



**Scottish Civil Justice Council Personal Injury Committee –  
Information Gathering Exercise on Pre Action Protocols**

**Response from the Motor Accident Solicitors Society**

**June 2014**

**Introduction**

This response is prepared on behalf of the Motor Accident Solicitors Society (MASS).

MASS is a society of solicitors acting for the victims of motor accidents, including those involving Personal Injury (PI). MASS has 150 solicitor firm members and we estimate that member firms conduct upwards of 500,000 PI motor accident claims annually on behalf of the victims of these accidents. The Society's membership is spread throughout the United Kingdom including a number of members in Scotland.

We are a not for a profit organisation, which requires specialism in motor accident pursuer work as a pre-requisite for membership. We also have Code of Conduct which member firms are required to abide by, which is directed to the best interests of the motor accident victims.

The objective of the Society is to promote the best interests of the motor accident victim. This is central and core to our activity. We seek to promote only those policy and other objectives which are consistent with the best interests of the accident victim. We seek to set aside any self interest in promoting these arguments, recognising that we are in a position of trust, and best placed to observe the best interests of motor accident PI victims first hand.

MASS has 14 member firms in Scotland and represent the majority of solicitors who deal with motor accident cases that occur in Scotland. Scotland is considered a separate region from the rest of the UK for the purpose of membership. Membership is by office rather than individual.

The vast majority of Scottish member firms are volume businesses acting for victims of road traffic accidents and this response does not necessarily reflect the view of the individual member firms.

We are grateful for this opportunity to submit a response to this Information Gathering Exercise.

If you have any queries or would like further information, please contact Jane Loney at:

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**ANNEX A**

**RESPONDENT INFORMATION FORM**

Please note this form **must** be returned with your response to ensure that we handle your response appropriately.

**Name/Organisation**

Motor Accident Solicitors Society

**Title** *(Please tick as appropriate)*

1.

Mr  Ms  Mrs  Miss  Dr

Other  *Please state:*

**Surname**

Russell

**Forename**

Elaine

**2. Postal Address**

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**Postcode: BS1 5BT**

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## Permissions

I am responding as an:

Individual  (*complete section (a)*)      Group/Organisation  (*complete section (b)*)

## INDIVIDUALS

(a) If responding as an **individual**:

**(i) Do you agree to your response being made available to the public (on the Scottish Civil Justice Council website)?** (*Please tick as appropriate*)

Yes       No

**(ii) If you are content for your response to be published, please tell us how you wish us to make your response available to the public:**

*Please tick ONE of the following boxes:*

Make my response, name and address all available

Make my response available, but not my name and address

Make my response and name available, but not my address

## ORGANISATIONS

(b) If responding as a **group or organisation**:

**(i) The name and address of your organisation will be made available to the public on the Scottish Civil Justice Council website. Are you content for your response to be made available?**

Yes       No

## ANNEX B

## INFORMATION GATHERING EXERCISE QUESTIONNAIRE

1. Are the stated aims and purposes of the current voluntary pre-action protocols adequate to comply with the recommendations of the Scottish Civil Courts Review if made compulsory? *(Please tick as appropriate)*

Yes

No

No Preference

In general terms MASS is in favour of the introduction of a mandatory pre-action protocol. We fully support a system that is transparent, that allows evidence to be exchanged at the earliest possible opportunity and safeguards the rights and facilitates the proper representation of injured people. We agree that the usefulness of the existing pre- action protocol is limited by the fact it is not compulsory.

Our organisation represents 14 firms of motor accident solicitors in Scotland and, in turn, they represent over 50% of all people who are injured as a result of road traffic accidents in Scotland.

We believe that the quality of process between insurance companies and solicitors who represent people injured in accidents should engender consistency of process and outcomes.

We firmly support a pre-action protocol that is founded on “shall” duties that will be incumbent on both insurers and solicitors and any protocol should be founded upon principles that are strict, clear and compel parties to exchange information.

Any mandatory protocol should encourage and facilitate this exchange of information and there should be greater penalties for non-compliance with the protocol .

**2. If not, what changes, if any, should be made to the voluntary pre-action protocols to make them more effective in achieving their stated aims and purposes?**

The protocol requires to be clear regarding the extent of sanctions for non-compliance and requires to set out an exact framework which stipulates what the requirements are in terms of the extent of and timescales for disclosure.

Our suggested wording for the "Aims and Purposes" section is:

1.2:

- To facilitate and encourage fair and early settlement and without litigation
- To ensure the early provision of reliable information reasonably required to enter into meaningful discussions regarding liability and quantum and to narrow the disputed issues
- To ensure appropriate offers are made before litigation commences

1.4:- The Protocol places a duty on both parties to explore rehabilitation where appropriate at the earliest opportunity without prejudice to liability

We suggest that the addition of the following provision would be beneficial:

1.6 – To enable the court to place sanctions on parties who do not follow the protocol or its spirit without reasonable justification.

Any references to "voluntary" should be omitted.

**3. Are changes required to ensure that pre-action protocols better reflect the needs of party litigants?**

Yes                       No                       No Preference

MASS supports a protocol that is focused on resolution and a process which is just, equitable and proportionate. It is paramount that any protocol allows injured people to have equality of arms by way of specialist advice and representation and results in access to justice for the victims of road traffic accidents in Scotland.

Our membership has experience of the increased use of pre-medical offers by the insurance industry. We believe that this practice is not fair or consistent and should not be permitted in any circumstances. We support a protocol which ensures that any injured person requires the representatives of the injured party to exhibit a medical report outlining the extent of injury and prognosis.

MASS believes that it will be difficult to change the behaviour of insurers and to ensure that pre-medical offers are prohibited within or outside of a protocol, in addition to the necessary rules required, MASS suggests that the ABI be asked to put forward proposals as to how the practice can be brought to an end within the insurance industry, or at least the very high proportion of the motor insurance industry that holds ABI membership.

Injured people by their very nature are vulnerable and it is important they are entitled to specialist representation to ensure that access to justice is achieved.

**4. Should a compulsory pre-action protocol apply to higher value cases involving fatal or catastrophic injury?**

Yes.  
 No. If not, what should the "cut off" threshold be?  
 No Preference

MASS support a protocol that encourages decisions to be made as soon as is reasonably possible for ALL road traffic cases. In relation to higher value and catastrophic cases there is arguably a greater need for decisions to be taken in relation to liability to allow the injured person and then family to have access to rehabilitation.

Our members have experience of liability decisions being subject to delay pending criminal prosecutions when liability is straightforward and an admission of liability would be achieved earlier within the process. On that basis, we welcome the 3 month time limit in relation to the question of liability to apply to all road traffic cases.

MASS recognises that there may be difficulty with adherence to protocol time limits for medical reports given that in higher value cases the extent of injuries and timescale for prognosis may not be attained for a significant time following the accident. On that basis, we advocate that there should be scope for parties to agree to extend timescales for medical reports. Furthermore we welcome a protocol where there are no penalties against injured people or their representatives. We believe that this would run contrary to the spirit of the protocol and access to justice for injured people.

Our organisation supports a protocol which recognises The Rehabilitation Code and the importance of the use of this in road traffic accident cases and in particular catastrophic cases.

In principle, we believe the current voluntary pre-action protocol letter should apply for higher value cases and the principles of the protocol operate for clients who are seriously injured.

We support the recommendations made in the Scottish Civil Courts Review that “in principle the protocols should apply to all categories of personal injury claim” (recommendation 103).

**5. Is it necessary to consider any additional protocols, or maintain exceptions, for specific types of injury or disease claim, for example, mesothelioma?**

Yes

No

No Preference

MASS is a society which represents solicitors acting on behalf of victims of road traffic accidents. Accordingly, only those questions which are directly related towards road traffic PI will be answered.

**6. How successful has the use of separate pre-action protocols for professional negligence and industrial disease claims been?**

MASS is a society which represents solicitors acting on behalf of victims of road traffic accidents. Accordingly, only those questions which are directly related towards road traffic PI will be answered.

**7. Should a pre-action protocol for medical negligence claims be developed?**

Yes.

No

No Preference

MASS is a society which represents solicitors acting on behalf of victims of road traffic accidents. Accordingly, only those questions which are directly related towards road traffic PI will be answered.

**8. If you answered yes to Question 7, what should the key features be?**

MASS is a society which represents solicitors acting on behalf of victims of road traffic accidents. Accordingly, only those questions which are directly related towards road traffic PI will be answered.

9. Are there any issues relating to the operation of the [Pre-action Protocol for the Resolution of Clinical Disputes in England and Wales](#) that should be taken into account?

Yes

No

No Preference

MASS is a society which represents solicitors acting on behalf of victims of road traffic accidents. Accordingly, only those questions which are directly related towards road traffic PI will be answered.

10. Should a new pre-action protocol regime be introduced in advance of the creation of the specialist Personal Injury Court? Please give reasons for your answer.

Yes

No

No Preference

It is important that there is access to justice and certainty of process for injured people should be brought into at the same time. MASS supports the contemporaneous introduction of a mandatory pre- action protocol and specialist PI courts in Scotland. Ideally any changes should be brought in together. Should there be a delay to the introduction of the specialist PI courts MASS considers there are no reasons why the mandatory pre- action protocol should not be introduced sooner.

MASS submits that specialist PI courts must be given sufficient staffing and resources (both financial and in terms of available accommodation for sittings) to ensure civil cases can proceed efficiently and without delay.

Under the current PI court rules, there is early communication between both sides of litigation and the introduction of a mandatory pre- action protocol would be a natural and entirely practical precursor to litigation with resolution and the care of injured people at the heart of it.

In our organisation's response to the Gill Review we advised that MASS supports the introduction of a mandatory pre- action protocol and we remain of the strong opinion that an efficient judiciary coupled with a mandatory pre- action protocol would assist victims of road traffic accidents and their legal representatives in the pursuit of justice. This would mean that only cases which reach court are cases where liability is denied, the insurer makes no offer in settlement or the insurer makes an inadequate offer to settle.

**11. Are you or your organisation aware of variations in awards of expenses where the pre- action protocol has not been adhered to?**

Yes

No

No Preference

Our organisation has experience of some insurance companies not adhering to the terms of the current voluntary pre-action protocol. This has resulted in increased litigation, uncertainty for clients and lack of consistency for awards of expenses. Our experience is that the non-adherence to the current protocol has encouraged insurers to “have a go” for costs- this is unfair for injured people when resulting in an arbitrary reduction in recovered costs; unsatisfactory for agents who cannot advise on the likely outcome of decision and has the practical effect of burdening the court rolls with an ever increasing number of expenses hearings.

The variation in awards of expenses means that there is no real consistency of decisions and it is important that this is addressed. MASS would be happy to supply specific examples.

We believe that the terms of a mandatory pre-action protocol should ensure that there is consistency of process including consistency of decision making in relation to expenses.