with the tendency of some pursuers' agents to instruct Counsel from the outset to carry out even the most straightforward drafting exercise. It is for this reason that the above cases are at the forefront of the debate over sanction for Counsel.

The test for sanction

The Court must have regard to the difficulty or complexity of the proceedings, the importance or value of any claim in the proceedings, and the desirability of ensuring that no party gains an unfair advantage through the employment of Counsel. They may also have regard to such other matters it considers appropriate. Where the Sheriff considers that it was reasonable to instruct Counsel, sanction must be granted. However, they can place restrictions on sanction as they see fit.

Asbestos and sanction

When the reforms were being debated in parliament an issue was raised over the instruction of Counsel in asbestos cases. The relevant Minister went as far to say it would be difficult to envisage an Asbestos case which Counsel would not be involved. It has been our experience that, despite the relevant legislation making no specific exception for Asbestos cases, pursuers are being successful in motions seeking sanction for Counsel in unreported cases.

In *Cumming*, sanction was granted for the involvement of Counsel from the adjustment stage onwards. This was on the basis of (i) complexity of the case, (ii) its importance to the pursuer, (iii) that the exposure had been unusual, and (iv) liability was denied. The effect was that the pursuer was therefore able to recover Counsel's fees for consulting, drafting adjustments, valuing the claim, and providing advice on settlement.

Discussion

A year into life in the new ASPIC trends in these motions can be seen to emerge. The three reported cases cited allowed for the restricted involvement of Counsel. However, recent motions have moved for sanction from the outset of the case, including the drafting of an Initial Writ. It appears that pursuers' agents are attempting to expand sanction as far as possible. Unfortunately it appears the Court is with them, for the moment, and refusal of sanction is the exception rather than the rule.

What then can defenders do? It may be to argue that the Court ought to use its wide discretionary power in granting sanction to restrict sanction only to specified hearings or for the drafting of specified documents. For instance it is difficult to see why Counsel would be required to draft a straightforward Specification of Documents. Also in *Cumming* the Court placed some reliance on the fact that liability was disputed. Therefore an admission of liability should be considered as early as possible in appropriate cases. It is also worth bearing in mind that if a Solicitor Advocate deals with a matter for the defenders and the pursuer's solicitors discover this, it is likely to be used against the defenders in a motion for sanction.

The *Cumming* appeal is not due to be heard until mid-2017 and, as each case is fact specific, it remains to be seen on how authoritative any ruling from the Sheriff Appeal Court will be in the wider sense. This issue will therefore continue to be challenged before the Court and will no doubt be the subject of further published judgments. Hopefully by the Court's second birthday there will be more positive news for defenders.

Lewis Richardson lri@bto.co.uk

Recovery of Documents: Public Bodies Beware!

Insurers will be aware that the Courts have powers to allow parties in an action the ability to recover documents from another party in certain circumstances. The party from whom the documents are requested could be party to the Court action or they could be another party altogether.

In either case, the party who is requesting the documents ('the requesting party') must show that the documents they wish to recover would have some bearing on the case. This should be outlined in the requesting party's pleadings. The requesting party must have sufficient grounds within their pleadings to justify the recovery of the documents being sought, otherwise the request could be argued to be a fishing expedition.

The usual procedure for recovering documents in litigated matters in personal injury actions is by way of a motion (application) for commission and diligence in terms of a Specification of Documents. A Specification is essentially a list of the documents which the requesting party wishes to recover. The motion effectively asks the Court to approve the Specification and accordingly the recovery of the documents called for under the Specification.

If the motion is opposed by the other side, in practice, the parties will sometimes look to resolve the dispute between themselves by altering the parts of the Specification in dispute. The motion and revised Specification, which by then would be in an agreed format between the parties, would then be put to the Court by the requesting party for approval. Assuming it is so approved by the Court, the requesting party can then proceed to recover the documents requested in their Specification from whoever holds the documents (known as 'the haver'.)

So far so good. However, there may lie a sting in the tail for public bodies.

Say for example, the claimant in an action has intimated a motion and Specification of Documents to the defender who is a public body. The Specification calls for recovery of documentation which is held by that public body. The reasons for seeking those documents are outlined in the pursuer's pleadings. The defender opposes the Specification on the basis that it is too wide and amounts to a 'fishing diligence'. The matter then comes before the Court at an opposed motion hearing.

It is worth considering the potential issues that could arise if the Court were to refuse the motion or restrict the scope of the Specification. Would there be anything to prevent the pursuer from recovering the parts of the Specification which were restricted from the public body directly under a Freedom of Information Request? Indeed, why go through any of this process at all, when they could simply write to the public body for recovery of all of the documents under a Freedom of Information request (FOI) in the first place?

The FOI legislation gives everyone the right to ask for any recorded information held by a Scottish public authority. This right is subject to certain conditions but the default position is that FOI requests should usually be complied with, unless an exemption applies. The exemptions broadly cover situations where:

- The requester has not provided enough detail to identify the information sought;
- The public body does not have the information requested;
- It would cost over £600 to provide the requester with the information;
- The request is 'vexatious';
- The information is subject to an exemption in terms of the FOI legislation.

Over and above this, a further ground for refusal would be if the documents requested were covered by legal privilege. If the public body has separate departments dealing with FOI requests and litigated cases, therein lies a risk that one department may not know what the other is doing or what information is being disclosed. Unless properly reviewed, this could have serious consequences in a litigation, particularly if liability remains in issue.

The above scenarios represent a difficult balancing exercise for a public body which, on the one hand, will wish to protect its position in the litigation and, on the other, fulfil its statutory obligations under the FOI legislation.

Standing the above, it is therefore of paramount importance that public bodies, and their insurers, are alive to these issues particularly in claims where liability remains in dispute. Devising a strategy to deal with FOI requests which could be pertinent to a litigation, together with good communication within the public body and their insurers is fundamental. Given the increasing use of FOI legislation in personal injury claims, specialist legal advice ought to be sought to ensure that such issues are dealt with properly to protect the position of the public body and its insurers.

Rhona Cameron rca@bto.co.uk

Blackouts at the wheel – is there a liability?

The consequences of a driver suffering sudden incapacitating illness while driving can often be horrific. This has come to the fore again recently in Scotland with the attempts by two families whose loved ones were killed in such incidents, to bring private prosecutions against the drivers concerned, since the prosecuting authorities have decided not to prosecute in the public interest. In one incident, two teenage girls were struck and killed, and others were injured, when the driver of a Land Rover suffered sudden incapacity due to epilepsy. In the other, a bin lorry ran out of control in a busy city centre shopping area when its driver became incapacitated, killing six people and injuring fifteen.

The defence to both criminal and civil liability in such cases is commonly known as the "automatism" defence. It is thought that the drivers in both these cases are likely to seek to invoke such a defence should prosecutions proceed. Put simply, the defence is that the driver, being suddenly and totally incapacitated by a loss of consciousness, cannot be held criminally responsible, or liable in negligence, for his or her actions while incapacitated.

To succeed, the onus is on the defence to establish a total absence of voluntary control. Evidence of partial impairment, however severe, is insufficient. In the English case of *Chelsea Girl v. Alpha Omega Electrical Services*, (1995) the driver suffered a hypoglycaemic attack and lost control of her vehicle, causing an accident. Her condition was held not to satisfy the defence of automatism because there was not a complete absence of voluntary control. There was evidence that her driving had been erratic for a spell prior to the incident, and she had been able to undertake manoeuvres in order to avoid previous collisions. It was held that the defence of automatism could not succeed where there was a gradual loss of control, and where the loss of control was not complete when the accident occurred.

In contrast, in *Cox v. Rawlinson* (2010), the defence succeeded. The defendant suffered an epileptic fit immediately prior to the collision, rendering him completely incapable of taking any form of avoiding action. Evidence was given by a Consultant Neurologist as to the fact that this would have caused a sudden and total loss of consciousness.

The driver's previous medical history and the occurrence of any previous similar episodes will be highly relevant. Matters such as the food and drink they have consumed prior to the accident, and the amount of sleep that they had, may also be relevant.

In the case of *Waugh v. James K Allan Ltd*, (1964) the driver of a lorry suffered a coronary thrombosis, which killed him. The lorry mounted the pavement, striking and injuring a pedestrian. Fifteen minutes before the accident, the driver had felt ill when loading the lorry, but had recovered, at least partially, and driven off. He had driven about a quarter of a mile when the accident occurred. He had suffered gastric attacks in the past but had otherwise enjoyed good health. The Court commented that a motor vehicle is potentially a dangerous and lethal instrument; there rests upon every driver a serious duty towards his fellow human beings not to drive the vehicle on a public highway if he has or should have any reasonable grounds for thinking that, from illness or otherwise, his skill or judgement as a driver may be impaired. On the facts of that particular case, the driver was held not to have been negligent. He had no reason to suppose that his illness was not simply another gastric attack which, after it passed, would leave no serious impairment.

In the 1981 case of *Moses v Winder*, it was noted that cases where a defence of automatism can succeed without medical evidence will be exceedingly rare. In that case, the defendant's vehicle collided with another. He pleaded automatism. He was a diabetic and was aware of the danger of going into a coma. He had felt that he was about to have an attack prior to starting his journey. He consumed sweets to ward it off, but after he started his journey, his condition worsened. The Court held that he had failed to take appropriate precautions, both in his own interest and the interest of public safety. He was found guilty of careless driving.

The recent case *of Green v Haynes* (2014) underlines that the Court will look at the whole circumstances leading up to the accident and the driver's decision to drive, particularly if they had felt at all unwell prior to starting their journey. In that case, the defendant claimed to have suffered a vaso-vagal syncopal attack, triggered by abdominal pain, for which no particular cause or diagnosis was ever found.

Medical experts for both parties accepted that the defendant had genuinely suffered such an attack, had passed out at the wheel of his car, and was therefore unconscious just prior to the point of impact. The case demonstrates that the Courts will examine the evidence from both factual witnesses and medical

Continued over page

Continued: Blackouts at the wheel – is there liability?

experts, in minute detail, in relation to the circumstances leading up to the loss of consciousness. The Court will consider whether there is any evidence to indicate that the driver should not have been driving in the first place, or whether they could have done anything to avoid the accident prior to losing consciousness.

In *Green v Haynes* the defendant had felt unwell prior to the accident and had decided to leave a business conference he was attending and drive home. Very detailed evidence was given by the defendant as to his activities and state of health in the hours leading up to the accident. The Judge found that he had attempted to minimize, in his evidence, the extent of his illness, and that he should have appreciated the risk of his condition getting worse, and that if it did, his judgement and his ability to drive might be impaired. It was found that the defendant should not have driven when he felt unwell, and that in doing so, he was in breach of his duty to other road users. The Judge also found that even if it was reasonable for the defendant to be driving, then he should have driven in the inside lane of the dual carriageway, and at a slower speed would have enabled him to stop at the side of the road more easily if his condition worsened. As it was, the Judge found that he was driving at a speed in the region of 75mph in the outside lane of a dual carriageway, which made it less likely that he would be able to stop if required to do so.

The Judge also considered, in some detail, the expert opinion as to the length of time between the initial onset of the severe symptoms, and the loss of consciousness. In vaso-vagal syncopes, this is known as the “prodrome”. There are differing scientific and medical opinions on the average length of that period. While not reaching a final view on the exact length of the prodrome which is likely to have occurred in the particular case, the Judge determined that it was likely to have been longer than the two to three seconds estimated by the defendant, and this being the case, he would have had some opportunity to at least take his foot off the accelerator. The Judge also noted that the defendant specifically recalled that he had made a decision to pull off the road to the nearside and seek help, and he also remembered gripping tightly on to the steering wheel. These factors indicated that he had some presence of mind prior to losing consciousness, and that the period of lucidity was probably sufficient to allow him to try to take some evasive action.

Should you be faced with a claim arising out of a possible automatism episode, in order to determine whether such a defence has any prospects of success, we recommend that detailed investigations should be undertaken into the circumstances leading up to the accident. Detailed information will be needed from the driver as to his activities in the 24-48 hours prior to the accident.

What were they doing? How much sleep did they get? What food and drink did they consume? Did they experience any prior symptoms, however seemingly minor or unconnected to the incident?

The medical records from any post-accident treatment or attendance at hospital should be obtained and it will usually be appropriate to obtain statements from any first aiders or ambulance personnel who treated the driver in the immediate aftermath of the accident.

An appropriate medical expert will be required to confirm the diagnosis in respect of the sudden loss of consciousness and the cause, if one can be identified.

The Court will be interested not only in the hours leading up to the incident, but also the fine detail of the incident itself and, in particular, the time between the first onset of symptoms and the eventual loss of consciousness and what happened during that period.

There are cases where there is a very sudden loss of consciousness with no prior warning symptoms, and these are often due to pre-existing (but hitherto undiagnosed) medical conditions, such as diabetes, epilepsy, cardiac disease, etc. In those cases, it is generally accepted that the driver would experience little in the way of prior warning, and therefore the prodrome period is by definition either non-existent or very brief indeed.

In other cases, such as *Green v Haynes*, there have been some prior symptoms experienced by the driver, and the Court is therefore required to consider whether they have taken sufficient cognisance of these when making the decision to drive or continue to drive.

Once the Court has identified the likely period between the onset of symptoms and the total loss of control, it will need to consider whether, in that period, the driver could have taken any effective evasive action. Police, forensic, and eye witness evidence will be relevant to this.

Any evidence that the driver retained any degree of control over the vehicle (such as an eye witness seeing the vehicle brake or swerve suddenly) may be deemed to be evidence that they must have retained some presence of mind. For example, in *Green v Haynes* the fact that the driver remembered gripping the steering wheel very tightly suggested that his loss of control was not complete.

It can be seen therefore that this a not a straightforward defence as each case turns on its own facts. A common thread is the requirement for very detailed investigation and preparation if there is to be any prospect of success.

Claire White cwh@bto.co.uk

Autumn Insurance Seminars

If you have not already booked yourself a place at our free insurance seminar, here's a reminder of the topics and date. More info at **www.bto.co.uk/events**

October

Modernising FAIs – What are the implications?

Clare Bone, Partner and Solicitor Advocate

New legislation to modernise the Fatal Accident Inquiry process has been passed by the Scottish Parliament. The Inquiries into Fatal Accidents and Sudden Deaths etc. (Scotland) Act 2016 is an attempt to "strengthen Fatal Accident Inquiry legislation and bring it into the 21st century". With mandatory Inquiries for new categories of deaths and discretionary Inquiries into the deaths of Scots abroad, BTO examines the wider implications for Brokers, insurers and their insureds.

Inherently Hazardous Operations – Who carries the can?

Jilly Petrie, Partner

As a general rule, a landowner who employs an independent contractor is not liable for damage caused to a third party property by the fault of the contractor. The rule has exceptions, one of which is where the operations instructed are "inherently hazardous". For years, the Courts north and south of the border have been grappling with what this means and if it is even part of the law in these jurisdictions. A recent decision from the Scottish Courts found that the exception does operate in Scotland and that liability will remain with the landowner, irrespective of contracting and subcontracting of the works. If followed, this gives rise to potentially widespread repercussions for landowners. This session is intended to build insurers' and insureds' awareness of the potential liabilities they may face if things go wrong on a construction project.

What does the policy cover?

Mark Morton, Partner and Solicitor Advocate

Mark will highlight some recent coverage issues which have arisen in claims which BTO's insurance team has handled and he will provide an insight into how to find the right approach to dealing with policy matters and strengthening client relationships. Mark's talk is intended to be of interest to claims handlers, underwriters, brokers, loss adjusters and those involved in dealing with complex claims.

TO BOOK: Click here + send