

## **Stewarts Response to the Civil Justice Council Consultation on pre-action Protocols**

**December 2021**

Please find below our response to the above consultation. Please note all the answers are within the word and character limits set out by the CJC.

1. **Your response is:**
  - **Public**
2. **Your first name:** [REDACTED]
3. **Your last name:** [REDACTED]
4. **Your location (town/city):** London
5. **Your role:**
  - **Lawyer**
6. **Your job title:** [REDACTED]
7. **If relevant, whose interests to you predominantly represent?**
  - **Claimants**
8. **Your organisation:** Stewarts
9. **Are you responding on behalf of your organisation?** Yes
10. **Your email address:** [REDACTED]

### **QUESTIONS RELEVANT TO ALL PROTOCOLS**

11. **Do you agree that the Overriding Objective should be amended to include express reference to the pre-action protocols?**
  - **No**

We do not consider a change to the overriding objective is necessary given that the overriding objective already encourages proportionality and equal footing between the parties. We do not consider that an express reference to the protocols within the overriding objective would assist with compliance in any event.

12. **Do you agree that compliance with PAPs should be mandatory except in urgent cases? Do you think there should be any other exceptions generally, or in relation to specific PAPs?**

We do not consider that compliance should be mandatory, except in urgent cases. Whilst we appreciate that there needs be stronger measures to encourage compliance, it is also important that status of the PAPs remain as they are, to ensure flexibility at the early stage of an action.

Rather than mandating of the PAPs, there should be more focus on the courts' response to failures to follow the existing PAPs and analysis as to the type of claims or parties and patterns of non-compliance in order to gain more clarity on what the problem is, rather than creating further rules and guidance with the risk of over-complicating the process.

There is concern that it may be unclear as to what is meant by "urgent" and it should be appropriately defined as far as possible. The examples of cases where the limitation period is about to expire and injunctions provided in the consultation are helpful, but there are also cases where specific performance and declarations are also needed from the court in which case those should also be an exception.

If parties have chosen litigation having already gone through a dispute resolution/escalation process enshrined in their contract, it would not be appropriate to have to follow the PAP as envisaged in the consultation. Likewise, where parties have contractually agreed that the court system is the appropriate way to deal with their dispute rather than opt for mediation or expert/QC adjudication/determination then we consider this too must be respected.

For foreign parties, until it is determined that the English court has jurisdiction, to engage in the PAP process as envisaged, may also not be proportionate, nor in the party's best interests if there is a risk of that triggering a "torpedo" action in another jurisdiction.

A case may be 'urgent' where the claimant requires access to interim payments and therefore proceedings must be issued if the defendant is not prepared to make any such payment. A further example of urgency would be if the party has a life threatening condition and any delay runs the risk of them dying before their claim is concluded.

Given the number of examples of exceptions listed here, this suggests that more analysis may need to be undertaken before deciding whether to make it mandatory. Compliance with the relevant PAP is desirable but mandating use might serve to hinder the parties and see more cases issued.

**13. Do you agree there should be online pre-action portals for all cases where there is an online court process and that the systems be linked so that information exchanged through the PAP portal will be automatically accessible to the court (except for those designated as without prejudice)?**

- **Yes**
- **No**
- **Other**

N/A – No response offered.

**14. Do you support the creation of a new summary costs procedure to resolve costs disputes about liability and quantum in cases that settle at the PAP stage? In giving your answer, please give any suggestions you might have for how such a costs procedure should operate.**

We consider that there is sufficient process embedded in CPR 46.14 and 46.15 to deal with assessment of costs for matters settled pre-action. Rather than consider a new summary assessment process, which would perhaps have the undesired effect of further litigation in relation to costs disputes, Part 8 could be revised to enable assessment of matters settled pre action on paper. We consider that most cases that settle pre-action are unlikely to be complex, high value or multi-party claims and it remains unclear how a new process would assist resolution of lower value straightforward cases, in a manner that is not already achievable by Part 8 or the relevant CPR provisions. We note that the paper considers (footnote 97) that the 47.15 procedure might be extended. However, if there is a real dispute as to liability for costs, as opposed to simply the quantum of them, then the parties should be permitted to bring proceedings for court adjudication/assessment of that issue given that the arguments (by reference to CPR 44.2) are unlikely to be suitable for determination via a summary process. As mentioned in the paper, the fixed costs regime is already in place, and soon to be extended; we therefore consider that a new summary costs assessment process is unlikely to be warranted before there is any reliable data from MoJ/HMCTS on how many cases this proposed

process would have positively impacted upon.

**15. Do you agree that PAPs should include mandatory good faith obligation to try to resolve or narrow the dispute? In answering this question, please include any views you have about the proper scope of any such obligation and whether there are any cases and protocols in which it should not apply.**

The provision of a good faith obligation, while at first glance seem sensible to encourage parties to try and resolve their differences and narrow the dispute, is quite vague and therefore may be more difficult to apply leading to uncertainty and the risk of satellite litigation. It is unclear what benefit the addition of a specific good faith obligation might have. In addition, the notion is more familiar to civil law jurisdictions than our common law system and so we would suggest that more clarity is needed for such a new approach.

The good faith obligation does not appear to address the incentives to resolve or narrow a dispute, which include costs and time savings, avoiding court's censure, obtaining a resolution that the court cannot give such as an apology and the prospect of a continued relationship amongst others. These drivers could be more explicit rather than focussing on obligations and non-compliance.

Preserving the parties' ability to choose to resolve a case through the courts is crucial to ensure access to justice. For those parties whose honesty has been challenged, or where fraud is alleged and for those wishing to protect their reputation, their rights must be protected and they must not be hindered from pursuing a court action.

**16. Do you agree that, unless the parties clearly state otherwise, all communications between the parties as part of their good faith efforts to try to resolve or narrow the dispute would be without prejudice? Invitations to engage in good faith steps could still be disclosed to the court demonstrate compliance with the protocol, and offers of compromise pursuant to Part 36 would still be governed by the privilege rules in Part 36.**

- **Yes**

**17. Do you agree that there should be a requirement to complete a joint stocktake report in which the parties set out the issues on which they agree, the issues on which they are still in dispute and the parties' respective positions on them? Do you agree that this stocktake report should also list the documents disclosed by the parties and the documents they are still seeking disclosure of? Are there any cases and protocols where you believe the stocktake requirement should not apply? In giving your answer please also include any comments you have on the Template Joint Stocktake Report in Appendix 6.**

A joint stocktake report setting out the issues, the documents disclosed and those which parties are still seeking disclosure of, risks over-complicating the process, being too formulaic and too much of a hurdle to overcome before starting proceedings. Particularly for complex, high-value multi-party and multi-jurisdiction disputes, it does not seem appropriate and so an opt-out provision would be sensible. For every prescriptive requirement, there are more areas for disagreement giving rise to more disputes. In addition, rather than assist, it may reduce flexibility. At pre-action stage, where the nature of the dispute is still being crystallised, given that pleadings have not been made and potentially advice from counsel or experts not yet sought, flexibility is key.



any delay caused by such conduct. We agree that it should be possible to apply to court for sanction on an opposing party for non-compliance at DQ stage.

**19. Do you agree that PAPs should contain the guidance and warnings about pre-action conduct set out in paragraphs 3.8-3.13?**

- **Yes**

Clear warnings and guidance about compliance with the PAPs as suggested seems sensible. Guidance for large organisations to publish on their websites contact information for sending pre-action letters of claim is also sensible.

**20. Do you think there are ways the structure, language and/or obligations in PAPs could be improved so that vulnerable parties can effectively engage with PAPs? If so, please provide details.**

The overriding objective has been updated to include provision for vulnerable parties to ensure they are in the best position to give evidence. Whilst vulnerability is not defined, there are various vulnerability factors, which might hinder a party's involvement with a PAP. Injury claimants are often vulnerable parties and would have difficulty understanding the relevant PAPS where unrepresented. There should be easy access via the MOJ website or similar as to what steps a claimant might need to take in relation to any protocol if acting as a litigant in person. There must be sufficient flexibility to allow PAPs to work around the needs of a vulnerable party. Any online process would need to be carefully considered in relation to vulnerability to ensure litigants retain access to justice where they cannot access the internet.

**21. Do you believe pre-action letters of claim and replies should be supported by statements of truth?**

- **No**

Paragraph 2 of the Practice Direction – Pre-Action Conduct and Protocols already provides that if a person knowingly makes a false statement they may be subject to proceedings for contempt. Similar guidance could be given in any proposed new PAP. We consider that this would be sufficient. To add a statement of truth elevates them to a pleading. While a lot of work goes into preparing correspondence in compliance with the PAPs, counsel or experts may not be instructed at this stage, and the letter of claim would not necessarily hold all relevant details of a crystallised claim, particularly in relation to quantum. The letter of claim should simply provide enough information to enable the defendant to investigate the claim and a statement of truth is therefore unnecessary.

If there was such a requirement for a statement of truth, then the parties may consider that such extra advice was needed in advance of the letter of claim, thus increasing costs, leading to delay and restricting flexibility.

**22. Do you believe that the rule in the Professional Negligence Protocol giving the court the discretion to impose sanctions on defendants who take a materially different position in their defence to that which they took in their pre-action letter of reply should be adopted in other protocols and, if so, which ones?**

We think sanctions do need to be imposed for those who take a materially different position in their defence than in their pre-action letter of reply, but with

the proviso that if they have good reason then it would not be appropriate to do so.

We would support a similar provision in the Personal Injury Protocol to encourage earlier admissions from Defendants, which would save unnecessary costs for claimants in relation to liability investigations, whilst assisting with access to much needed earlier interim payments for rehabilitation.

**23. Do you think any of the PAP steps can be used to replace or truncate the procedural steps parties must follow should litigation be necessary, for example, pleadings or disclosure? Are there any other ways that the benefits of PAP compliance can be transferred into the litigation process?**

We are open to considerations as to how to improve the litigation process so as to make it more efficient and proportionate. That said, for the complex, high value, cases upon which we are routinely instructed, we do not consider the PAP steps can be used to replicate or truncate the procedural steps that parties must follow. This may be appropriate for straightforward claims, but not for multi-party, high-value, multi-jurisdictional claims where the court procedures under the Civil Procedure Rules and court guides have developed rules to deal with such disputes.

In some claims a 'cards on the table' approach on both sides may serve to narrow the issues in dispute prior to proceedings being required, however, it is more likely that any such disclosure or potential witness evidence may only be provided on a without prejudice basis in order to do this, by both parties. This could enable the parties to consider at an early stage, what expert evidence might be required, for example.

**QUESTIONS SPECIFICALLY RELATED TO PRACTICE DIRECTION - PRE-ACTION CONDUCT**

**24. Do you wish to answer questions about Practice Direction – Pre-Action Conduct?**

- Yes

**25. Do you support the introduction of a General Pre-action Protocol (Practice Direction)? In giving your answer please do provide any comments on the draft text for the revised general pre-action protocol set out in Appendix 4.**

We are in agreement to converting the existing practice direction to a general Pre-action protocol, but with the understanding that there is no one-size fits all situation and having the benefit of the differing protocols assists. In practice while there may be a number of differing protocols, they are appropriately named and signposted and fairly well embedded in the various areas to which they apply. We have already made general comments on the protocol as above.

**26. Do you agree parties should have 14 days to respond to a pre-action letter of claim under the general pre-action protocol, with the possibility of a further extension of 28 days where expert evidence is required? In cases of extension, the defendant would still be required to provide a reply within 14 days disclosing relevant information they**

**had in their possession and confirming that a full reply would be provided within a further 28 days. Claimants would have 14 days to respond to any counter claim. If you do not agree with these timeframes, what timeframes would you propose?**

For complex claims, we would propose longer time periods to respond to claims and counterclaims than that envisaged such as the existing 3 months with the proviso that where a party is able to do so it should respond more quickly. 28 days is in our experience far too short for expert evidence to be obtained.

- 27. Do you think that the general PAP should incorporate a standard for disclosure, and if so, what standard? For example, documents that would meet the test for standard disclosure under CPR 31, or meet the test for "Initial disclosure" and/or "Limited Disclosure" under Practice Direction 51U for the Disclosure Pilot. In giving your answer we are particularly interested in respondents' views about whether the standard should include disclosure of 'known adverse documents'?**

At present, the protocol refers to key documents which is sufficient. Practice Direction 16 – Statements of Case sets out differing requirement for differing claims. We would suggest that something similar for the differing types of documents for these claims could be drafted. At the pre-action stage, we do not agree that it is appropriate to disclose known adverse documents. This was recognised in the changes to Practice Direction 51U on 6 April 2021.

## QUESTIONS SPECIFICALLY RELATED TO PERSONAL INJURY PROTOCOLS

The sub-committee were very conscious, as a final point worth stressing, that there is a need for evidence to underpin any changes that might be suggested in response to the questions below.

**28. Do you wish to answer questions about the personal injury protocols.**

**Yes**

**29. Do you agree that there should be a generic PI protocol that incorporates relevant general principles from the General PAP but also identifies PI specific objectives not applicable to other litigation (Part A) with users being directed to a subject specific "Part B" rules for each specialist area?**

**• No**

Personal injury practitioners are generally familiar with the PI protocol and/or the specific injury protocol relevant to their client's claim. To embed PI specifics within a general PAP would simply serve to confuse the PAP process and we do not consider it necessary. PI specific objectives should remain in a standalone PI PAP, and if change is required between fast and multi-track matters, or by specialism, we consider that can be reasonably achieved within the current PI protocols. Part B rules in relation to multi track work would not necessarily improve the PAP, beyond the already placed signpost to the Serious Injury Guide for relevant cases.

**30. Do you agree that all PI protocols should include a good faith obligation more prominently in the introduction to try to resolve or narrow the dispute?**

**• Other**

Whilst we agree that a good faith obligation could feature more prominently, we agree with the CJC (para 2.10 of the Interim Report) that such obligation should not be prescriptive, whilst it may assist parties in seeking to narrow the issues in the pre-action stage. Implementation of the good faith obligation might also serve to increase dispute between the parties, where the stocktake document itself cannot be agreed, for example, and result in satellite litigation. Also see our response to Q15 above.

**31. Do you agree that all PI protocols should include an obligation to a complete a joint stocktake report/list of issues and should this be:**

- a) before or after ADR, and/or**
- b) filed with the Directions Questionnaire?**

We do not agree that all cases would be suitable for a joint stocktake report. We consider that whilst it may focus the minds of the parties prior to issue of proceedings, we remain concerned that the document, if it were completed jointly, will provide a further area for dispute.

We repeat our comments in q30 above regarding potential for further dispute. For example, the parties may have complied with the PI protocol and been unable to reach agreement on settlement where further expert evidence or disclosure is required and/or expert evidence cannot be completed. Cases involving catastrophic injuries will often require updated evidence post-issue of proceedings.

In more straightforward cases, it is difficult to ascertain what benefit the stocktake would have, given that the draft directions might be agreed between the parties,





The PI Protocol currently does not extend to those cases relating to serious injury but it is generally understood that the spirit of the Protocol should be followed where possible and that the Serious Injury Guide should be considered in relation to those claims as set out in the PAP itself at para 1.1.2. It would assist parties to integrate the Guide more fully into the PAP.

One conflicting element of the new proposals for the PAPs generally in relation to signposting to Part 36, is that the Serious Injury guide suggests no Part 36/Calderbank offers should be made unless or until the parties have tried to agree an issue through dialogue and negotiation. If the PI PAP is to be updated to include higher value/multi track cases, then signposts to Part 36 via an online portal (if implemented), should be considered carefully to ensure the Guide can still be reasonably engaged without either party risking costs consequences following premature offers at a time when treatment/rehabilitation is ongoing and the lifetime consequences of the claimant's injuries are often unclear. Whilst institutional defendants to injury claims can afford to make opportunistic early offers to settle in some or all of the claims they face, the seriously injured claimant only has one claim and needs to ensure that the compensation will actually provide for their lifelong disability related needs. The Guide is also clear that all methods of dispute resolution should be considered (para 8.3) including; stocktake/cooling off period before parties re-engaged/Early Neutral Evaluation/ JSM/ mediation/ arbitration, so we consider that the necessary pre-action steps are clearly enough set out in the Guide.

It is our view that the Guide and PAP could work together to ensure claimants earlier access to interim payments and implementation of rehabilitation. As the Guide does not apply to clinical negligence, it would be welcomed for a similar code or extension of the Guide to clinical negligence claims whereby claimant are often forced into interim payment applications, even where primary liability is admitted.

- b) We do not consider that the protocol needs to be updated further in relation to moderately severe cases, save that it could be clearer what 'moderately severe' means and whether some elements of the protocol should still be followed. Injury claimants are often vulnerable parties and would not be best served by further updates to the protocol to deal with moderately severe cases. It will remain possible that a case can increase and decrease in value from the first instructions as the case progresses, but a change in protocols could not work unless 'moderately severe' cases are properly defined. It is already apparent that there is work to do in defining cases suitable for the 'intermediate track' in relation to the new costs regime, and we suggest that until this is clear, there cannot be a separate protocol at this stage. The fixed costs and multi-track regimes should provide the necessary guidance for pre issue engagement.

**33. Do you agree that there should be better integration of each protocol with the Rehabilitation Code? If so, should the protocol require a claimant to identify any rehabilitation they consider would be beneficial, with estimated costs if possible and should it require a defendant to supply reasons if they refuse, or fail to provide assistance with rehabilitation.**

The PI Protocol already clearly refers to the Rehabilitation Code at section 4.2 but only so far as it states it is 'likely to be helpful in considering how to identify the claimants needs and how to address the cost of providing those needs'; there is no requirement to follow the Code. Engagement with the Rehab Code is central to the claimant's recovery and should be considered in all matters. The parties should work as closely as possible with the Rehabilitation Code, particularly in serious injury claims.

Depending upon the stage at which the claimants solicitors are involved in the claim, they should be able to involve the correct people to assess the claimants rehabilitation needs as early as possible, but the costs of those needs can increase and decrease over the course of the claim and along with the progress of the claimant's recovery. Similarly, we propose that the Rehab Code becomes applicable to clinical negligence cases within the pre-action protocol.

It is possible that a defendant insurer might not agree on the method or benefit of particular rehabilitation options, and a reason-based refusal would be of benefit to allow the parties to narrow the issues in line with any pre-action protocol. Rehabilitation needs often drive a claim towards interim payment applications, when the defendant does not agree to provide rehabilitation funding. If the claimant is able to assess early on whether and why the defendant agrees with an identified rehabilitation need, prior to an interim payment application, costs and court time will be saved.

**34. Do you agree the transitional integration clauses for injury claims exiting fixed recoverable processes and slotting into the main injury protocol require greater clarity?**

• **Other**

If a claim which begun within the low value protocol is allocated to the multi-track, requiring increased time and expense on both sides, we propose that the PI protocol be revised to allow parties to collaborate on a potentially high value claim prior to issue of proceedings. In any case which is issued under Part 7 for a value over £25,000, the relevant protocol should require the parties to engage in order to assess whether the protocol can be extended to allow for further disclosure and/or finalised medical evidence as necessary.

**35. Is there value in being more specific within protocols about the level of quantification work to be undertaken without a route map agreed with the other party and the timetable for commencing proceedings following an admission of liability?**

• **No**

No. Route mapping for quantum work needs flexibility. Not all injury or clinical negligence claims require the same types of evidence, experts and witnesses and disclosure on both sides and can take many months to finalise. As mentioned above, an admission of liability does not always result in interim payments being volunteered for treatment and/or rehabilitation needs and so proceedings are often necessary to secure interim funding. Similarly, parties can negotiate at length, including having ADR/joint settlement meetings prior to issue of proceedings and enforcing a timescale in which to make this happen might have the reverse effect of seeing proceedings issued prematurely where evidence is still being gathered, rehabilitation/treatment being attempted, or constructive negotiations are ongoing.

The PAP requires a schedule of loss to be provided once liability is admitted, which is reasonable. As noted elsewhere in this response, the claimant should not be required to put detailed work into quantum without a sense of the defendant's stance on liability, particularly if liability documents are largely held by the defendant and/or the defendant insurer. Most claimants (notably those still undergoing treatment or rehabilitation) will not be able to confirm all special damages and levels of the same at conclusion of the protocol. It would not be reasonable to extend the protocol to deal with quantum issues and we would suggest it would be counterproductive in relation to the overall aims of simplifying

pre action procedure and consolidating it. We do however support regular route mapping meetings to discuss the cases generally, in line with the Serious Injury Guide.

**36. Do you agree the management of disclosure pre-issue needs to be strengthened to encourage greater compliance with the protocol? Paragraph 7.1 of the protocol expects the claimant to identify which documents are relevant and why. Should there be equal obligations on defendants to give reasons why they consider a document is not relevant/why they will not disclose a document?**

Yes. The CJC report suggests that it is often the Claimant withholding relevant disclosure, which delays the ability of the defendant to assess the case they are facing, but it is often the defendant who holds relevant liability disclosure.

We would propose a two stage approach to disclosure whereby liability disclosure is provided at the first stage, and then if liability is admitted, primary quantum documentation should be provided at the second stage, with an acknowledgement that where there are ongoing losses, disclosure would not be complete.

If liability is denied, the claimant should not be obliged to provide quantum disclosure, but could be asked to confirm a bracket to value the claim to enable the defendant to appropriately reserve for the claim. Similarly, there should be equal requirements of a defendant to provide early disclosure in relation to liability and if not, to give reasons why a document is not disclosed. We consider this revision could be made to the PI and Clinical Negligence PAPs.

It is our experience also in clinical negligence claims, where much of the relevant liability documentation is in the possession of the defendant, disclosure is not forthcoming and this simply serves to increase time and expense to the parties, and prolong the claimant's case even at pre-action stage. Both parties should be encouraged to approach disclosure collaboratively and our experience is that providing 'rolling disclosure' of certain documents as the case progresses, is useful to both parties.

**37. Should the claimant's letter of claim state what medical records have been obtained and are available for disclosure and what medical records are still to be obtained?**

• **No**

We do not consider this is practical given the claimant may have alerted the defendant insurer in line with the Guide, and/or sent a letter of claim prior to receipt of the medical records. In catastrophic injury cases, a letter of claim will often be sent prior to receipt of medical records, notably because the claimant will often still be an inpatient so the medical records are not yet complete. The focus of the parties efforts at this stage ought to be to urgently establish liability before spending time of medical records/evidence (save to the extent that they are directly relevant to liability issues). Similarly, there is no benefit in 'front loading' a claim at letter of claim stage when the claim, and any related losses, will take some time to crystallise. We would accept that it would be appropriate for claimants to clarify the position in relation to the gathering medical records within a timely period after any Reply to the Letter of Claim, which admits primary liability. We repeat our points and suggestions at Q36 above.

**38. Do you agree that a working group should be established, as a priority, to consider a specific protocol for abuse claims?**

- Yes
- No
- Other

N/A no response

**39. Do you agree that a working group should be established to consider a specific protocol for foreign accident cases?**

- Yes

Yes. It is quite common to be working on a case with a foreign defendant whereby the relevant deadlines under the pre action protocol are not complied with. It is imperative that the working group consider how to engage foreign defendants and insurers in the pre action process in a timely manner, particularly where there is a risk of "torpedo" actions attempting to seize jurisdiction in either country.

**40. Should initiatives with third party organisations such as the expert witness community and HMRC be considered to reduce delays in the resolution of injury disputes?**

- Yes

Yes. Experts in catastrophic injury cases are often required to report several times during the case and in the absence of appropriate administrative support, delays can ensue. It would be difficult to impose deadlines beyond those imposed by the courts but we suggest it is considered whether there is a protocol of sorts by which experts are to comply. Part of this protocol may be in relation to experts refusing instructions where they do not have capacity, or do not receive medical records by a certain time, or where there is an appropriate expert available at an earlier time. It would be worth exploring whether parties should pre-action disclose or exchange short form preliminary expert reports (which may have been prepared at a time when related evidence gathering is incomplete) on a without prejudice basis, on terms that would not enable the opposing party to attempt to exploit any later change of that expert's opinion as and when they undertake the more extensive and hence costly exercise of preparing a full CPR 35 compliant report.

HMRC can only be assisted in reducing delays with better funding and resourcing. Whilst the move to online and electronic e-filing as well as hearings may have assisted timetabling hearings, the QBD remains under significant pressure with a small number of Masters able to service the claims lodged. We do accept that wider use and possible sanction may reduce delays at court, however, it is not always possible for a claimant to avoid issuing proceedings (i.e. where limitation is in issue, interim payments are required, or the parties are unable to negotiate settlement despite attempting to do so). We do not consider that moving the pre action process online would resolve the issues of delay with multi track cases and consider any online extension should be limited to fast track cases which are often more routine in nature and with limited disclosure and/or expert evidence.

**41. Should the personal injury PAPs deal with the question of what to do where a Claimant obtains medical evidence prior to issue but elects not to serve, and if so, what steps should be open to the Defendant?**

No. As detailed in the paper, there is no requirement for a claimant, or defendant,

to serve medical evidence prior to issue of proceedings. Our experience is that many claimants, and a rare few defendants, will release medical evidence in order to assist resolving or narrowing the dispute, but may also be waiting for key disclosure documents from the opponent before it can be finalised in any event. Any steps open to the either party need not be changed and will be dictated by the long established principle of legal professional privilege in any event; if the claimant wishes to waive that privilege, then that is for them to decide and not for the other party to compel. It does not seem that there was agreement within the working group on this point and we do not agree that legal professional privilege should be waived in relation to medical evidence that is not served. The burden is on the claimant to prove his/her case with the relevant evidence; we do not see what benefit this change would give to the PAP. If there were to be any further consideration of such a provision it is crucial, for fairness, that it would be equally applicable to defendants.

**42. Prior to commencement of proceedings by the Claimant should the Defendant be entitled to obtain a medical report on the Claimant if the Claimant does not disclose a medical report?**

- **Yes**

In cases where the claimant is unable to disclose their own medical expert evidence prior to the issue of proceedings, the defendant should be entitled to obtain an appropriate report. However, if such a provision is to be implemented, there should be related provisions about reimbursing the claimant expenses for attending an examination and that an appointment can only take place where the expert is of an appropriate expertise for the claim.

If the parties are engaging within the PAP in any event, the parties might consider early disclosure of medical evidence on a without prejudice basis in order to enable collaboration between the parties.

**43. Do you agree that the protocol should include provision that for the purposes of rehabilitation the claimant solicitors should give reasonable access for medical assessment when requested by the defendant insurer?**

- **Yes**

If the defendant has agreed to fund rehabilitation, it would not be unreasonable for them to assess the claimant on that basis. We consider this appropriately covered by the Guide and Rehab Code (which might be better integrated in to the PAP). We do not agree that the claimant should be compelled to provide further pre-action disclosure beyond that which is already provided for in the Guide and Rehab Code.

**44. If you consider any change to the PI PAP expert evidence process in multi-track cases would be beneficial what would the new process look like?**

We do not consider that this element of the PI PAP needs changing. Issues over expert availability cannot be eased by a change in the PAP itself and the process within the PAP whereby a claimant nominates experts is embedded. The only improvement would be for the defendant to more readily accept one of the claimant's nominations within the allotted period and alert the claimant at the earliest opportunity should they consider a different expert to be more suitable. It is in practice very rare for parties to jointly instruct an expert pre issue where the claim is of high value, in any event. The duties of the experts and directions for joint statements are clearly set down in PI practice, and are not in need of change in relation to multi track matters.

As in question 40 above, it may be worth exploring whether parties could pre-action disclose or exchange short form preliminary expert reports (which may have been prepared at a time when related evidence gathering is incomplete) on a without prejudice basis, on terms that would not enable the opposing party to attempt to exploit any later change of that expert's opinion as and when they undertake the more extensive and hence costly exercise of preparing a full CPR 35 compliant report.

**45. Would an ability to have pre litigation court case management help dispute resolution in multi-track personal injury cases?**

- **No**

It is difficult to see what benefit this would bring to progression or conclusion of the case. The parties are already required to consider early settlement options, ADR etc. and requiring court assistance, pre issue, would simply increase costs and would not be proportionate. The courts are already seeing delays with issued cases, and bringing numerous 'pre-issue' cases into the court stream for direction would cause claimants further delays in accessing compensation, and cause both sides to incur unnecessary costs in duplicating time that must be spent once the case is issued. We do not consider that the court should be involved in pre-action assessments as to do so would defeat the object of the pre action protocol altogether. We do however agree that the court should consider compliance with any pre action protocol at the right stage of proceedings.

The much more pressing requirement for any judicial case management resources is to reduce the worrying delays in the listing of CCMCs, which in some courts now exceed 6 months.

## **QUESTIONS SPECIFICALLY RELATED TO THE PROFESSIONAL NEGLIGENCE PROTOCOL**

**56. Do you wish to answer a question about the professional negligence protocol?**

- **Yes**

**57. Would you support aligning the time limits for responding to the pre-action letter of claim to those suggested for the revised general PAP (14 days with a right to extend for a further 28 days to obtain further information)?**

Whilst alignment of the time limits would seem sensible, 28 days is rarely long enough to gather documentation.

## **ANY OTHER COMMENTS**

**Please include here any other comments you wish to make not covered by the questions already posed**

We do not consider that mandating of pre action protocols, a good faith obligation nor a stocktake report will, on balance, deliver clear benefits to the resolution of disputes. It is important that the court can apply a clear framework in the costs assessment process to consider and enforce sanctions for non-compliance in relation to costs. It is imperative that any pre action protocol maintain a level of flexibility given the facts of the cases concerned will differ, values can fluctuate and/or decrease, as the claim continues and a number of cases might only be issued where court intervention is essential to progress the claim towards resolution.

Pre-action disclosure remains an ongoing issue between parties, and we would suggest that both parties should be required to disclose certain documents pre action to narrow liability issues, and wherever possible, the parties engage in early discussions as to witness evidence and/or documentation that can reasonably impact on resolving those liability issues. If and when liability is resolved pre-action the focus can then turn to the quantum evidence.

Whilst we accept there may be support for a multi-track pre action protocol in injury claims, we do not consider that such a protocol would impact on the approach of parties to serious injury litigation unless the Guide is embedded into the PAPs. If the Guide is integrated into the PAPs, issues over lack of signatories would be less important as compliance will be encouraged by the PAP itself. It is important that parties engage in the Serious Injury Guide as early as possible as well as work with the Rehabilitation Code. As stated above, rather than implement a new protocol, embedding of the Guide or Rehab Code should focus the minds of the parties, along with a requirement for regular route mapping meetings and costs sanctions for non-compliance, particularly where primary liability of one or more Defendant is (or ought to be) clear. We do not consider that allegations of contributory negligence should affect the parties narrowing the issues prior to issue of proceedings. We do not consider a joint stocktake would be appropriate before proceedings are issued. If a joint stocktake/list of issues is to be introduced into injury PAPs, it could reasonably take place at DQ stage where the pleadings have been exchanged and the issues crystallised.

Any increased pre action steps will require engagement from both sides, and in some instances from litigants in person. Whilst an online process may be considered to enable streamlining of any such process, it is important that claimants' access to justice is not impeded by implementation of portals and online procedures. It is imperative that feedback is taken and members of the public closely surveyed to ensure that any vulnerability factors are addressed



in the roll out/pilot phase. We do not consider that any correspondence exchanged in the portal need to be placed in front of the court, save in relation to Part 36 offers and costs issues, as appropriate, and do not believe that a link between the pre action system to the court file is necessary nor beneficial.

In relation to the proposed pre-action summary costs assessment process, it would be important to ascertain the number of cases this might impact upon and whether a change to the CPR / PAPs would reasonably benefit or supplement the current process already in place, and if that number is sufficient to require a wholesale change to the PAPs and costs process.