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 x No ☐ No Preference

1. It does not achieve its aim in having both parties properly negotiate a settlement to avoid litigation.

2. Where a breach on behalf of a defender is penalised by the pursuer raising an action (and awarding the pursuer's solicitors greater fees) there is no penalty for the pursuer in failing to comply with the terms of the pre-action protocol as it currently stands. The pre-action protocol accordingly can be (and regrettably sometimes is) abused.

3. There are frequently issues with regard to correspondence not properly reaching insurers, particularly when an insurer has a number of addresses.

4. The fees allowed in terms of the voluntary pre-action protocol are excessive, particularly in relation to the majority of low value road traffic accidents where issues of liability are never likely to be contested (e.g. a rear collision).

For example, as currently stated a simple road traffic accident where the pursuer is struck from behind and suffers three or four months of a whiplash-type injury could have his claim settled at £1,600. The fees allowable in terms of the current scale would total £1,210 plus VAT and outlays. Once a medical report is taken into consideration the expenses are likely to exceed any award of damages to the pursuer. This cannot be said to be proportionate.

In England a fixed fee scheme is in operation. In similar circumstances the expenses payable would total £500 plus VAT and outlays (just more than 40% of the fee in Scotland).

5. The system currently in place in England secures a faster settlement to the benefit of claimants than the timescales involved in the current voluntary pre-action protocol in Scotland.

Please see the paper apart in respect of an overview of the pre-action protocol for low value personal injury claims and the Ministry of Justice portal process that takes place in England and Wales.

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?

Comments

FOIL Scotland endorses the view of the Forum of Scottish Claims Managers that the opportunity should now be taken to establish a compulsory pre-action protocol similar to the system currently operating in England and Wales following the Ministry of Justice reforms.

We do, however, recognise that this would be a radical overhaul and should perhaps therefore be seen as a long term goal. As an immediate alternative, our paper apart details our proposal for a compulsory pre-action protocol which promotes the aims of access to justice, protection of the consumer, regulation of pre-action behaviour and genuine attempts to settle claims without recourse to litigation.

The radical proposals contained within the Taylor report on costs mean that an effective, simple and strict compulsory pre-action protocol, with appropriate penalties, is essential to prevent unnecessary litigation.

We are of the view that the limit should mirror that in England and Wales, namely £25,000 for accidents occurring on or after the date of implementation of the protocol, but remaining at £10,000 for accidents occurring before that date. Proposals for a voluntary protocol above that level are found in our response to Question 4.

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

x Yes ☐ No ☐ No Preference

The ABI has a voluntary code of conduct for Insurers when dealing with unrepresented claimants:

https://www.abi.org.uk/~/media/Files/Documents/Publications/Public/Migrated/Motor/ABI%20code%20of%20practice%20-%20third%20party%20assistance.ashx

Such party litigants are free to seek legal advice or representation at any time, and insurers are encouraged to recommend that a party litigant obtains legal advice.

We would recommend that, where a pursuer is unrepresented, the protocol envisaged in this response would not be appropriate. Instead, we would be in favour of making the above voluntary code of conduct compulsory for claims up to £25,000, particularly as it makes specific provision for unrepresented claimants who decline any assistance offered.

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

☐ Yes.

x No. If not, what should the “cut off” threshold be?

☐ No Preference

We are of the view that the limit should mirror that in England and Wales, namely £25,000 for accidents occurring on or after the date of implementation of the protocol, but remaining at £10,000 for accidents occurring before that date.

- Claims dealt with over this level would require to be dealt with on a case by case basis and as a matter of agreement between the parties. Where, however, either party proposes that a case is dealt with under the following proposed voluntary protocol; it shall not be refused by the other party unless there is a good and valid reason for doing so:

1. A period of three months from any letter of claim for the defender to admit or deny liability.

2. If there is any admission of liability (in whole or in part) the pursuer will provide the defender with a statement of valuation of claim that details each head of claim together with a valuation for each head of claim. There must be supporting vouching to support all heads of claim.

3. Upon receipt of the statement of valuation of claim (and all necessary vouching) the defender would have 20 working days to make a settlement offer. There would then be a period of 2 months for settlement discussions to take place between the parties. There should be a genuine attempt between the parties to settle the claim.

4. All pre-litigation offers ought to be treated as a "pre-litigation tender", with expenses consequences running from the date of that offer.

5. The consequences of breach should be severe so as to discourage unnecessary litigation and ensure that proper negotiations occur. We suggest:

(A) Breach by the defender entitles the pursuer to litigate without penalty.
(B) If the pursuer litigates in breach of the CPAP, the pursuer's agent's expenses will be reduced to nil;
(C) In the event of any other breach of the CPAP by the pursuer, the pursuer's agent's expenses shall be modified by 50%;
(D) In the case of unreasonable conduct by the pursuer or his/her agent, the defender will be entitled to recover the expenses of litigation.

5. Pre-litigation admissions of liability in claims worth over £25,000 ought not to be binding upon the defender.

6. We would propose that fees are dealt with on the same basis as the current Voluntary Pre-action Protocol scale.

7. For claims above £250,000 we would propose the adoption of a similar model to the multi-track code used in England and Wales. Although this would be voluntary, again it shall not be refused without a good and valid reason for doing so. The following provisions should be included:

- Appointment of an independent clinical case manager in appropriate cases;
- Early discussions over appropriate care regimes;
- Commitment by both sides to share evidence, and to avoid duplication of cost in obtaining evidence;
- Willingness to make interim payments.

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

x Yes ☐ No ☐ No Preference

This question raises three points, considered in the attached paper apart:

1. Is it necessary to maintain a separate, general disease protocol?
2. Is it necessary to maintain exceptions or additions for specific injury or disease claims?
3. What features would be desirable in the above?

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

Disease

It is submitted that the Law Society's voluntary pre-action protocol for disease is currently underused, although we are seeing increased use in deafness claims. In respect of asbestos, this is principally due to the existence of other agreed processes – namely:

(i) the Lord President's practice direction for pleural plaques actions in the Court of Session;
(ii) the pleural plaques framework agreement which sets down a range of figures for damages and costs; and
(iii) the mesothelioma arrangement which marries elements of the pleural plaques practice direction and the voluntary disease pre-action protocol but with increased document disclosure and scope for an interim payment.

These processes have successfully avoided litigation in the majority of cases. Although the practice direction covers only litigated Court of Session cases, our general experience is that parties are adhering to its terms in most pleural plaques claims. The practice direction currently has no end date but in any event, when the court reforms are implemented, it is probable pleural plaques claims will require to be raised in the Sheriff Court and so will not be covered by the practice direction. A compulsory protocol would avoid any issues arising from this and would help to ensure consistency and reduced litigation in all disease claims

Professional Negligence

It is submitted that the Law Society's voluntary pre-action protocol for professional negligence claims is also underused. Most parties cite the complexity of professional negligence claims as the primary reason for its underuse. If it is considered desirable to revisit the current voluntary pre-action protocol, a significant degree of flexibility will be required to enable parties to use the protocol for the wide variety of claims seen in this practice area.

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

x Yes. ☐ No ☐ No Preference

There are currently voluntary pre action protocols in place for personal injury, disease and professional negligence claims. Protocols generally encourage early exchange of information and identification of the issues between parties. Protocols ought to avoid unnecessary delay, expense (on both sides) and ultimately reduce the need for litigation.

Most Respondents to The Gill consultation favoured the use of pre-action protocols in medical negligence claims. In addition, three quarters of Respondents considered that compliance with pre-action protocols should be compulsory. It was noted that a number of Respondents submitted that a protocol for medical negligence claims should be introduced and that the clinical negligence protocol in England and Wales was working well.

Accordingly, we support the introduction of a compulsory pre action protocol for medical negligence claims, and that this should be separate to the personal injury protocol.

Medical negligence claims are generally more complex than "standard" injury claims. They require input from medical experts on liability and causation before it can be confirmed whether or not there is a valid claim. There is often a chronology of events to be considered and causation can often be exceptionally complicated. By their very nature, medical negligence claims frequently take much longer to investigate than other injury claims and there is often an ongoing relationship between the claimant and his/her medical advisers.

Accordingly, we support the introduction of a separate pre action protocol specifically designed to cater for the unique nature of medical negligence claims.

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

> The purpose of a voluntary pre-action protocol in medical negligence claims should be to encourage the early exchange of information so that the facts and legal issues are established at an early stage. That should facilitate early agreement on key points and avoid delay in progressing the claim to conclusion.
>
> We consider the current voluntary pre-action protocol professional negligence claims provides a sound basis for a similar protocol for medical negligence claims. We submit that any protocol ought to be as simple as possible to avoid ambiguity or misinterpretation.
>
> The attached paper apart considers the key features of any medical negligence pre-action protocol that might be developed.

9. Are there are 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?

x Yes ☐ No ☐ No Preference

The English clinical disputes protocol contains a number of features that are not suggested in response to Question 8. Those include:-

1. Offer to settle

The Claimant can make an offer to settle the claim at an early stage by putting forward an amount of compensation which would be satisfactory. If an offer to settle is made, it should be supported by a medical report dealing with injuries, condition and prognosis and by a Schedule of Losses with supporting documentation. Medical reports may not be necessary where there is no significant continuing injury and a detailed Schedule may not be necessary in a low value claim.

We consider such a proposal would be useful for Scottish medical negligence claims, particularly those of low value where the Claimant and his/her agent will be able to quantify the case at an early stage and there are no ongoing losses.

2. Joint Experts

The English clinical disputes protocol recognises the difficulties there might be in agreeing to the use of joint experts. Parties are to decide when the use of joint experts might be appropriate depending on the nature and circumstances of the case. We do not advocate compulsory use of joint experts in any compulsory pre-action protocol for medical negligence cases in Scotland. We suggest parties should be free to agree the appointment of a joint expert if appropriate, but should not be forced to do so.

3. Alternative Dispute Resolution

The English clinical disputes protocol encourages parties to explore alternative dispute resolution. It stops short of forcing mediation or any other form of ADR. We consider that litigation might be avoided in medical negligence disputes if parties were encouraged to consider ADR, whether that be face to face meetings, introduction of a mediator or the appointment of an independent expert to consider liability and/or causation issues in dispute. In the English clinical disputes protocol, parties are warned that if ADR is not considered, the court in any subsequent litigation must have regard to that conduct when determining costs. We would welcome a similar approach being applied in any compulsory medical negligence protocol in Scotland. Ongoing dialogue between parties ought to be encouraged as it should ultimately lead to earlier claims resolution and reduced cost for all parties.

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.

x Yes ☐ No ☐ No Preference

We believe that a compulsory pre-action protocol should be introduced either in advance of, or at the same time as, the establishment of the specialist Personal Injury Court.

We are firmly of the view that we should embrace the opportunity for wholesale reform of personal injury litigation in Scotland. The respective recommendations contained in the Gill and Taylor reports will be run together, and any pre-action protocol should be seen as an integral part of this reform.

A specialist Personal Injury Court will be able to ensure, from day one, a consistent approach to penalising and discouraging poor pre-litigation behaviour on both sides.

A side benefit is that many parties have concerns about the volume of litigation with which the Personal Injury Court will require to cope. A properly focussed compulsory pre-action protocol should ensure that the Court will only be troubled by cases where resolution is genuinely impossible to achieve.

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

x Yes ☐ No ☐ No Preference

We are aware of a very wide range of results in the courts on the issue of expenses. This is perhaps not surprising in light of the fact that expenses are always at the sole discretion of the sheriff/judge who hears the submissions.

Some insurers (and self-insuring bodies) who do not wish to use the terms of the Voluntary Pre-Action Protocol ("VPAP") have been penalised for not following it (even when it is supposed to be voluntary). In other identical situations the same insurers have been fully vindicated in choosing not agree to the VPAP. Different Sheriffdoms have taken different approaches.

Clearly a compulsory pre-action protocol would take away any uncertainty about whether or not it should be followed in any given case.

In cases where there have been breaches of the VPAP, or disagreement over whether it should have been followed, there have been a very wide-range of decisions. These include modification to nil, modified significantly by a large percentage, modified by a lower percentage, restricted to a lower scale or not modified to any extent.

Most decisions are given orally. If there are written decisions, then they are seldom reported. We would be happy to provide copies of decisions if requested showing the wide range of outcomes.

An issue of concern relates to taxations for expenses. In some cases, actions settle having been litigated when there is breach of the VPAP on the part of a pursuer. Most often the auditor grants a full "Pre-litigation fee" even in these circumstances, when we would argue that this is not warranted.

PAPER APART

Question 2. "…[W]hat changes, if any, should be made to the voluntary pre-action protocols to make them more effective in achieving their stated aims and purposes?

FOIL Scotland proposes the following as a framework for a Compulsory Pre-action Protocol ("CPAP") for personal injury claims with a value of £25,000 or less for accidents occurring on or after the date of implementation of the CPAP, and £10,000 for accidents occurring before that date. Reference to "insurer" below includes the defender where no insurer is involved.

In order to assist communication throughout the process, it would be extremely helpful to have a portal arrangement as seen in England and Wales. In the absence of same, the following should be sent by recorded delivery post:

- Letter of claim
- Insurer's response
- Medical evidence and other vouching
- Statement of Value of Claim
- Offers and counter-proposals

1. Letter of Claim

The letter of Claim should be in a mandatory prescribed form, aimed at driving consistency and efficiency in investigations. The following must be included:

- Pursuer's full name, date of birth, NI number and full residential address (including postcode);
- Details of injuries sustained;
- Details of time off work;
- Employers name and address;
- Details of GP and hosptials attended;
- Details of treatment received;
- Identification of material witnesses, with copies of material witness evidence;
- A clear summary of the facts, including clear allegations of negligence.

2. Insurer’s response

As the proposal is for a compulsory protocol, the presumption is that the CPAP will apply and there is therefore no need for the insurer to confirm same.

The insurer will respond within 20 working days (40 days in employers’ liability or public liability claims) of receipt of all information in the proposed mandatory prescribed form of letter of claim by the insurer, to address the following:

- Admit liability in full; or
- Repudiate liability in full. The insurer must disclose all relevant documents available in support of the repudiation. If liability is repudiated in full, the pursuer can litigate without penalty; or
- Admit primary liability subject to contributory negligence. The insurer must include detailed reasons for the allegation of contributory negligence and disclose all relevant documents available in support. The allegation of contributory negligence, provided the above criteria are met, does not remove the case from the CPAP. It is submitted that the following timescales for investigation of quantum allow sufficient time for the pursuer to investigate contributory negligence; or
- Seek further time to investigate and address the issue of liability. This invokes a 90 day extension of time to investigate and respond on liability, by which time the insurer must respond as above. If the 90 day extension is invoked, the pursuer’s agent is entitled to an additional fee (below); or
- The letter will include details of the appropriate address at which, or solicitor on whom, to serve proceedings. Any subsequent failure by the pursuer to adhere to this request will be taken into account in any question of expenses or recall of decree; and
- An admission of liability in whole or in part will be binding upon the insurer unless there is any fraudulent aspect to the claim, to include misrepresentation of the accident circumstances or deliberate exaggeration.

3. Medical Reports & Valuation of Claim

- Within 20 working days of receipt of the insurer’s letter admitting liability in full or in part, the pursuer’s agent must instruct a medical report or, if a medical report is already in their possession, disclose it to the insurer;
- Any expert instructed must have sight of full pre- and post-accident GP records and all records from any institution attended for treatment;
- Within 20 working days of receipt of the medical report, the pursuer’s agent will disclose it to the insurer;

- Disclosure of the medical report by the pursuer's agent must be accompanied by a Statement of Valuation of Claim ("SVC"), including all heads of claim and all supporting documentation. It is not necessary to forward medical records, but these must be disclosed within 10 working days if requested by the insurer;
- Within 20 working days of receipt of the medical report, the insurer can ask questions of the medical expert. The questions will be directed through the pursuer's agent, who must forward the said questions within 5 working days of receipt;
- The pursuer's agent must forward the expert's answers within 5 working days of receipt.

4. Offers and Settlement

- Within 20 working days of receipt of the medical report and SVC, or receipt of answers to questions put to the expert if such a right is invoked, the insurer must write to the pursuer's agent with an offer to settle the case;
- The insurer's offer commences a two month period during which the pursuer will not litigate, unless the case would otherwise be extinguished by time bar;
- Within 20 working days of receipt of the insurer's offer, the pursuer's agent must respond with either acceptance of the offer, or a counter-proposal. A bare rejection of the offer will be treated as a breach of the CPAP;
- Acceptance of the offer must be accompanied by a note of the pursuer's agent's expenses, along with vouching for outlays claimed. Any dispute over expenses and/or outlays must be raised within 5 working days and parties must seek to negotiate settlement of same within the 2 month settlement period;
- Any attempt to stipulate unreasonable conditions as part of any offer or counter-proposal will be treated as breach of the CPAP;
- Within 20 working days of settlement of damages and expenses, the insurer must send funds in full settlement to the pursuer's agent, failing which interest will run at the prevailing judicial rate from the date of settlement until payment is made in full;
- If settlement is not achieved and the case subsequently litigates, all offers made under the CPAP will be treated as pre-litigation tenders with expenses consequences running from the date the offer was made;
- If the case subsequently litigates and the pursuer beats his or her counter-proposal (before the addition of interest) the pursuer will receive an additional 10% on any solatium award made.

5. Penalties

- In the event of breach of the CPAP by the insurer, the pursuer shall be entitled to litigate without penalty, and the pursuer will receive an additional 10% on top of any solatium award made;
- If the pursuer litigates in breach of the CPAP, the pursuer's agent's expenses will be reduced to nil;
- In the event of any other breach of the CPAP by the pursuer, the pursuer's agent's expenses shall be modified by 50%;
- In the case of unreasonable conduct by the pursuer or his/her agent, the insurer will be entitled to recover the expenses of litigation.

6. Additional Provisions

- It is open to the insurer to make an offer to settle at any point, without leading to removal from CPAP. If any such offer is rejected, and thereafter settled at a later stage, the pursuer's agent's expenses will be capped at the appropriate figure for the stage at which the offer was made;
- If settlement is not achieved and the pursuer subsequently litigates, the pursuer will be barred from introducing additional heads of claim if the existence of same ought reasonably to have been known and raised prior to raising proceedings;
- The pursuer can ask the insurer for any information held by the insurer and/or defender by way of a pre-litigation specification of documents, subject to the normal rules of recoverability of relevant documentation. The insurer must respond within 20 working days.

7. Expenses

The following proposed fees are cumulative and we would submit, reasonable and proportionate in respect of protocol claims. The pursuer's agents will be entitled to a fee for each stage reached within that process, and the relevant fee would be payable as soon as the appropriate stage has been reached. These fees exclude VAT and all reasonably incurred outlays.

We propose three fee structures to reflect the value of the claim, with separate fee structures for motor claims and EL/PL respectively.

Motor Claims

1. Claims with a value at £1,000 or below

Fixed fee of £300 payable upon settlement of the claim (regardless at what stage settlement is achieved).

2. Claims between £1,000 and £10,000 (inclusive)

Stage 1 (up to and including the insurers' response on liability) - £200

Optional extension period – where the 90 day extension period is sought by the defenders – an additional £200

Stage 2 – upon settlement, or up to and including the expiry of the two month settlement period – an additional £300

3. Value of claim between £10,000 up to and including £25,000

Stage 1 (up to and including the insurers' response on liability) - £200

Optional extension period – where the 90 day extension period is sought by the defenders – an additional £200

Stage 2 – upon settlement, or up to and including the expiry of the two month settlement period – an additional £600

Employers' and Public Liability Claims

1. Claims with a value at £1,000 or below

Fixed fee of £400 payable upon settlement of the claim (regardless at what stage settlement is achieved).

2. Claims between £1,000 and £10,000 (inclusive)

Stage 1 (up to and including the insurers' response on liability) - £300

Optional extension period – where the 90 day extension period is sought by the defenders – an additional £200

Stage 2 – upon settlement, or up to and including the expiry of the two month settlement period – an additional £600.

3. Value of claim between £10,000 up to and including £25,000

Stage 1 (up to and including the insurers' response on liability) - £300

Optional extension period – where the 90 day extension period is sought by the defenders – an additional £200

Stage 2 – upon settlement, or up to and including the expiry of the two month settlement period – an additional £1300.

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

General Disease Protocol

There are material differences between a standard personal injury claim and one involving disease (particularly long tail) which make it appropriate to retain a separate disease protocol. It is often the case that a longer period of time is required to investigate liability and frequently issues relating to apportionment, causation and limitation require to be addressed. The involvement of multiple insurers and/or defenders is a regular feature in disease claims and it can take time to identify and liaise with all the relevant parties. A disease protocol should reflect this.

Specific Types of Injury or Disease Claim

If the general disease protocol is sufficiently flexible to allow extension of time limits when necessary (as per 3 below) then it is not considered that separate protocols would be required. For example, it may be necessary to agree to a put a stress claim on hold pending the outcome of an employment tribunal or to extend the investigation period whilst empirical evidence is obtained in a HAVS claim.

Exceptions, however, may be appropriate with mesothelioma. For example, to allow for an interim payment (already included in the mesothelioma arrangement).

Further, with mesothelioma claims there is potential for separate claims pre and post death. If a live claim is settled under the protocol then thought should be given on how to resolve the family's claims (if any) expeditiously post death. It may be prudent to include timescales for notification of death to the insurer as well as the forwarding of the death certificate, funeral invoice, confirmation and necessary birth/marriage certificates.

Features of a Disease Protocol

Time Limits

Parties should be encouraged to adhere to the timescales set but it is proposed that, similar to the professional negligence protocol, some flexibility should be allowed and parties should be able to propose extensions (and that should be agreed to) where it is reasonable to do so.

Mandates

The current protocol refers to the disclosure of relevant medical and DWP records by the Claimant but it appears this is envisaged only following an admission of liability. It is important to have these documents as early as possible in disease cases as not only can they assist with liability, they can contain information relevant to apportionment, causation and limitation.
Accordingly, with the letter of intimation of claim, it would be desirable for mandates to be provided by the Claimant's agent to the insurer or the Defence agent authorising release of the Claimant's medical and, if appropriate, DWP records. It would be preferable to have sight of all GP records or to at least to have the opportunity to recover them.

Experts

It is suggested that parties should be able to instruct a joint expert or experts to expedite matters. Given the difficulties with diagnosis and causation which often arise in disease claims, it is not proposed this is included as a compulsory feature.

Limitation

Given the potential for limitation in personal injury claims to be increased from 3 to 5 years, it is suggested that thought is given to whether the time bar clause in the current protocol is retained. If limitation is increased and the time bar clause is retained in its current form, a claim might not be litigated until over 6 years after the claimant's date of knowledge. This could make it more difficult to secure the evidence required to pursue or defend any subsequent court action.

Expenses

It is proposed that these are in line with the pre action protocol expenses for personal injury claims. However, it is anticipated that Claimants' agents may propose an increased tariff for disease claims to reflect some of the complexities which can arise. In a mesothelioma claim, where the deceased's claim is settled in life, it would be appropriate to agree what additional fee would be merited in respect of the family's claims

Question 8. "[W]hat should the key features [of a medical negligence protocol] be"?

We suggest the following features should be present in any compulsory Scottish protocol:-

- The protocol should apply to all claims. No exemptions should be permitted. Exemption from the protocol, even on an agreed basis between the parties, would defeat the purpose of the protocol.
- A "preliminary notice" letter should be sent by the Claimant's agent to the medical professional and/or hospital as soon as the Claimant recognises that there is a potential claim. The letter should provide a brief outline of the Claimant's issues with his medical care and potential losses sought. The provision of a letter at this stage will allow the Defender and his insurer to commence investigations with a view to avoiding unnecessary delay in claim progression, should a claim be formally intimated. It will also facilitate capture of crucial factual evidence that might otherwise be lost due to the passage of time. The preliminary notice letter should be acknowledged within fourteen days of receipt by the insurer.
- If a Claimant decides to proceed with a claim for medical negligence, a letter of claim should be intimated. The content of the letter of claim should be necessarily detailed and set out the basis of the alleged negligence, the losses caused and the heads of claim under which damages are sought. If possible, a valuation ought to be provided together with supporting documentation. The Claimant ought not to be bound to such a valuation. The content is likely to be similar to the content of the letter of claim set out in the current voluntarily pre-action protocol for professional negligence cases.
- The letter of claim should be acknowledged within fourteen days by the insurer.
- The Claimant's solicitor should disclose a copy of any medical report upon which the Claimant intends to rely within fourteen days of receipt of the insurer's letter.
- The insurer should have four months from the date of issuing the letter of acknowledgement to investigate the claim. This is the same period as currently provided in the English Clinical Negligence Protocol. If for any reason the insurer is unable to complete investigations within that four month period, the problem should be explained to the Claimant's agent and the Claimant's agent should agree to any reasonable request for an extension of the four month period. This provision is contained in the Scottish pre action protocol for professional negligence claims.
- Upon conclusion of investigations, the insurer will write to the Claimant's agents to confirm whether or not liability and causation are being admitted or denied. If they are to be denied in whole or in part, the insurer should set provide a

detailed response explain why the claim or part of it is being denied. The insurer should release any expert report relied upon.

- If the insurer confirms that liability and causation are admitted, the insurer should write to the Claimant's agent with a settlement offer.
- Both parties should aim to conclude settlement negotiations within a three month period of the offer letter and exchange additional supporting documentation where necessary in order to value to claim. If the claim cannot be resolved within that period parties should agree a reasonable period of extension.
- The Claimant's agent will advise insurers whether or not the insurer's offer is to be accepted or rejected prior to the raising of proceedings and set out reasons why the offer is rejected prior to raising proceedings.
- In the event of settlement being agreed, funds in settlement of damages and agreed expenses will be paid within five weeks of the date settlement is agreed.

We believe it is important that clear timescales are set out in any pre-action protocol but given the often complex nature of clinical negligence claims, parties should be able to agree extensions to time limits where there is a reasonable request to do so.

Any reasonable request should be adhered to by the opposing party.

Expenses for cases settled within the terms of the pre-action protocol ought to be aligned with an agreed tariff similar to the existing tariff in the voluntary pre-action protocol in professional negligence cases.