SCOTTISH CIVIL JUSTICE COUNCIL

INFORMATION GATHERING EXERCISE ON PRE-ACTION PROTOCOLS

Response by Fraser W Simpson, Partner, Digby Brown LLP,

Introduction

I welcome this opportunity to provide my response to the questionnaire as part of the Scottish Civil Justice Council information gathering exercise on pre-action protocols. I provide this response, as an individual, and in my capacity as a member of the SCJC personal injury sub-committee. I am head of this firm's Union and Industrial Disease departments. I am accredited by the Law Society of Scotland as a specialist in personal injury, and I am a senior litigator with the Association of Personal Injury Lawyers. While the views expressed are mine, I have taken the opportunity to canvas opinion from other partners within this firm, in particular the head of our clinical negligence department. Digby Brown LLP is rated band 1 for personal injury, pursuer, in both the Legal 500 and Chambers and Partners Guide to the Legal Profession.

Q1. 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?

Yes.

i) The first stated aim of the personal injury protocol is to put parties into a position where they **may** be able to settle cases fairly and early without litigation. It is important to recognise Protocol is intended to facilitate settlement, not act as a barrier to litigation. In his Review of Expenses and Funding of Civil Litigation in Scotland, Sheriff Principal Taylor refers to statistical analysis which presents declining levels of litigation in Scotland's civil courts, which challenges any belief that there is a compensation culture in Scotland, as opposed to the perception in England and Wales *[p iii* Foreword]. In personal injury cases, defenders generally have the benefit of the considerable resources and expertise of the insurance industry. Some insurers have already shown a willingness to adopt software programmes designed to secure settlement of claims at less than full value, or otherwise make arbitrary "economic" offers without the benefit of medical evidence. An effective protocol should guard against fraud, facilitate equality of arms and protect against attrition negotiation, unnecessary delay and unsatisfactory

outcomes - insurers settling as late as possible for as little as possible, by encouraging early, reasonable and fair settlement, but where that is not achieved, to facilitate litigation and simplify the course of litigation once commenced.

ii) The second aim is early provision of reliable information reasonably required to enter meaningful discussions re liability and quantum. The advantage of candid disclosure of information at this stage is that it may prevent cases being litigated which do not have sufficient merit, and where settlement cannot be agreed, at least identify areas of common ground and allow parties to focus on areas that remain in dispute. Unfortunately compliance is variable, with many defenders routinely failing to provide any documentary evidence requested when denying liability in full or in part, resulting in additional procedure and expense once litigation is commenced.

iii) Thirdly, to enable appropriate offers to be made either before or after litigation commences. Where liability is admitted, the protocol enables this, but is should be emphasised that offers require to be reasonably based with reference to supporting evidence recovered and disclosed.

An exception to the above would be the application of compulsory protocols in disease cases, which cases do not easily lend themselves to adherence to strict timetables – see Q5. below.

Q2. 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?

1) There should be recognition by the courts the pre-action protocols should be the "Gold Standard" for pre-litigation disclosure and negotiation, and that any variation there from should be discouraged and where appropriate, penalised. At present some defenders, for example Glasgow Council or insurers such as Sabre Insurance, attempt to "cherry pick" aspects of the protocols with which they agree, but ignore aspects such as strict adherence to time limits, provision of liability information / documentation, making unqualified admissions, or meeting protocol fees, which they regard as unfavourable, and in doing so this creates an imbalance in their favour. Any departure from the protocol provisions, including issuing pre-medical offers should be seen as unwillingness to adhere to the principles of good practice, rendering litigation justifiable, and necessary to protect the pursuer's position.

2) We frequently experience the non-release by defenders of information relevant to liability or quantum, which is readily available pre-litigation. Failure to produce documentation can result in unnecessary litigation, which could be easily avoided by full disclosure**.** Any compulsory protocol should

have measures to enforce compliance with paragraph 3.8. – costs sanction to increase, or reduce / vary adverse costs in unsuccessful cases where relevant information is not produced pre-litigation.

3) Similarly, it should remain open to defenders to argue non-compliance by pursuers resulting in premature litigation should justify costs variation to VPPS scale fee.

4) We have experienced situations where liability is admitted at the pre-action protocol stage but when proceedings are commenced because quantum cannot be agreed, that admission is subsequently withdrawn, under explanation that previous admission was in some way qualified, or specific to pre-issue negotiations only. Any compulsory protocol should ensure admissions of liability are binding in subsequent proceedings, thereby avoiding unnecessary duplication of work and reducing the scope and expense of subsequent litigation. To this effect the protocol should require admissions of liability to be expressed in clear and unambiguous, defined terms thereby avoiding the current practice of some defenders to express a mere willingness to negotiate.

Q3. Are changes required to ensure that pre-action protocols better reflect the needs of party litigants?

Yes. It may be difficult for any party litigant to achieve equality of arms in a reparation case. "Third party capture" by insurers is increasingly common, as are insurers keen to liaise with individuals without legal representation. Individuals are often in vulnerable situations, absent from work, suffering financial and other loss and may be open to be exploited. Often specialist input is required to identify full extent of loss and injury. There may be a need to guard against prejudicing a future loss claim by accepting low full and final settlement awards, or by not being aware of all competent heads of claim. If expert medico-legal opinion is not sought, a party litigant may not be aware of how an injury can give rise to future losses, or be alert to the need for protection of a provisional damages award. Insurers therefore should be required to direct individuals to the protocol as the gold standard to follow and highlight to individuals the need for independent legal advice.

Q4. Should a compulsory pre-action protocol apply to higher value cases involving fatal or catastrophic injury?

No, while principles of early and candid disclosure to facilitate settlement or identify matters capable of agreement should be encouraged, catastrophic injury cases are usually highly complex, and by their nature cannot easily conform to standard timetable requirements. Such cases may require the appointment of a case manager, or even a curator ad litem, and may involve

input by numerous medical experts in different disciplines, as well as experts in other fields dealing with matters such as rehabilitation, vocational / employment, care needs, pension loss etc.
However, there is no obvious reason why a standard protocol could not be applied to such cases as far as the issue of liability is concerned, with the same time periods applying as in other case concerning responding to the letter of claim, providing binding admissions of liability, or supplying documentation in support of any qualified liability admission or denial.
Subject to the issue of liability, any case with a value likely to be in excess of £30,000 should be capable of being exempt from the remaining protocol timetable requirements.

Q5. Is it necessary to consider any additional protocols, or maintain exceptions, for specific types of injury or disease claim, for example, mesothelioma?

As one of only 2 firms in Scotland which has a significant volume of asbestos exposure cases, we have been approached on more than one occasion by leading defenders' firms and insurers to see whether we would be willing to enter into an arrangement "to progress mesothelioma cases expeditiously through appropriate and timeous disclosure of information between the parties". The arrangement is loosely based on the pleural plaques directive (see Q6.), and can be seen as being a form of pre-action protocol. This firm and the asbestos victims groups we represent are strongly opposed to agreeing any such protocol in mesothelioma cases for the following reasons –

1. Mesothelioma is a devastating terminal condition, with a short life expectancy, where there can be sudden, unforeseen deterioration. Time is of the essence, in order to secure some measure of damages to provide comfort for the sufferer and their family in the remaining time available to them.

2. Despite assurances from insurers that they will deal with such cases expeditiously and sympathetically, our experience does not support that. Rarely do we receive pre-litigation admissions of liability or offers of interim damages.

3. Mesothelioma is not a divisible condition. Section 3 of the Compensation Act 2006 allows the pursuer to recover full compensation from any single defender responsible for negligent exposure. Accordingly, unlike other divisible conditions, such as asbestosis, to secure full damages, the pursuer does not require to provide a full employment history or set out details of all other potential exposures. While defenders may reasonably request that information post settlement to allow them to seek a contribution from other

negligent exposers, the initial claims process should not be allowed to be delayed while evidence of other additional exposure is recovered and provided. Any proposed protocol we have seen requires provision of a full employment history and Inland Revenue schedule and / or other employment records prior to any initial determination of liability. That requirement imposes additional delay, and is not necessary for the determination of the claim.

4. Asbestos exposure was common in certain industries, where whole groups of workers were exposed over many years. Accordingly most defenders and their insurers are treading a well worn path when it comes to undertaking liability inquiries, which generally concern the same issues of exposure and guilty knowledge. Accordingly in many cases it is not necessary to afford defenders the same time period to carry out liability inquiries ad other cases involving one-off accidents, particularly when measured against the interests of a dying pursuer.

5. The period of negligent exposure may be up to 40 years prior to the date of diagnosis. Given this passage of time if is often difficult for pursuers to recollect with great accuracy full details of their employment history. Despite this, the draft protocol suggested to us requires the pursuer to produce a "pursuer's statement" at first intimation of a claim. Such a requirement is unnecessary, burdensome and unfair to the pursuer. It could be seen as a means whereby a defender will try to undermine a pursuer's claim by highlighting any inconsistencies that may have arisen due to passage of time. It would also result in a potentially significant delay in the claims process, as the pursuer's agent would be unable to start the claims process until all aspects of the statement were cross checked and verified so far as possible, and all other additional information required by the protocol is recovered.

6. We are already seeing examples where defenders are attempting to drive down the value of damages awarded in mesothelioma cases by making reference to what they regard as a "standard" valuation being adopted in cases dealt with in accordance with a voluntary protocol agreed with another firm. We categorically reject such an approach. Each victim is entitled to have his damages properly and subjectively measured against the loss suffered in their own particular case.

7. A dedicated mesothelioma protocol has been suggested, and rejected on numerous occasions in England and Wales, most recently following a consultation exercise by the Westminster government at the end of last year. In December the government announced that after detailed consideration of the consultation responses (including unanimous opposition by asbestos

victims' groups) it would not be taking forward the insurance industry's proposals to create a dedicated Mesothelioma Pre-Action Protocol as the case was not strong enough that it would meet the aim of ensuring that mesothelioma compensation claims are settled quickly where necessary, and fairly. We agree with that conclusion.

The Court of Session continues to demonstrate, on a weekly basis, that it can be dynamic and responsive to meet the needs of pursuers and defenders alike in these exceptional cases. Requests for accelerated diets are dealt with quickly and efficiently, satisfying the need to secure an early outcome while preserving the defender's right to reasonably investigate and prepare their case, even in situations where circumstances mean that there has been no pre-litigation intimation of claim. We strongly believe that this flexibility, which may involve an element of judicial inquiry or case management, should be encouraged and that these types of exceptional would be better suited to flexible case management set out in a practice note to facilitate a consistent approach, prioritisation and quicker progression.

Q6. How successful has the use of separate pre-action protocols for professional negligence and industrial disease claims been?

The majority of our disease cases, while intimated in terms of the voluntary disease protocol, do not progress in accordance with the protocol timetable. By their nature, they are not suited to a strict timetable approach. Complex issues concerning time bar, dates of negligent exposure, constructive knowledge of the condition and causation require detailed and at times onerous investigation, which means that it is usually necessary to deal with these cases on an individual case by case basis. Some diseases are "divisible" requiring multiple liability investigations and intimations of claim against multiple defenders. Similarly defenders may require undertaking more onerous investigations focusing on an employment history or when trying to identify alternative sources of exposure before being in a position to commit to a liability position. Provided general principles of disclosure and reasonable notice are adhered to, it is hard to see how theses cases would benefit form application of a compulsory protocol. Use of a pre-action protocol for such cases should remain voluntary.

Rather the courts have demonstrated a more effective way to deal with particular issues which may arise is certain types of disease case is to make greater use of judicial case management. A good example of this is the Court Of Session, "Direction - No. 2 of 2012 -Personal Injury Actions in respect of Pleural Plaques and the Damages (Asbestos-related Conditions) (Scotland) Act 2009", which is a variation to chapter 43, effectively creating a protocol,

overseen by a nominated judge, to facilitate the clearance of a log-jam of pleural plaques cases caused by judicial review challenges to the 2009 Act. Other attempts to create voluntary framework agreements have been less successful, for example a Framework Agreement for Settlement of Scottish Pleural Plaques cases. While this was helpful in helping to clear a backlog of such cases, it has proved to be too inflexible for pursuers in relation to quantum of damages and overly restrictive return conditions for provisional damages.

Q7. Should a pre-action protocol for medical negligence claims be developed?

Yes. The need for a proper protocol has become increasingly widely recognised by various groups including Professor Sheila MacLean's Working Party on No Fault Compensation and the subsequent Scottish Government Recommendations for No-Fault Compensation in Scotland for injuries resulting from clinical treatment April 2014 (Para 5.17.4, page 28).

We would agree that a Protocol is long overdue in the field of clinical negligence. The lack of consistency in the way clinical negligence cases are dealt with, by Health Boards in particular is a cause of frustration to those who have genuine claims and cannot progress them.

Q8. If you answered yes to Question 7, what should the key features be?

This is a matter for detailed discussion amongst those involved in the day to day handling of clinical negligence claims but it is submitted that any Protocol should cover the following:-

1. An early and detailed disclosure as to the basis of the claim.

2. Included with letter of intimation is to be a list of relevant documents sought.

3. Claims only to be intimated if there is supportive evidence (from records or where appropriate report from an Expert.)

4. Early identification of any rehabilitation or treatment needs of the injured party. The present arrangement is inadequate as it is assumed that any treatment needs will simply be met through the NHS in the normal way. In reality, those injured through clinical negligence rarely, if ever, receive the level of focussed rehabilitation and treatment which a claimant injured in a RTA or other types of PI will receive by virtue of the Rehabilitation

Code.5. Early exchange of copy medical records and treatment information, including any Significant Adverse Event Reviews and the like (subject to post litem motam rule)

5. Early identification of relevant medical issues and facts.

6. Clearly agreed timescales for investigation by each side and responses by each side. Defenders have an agreed window of time within which to provide substantive response. No Court proceedings can be raised by the claimant within that window of time (unless there is an impending triennium).

7. Mutual exchange of expert reports

8. Timescales for resolution

9. An agreed scale of costs/expenses recognising additional complexity and specialism of work

Q9. 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. It would also be sensible to liaise with practitioners and participants in Wales and England to see what lessons can be learned from the operation of similar protocols in practice elsewhere in the UK.

Q10. 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. We already have dedicated rules of procedure personal injury cases in the Court of Session, and at Ordinary and Summary Cause in the Sheriff Court. One of the objectives of compulsory protocols is to make the litigation process more efficient. There is no reason why that would require to await the creation of the specialist Personal Injury Court.

Q11. Are you or your organisation aware of variations in awards of expenses where the pre-action protocol has not been adhered to?

Yes, but it is a source of frustration that there is no consistent approach to modification of expenses where the voluntary protocol is not adhered to. Currently, where the protocol is not adhered to, there can be no certainty in anticipating awards on expenses.

There are two areas which feature prominently when arguments for variations in awards of expenses are considered by the courts – failure to agree the expense scale in non protocol cases; and the timeframe within which it is reasonable to commence litigation, otherwise referred to as "premature litigation" arguments. In some cases the latter is prompted by the former.

There has been much recent legal argument, particularly in cases involving certain insurers, such as Sabre Insurance, who routinely refuse to engage in the voluntary protocol process, but who nonetheless expect the pursuer to adhere to protocol standards of intimation, reasonable investigation and disclosure, but remain unwilling to meet extra-judicial expenses at a level consistent with the protocol scale. A number of cases have held the pursuer in these circumstances entitled to full judicial expenses. The leading case is Brown v. Sabre Insurance [2013] CSOH 51, where Lord Boyd held that if the defender is not prepared to be bound by the protocol, then they cannot expect the pursuer to be bound, and accordingly a pursuer is entitled to raise an action in the absence of agreement to negotiate under the protocol. However there have been other decisions in cases involving the same insurer where it has been held that as the protocol is not mandatory, expenses can be varied where it is argued the pursuer has not adhered to general rules of fair notice, notwithstanding the defender's refusal to adhere to the protocol "gold standard". This situation is unsatisfactory, and encourages some defenders to cherry pick. They can fail to adhere to parts of the protocol they regard as onerous without the certainty of having to meet full judicial expenses if proceedings are raised as a result.

In cases involving "premature litigation" arguments, it is reasonable that a pursuer, who undertakes to adhere to the protocol, should face the sanction of reduced judicial expenses where they subsequently depart from the protocol timescales and raise proceedings without justification. However it is not reasonable for a pursuer to face such sanction where a defender who similarly undertakes to adhere to the protocol, fails to adhere to the strict timetable requirements. The sanction against a non-compliant defender in these circumstances should be the certainty of an award of full judicial expenses, if proceedings are raised.

It is hoped that the introduction of compulsory protocols will remove this inconsistency, provide clarity, and reduce the frequency of expenses arguments.

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