



**Scottish  
Civil Justice  
Council**

# **Information Gathering Exercise on Pre-Action Protocols**

**May 2014**

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## RESPONDING TO THIS INFORMATION GATHERING EXERCISE

We are inviting written responses to this paper by **30 June 2014**.

Please send your response with the completed Respondent Information Form (see "How we will treat your response" below) to:

[scjc@scotcourts.gov.uk](mailto:scjc@scotcourts.gov.uk)

or

Anne Hampson  
Scottish Civil Justice Council  
Parliament House  
Edinburgh  
EH1 1RQ

If you have any queries, please contact Anne Hampson on 0131 240 6778.

We would be grateful if you (if appropriate) would use the questionnaire provided or could clearly indicate in your response which questions or parts of the paper you are responding to as this will aid our analysis of the responses received.

This information gathering exercise, responses and the analysis of responses will be published on the Scottish Civil Justice Council (SCJC) website.

<http://www.scottishciviljusticecouncil.gov.uk/home>

### **How we will treat your response**

We need to know how you wish your response to be handled and, in particular, whether you are happy for your response to be made public. Please complete and return the Respondent Information Form with your response (at Annex A) as this will ensure that we treat your response appropriately. If you ask for your response not to be published we will regard it as confidential, and we will treat it accordingly.

All respondents should be aware that the SCJC is subject to the provisions of the Freedom of Information (Scotland) Act 2002 and would therefore have to consider any request made to it under the Act for information relating to responses made to this exercise.

Where respondents have given permission for their response to be made public (see the Respondent Information Form at Annex A) and after we have checked that they

contain no potentially defamatory material, responses will be made available to the public on the SCJC website.

### **What happens next?**

Following the closing date, all responses will be analysed and considered along with any other available evidence to help the SCJC reach a view on draft rules for pre-action protocols. It is intended to publish a report on the SCJC website later this year.

### **Feedback**

If you have any comments about how this exercise has been conducted, please send them to:

**Name:**

Anne Hampson

**Address:**

Scottish Civil Justice Council  
Parliament House  
Edinburgh  
EH1 1RQ

0131 240 6778

**E-mail:**

[scjc@scotcourts.gov.uk](mailto:scjc@scotcourts.gov.uk)

## SECTION 1 INTRODUCTION

1. The Scottish Civil Justice Council (SCJC) was established on 28 May 2013 under the Scottish Civil Justice Council and Criminal Legal Assistance Act 2013. The SCJC replaced the Court of Session Rules Council and the Sheriff Court Rules Council. The SCJC took over the rule drafting functions of those bodies and will also have a new, wider, role to advise and make recommendations on the civil justice system.
2. The SCJC may establish committees to help it with its work. At its first meeting on 10 June 2013 the SCJC established and Personal Injury Committee (PIC) with the following remit:

*“In light of a) the Report of the Scottish Civil Courts Review b) the personal injury proposals in the Court Reforms (Sc) Bill and c) legislative developments in personal injury legislation to consider the procedure to be followed in personal injury actions.*

*The Committee will take due account of the different circumstances of the sheriff court and Court of Session whilst maintaining, where possible, consistency in overall approach and use of language. The Committee will make recommendations to the Scottish Civil Justice Council as to the policy which should be adopted and where appropriate will promulgate draft rules for their consideration.”*

3. At its inaugural meeting the PIC discussed the advantages of pre-action protocols and agreed that their usefulness was limited by the fact that they are not compulsory.
4. There are currently no compulsory pre-action protocols in Scotland. The Courts Reform (Scotland) Bill proposes to give the Court of Session the power to introduce, by means of rules, compulsory pre-action protocols. The provisions are contained within sections 96 for the Court of Session and 97(2)(b)(ii) for the sheriff court.
5. The PIC is, therefore, undertaking an information and evidence gathering exercise around the current use of voluntary pre-action protocols and the possible introduction of compulsory pre-action protocols in order to assist its

consideration of the matter of the relevant rules should the proposed powers become law.

**SECTION 2                      BACKGROUND**

6. There are currently four voluntary pre-action protocols in Scotland covering:
- [Commercial actions in the Court of Session](#)
  - [Personal injury claims up to £10,000](#) (although parties may agree to use it for claims of a higher value)
  - [Professional negligence claims up to £20,000](#) (although parties may agree to use it for claims of a higher value)
  - [Industrial disease claims](#)

Further details on these protocols can be found at Annex D.

7. The Scottish Civil Courts Review (SCCR) made a number of recommendations in relation to pre-action protocols (recommendations 102-4 and 106, Chapter 8). The SCCR considered that:
- existing pre-action protocols in relation to personal injury and industrial disease claims should be compulsory (recommendation 102);
  - that in principle the protocols should apply to all categories of personal injury claim (recommendation 103);
  - that a protocol on clinical negligence actions should be developed (recommendation 104); and
  - that the court should have power to make orders in relation to expenses and interest for non-compliance with pre-action protocols (recommendation 106).
8. The PIC is supportive of the recommendations made in the SCCR and is seeking to refine its policy position on compulsory pre-action protocols. In order to do so, it is carrying out an information gathering exercise, seeking views and evidence on specific topics from stakeholders.

## SECTION 3                    CONSULTATION QUESTIONS

### Consultation Questions

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?
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?
3. Are changes required to ensure that pre-action protocols better reflect the needs of party litigants?
4. Should a compulsory pre-action protocol apply to higher value cases involving fatal or catastrophic injury?
  - a. If not, what should the “cut off” threshold be?
5. Is it necessary to consider any additional protocols, or maintain exceptions, for specific types of injury or disease claim, for example, mesothelioma?
6. How successful has the use of separate pre-action protocols for professional negligence and industrial disease claims been?
7. Should a pre-action protocol for medical negligence claims be developed?
8. If you answered yes to Question 7, what should the key features be?
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?
10. Should a new pre-action protocol regime be introduced in advance of the creation of the specialist Personal Injury Court?
11. Are you or your organisation aware of variations in awards of expenses where the pre-action protocol has not been adhered to?

## 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

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

1.

Mr     Ms        Mrs        Miss        Dr

Other     *Please state:*

### Surname

### Forename

### 2. Postal Address

  
**Postcode:**

### Phone

### Email

## 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

Comments

**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

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

- Yes                       No                       No Preference

Comments

**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

**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

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

Comments

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

- Yes.  
 No             No Preference

Comments

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

Comments

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

Comments

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

**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

**ANNEX C                    LIST OF THOSE BEING WRITTEN TO**

As well as being published on our website, this information gathering exercise paper has been sent to the following people or organisations.

- Faculty of Advocates
- Law Society of Scotland's Voluntary Pre-Action Protocol Working Group
- Association of Personal Injury Lawyers in Scotland
- Forum of Insurance Lawyers
- Forum of Scottish Claims Managers
- Association of British Insurers
- Citizens Advice Scotland
- Which?
- Court of Session Personal Injuries Users Group
- Central Legal Office
- Motor Accident Solicitors Society
- Scottish Trades Union Congress
- The Auditor of the Court of Session
- Members of the Scottish Civil Justice Council's Personal Injury Committee

**ANNEX D VOLUNTARY PRE-ACTION PROTOCOLS IN SCOTLAND****Commercial Actions in the Court of Session****Extract from Practice Note 6***Pre-action communication*

11.—(1) Before a commercial action is commenced it is important that, save in exceptional cases, the matters in dispute should have been discussed and focused in pre-litigation communications between the prospective parties' legal advisers. This is because the commercial action procedure is intended for cases in which there is a real dispute between the parties which requires to be resolved by judicial decision, rather than other means; and because the procedure functions best if issues have been investigated and ventilated prior to the raising of the action.

(2) It is therefore expected that, before a commercial action has begun, the solicitors acting for the pursuers will have:

- (i) fully set out in correspondence to the intended defender the nature of the claim and the factual and legal grounds on which it proceeds;
- (ii) supplied to the intended defender copies of any documents relied upon;
- and
- (iii) where the issue sought to be litigated is one for which expert evidence is necessary, obtained and disclosed, to the intended defender, the expert's report.

For their part, solicitors acting for the defender are expected to respond to such prelitigation communications by setting out the defender's position in substantial terms; and by disclosing any document or expert's report upon which the defender relies. To that response the solicitors for the pursuers are expected to give a considered and reasoned reply. Both parties may wish to consider whether all or some of the dispute may be amenable to some form of alternative dispute resolution.

(3) Saving cases involving an element of urgency, actions should not be raised using the commercial procedure, until the nature and extent of the dispute between the parties has been the subject of careful discussion between the parties and/or their representatives and the action can be said to be truly necessary.

## **Personal Injury Claims up to £10,000**

### **Division D: Pre action Protocol in Personal Injury Cases**

#### **1. Purpose of the voluntary protocol**

**1.1** The Voluntary Protocol has been kept deliberately simple to promote ease of use & general acceptability

**1.2** The aims of the Voluntary Protocol are:-

§ To put parties in a position where they may be able to settle cases fairly and early without litigation;

§ To ensure the early provision of reliable information reasonably required to enter into meaningful discussions re liability and quantum;

§ To enable appropriate offers to be made either before or after litigation commences:

**1.3** It also sets out good practice making it easier for the parties to obtain and rely upon information required.

**1.4** The Voluntary protocol encourages the joint exploration of rehabilitation at an early stage, in appropriate cases, without prejudice to liability.

**1.5** The standards within the Voluntary Protocol are to be regarded as the normal, reasonable approach to pre-action conduct in relation to Voluntary Protocol cases.

#### **2. A voluntary pre-action protocol in Scotland**

**2.1** Unlike England, there is no statutory basis for a Pre-Action Protocol. The Protocol will therefore require to be entered into voluntarily on an individual case by case basis by mutual agreement. It will be for the pursuer's Agent to intimate the claim in the general format of a Specimen Letters A1 or 2 which will invite the defender or Insurer to agree on a case by case basis that conduct of the pre-action negotiations is to be undertaken in terms of the Voluntary Protocol. When a defender or Insurer accepts, a letter in the general format of specimen letter B will be sent within 21 days of receipt of the letter of claim. Thereafter the claim will proceed in terms of the Voluntary Protocol in respect of the negotiations, disclosure, repudiation of liability, settlement and calculation of fees

**2.2** The Agent may wish to notify the Insurer as soon as they know a claim is likely to be made but before they are able to send a detailed Letter of Claim, particularly for instance, when the Insurer has no or limited knowledge of the incident giving rise to the claim or where the claimant is incurring significant expenditure as a result of the accident which he/she hopes the Insurer might pay for, in whole or in part. If the pursuer's agent chooses to do this, it will not start the timetable for responding.

**2.3** The Voluntary Protocol if entered into will apply in all cases which include a claim for personal injury (excepting Clinical Negligence and Disease and Illness cases) and will apply not merely to the personal injury element of a claim but also to other heads of loss and damage. It is primarily designed for road traffic, tripping and slipping and accident at work cases where the value of the claim is up to £10,000. The Protocol is voluntary and there is nothing to prevent parties by mutual agreement dealing with any claim of a higher value under the Protocol.

**2.4** Where proceedings are raised in a Voluntary Protocol case, whether for the payment of damages or for the recovery of evidence and other orders under the Administration of Justice (Scotland) Act 1972, without prejudice to any existing rule of law, it shall be open to any party to lodge Voluntary Protocol communications for the sole purpose of assisting the court in any determination of expenses.

### **3. Letter of claim**

**3.1** The Agent shall send to the proposed defender (or to his Insurer if known) a letter of claim as soon as sufficient information is available to substantiate a claim and before issues of quantum are addressed in detail. The letter should ask for details of the Insurer if not known and the letter should request that a copy should be sent by the proposed defender to the Insurer where appropriate. If the Insurer is known, a copy shall be sent directly to the Insurer.

**3.2** The letter shall contain a clear summary of the facts on which the claim is based, including allegations of negligence, breaches of common law or statutory duty, together with an indication of the nature of any injuries suffered and of any financial loss incurred, so far as known. In all cases the letter should provide the name and address of the hospital where treatment has been obtained and where appropriate, the name and address of the claimant's own motor Insurer.

**3.3** Agents are recommended to use a standard format for such a letter, specimen letter A1 or A2: this can be amended to suit the particular case.

**3.4** Sufficient information should be given in order to enable the Insurer to commence investigations and at least put a broad valuation on the "risk".

**3.5** The Insurer should acknowledge the letter of claim within 21 days of the date of receipt of the letter. The Insurer should advise in a letter in the terms of Specimen B whether it is agreed that the case is suitable for the Voluntary Protocol. If there has been no reply by the defender or Insurer within 21 days, the claimant will be entitled to issue proceedings.

**3.6** Where liability is admitted, the Insurer will be bound by this admission for all Protocol claims with a personal injury value, as laid down in 2.3, of less than £10,000. The exception to this will be when, subsequently, there is evidence that the claim is fraudulent.

**3.7** The Insurer will have a maximum of three months from the date of specimen letter B to investigate the merits of the claim. Not later than the end of that period, the Insurer shall reply, stating whether liability is admitted or denied and giving reasons for their denial of liability, including any alternative version of events relied upon and all available documents supporting their position.

## **Documents**

**3.8** The aim of early disclosure of documents by the Insurer is to promote an early exchange of relevant information to help in clarifying or resolving the issues in dispute. If the Insurer denies liability, in whole or in part, they will at the same time as giving their decision on liability, disclose any documents which are relevant and proportionate to the issues in question, with reference to those identified in the letter of claim.

**3.9** Attached at Appendix A are specimen, but not exhaustive, lists of documents likely to be material in different types of claim. Where the pursuer's agents investigation of the case is well advanced, the letter of claim should indicate which classes of documents are considered relevant for early disclosure. Where this is not practical, these should be identified as soon as practical but disclosure will not affect the timetable.

**3.10** Where the Insurer admits primary liability but alleges contributory negligence by the pursuer, the Insurer should give reasons supporting these allegations and disclose those documents from Appendix A which are relevant and proportionate to the issues in dispute. The pursuer's Agent should respond to the allegation of contributory negligence before proceedings are issued.

## Medical reports

**3.11** A medical report will be instructed at the earliest opportunity but no later than 5 weeks from the date the Insurer admits, in whole or part, liability unless there is a valid reason for not obtaining a report at this stage. In those circumstances, the pursuer's agents will advise accordingly and agree an amended timetable with the Insurers or withdraw the case from the protocol. Any medical report obtained and on which the pursuer intends to rely will be disclosed to the other party within 5 weeks from the date of its receipt. By mutual consent, the Insurers may ask the examiner, via the pursuer's agent, supplementary questions.

**3.12** The pursuer's agent will normally instruct a medical report, will organise access to all relevant medical records, and will send a letter of instruction to a medical expert in general terms of specimen letter C. Where it has been agreed that the Insurer will obtain the medical report, the pursuer's agent will agree to disclosure of all medical records relevant to the accident. Pre-accident medical records will be disclosed only with the specific agreement of the pursuer's agent and if relevant to the claim. Any medical report on which the Insurer intends to rely will be disclosed to the pursuer's agent within 5 weeks of receipt.

## Damages

**3.13** The pursuer's agents will send to the Insurer a Statement of Valuation of Claim (the Statement of Valuation) with supporting documents, where the Insurer has admitted liability. The pursuer's agents are recommended to use a standard format for the Statement of Valuation. An example is at specimen D. [Form 439 in the Rules of Court of Session](#). This can be amended to suit the particular case.

## 4. Settlement

**4.1** Where the Insurer admits liability in whole or in part, before proceedings are issued, any medical reports supporting documentary evidence and Statement of Valuation obtained under this Voluntary Protocol on which a party relies, should be disclosed to the other party. The pursuer's agent should delay issuing proceedings for 5 weeks from the date the Insurer receives the Statement of Valuation to enable the parties to consider whether the claim is capable of settlement.

**4.2** Where a Statement of Valuation with supporting documents has been disclosed under 3.12, the Insurer shall offer to settle the claim based on his reasonable valuation of it within 5 weeks of receipt of such disclosure, serving a counter-schedule of valuation if they dispute the pursuer's agent's valuation.

**4.3** The pursuer's Agent will advise Insurers whether or not their offer is to be

accepted or rejected, prior to the raising of proceedings and in any event within 5 weeks of receipt.

**4.4** Where a Voluntary Protocol case settles, cheques for both damages and agreed expenses must be paid within 5 weeks of the settlement. The date of settlement will be the date when the insurer receives notification of settlement. Thereafter, interest will be payable on both damages and expenses due and payable in accordance with the agreed settlement terms at the prevailing judicial rate from the date of settlement until payment is made in full.

## **Professional Negligence Claims up to £20,000**

### **Division D: Pre action Protocol in Professional Negligence Cases**

#### **1. Introduction and purpose of voluntary protocol**

**1.1** This Voluntary Protocol applies where a claimant wishes to claim against a professional as a result of that professional's alleged negligence or equivalent breach of contract or breach of fiduciary duty.

**1.2** Unlike in England and Wales, there is no statutory basis for a Pre-Action Protocol. The Protocol therefore will require to be entered into voluntarily on an individual case by case basis by mutual agreement.

**1.3** The Voluntary Protocol has been kept deliberately simple to promote ease of use and general acceptability.

**1.4** The aims of the Voluntary Protocol are:

To establish a framework in which there is an early exchange of information so that the claim can be fully investigated and meaningful discussions entered into regarding liability and quantum, so that, if possible, the claim can be resolved without the need for litigation;

To enable appropriate offers to be made either before or after litigation commences;

To set out good practice making it easier for the parties to obtain and rely upon information required.

**1.5** The standards within the Voluntary Protocol are to be regarded as the normal, reasonable approach to pre-action conduct in relation to Voluntary Protocol cases.

**1.6** The Voluntary Protocol is intended to apply to all professional negligence claims where the value of the claim is up to £20,000. The parties may by mutual agreement use the Voluntary Protocol for claims of higher value.

**1.7** Where proceedings are raised in a Voluntary Protocol case, it shall be open to any party to lodge Voluntary Protocol communications for the sole purpose of assisting the court in any determination of expenses.

**1.8** In interpreting this agreement, words importing the singular include the plural (and vice versa) and words importing a particular gender shall include all genders.

#### **2. The protocol**

## 2.1 Preliminary notice

**2.1.1** As soon as the claimant decides there is a reasonable chance that he will bring a claim against a professional, the claimant's agent is encouraged to issue a letter to the professional providing details of:

the identity of the claimant and any other parties;

a brief outline of the claimant's grievance against the professional;

if possible, an indication of the financial value of the potential claim.

**2.1.2** The letter should be addressed to the professional and should ask the professional to inform his professional indemnity insurers, if any, immediately. Such a letter does not bind the claimant in any way and if after further enquiry the claimant's letter of claim (see 2.2) sets out a different case the insurer may not found upon the preliminary notice.

**2.1.3** Professional indemnity insurers receiving preliminary notice letters from their insureds are encouraged to arrange for acknowledgment to the claimant's agent within 14 days of the insurer receiving the letter.

## 2.2 Letter of claim

**2.2.1** As soon as the claimant decides there are grounds for a claim against the professional, the claimant's agent should write a detailed letter of claim to the professional, or to the insurer if a preliminary notice letter has already been acknowledged by the insurer.

**2.2.2** The letter of claim should include the following:

- a) the identity of the claimant;
- b) a clear chronological summary (including key dates) of the facts on which the claim is based. Key documents to be relied upon should be identified, copied and enclosed, although there is no requirement at this stage to produce a copy of a report by an expert (see 2.3.2);
- c) the allegations against the professional. What has he done wrong? What has he failed to do?
- d) an explanation of how the alleged fault has caused the loss claimed;
- e) an estimate of the financial loss suffered by the claimant and how it is calculated. Supporting documents should be identified, copied and enclosed. If details of the financial loss cannot be supplied, the claimant should explain why and should state when he will be in a position to provide the details. This information should be sent to the professional or as appropriate his insurers as soon as possible. If the claimant is seeking some form of non-financial redress this should be made clear;

- f)** confirmation whether or not an expert has been instructed, and if so the identity and discipline of the expert should be provided;
- g)** where relevant, the letter of claim should contain a request that it is forwarded immediately to the professional's insurers;
- h)** if the terms of this Voluntary Protocol are intended to apply, the letter of claim should include the following paragraph:  
"This is a claim which we propose should be handled by reference to and in accordance with the Voluntary Professional Negligence Pre-Action Protocol as agreed between the Law Society of Scotland and the Forum of Scottish Claims Managers."

## 2.3 Letter of acknowledgment

**2.3.1** Within 14 days of receiving the letter of claim from his insured, the insurer should acknowledge receipt to the claimant's agent. The insurer should make clear in his letter of acknowledgment whether or not it is agreed that the Voluntary Protocol should apply.

**2.3.2** Within 14 days of receiving a letter of acknowledgment confirming that the Voluntary Protocol should apply, a copy of any expert report already obtained upon which the claimant intends to rely should be provided by the claimant's agent.

## 2.4 Investigations

**2.4.1** If the Voluntary Protocol is to apply, the insurer will have three months from the date of the letter of acknowledgment to investigate the claim.

**2.4.2** If the insurer is in difficulty in complying with the three month time period, the problem should be explained to the claimant's agent as soon as possible. The insurer should explain what is being done to resolve the problem and when the insurer expects to complete the investigations. The claimant's agent should agree to any reasonable request for an extension of the three month period.

## 2.5 Letter of response and letter of settlement

**2.5.1** As soon as the insurer has completed his investigations, the insurer should send to the claimant's agent:

- a)** a letter of response; or
- b)** a letter of settlement; or
- c)** both (whether contained in a single letter or not).

**2.5.2** The letter of response will normally be an open letter (as opposed to being without prejudice) and should be a reasoned answer to the claimant's allegations:

- a) if the claim is admitted the insurer should say so in clear terms;
- b) if only part of the claim is admitted then the insurer should make clear which parts are admitted and which parts are denied;
- c) if the claim is denied in whole or in part then a detailed response on each allegation should be included and the insurer should provide his insured's version of events, together with expert report(s) on which reliance is intended;
- d) if the insurer is unable to admit or deny the claim, the insurer should identify any further information that is required;
- e) if the value of the claim is disputed, the letter of response should set out the insurer's valuation. If a valuation cannot be provided, the insurer should explain why and should state when he will be in a position to provide a valuation. This information should be sent to the claimant's agent as soon as reasonably possible.

**2.5.3** The letter of settlement should be a "without prejudice" letter and should be issued if it is intended to make settlement proposals. The letter should:

- a) set out the insurer's views to date on the aspects which remain in dispute and those which are not disputed;
- b) make a settlement proposal or identify what further information is required to enable a settlement proposal to be made;
- c) where additional documents are relied upon, copies should be provided;
- d) include reference to fees etc payable in accordance with section 2.8.

**2.5.4** Unless the letter of response denies the claim in its entirety and there is no letter of settlement, the insurer and the claimant's agent should commence negotiations with the aim of concluding these within six months of the date of the letter of acknowledgment.

**2.5.5** If the claim cannot be resolved within this period:

- a) the parties should agree within 14 days of the end of this period whether the period should be extended and, if so, by how long;
- b) the parties should seek to identify those issues which are still in dispute and those which can be agreed;
- c) if an extension of time is not agreed then this Voluntary Protocol will cease to apply.

## **2.6 Settlement**

**2.6.1** The claimant's agent will advise insurers whether or not their offer is to be accepted or rejected, prior to the raising of proceedings and in any event within five weeks of receipt of the letter of settlement.

**2.6.2** Where a Voluntary Protocol case settles, cheques for both damages and agreed expenses must be paid within five weeks of the settlement. The date of settlement will be the date when the insurer receives notification of settlement. Thereafter, interest will be payable on both damages and expenses due and payable in accordance with the agreed settlement terms at the prevailing judicial rate from the date of settlement until payment is made in full.

## **2.7 Alternative dispute resolution**

**2.7.1** The parties should consider whether some form of alternative dispute resolution (ADR) procedure would be more suitable than litigation and, if so, endeavour to agree which form to adopt. The parties can agree at any stage to take the dispute (or any part of the dispute) to mediation or some other form of ADR.

## **2.8 Entitlement to fees**

In claims which are resolved without the need for litigation the claimant's agent will be entitled to recover fees from the professional or his insurers as follows:

### **2.8.1 Instruction fee: on and after 1st January 2011**

On all settlements: £1041

### **2.8.2 Instruction fee; on and after 1st July 2009**

On all settlements : £ 1006

### **2.8.3 Instruction fee: prior to 1st July 2009**

On all settlements: £900

### **2.8.4 Completion fee:**

- a) On settlements up to £2,500 25%
- b) On the excess over £2,500 up to £5,000 15%
- c) On the excess over £5,000 up to £10,000 7.5%
- d) On the excess over £10,000 up to £20,000 5%
- e) On the excess over £20,000 2.5%

VAT will be payable in addition on all elements of the fee except where the claimant is VAT registered.

Disbursements reasonably incurred will be payable in addition.

## **Industrial Disease Claims**

### **Division D: Pre action Protocol in Disease cases**

#### **1. Purpose of voluntary protocol**

Diseases defined as:-

"Any illness, physical or psychological, any disorder, ailment, affliction, complaint, malady or derangement, other than physical or psychological injury solely caused by an accident or other similar singular event. A singular sensitising event may be considered appropriate for this Protocol." (The definition is not restricted to "disease" occurring in the workplace.)

**1.1** The Voluntary Protocol has been kept deliberately simple to promote ease of use and general acceptability.

**1.2** The aims of the Voluntary Protocol are:-

- To encourage exchange of information at an early stage;
- To resolve disputes without litigation;
- To identify/narrow issues in disputes;
- To enable resolution of claims pre-litigation.

**1.3** It also sets out good practice making it easier for the parties to obtain and rely upon information required.

**1.4** The standards within the Voluntary Protocol are to be regarded as the normal, reasonable approach to pre-action conduct in relation to Voluntary Protocol cases.

#### **2. Introduction**

A Voluntary Pre-Action Protocol in Scotland

**2.1** Unlike England and Wales, there is no statutory basis for a Pre-Action Protocol. The Protocol therefore will require to be entered into voluntarily on an individual case by case basis by mutual agreement. The claimant may request occupational health records before the letter of claim is issued. The request should contain sufficient information to alert the defender to a possible claim including the specific nature of the disease (i.e. asbestosis, noise-induced hearing loss, tinnitus, etc). A mandate (see Specimen Letter 2.1) should be provided authorising release of the occupational health records to both claimant and defender. Records should be provided within 40 days, at no cost to the claimant. It will be for the claimant's Agent to intimate the claim in the general format of Specimen Letter A1 or A2 and invite the defender or Insurer to agree on a case by case basis that conduct of the pre-action

negotiations are to be undertaken in terms of the Voluntary Protocol. When a defender or Insurer accepts a letter in the general format, Letter B will be sent within 21 days of receipt of claim. The claim will proceed in terms of the Voluntary Protocol in respect of the negotiations, disclosure, repudiation of liability, settlement and calculation of fees.

**2.2** The Agent is encouraged to notify the Insurer as soon as they know a claim is likely to be made but before they are able to send a detailed letter of claim, particularly for instance, when the Insurer has no or limited knowledge of the events giving rise to the claim or where the claimant is incurring significant expenditure as a result of the disease which he/she hopes the Insurer might pay for, in whole or in part. If the claimant's Agent chooses to do this, it will not start the timetable for responding.

**2.3** The Voluntary Protocol, if entered into, will apply not merely to the personal injury element of a claim but also to other heads of loss and damage.

**2.4** Where proceedings are raised in a Voluntary Protocol case, whether for the payment of damages or for the recovery of evidence and other orders under the Administration of Justice (Scotland) Act 1972, without prejudice to any existing rule of law, it shall be open to any party to lodge Voluntary Protocol communications for the sole purpose of assisting the court in any determination of expenses.

### **3 Letter of claim**

**3.1** The Agent shall send to the proposed defender (or to his Insurer if known) a detailed letter of claim as soon as sufficient information is available to substantiate a claim and before issues of quantum are addressed in detail. The letter should ask for details of the Insurer if not known and the letter should request that a copy should be sent by the proposed defender to the Insurer where appropriate. If the Insurer is known, a copy shall be sent directly to the Insurer.

**3.2** The letter of claim should include:-

- (1) Details of the disease or illness alleged;
- (2) Main allegations of fault;
- (3) Present condition and prognosis;
- (4) Outline of financial loss;
- (5) Employment history and HMRC schedule (including job titles/duties carried out);
- (6) Identity of records required;
- (7) Identity of other potential defenders and their insurers if known;
- (8) Chronology of relevant events, e.g. dates (period of exposure linked to employment).

**3.3** Agents are recommended to use a standard form for such a detailed letter. Specimen Letter A1 or A2 can be amended to suit the particular case.

**3.4** Sufficient information should be given in order to enable the Insurer to commence investigations and at least put a broad valuation on the claim.

**3.5** The Insurer should acknowledge the letter of claim within 21 days of the date of receipt of the letter. The Insurer should advise in a letter in the terms of Specimen B whether it is agreed that the case is suitable for the Voluntary Protocol. If there has been no reply by the defender or Insurer within 21 days, the claimant will be entitled to issue proceedings.

**3.6** Where liability (subject to causation) is admitted, the Insurer will be bound by this admission for all Protocol claims with a gross damages value of less than £10,000. The exception to this will be when, subsequently, there is evidence that the claim is fraudulent.

**3.7** The Insurer will have a period of three months from the date of the Insurer's response letter to investigate the merits of the claim. By mutual agreement the investigation period can be extended. Not later than the end of that period, the Insurer shall reply, stating whether liability (subject to causation) is admitted or denied and giving reasons for their denial of liability (subject to causation), including any alternative version of events relied upon and all available documents supporting their position.

**3.8** The Insurers will disclose the period of employment as soon as the information is known to them and will appoint a lead Insurer. Details of other Insurers will be produced when known.

Documents

**3.9** The aim of early disclosure of documents by the parties is to promote an early exchange of relevant information to help in clarifying or resolving the issues in dispute. If the Insurer denies liability, in whole or in part, they will at the same time as giving their decision on liability, disclose any documents which are relevant and proportionate to the issues in question, with reference to those identified in the letter of claim.

**3.10** Attached at Appendix A are specimens, but not an exhaustive list of documents likely to be material in different types of claims. Where involvement of the Claimant's Agent in the case is well advanced, the letter of claim should indicate which classes of documents are considered relevant for early disclosure. Where this is not practical, these should be identified as soon as practicable, but disclosure will not affect the timetable.

**3.11** Where the Insurer admits primary liability (subject to causation) but alleges contributory negligence by the claimant, the Insurer should give reasons supporting these allegations and disclose the documents from Appendix A which are relevant and proportionate to the issue in dispute. The claimant's Agents should respond to the allegations of contributory negligence before proceedings are issued.

#### Medical Evidence

**3.12** A medical report will be instructed at the earliest opportunity, but no later than 5 weeks from the date the Insurer admits liability, in whole or in part, unless there is a valid reason for not obtaining a report at this stage. In those circumstances, the claimant's Agents will advise accordingly and agree an amended timetable. Any medical report obtained and on which the claimant intends to rely will be disclosed to the other party within 5 weeks from the date of its receipt. By mutual consent, the Insurers may ask the examiner, via the claimant's Agent, supplementary questions.

**3.13** The claimant's Agent will normally instruct a medical report, will organise access to all relevant medical records and will send a letter of instruction to a medical expert. The Insurer is encouraged to attempt to resolve issues by questioning the claimant's expert, but may seek its own expert evidence, if appropriate. The claimant's Agent will agree to disclosure of all relevant medical and DWP records. Any medical report on which the Insurer intends to rely will be disclosed to the claimant's Agent within 5 weeks of receipt.

#### Damages

**3.14** Where the Insurer has admitted liability (subject to causation), the Claimant's Agent will send to the Insurer as soon as possible, a Statement of Valuation of Claim (the Statement of Valuation) together with supporting documents, and keep the Insurers advised of any potential delays.

### **4 Settlement**

**4.1** Where the Insurer admits liability (subject to causation) before proceedings are issued, any medical reports, supporting documentary evidence and Statement of Valuation obtained under this Voluntary Protocol on which a party relies, should be disclosed to the other party. Subject to expiry of the triennium, the claimant's Agent should delay issuing proceedings for 5 weeks from the date the Insurer receives the Statement of Valuation to enable the parties to consider whether the claim is capable of settlement.

**4.2** Where a Statement of Valuation with supporting documents has been disclosed under 3.13 and liability and causation are admitted, the Insurer shall offer to settle the claim based on his reasonable valuation of it within 5 weeks of receipt of such

disclosure, serving a counter-schedule of valuation if they dispute the claimant's Agent's valuation.

**4.3** The claimant's Agent will advise Insurers whether or not their offer is to be accepted or rejected, prior to the raising of proceedings and in any event within 5 weeks of receipt.

**4.4** Where a Voluntary Protocol case settles, cheques for both damages and agreed expenses must be paid within 5 weeks of settlement, which will be either the date when the Insurer receives notification of settlement or, where a discharge is required, the date when the signed discharge is received by the Insurer. Thereafter, interest will be payable by any defaulting Insurer on any outstanding damages due to the claimant and/or expenses due and payable in accordance with the agreed settlement terms, at the prevailing judicial rate from the date of settlement until payment is made in full.

## **5 Time Bar**

**5.1** In the event that the Insurer repudiates liability or that the claimant rejects an offer in settlement, provided that proceedings are subsequently raised within a period of one year from the date of such repudiation or rejection, the date of raising proceedings will be deemed to be the date when intimation of the claim was made in terms of this protocol for purposes of prescription and limitation.

## **6 Litigation**

**6.1** In the event of litigation, the claimant's solicitors will give the Insurers an opportunity to nominate solicitors to accept service, on behalf of their insured