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

Comments

The Voluntary Pre-Action Protocol was first introduced in 2006 and was a progressive first step to improve pre-litigation behaviour.

The world has moved on substantially since then and changes in the legal landscape and advancements in technology create opportunities to introduce a more streamlined, proportionate and effective protocol to the benefit of the consumer and all stakeholders.

In recent years, our experience has been that the current voluntary protocols leave a distinct gulf between the pre-litigation behaviour and what occurs when a case litigates.

As insurers, we see cases litigate for reasons that are largely irrelevant to the facts of the case such as solicitors frequently writing to incorrect or out of date addresses for an insurer and then litigating over the lack of response – we even see examples where the litigation papers also then go to the incorrect address and only then is the problem investigated and realised.

Essentially, the overriding objective parties should be that a Compulsory Pre-Action Protocol facilitates a genuine attempt by all parties to resolve the matter without resorting to litigation.

A key outcome for mandatory protocols should be transparent process which encourages both sides to have an early exchange of information and evidence, to facilitate dialogue and agreement and create a compulsory legacy that can be used if the case litigates without parties starting the process afresh.

To help provide context, we can share our experiences in other jurisdictions which have moved to more advanced models.

We have an opportunity to improve access to justice and speed of compensation for the injured innocent victim.

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

An electronic based procedure (similar to that effected in England and Wales by the Ministry of Justice Reforms) would create efficiency savings for both Pursuers Solicitors and Defender Insurers alike.

It would also dramatically reduce the instances referred to in answer 1. where we frequently see solicitors writing to incorrect or out of date addresses and litigating when they do not receive a response. An electronic based procedure would alleviate this problem entirely.

An electronic based portal would be used (by both sides) to:

Action	*Who carries out the action?*	*Timescale (working days)*
Intimate the claim with allegations and heads of claim	Pursuer	no timescale – within limitation period
Response on liability	Defender	Motor - 15 days, EL – 30 days and PL – 40 days
Submission of medical evidence and supporting evidence of all other heads of claim with a statement of valuation which would be acceptable to the Pursuer	Pursuer	no timescale – within limitation period
Consideration of evidence and response with counter offers	Defender	20 days
Negotiation period if required	Pursuer & Defender	15 days
If agreement is not reached, proceed to litigation on areas of disagreement – using the evidence already gathered	Pursuer	no timescale – within limitation period
The Sheriff should then be able to impose sanctions on either party who have displayed inappropriate behaviour or delayed settlement unfairly.		

all medical evidence obtained during this period must be disclosed pre-litigation

NB: a Compulsory Pre-Action Protocol must force parties to negotiate pre-litigation to be effective in implementation, otherwise there is always the temptation for either side to depart from the Protocol and it's aims

Please see Appendix 1 for a Flowchart fully detailing the proposed process.

There is a similar portal already in operation in England and Wales – here are the Pre-Action Protocols here:

Low Value Personal Injury claims in RTA:

http://www.justice.gov.uk/courts/procedure-rules/civil/protocol/pre-action-protocol-for-low-value-personal-injury-claims-in-road-traffic-accidents-31-july-2013

Low Value Personal Injury Claims (Employers & Public Liability):

http://www.justice.gov.uk/courts/procedure-rules/civil/protocol/pre-action-protocol-for-low-value-personal-injury-employers-liability-and-public-liability-claims

We would propose mirroring the limits in existence in England and Wales namely a limiting the Compulsory Protocol to damages of £25,000 or less.

We would also propose to mirror the built in procedure for cases up to £10,000 where there is an expectation that 1 medical expert report on straightforward injury claims (usually a GP report) should be sufficient and the cost of same is a fixed cost disbursement. (further reports for different or more specialist experts can be obtained where it is justified)

The report 'Evaluating the low value Road Traffic Accident process' [1]written by Professor Fenn in July 2012 into the MoJ Portal found that from an analysis of 8,939 claims settled pre-portal and 10,306 claims settled post-portal, the overall mean time to settlement on low value claims had reduced by 5 and 7% so the injured claimants were receiving their damages quicker as a consequence of the introduction of the portal.

The operators of the current Ministry of Justice Portal, CRIF would be willing to provide a demonstration of what a web based portal could provide if appropriate.

[1] https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/217387/evaluating-traffic-accident-process.pdf

To enable the Compulsory Pre-Action Protocol to meet the aim of settling cases without the need for litigation, a balance needs to be struck between remunerating the Pursuers Solicitor but at the same time, reducing the potential conflict of interest that is awarding expenses directly linked to the damages as a percentage of the settlement figure – expenses should be proportionate to the matter at hand.

In the present Voluntary Pre-Action Protocol in Scotland, where a Pursuer suffers a whiplash type injury which lasts for 3-4 months the settlement could be in the region of £1,600. The expenses under the VPAP would be £1,210 plus VAT and outlays – Once a medical report is added, the expenses are likely to be more than the damages.

In England and Wales, the same claim would see a fixed fee of £500 plus VAT (40% of the equivalent Scottish Fee) and outlays for a Road Traffic Accident or £900 plus VAT (74% of the equivalent Scottish Fee) and outlays for an Employers or Public Liability claim.

The current fixed costs in England and Wales are as undernoted:

Fixed costs in relation to the RTA Protocol

Where the value of the claim for damages is not more than £10,000		**Where the value of the claim for damages is more than £10,000, but not more than £25,000**	
Stage 1 fixed costs *	£200	Stage 1 fixed costs *	£200
Stage 2 fixed costs **	£300	Stage 2 fixed costs **	£600
Total	£500	Total	£800
(Plus VAT and outlays)		(Plus VAT and outlays)	
The stages are cumulative with * Stage 1 being the investigation stage and ** Stage 2 being when medical evidence is submitted and offers are being made			

Fixed costs in relation to the EL/PL Protocol

Where the value of the claim for damages is not more than £10,000		**Where the value of the claim for damages is more than £10,000, but not more than £25,000**	
Stage 1 fixed costs *	£300	Stage 1 fixed costs *	£300
Stage 2 fixed costs **	£600	Stage 2 fixed costs **	£1300
Total	£900	Total	£1600
(Plus VAT and outlays)		(Plus VAT and outlays)	
The stages are cumulative with * Stage 1 being the investigation stage and ** Stage 2 being when medical evidence is submitted and offers are being made			

For any Compulsory Pre-Action Protocol to work in practice there should be sanctions on a party which fails to comply with the Protocol. This would prevent cases litigating without reason and also ensuring proper negotiations are occurring.

Firstly, to bridge the current gulf between what happens pre and post litigation, all pre-litigation offers should be treated as 'pre-litigation tenders' with either expenses consequences running from the date of that offer or other financial consequences – we would suggest this should follow the same manner as Part 36 Offers in England and Wales.

We would suggest the following:

1. Breach by Defender entitles the Pursuer to litigate without penalty

2. If the Pursuer litigates in breach of the Compulsory Pre-Action Protocol, their expenses should be modified to Pre-Action Protocol Expenses (or 'nil' in more serious breaches) at the Courts discretion (unless there are limitation issues)

3. If the Pursuer fails to subsequently beat a Defenders Pre-litigation offer, their expenses should be modified to Pre-Action Protocol expenses

4. If a Pursuer beats a Defenders Pre-litigation offer, the Pursuers damages should be uplifted by 10%

5. In the case of unreasonable conduct by the pursuer and/or their agents, the defender will be entitled to recover the expenses of the litigation

6. Pre-litigation admissions of liability should be binding as long as the claim remains worth under £25,000 (with the exception of fraud/fundamental dishonesty cases – the English courts approached this recently in *Gosling v Screwfix and Anr (unreported)* which is discussed in detail in an article here [2]

7. Additional heads of claim added once the claim litigates should be at the Sheriff's discretion and in exceptional circumstances only

We consider that the practice of pre-litigation offers to be treated as 'pre-litigation tenders' would be equally applicable to claims exceeding the limits of the Compulsory Pre-Action Protocol. Pre-litigation admissions of liability in claims worth more than £25,000 ought not to be binding upon the defender.

[2] http://www.9goughsquare.co.uk/news/865

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

☒ Yes ☐ No ☐ No Preference

Comments
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 unrepresented claimants are free to seek legal advice or representation at any time. It would be entirely possible to re-work the Voluntary code of conduct into a branch of the Pre-Action Protocol suitable for party litigants

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

Comments
Whilst higher value cases could be dealt with in the spirit of any Compulsory Pre-Action Protocol, it may be that such cases are too complex, require greater investigation or simply require the intervention of the courts to resolve areas of dispute. We do however consider that the practice of pre-litigation offers to be treated as 'pre-litigation tenders' should be equally applied to claims exceeding the limits of the Compulsory Pre-Action Protocol. We are aware of the existence of a 'multi-track code' in England and Wales which could be relevant if there was a desire for a Compulsory Protocol on higher value claims: http://www.apil.org.uk/multi-track-code

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

Comments

We are aware of a "disease protocol" in use in England and Wales and would suggest something similar could be introduced in Scotland. Anecdotal evidence is it works well, but is hampered by the lack of any fixed fee provision. As a result, insurers have seen a large upsurge in Noise Induced Hearing Loss claim intimations large numbers of which, are never progressed past the intimation stage.

The Disease Protocol is detailed here:

http://www.justice.gov.uk/courts/procedure-rules/civil/protocol/prot_dis

We do believe there should be a separate protocol for mesothelioma claims.

Historically there have been delays in dealing with claims at a pre-litigation stage as well as during litigation. These delays can be attributed to the civil justice system in Scotland, as well as the behaviours of the legal representatives on both sides of these claims.

Delays are in no-one's best interests.

The current voluntary disease protocol is not entirely suitable for the handling of mesothelioma claims. An informal arrangement is currently in place which puts the mesothelioma sufferer and the family at the centre of the process. This is perhaps less formal than a protocol, but does encourage the appropriate behaviours.

Expeditious exchange of information between parties allows for swifter settlement of claims and achieving settlement during the lifetime of the mesothelioma sufferer.

There has been a significant reduction in the time taken to settle these claims using the informal arrangement. Claims which proceed under the arrangement are capable of settlement on average within five months of receipt of the letter of claim of the mesothelioma sufferer's solicitor. Prior to the introduction of the arrangement, the average time was twenty-two months.

A protocol tailored to the particular circumstances of mesothelioma claims will ensure that the benefits seen by those participating in the voluntary arrangement can be rolled out across every mesothelioma claim.

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

Comments

The voluntary pre-action protocol for disease claims is rarely used. There are a large number of claims which could be dealt with under the protocol, but are not.

One explanation for this is that pleural plaques claims are dealt with in terms of a framework agreement which was set up involving joint consultation with all parties involved in the handling of pleural plaques claims.

This arrangement is, again, less formal than a protocol, but sets out the behaviour to be adopted in the handling of pleural plaques claims and again encourages early exchange of information in order to allow the claim to progress to settlement.

As well as the framework agreement, discussions between the various stakeholders in the handling of pleural plaques claims also resulted in judicial involvement when the Lord President issued Practice Direction No. 2 of 2012.

This dealt with the backlog of pleural plaques claims which were sisted in the Court of Session. It also deals with new pleural plaques claims going forward. The claims handling process in terms of pleural plaques claims as set out in the Practice Direction mirrors the content of the Framework Agreement.

Both processes put the claimant at the centre of the system. There is no issue in relation to access to justice. The early exchange of information ensures swift settlement for the vast majority of cases. There is no reason why these informal arrangements should not be converted into mandatory protocols to ensure that the benefits are available to all.

This example shows where better links can be built between the pre and post ltigation arenas.

An appropriately worded disease pre-action protocol could and should achieve the same results.

Given the progress that has been made in the handling of pleural plaques and mesothelioma claims, there is no reason why similar progress cannot be made for all types of disease claim were a compulsory pre-action protocol to be put in place.

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

☐ Yes.
☐ No ☒ No Preference

Comments

This is outwith our area of expertise

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

Comments

n/a

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?**

☐ Yes ☐ No ☒ No Preference

Comments
This is outwith our area of expertise

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

Comments
We view the introduction of a Compulsory Pre-Action Protocol as being first and foremost for the benefit of the injured claimant. As such, any progress we make in this area to streamline, simplify and enhance the process should be implemented at the earliest available opportunity. This is required to dovetail into the Court Reform Bill proposals to assist in the aim of freeing up court resource. A Compulsory Pre-Action Protocol in the format we've envisaged would also be very important to successful implementation of Sheriff Principal Taylor's recommendations in his Cost and Funding of Civil Litigation Review. It is important to recognise how a Compulsory Pre-Action Protocol would work as a component part of the current Court Reform Bill and any legislation designed to enact Sheriff Principal Taylor's recommendations. Our preference is to have a Compulsory Pre-Action Protocol which effectively prepares cases for the courts prior to litigation and lends itself to lower value personal injury claims being suitable for the proposed simplified procedure to ensure that injured persons get access to justice, quicker resolution of their cases and proportionate use of resources expended by the parties throughout.

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

Comments

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 who hears the submissions.

Some insurers (and self-insuring bodies) who have not wanted to use 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 Courts and /or Sheriffdoms have taken different approaches.

Some of the main cases being:

McIlvaney v A Gordon & Co Ltd, 2010 CSOH 118

Thomson v Aviva, unreported, Livingston Sh Ct, 10 June 2010

Ewan Graham v Douglas Bain, unreported, Cupar Sh Ct, 17 Sept 2012

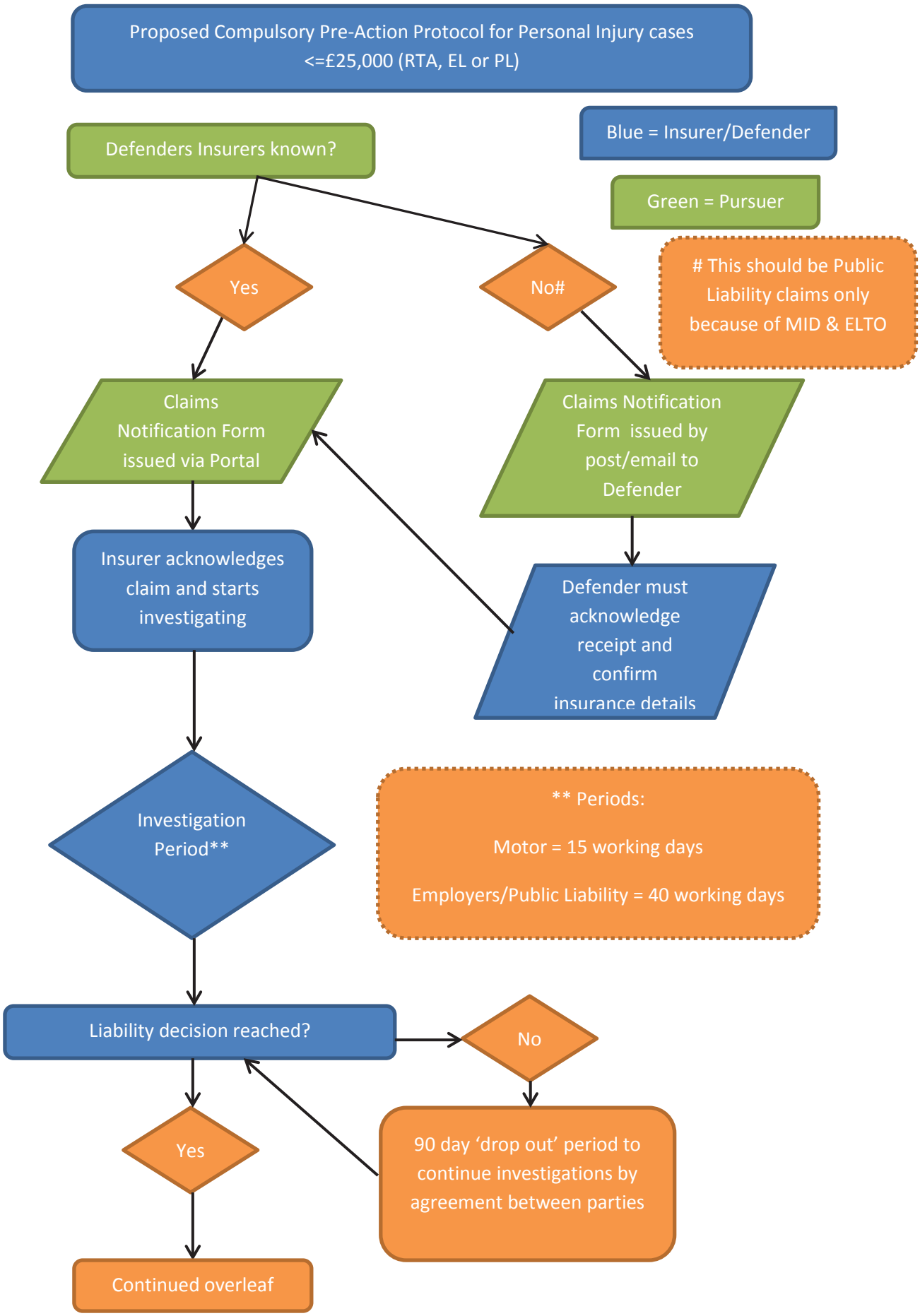
McDade v Skyfire , unreported, Glasgow Sh Ct, 21 August 2013

Ross Brown v Sabre Insurance Company, 2013 CSOH 51

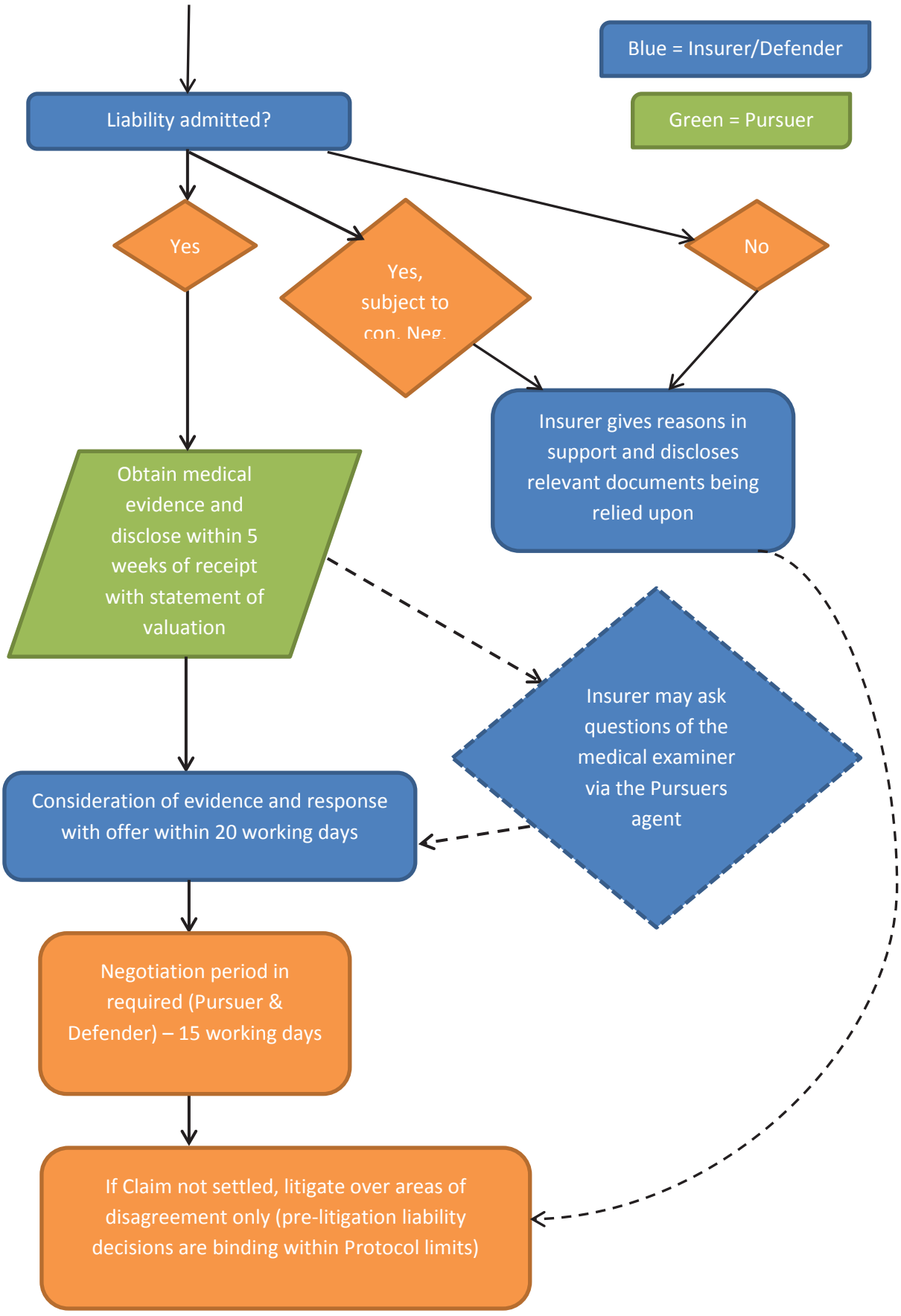
Emma Lawson v Sabre Insurance Company, 2013 PD4/13

Greater certainty is required and a Compulsory Pre-Action Protocol with clear sanctions for non-compliance would give that greater certainty.

Appendix 1


Proposed Compulsory Pre-Action Protocol for Personal Injury cases <=£25,000 (RTA, EL or PL)
Blue = Insurer/Defender
Green = Pursuer
Defenders Insurers known?
Yes
No#
This should be Public Liability claims only because of MID & ELTO
Claims Notification Form issued via Portal
Claims Notification Form issued by post/email to Defender
Insurer acknowledges claim and starts investigating
Defender must acknowledge receipt and confirm insurance details
Investigation Period**
** Periods:
Motor = 15 working days
Employers/Public Liability = 40 working days
Liability decision reached?
No
Yes
90 day 'drop out' period to continue investigations by agreement between parties
Continued overleaf

Appendix 1


Blue = Insurer/Defender
Green = Pursuer
Liability admitted?
Yes
Yes, subject to con. Neg.
No
Insurer gives reasons in support and discloses relevant documents being relied upon
Obtain medical evidence and disclose within 5 weeks of receipt with statement of valuation
Insurer may ask questions of the medical examiner via the Pursuers agent
Consideration of evidence and response with offer within 20 working days
Negotiation period in required (Pursuer & Defender) – 15 working days
If Claim not settled, litigate over areas of disagreement only (pre-litigation liability decisions are binding within Protocol limits)