



Civil Justice Council Consultation:

Review of Pre-Action Protocols

Response from the Motor Accident Solicitors Society

December 2020

This response is prepared on behalf of the Motor Accident Solicitors Society (MASS) and submitted by the Chairman, Paul Nicholls.

MASS is a Society of solicitors acting for the victims of motor accidents, including those involving personal injury (PI). MASS has over 100 solicitor firm Members, representing approximately 2000 claims handlers. We estimate that member firms conduct in the region of 400,000 PI motor accident claims annually on behalf of the victims of those accidents. The Society's membership is spread throughout the United Kingdom.

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

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Questions

Note: not all questions are relevant to us and so have not been answered.

4. Which Pre-action Protocol do you have the most experience with?

Personal injury Pre-action Protocols.

Purpose of PAPs

6. What do you think the primary purpose of PAPs are?

The purpose the pre-action protocol is to set out the steps to be taken, in a relatively set format, by a person before they can bring their case to court. These steps encourage cooperation and early disclosure and inevitably lead to good cases being resolved without the necessity or cost of court proceedings.

7. What do you think the subsidiary purposes of PAPs are?

There are several: (1) to narrow any issues in dispute between the parties, (2) promote an atmosphere of cooperation between the parties, (3) reduce the overall costs of resolving the dispute, (4) ensure the parties engage in appropriate alternative dispute resolution (ADR) to try to resolve their dispute before going to court, (5) to stop potential unmeritorious claims from going to court (6) to ensure strong claims are paid/settled without the need to go to court.

8. To what extent do you think PAPs have achieved these objectives?

In broad terms, the PAPs are partially successful and at least provide a framework for pre-litigation information. Prior to the PAPs, there was little information relevant to the dispute available.

The protocols are designed for the purpose of reducing the number of cases that are litigated. For personal injury claims, these objectives have been broadly achieved with only 13% of personal injury claims presently ending up in court. The Compensation Recovery Unit (CRU) figures for 2018 to 2019 show there were 862,356 personal injury claims and, of these, according to the Civil Justice Statistics, only 113,800 were issued.

9. What do you think the purpose of PAPs should be?

With the Civil Liability Act 2018 and the government's reforms to Road Traffic Accident (RTA) whiplash claims, the role of the PI PAP will fundamentally change. With the reforms likely to remove legal representation for most litigants, the purpose of the PI PAP will primarily be to assist LiPs to prepare and present their case. It will need to describe what the LiP will need to do to win their claim and the evidence required to prove liability. It will have to describe the heads of loss that can be claimed, the amounts that can be claimed (loss of use, care rates etc) and to describe the evidence required to prove each head of loss and how to obtain it. Legal concepts and terminology will all have to be explained in simple terms for the layperson whilst ensuring that important legal concepts and commitments are not lost.

Fairness of PAPs

10. How burdensome are the requirements of PAPs?

About right – our members report that the burden of the current PI PAP is balanced and provides a framework that can be used by litigators.

11. Are PAPs fair to both prospective parties in the obligations they impose?

Yes.

12. Is there enough time to comply with PAP requirements, taking into account limitation periods?

Yes.

Costs and Funding

13. Do you believe PAPs help resolve disputes at proportionate cost?

Most of the time.

This is precisely what the existing Personal Injury Protocols achieve. Reduced 'staged' fixed costs are payable where a claim settles under the RTA and EL/PL Pre-Action protocol. If defendant's refuse to engage, delay, or unreasonably dispute liability or quantum, then it is only right they pay increased costs.

14. Do PAPs have the effect of frontloading of costs in cases that are not resolved without reaching court?

No.

There is no 'frontloading of costs' in personal injury cases with 95% of cases operating under fixed costs payable generally at case end.

15. Where costs are recoverable for complying with PAPs, do the costs fairly reflect the amount of work involved?

Fixed portal costs are proportionate where the case has few special damages and settles quickly after the disclosure of medical evidence.

They are not proportionate for cases involving multiple medical reports, the reviewing of medical records, substantial and complicated special damage claims.

They are not appropriate where the claimant is put to extra work because the defendant alleges or even hints at some impropriety on behalf of the claimant in respect of all or part of their claim.

Nor are they proportionate for cases involving children or persons under a disability which, by their nature, involve considerably more work.

Clarity

17. To what extent do you believe that PAPs are well adapted to the key issues in the litigation to which they relate?

The current RTA PAPs are highly adapted for the use of lawyers representing injured claimants.

However, without subject revision they will be utterly incomprehensible to the many thousands of LiPs who will be presenting their own RTA claims after April 2021. Terms like 'soft tissue injury', 'vehicle related damages', 'full liability basis', 'accredited medical expert', 'breach of duty', 'contributory negligence' 'certificate of recoverable benefits' will mean nothing to litigants in person and must all be explained in clear and simple terms.

18. Are PAPs sufficiently flexible to meet the needs of the prospective parties?

Yes they have been for the legal community, but they will have to adapt considerably to meet the needs of LiPs.

19. Are PAPs clear in the obligations they impose (and do not impose)?

Whilst the present PI PAP is clear and lawyers are competent in dealing with their obligations, the new PAP for LiPs is unlikely to be. Despite it yet to be published we remain very concerned that the new PAP is likely to cause significant confusion because of the numerous steps and difficult process proposed.

20. Are PAPs clear as to the sanctions that can be imposed for breaching them?

There is no consistency whatsoever as to the sanctions that will be imposed for breaching an RTA PAP. An example is Paragraph 7.8B of the RTA Protocol which requires the claimant to disclose the first medical report before obtaining a further medical report. The sanction imposed by the courts for failing to do so is to debar the claimant from relying on the further medical report. This sanction, notwithstanding the absence of any prejudice to the defendant, means that a claimant who has suffered injuries sufficiently serious to warrant further medical evidence, will not recover their full entitlement to compensation. The amount they recover for general damages will be restricted to the injuries described in the first report, and they will lose other heads of loss that cannot now be causally linked to injuries they suffered.

Contrast this with the position the courts take when a defendant wants to withdraw an admission of liability. Courts routinely allow these applications to succeed simply on the basis the defendant can show they have a realistic prospect of success and any arguments about prejudice to the claimant are dismissed in favour of good administration of justice.

Litigants in Person

21. To what extent do you consider PAPs to be comprehensible to litigants in person?

They are inaccessible but as set out in Answer 9, the PI PAP is currently being fundamentally reviewed and re-written to be accessible to the LiP. As a result it is difficult to comment on something not yet available.

22. Do you believe PAPs are easy to locate for litigants in person?

Currently not. We understand that the new PAP will be available for LiPs via the new claims portal (OIC) but have not seen a draft of the PAP and so do not know for certain.

Compliance and Enforcement

23. Do you believe prospective parties comply appropriately with PAPs?

Compliance is routine.

24. Do you believe courts deal consistently with non-compliance with PAPs when making case management directions or imposing costs orders?

Generally, yes.

25. What do you believe should be the appropriate sanction for non-compliance with PAPs?

It is noted that further sanctions may be considered. However, we believe the current sanctions are appropriate for non-compliance and the current cost sanctions are sufficient. Litigators have many burdensome regulatory matters to attend to and do not need further sanctions.

Judicial Case Management

26. To what extent does compliance with PAPs lead to more efficient case management if litigation is necessary (eg through the narrowing of issues in dispute)?

A lot.

27. What more could be done to transfer the benefits of compliance with PAPs to judicial case management if litigation is necessary ?

None

Technology

28. What role should PAPs play in online dispute resolution?

PAPs could potentially provide a helpful framework setting out the parameters within which a dispute could be resolved.

As a general comment, mediation should be utilised more, but parties have been slow to accommodate given the adversarial legal system.

29. Would it be desirable to incorporate PAPs into the steps built into online dispute resolution portals?

Yes, it would be, but the Ministry of Justice has unfortunately already determined that an Alternative Dispute Resolution (ADR) procedure will not be incorporated in the new claims portal to be launched in 2021.

Priorities for Reform

30. Do you believe PAPs require reform?

Yes, like law generally, PAPs should adapt with time and major developments, such as the digitalisation of the legal system.

The Personal Injury PAP is already undergoing fundamental reform. It is being re-written to be fully comprehensible to LiPs ahead of the introduction of the government's reforms in 2021 and we understand that this process is advancing.

31. What do you believe should be the priorities for reform?

The process of reform is already at an advanced stage, although we have been disappointed with the complete absence of any consultation on a draft with stakeholders.

Final observations

32. Are there any issues not raised above that you believe should be part of the CJC's review of PAPs?

No, other than urgent consideration needs to be given to the PAP for LiPs within the proposed OIC framework.