# COUNTY COURT OF NORTHERN IRELAND

# PROTOCOL FOR CLINICAL NEGLIGENCE LITIGATION

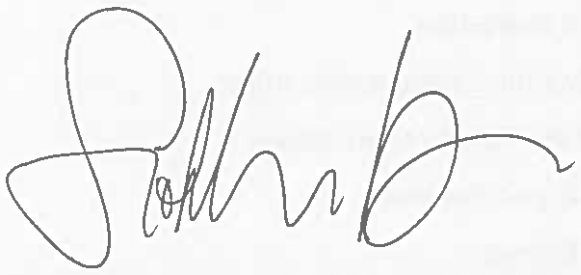
# COUNTY COURT OF NORTHERN IRELAND

## Application and Scope

**This Protocol applies to all Clinical Negligence actions in the County Court of Northern Ireland.**

**This Protocol has effect from 1st June 2023**

**Signed this** 1st June **2023**



**The Right Honourable Dame Siobhan Roisin Keegan**

**Lady Chief Justice**

# IN THE COUNTY COURT IN NORTHERN IRELAND

## PROTOCOL FOR CLINICAL NEGLIGENCE LITIGATION IN THE COUNTY COURT

# IN THE COUNTY COURT OF NORTHERN IRELAND

# PROTOCOL FOR CLINICAL NEGLIGENCE LITIGATION

## 1. INTRODUCTION

1.1 This Protocol ['this protocol'] applies to all cases involving claims brought or intended to be brought before the County Court in Northern Ireland ['the court'] in clinical negligence litigation. This protocol would revoke and replace the Pre-Action Protocol issued on the 25 February 2013 by HHJ McFarland, Recorder of Belfast.

1.2 The court will regard the standards set out in this protocol to represent the normal and reasonable approach of parties in all cases involving claims in clinical negligence litigation. The court will expect the parties to have fully complied with this protocol before any proceedings are issued.

1.3 This protocol does not alter the parties' rights and obligations.

1.4 In this protocol the word "he" shall include "she" or "they" and "it" or "its".

1.5 At all times during the course of County Court civil litigation in this jurisdiction, it is important to bear in mind *'The overriding objective'* as currently set out at Order 58 Rule 1 of the County Court Rules (Northern Ireland) 1981. In order to enable the Court to deal justly with litigation, that overriding objective requires the court, so far as is practicable, to:

(a) ensure that the parties are on an equal footing;

(b) save expense;

(c) deal with the litigation in ways which are proportionate to –

(i) the amount of money involved;

(ii) the importance of the case;

(iii) the complexity of the issues; and

(iv) the financial position of each party;

(d) ensure that the litigation is dealt with expeditiously and fairly; and

(e) allocate to the litigation an appropriate share of the court resources, while taking into account the need to allocate resources to other cases.

## 2. LITIGANTS IN PERSON

2.1 If a party to the claim does not have a legal representative ['a litigant in person'] that party should still, insofar as reasonably practicable, comply fully with this protocol.

2.2 If in advance of the issue of proceedings a party to a claim should become aware that another party is, or has become, a litigant in person, they should send a copy of this protocol to the litigant in person, at the earliest possible opportunity thereafter.

## 3. AIMS OF THIS PROTOCOL

3.1 This protocol aims to achieve best litigation practice by encouraging each of the following, namely:

(a) more pre-action contact between the parties;

(b) better and earlier exchange of information;

(c) better pre-action investigation by both sides;

(d) each of the parties to be placed in a position where they may be able to settle cases fairly and early, without recourse to litigation;

(e) proceedings to progress according to the court's timetable and efficiently, in the event that litigation does ultimately prove necessary;

(f) the promotion of an overall "*cards on the table*" approach to litigation, in the interests of keeping the amount invested by the participants in terms of money, time, anxiety and stress to a minimum, consistent with the requirement that the issues be resolved in accordance with accepted standards of fairness and justice.

3.2 Where litigation is appropriate the requirement is that it should be conducted economically, efficiently and in accordance with a realistic and flexible timetable set by the court. Clinical negligence litigation frequently involves complex and technical issues that may require time consuming and detailed investigation, with the assistance of specialised expert opinion. Such litigation also has the potential to be particularly stressful and emotionally demanding upon the parties.

3.3 All practitioners are reminded that this protocol is intended as a statement of best practice and should normally be adhered to in all clinical negligence cases. It is acknowledged that there may be exceptional cases, where compliance with the provisions of the protocol may be neither necessary nor desirable. It is not intended that this protocol should be "*a one size fits all*" guide which must be applied rigorously and without deviation to all intended clinical negligence litigation.

3.4 In practice, insofar as the pre-action procedures of this protocol are concerned, it is envisaged that the initial steps required of an intended plaintiff, will follow a two stage process. Firstly, there will be a record request from the healthcare provider(s)/record-holder(s). Records may be requested directly from the record-holder(s) without the need for a letter of claim. Practitioners should make clear in such initial correspondence that the letter is a record request only, and that it may be dealt with by the record holder(s) without recourse to legal advice. Secondly, when records have been obtained, and independent expert evidence has been secured, the intended plaintiff should then proceed to serve a letter of claim in accordance with this protocol.

## 4. MEDICAL NOTES AND RECORDS

4.1 In respect of living patients the Data Protection Act 2018 provides a right of access to health records by a patient or certain other parties on behalf of a patient through a 'subject access request' and such requests should be as specific as possible about the records that are required. Article 5(1)(e) of the Access to Health Records (Northern Ireland) Order 1993 continues to apply in respect of deceased persons. An initiating letter on behalf of someone who is considering pursuing an action arising out of medical treatment, briefly outlining the facts and anticipated allegations of negligence, should be sent to the relevant healthcare provider requesting the disclosure of medical notes and records. The Law Society has prepared **a template letter initiating a claim** and requesting the disclosure of medical notes and records which may be accessed here **https://www.lawsoc-ni.org/clinical-negligence-protocol**

4.2 Copies of the relevant records sought should be supplied by the relevant healthcare provider free of charge, within one calendar month or other relevant requisite period specified in the 2018 Act or the 1993 Order. For living patients, the healthcare provider can seek an extension under the Data Protection Act of up to three months in total, where the notes are complex or numerous. In such circumstances, the healthcare provider must notify the requesting party within one month of making the request explaining why the extension is necessary. The healthcare provider can make facilities available to inspect the original records and often will provide copies of the notes on encrypted disc.

4.3 Healthcare providers should make arrangements to ensure that they are able to react positively and expeditiously to inquiries and requests in accordance with the statutory procedures of the 2018 Act and 1993 Order. As a last resort, in the event that the relevant healthcare provider fails to provide disclosure of the relevant hospital notes and records, the patient and/or his representatives should apply for disclosure in accordance with the provisions of Order 15 Rule 5A of The County Court Rules (Northern Ireland) 1981.

4.4 If either the patient or the healthcare provider considers that additional health records are required from a third party in the first instance these should be

requested in writing by or through the patient or his or her representatives. The relevant third-party health provider should provide the notes within one month. An extension can be sought if the notes are complex or numerous, however, where such a difficulty is encountered, the third party must notify the requesting party within one month.

**4.5** It shall be the duty of the party affording initial disclosure to make available clear and complete copies, properly paginated, and indexed, or to assist with progress toward paper-light litigation, an encrypted disc or an electronic version containing the records.

**4.6** While a complete set of records may be required in some cases, a file may also contain records as to unrelated conditions. Legal representatives should use their discretion in making requests for disclosure, bearing in mind the defendant's duty to make full relevant disclosure and the cost and delay caused by copying bulky files.

## 5. HEALTH SERVICE COMPLAINTS PROCEDURE

**5.1** Attention is drawn to the complaints procedures that exist with the healthcare providers. These procedures are designed to provide patients with an explanation of what happened, and an apology, if appropriate. They are not designed to provide compensation for cases of negligence. However, patients might choose to use these procedures if their only, or main, goal is to obtain an explanation, or to obtain more information to help them decide what other action might be appropriate.

## 6. ALTERNATIVE DISPUTE RESOLUTION

**6.1** Parties should inform their clients of the options available to resolve disputes by alternative dispute resolution and in particular that it is voluntary, confidential and impartial. A form of alternative dispute resolution might be more suitable than litigation, and if so the parties may consider which form to adopt and pursue in a timely manner.

**6.2** During the course of proceedings, both the plaintiff and defendant may be required by the Court to produce evidence that alternative means of resolving their dispute had been considered, for example by production of the standard mediation correspondence, together with the parties' replies thereto. The parties need to be mindful that the Court takes the view that litigation should be a last resort and that claims should not be issued prematurely when a settlement is still being actively explored. If pursuing a means of alternative dispute resolution would assist in achieving a settlement, then this should be fully explored if the parties agree. Whilst it is recognised that no party should be forced to take part, representatives are reminded to advise their clients of this option for dispute resolution.

## 7. EXPERT REPORTS

7.1 In clinical negligence cases reports from expert witnesses may be required in relation to –

(a) The allegations relating to the existence and scope of the duty of care, breach of that duty, the nature and extent of any damage and causation;

(b) The plaintiff's prior, post incident short, medium and long-term condition and prognosis;

(c) Identification and quantification of the financial loss elements of the claim, including care aids and equipment; the construction, purchase and adaptation of premises; travel and transportation costs; therapy cost; loss of earnings, profits, prospect of employment etc.

7.2 Practitioners should have regard to the **Clinical Negligence Expert Practice Direction PD 1/2023** relating to expert evidence for general guidance. Copies of this documentation should be provided to each of the experts retained on behalf of the parties to the litigation. In particular, the attention of practitioners is drawn to paragraph 10 of the Practice Direction and they are reminded of the need to give careful consideration to the question of whether evidence from a particular expert is both necessary and appropriate bearing in mind that expert evidence is likely to represent a very substantial proportion of the costs incurred in the cost of clinical negligence litigation.

7.3 Practitioners are also specifically reminded of the fundamental importance of maintaining the independence of expert witnesses which is reflected, in particular, at paragraphs 14 and 15 of the **Clinical Negligence Expert Practice Direction**. The Law Society has prepared a template **Letter of Instruction to Expert** which is available here: https://www.lawsoc-ni.org/clinical-negligence-protocol (attached as Annex 3 below).

7.4 The parties are reminded that it is expected that they will be in receipt of expert evidence, addressing the nature and extent of the duty of care, breach of duty, causation and damage, prior to issue of proceedings in a clinical negligence claim. The parties are advised that, in the event that expert evidence is incomplete, or has not been obtained, by the time the claim appears before the County Court Judge, the Judge will seek to determine the status of the expert evidence, in accordance with the Overriding Objective, and will enquire as to the engagement of experts to date and those experts proposed to be engaged in the course of the action.

## 8. STANDSTILL AGREEMENTS

8.1 In the context of litigation, a standstill agreement is an agreement between the intended parties, or their representatives, which has the practical effect of

suspending or extending a statutory or a contractual limitation period. For example, a standstill agreement, duly executed between the intended parties to litigation, has the potential to avoid the issue of protective proceedings where a matter remains under investigation, thereby facilitating the completion of the said investigation, avoiding potentially unnecessary expenditure on all parts and the stress on the parties associated with proceedings.

8.2 Practitioners are encouraged, where limitation is likely to arise, to consider whether the execution of a standstill agreement is appropriate in the particular circumstances of the case and to communicate accordingly with all other parties. It is recognised that no party can be compelled to execute a standstill agreement, but it is an option that may be considered by practitioners in the event limitation presents. A standstill agreement can be executed between intended parties to litigation at any point in the pre-action process, prior to the issue of proceedings.

## 9. COMMENCEMENT OF PROCEEDINGS

9.1 Once a decision has been taken by the patient and/or his or her advisors that there are grounds for a claim, after consideration of the notes and records and after the obtaining of a report from an appropriate medical expert/experts, as soon as practicable, a letter of claim should be sent to the proposed healthcare defendant/representatives. Such letters should set out in full both the nature and extent of the duty, breach, causation and damage alleged, the identity of all the defendants and an assessment of quantum, broken down into the various heads of damage, or give reasons why this is impracticable. The Law Society has prepared a template letter of claim which is available here: **https://www.lawsoc-ni.org/clinical-negligence-protocol** (attached as Annex 1).

9.2 While the letter of claim is not intended to have the formal status of a pleading it should, be prepared based on expert evidence and generally be drafted for the purpose of providing sufficient information as is currently held by the plaintiff to enable the relevant healthcare provider to commence the investigations. The letter of claim should seek to include functional effects of injury and any information in relation to potential special damages to assist the Defendant in valuation. Practitioners are directed to the template letter of claim and attention is drawn to the headings contained therein. Practitioners are expected to address each heading in correspondence and where unable to do so, the party must clearly state why that is so. If practitioners are unable to provide information in compliance with this Protocol and the template, then consideration should be given to seeking an agreed extension of time for compliance.

9.3 Unless there is a limitation problem or some other reason as to why the proposed plaintiff's position needs to be protected by early issue, proceedings should not generally be issued until after 4 months from the date of receipt of the letter of claim by the proposed healthcare defendant/representatives. In

the event a plaintiff issues proceedings before the time period for provision of the letter of response expires then the plaintiff will be deemed to have waived their right to same. The parties may agree to an extension of the time for provision of the letter of response. In such circumstances, the proposed healthcare defendant/representatives must notify, where practicable, the proposed plaintiff's representatives within 14 days, explaining why the extension is necessary/desired.

**9.4** The relevant proposed healthcare defendant/representatives should acknowledge the letter of claim within 14 days of receipt and should identify the solicitor who will be dealing with the claim. No later than four months, subject to agreement to variation by the parties, from the date of receipt of the letter of claim, the relevant proposed healthcare defendant/representatives should write to the proposed plaintiff's solicitors, in the form of the recommended template response, stating whether liability(existence or breach of duty or causation) is denied or admitted, and provide relevant discoverable documents if the existence of a duty of care is denied or breach of duty or causation is repudiated. Thereafter, it will be appropriate for the proposed plaintiff to issue proceedings. This provision does not apply to cases where time is of the essence. The Law Society has prepared a template letter of response (which is available here: https://www.lawsoc-ni.org/clinical-negligence-protocol [attached as Annex 2]. As with the letter of claim, practitioners' attention is drawn to the headings contained within the template letter of response. Practitioners are expected to address each heading in correspondence and where unable to do so, the party must clearly state why that is so. Alternatively, if practitioners are unable to provide a response in compliance with this protocol and the template then consideration should be given to seeking an agreed extension of time for compliance. Where a request by the defendant for an extension of time to provide a letter of response is refused by the intended plaintiff, the defendant can submit a letter of response setting out under each heading the reasons they cannot provide responses in some areas and what information is not available.

## 10. PLEADINGS AND PARTICULARS

**10.1** Parties are directed to the full provisions of The County Court Rules (Northern Ireland) 1981, as amended, in relation to the pleading and particularisation of the action generally.

**10.2** Plaintiff practitioners are reminded that pleaded allegations of negligence, breach of statutory duty, breach of contract, misrepresentation, or fraud ("the particulars") should be based on expert evidence, prepared in accordance with the **Clinical Negligence Expert Practice Direction PD 1/2023,** specifically paragraphs 33 and 34. Practitioners are also reminded that in pleading particulars against a clinical or other professional practitioner, which are likely to impugn clinical or other professional practice or conduct, there should be evidence available to support such allegations. When preparing particulars for

the purpose of pleadings, practitioners are reminded of the need to identify allegations in respect of the nature and extent of any duty of care, breach of duty and causation. Where there are multiple defendants it is important that the particulars are pleaded separately against each defendant. In preparing the said particulars practitioners are reminded that they should be concise, illuminating and accurate and that they should avoid repetition.

**10.3** Full details of the plaintiff's particulars of personal injury and special loss should be pleaded and particularised as early as possible. Pleadings and particulars should be based on condition/prognosis and quantum medical and special loss/damage reports.

**10.4** Defence practitioners are reminded of the requirement to positively plead in the Replies to the Plaintiff's Notice for Further and Better Particulars their case with sufficient clarity, specificity and particularity as to ensure that the opposite party is made aware of the true nature of the defendant's case. If appropriate, the defendant will put forward its version of relevant facts or events, if materially different from what has been pleaded by the plaintiff. The defence must state which of the allegations are denied, which are admitted, and if the defendant is unable to either admit or deny a particular, then the defence should state that it is an allegation which the plaintiff will be required to prove.

**10.5** Practitioners should, in any pleading or particulars being provided subsequent to the issue of the Civil Bill, specifically plead and particularise any matter which makes any claim or defence not maintainable, which might take the opposite party by surprise, or which raises issues of fact not arising out of previous pleadings or particulars.

## 11. REVIEWS BEFORE THE COUNTY COURT JUDGE

**11.1** Practitioners are reminded that in the event that they are requested to attend for a review before the Judge, at any time after the issue of proceedings, they are expected by the court to have full knowledge of the action being reviewed. It is expected that in the ordinary course of events the solicitor with carriage of the action, or counsel, fully and properly instructed with a full brief of relevant materials, will appear at any such review.

**11.2** Parties will be expected to be able to address the Judge on all matters relevant to the action including, but not limited to the following; the circumstances of the index event/events, the identity of the parties, medical records, pre-action protocol compliance, pleadings, expert evidence, disclosure, interlocutory applications, directions, expert exchange and meetings, negotiations and trial.

**11.3** Practitioners are advised that, in the event that a representative of any Party appears before the court not in a position to address the Judge on these issues which are germane to the expeditious prosecution of the action, the matter may have to be adjourned to the next available date, and the solicitor with

carriage of the action or counsel, fully and properly instructed, will then be directed and expected to appear.

## 12. DIRECTIONS OF THE COUNTY COURT JUDGE

**12.1** All clinical negligence cases will normally be listed for a first review before the County Court Judge 6 months or thereabouts after the date of issue of the Civil Bill, should no Certificate of Readiness ['COR'] be lodged within that timeframe. A review will also be listed within 8 weeks of receiving the Notice of Intention to Defend. All parties are reminded of what is expected of the practitioner, as above, who appears at such a review. The purpose of such a review is to ascertain the readiness of the action for lodging of the COR, and for trial.

## 13. EXCHANGE OF EXPERT EVIDENCE

**13.1** Expert evidence will be exchanged in accordance with such directions as may be issued from time to time by the County Court Judge.

**13.2** Where more than one party to an action proposes to adduce expert evidence at trial on the issue of liability, the parties are expected to notify each other, 42 days prior to the proposed exchange, the number and type of reports it is proposed will be exchanged.

**13.3** Parties are reminded that exchange of liability evidence (including causation) is on a like-for-like basis, as per paragraph 36 of the **Clinical Negligence Expert Practice Direction PD 1/2023.** Parties are reminded that there is no obligation on a party to disclose evidence obtained from any medical expert on liability, save and except where the party or parties to whom such exchange is to be made is also relying on such evidence, and a simultaneous exchange is to take place.

**13.4** In respect of expert evidence on the issue of quantum, parties are reminded that disclosure of evidence is on a sequential basis as per paragraph 37 of the Clinical Negligence Expert Practice Direction PD 1/2023.

## 14. MEETINGS OF EXPERTS

**14.1** Following the exchange of expert evidence (existence, nature and extent of duty, breach of duty/causation and then quantum), the parties shall promptly, and in any event within 28 days, seek to arrange meetings of the respective experts, vide: paragraphs 39 to 43 of the **Clinical Negligence Expert Practice Direction PD 1/2023.**

**14.2** A draft agenda of issues to be discussed between the respective experts shall be prepared by the plaintiff's solicitor and sent to the defendant's solicitor no later than 42 days prior to the meeting of experts. The defendant's solicitor

shall respond within 21 days. The agenda should be agreed between the parties and sent to the experts no later than seven days prior to the expert's meeting.

**14.3** All meetings of experts will be conducted only as between experts of the same discipline, unless it is either agreed between the parties, or directed by the Court, that experts of more than one discipline should attend. An expert meeting shall not be attended by legal representatives.

**14.4** The parties should seek to ensure that the agenda questions are neutral and non-adversarial. Whilst closed questions can have an important role, experts should be encouraged, through appropriate questioning in the agenda, to express themselves and provide an explanation for their view.

**14.5** Leading questions should not, where at all possible, be included in the agenda. The parties should focus on limiting, as far as possible, the number of questions that the experts are required to address; repetition of the same question, asked in different ways, is to be avoided.

**14.6** Should the parties not be able to reach agreement on the issues to be addressed by the experts and included in the agenda, they should seek guidance from the court either in writing or by requesting a review before the Judge. Parties are advised that in considering issues arising in relation to the content of agenda for expert meetings, the court will deal with same administratively in the first instance, and thereafter by means of a court review only, if required and necessary.

**14.7** No later than 21 days before an experts meeting, the parties shall agree upon:

(a) a properly collated, paginated and indexed core bundle of documents, including any literature on which the experts seek to rely, for use at the experts' meetings; and

(b) which expert shall take the minute of the meeting.

**14.8** As soon as possible after agendas have been agreed, and no later than 28 days thereafter, the parties shall convene meetings of the experts by telephonic means (or whichever method is most timely and convenient and in accordance with the Overriding Objective).

**14.9** At the meetings, the experts shall prepare an agreed Scott Schedule, detailing those issues on which they agree or disagree (with the reasons for any disagreement clearly expressed) within 7 days of the meeting.

**14.10** The parties must make it clear to the experts that the minute is not to be circulated to any party prior to be it being agreed and signed by those present at the meeting.

## 15. MEDICAL NOTES, RECORDS AND LITERATURE

15.1 The court will normally direct that the parties to clinical negligence litigation must discuss, if necessary, and exchange agreed bundles of medical notes and records to be relied on prior to the hearing. It shall be the duty of the plaintiff's solicitors to lodge with the court no later than 7 days prior to the hearing, a bundle of medical notes and records to be relied on, paginated and with an index attached and certified by all parties as agreed. It is the responsibility of solicitors and barristers in the case to sift the documents available and to produce a manageable core bundle relevant to the issues to be determined. Excessive and unnecessary documentation must be avoided. It shall be the joint responsibility of all the parties to ensure the presence of the originals of all such documents in court during the hearing.

15.2 The parties to clinical negligence actions must ensure that any medical literature to be relied on by the medical experts shall be exchanged and lodged with the court no later than 7 days prior to the trial, appropriately paginated and indexed. In addition, a copy of the agreed minute from the meeting of medical experts and any agreed Scott Schedules with regard to special losses must be exchanged and lodged with the court at least 7 days prior to trial.

## 16. TRIAL OF THE ACTION

16.1 The trial date for the hearing of a clinical negligence action will be fixed, after the lodging of the COR, either by agreement between the parties or, in the absence of such agreement, by the County Court Judge at the time of review. The trial date will be fixed sufficiently far ahead to permit time for the parties to ensure full compliance with all directions of the court, so as to ensure that when the matter comes on for trial, the case is ready to proceed.

16.2 After fixing the trial date, a date for negotiations and/or further review, before the court, will be fixed no less than 3 months in advance of the commencement date of trial to ensure that, inter alia; all directions of the court have been complied with by the parties in anticipation of trial; counsel has been retained and appropriately instructed; and also so as to encourage, where appropriate, the resolution of the claim by negotiations between the parties, thereby avoiding the increased cost and stress of trial. At best, this will lead to resolution of the claim between the parties. At worst, it will serve to clearly define the nature and extent of the dispute between the parties and to highlight any issues which require to be addressed in advance of the commencement date of the trial, thereby ensuring that should a trial be necessary, it will proceed in an efficient, proportionate and timely manner in accordance with the provisions of the Overriding Objective.

16.3 The plaintiff's solicitors shall prepare and file with the relevant County Court Office no later than 7 days before trial a properly collated, paginated and indexed trial bundle. The bundle shall be agreed with the other parties. The parties will ensure that, in so far as it is possible, a single core bundle is agreed to promote an efficient trial and thereby save court time. In determining the

content of the bundle, the parties should, at all times, have regard to the necessity to exchange, agree, submit and include medical notes, records, reports and literature to be relied upon by the experts. Parties are reminded that in clinical negligence actions, where the records and other documentation is likely to be of primary importance, it is a pre-requisite to an efficient trial that there should exist a single core bundle, properly paginated, of all such records and other documentation upon which the court, the parties and all witnesses can rely.

**16.4** No later than 7 days prior to the date of trial, the parties shall, in appropriate cases, or where directed by the court, exchange and file with the court, a skeleton argument and/or position paper, together with caselaw authorities on any legal matter likely to arise during the course of the hearing. It is noted that such skeleton arguments and position papers are not considered by the court to be necessary in all cases, but in some matters these may be appropriate.

**16.5** Whilst it is rightly acknowledged that there needs to be flexibility to account for unforeseen circumstances, the attention of the parties is drawn to the objective that, when a trial date is fixed for the disposal of a clinical negligence action, the parties take all such action as is necessary to ensure their readiness for the trial, including full and timely compliance with all directions of the court, thereby avoiding the late vacation of the trial date. The parties acknowledge that the late vacation of a fixed trial date can frustrate the Overriding Objective, can lead to delay and expense and can also cause anxiety and stress to the parties to litigation.

**16.6** In the event that it becomes necessary for an adjournment application to be made, the application should be moved at the earliest opportunity. Such application may be made in writing or by appearance before the court. Parties are reminded that any application must be supported by substantive grounds for adjournment, together with draft directions for the re-listing of the action for trial.

## 17. DATE OF COMMENCEMENT

**17.1** This protocol shall take effect, from such date as the Lady Chief Justice shall specify.

Dated this day of 2023

**Annex 1**

## CLINICAL NEGLIGENCE LITIGATION

TEMPLATE LETTER OF CLAIM

*[Practitioners are expected to address each heading in correspondence and where unable to do so, the party must clearly state why that is so. If practitioners are unable to provide information in compliance with this protocol and the template, then consideration should be given to seeking an agreed extension of time for compliance.]*

Your Ref:

Our Ref:

Dear Sirs,

**[Plaintiff's full name, address, date of birth and National Insurance Number]**

We are instructed by the above named to claim damages in connection with [*medical/dental/other] [please specify*] treatment provided at [*insert address of Hospital(s)/GP Surgery/Dental Surgery/other]* on [*insert date or dates*] under Hospital Number [*insert details, if appropriate and if known*].

**The facts**

*[Provide details, as accurately as possible from the client's instructions/medical notes obtained to date, of the factual scenario relating to the claim, including, in more complex claims, details of all relevant healthcare providers involved in the patient's care. A Chronology of Events would be helpful and is likely to assist in narrowing the issues between the parties.]*

**Breach of duty**

*[Provide an outline, in a numbered/bullet-point fashion (where necessary), of the likely*

*allegations of breach of duty of care that each of the defendant(s) are likely to have to meet, providing the identity of <u>each</u> HSC Trust/GP/Dentist/other whom it is alleged provided the inadequate care or treatment. Reference can also be made in this section, it if it is considered appropriate, to any corroborative witnesses (for example, the patient's husband/wife/partner), the outcome of any complaint made against the healthcare provider and whether supportive expert evidence has been obtained.]*

**Causation**

*[Provide an outline of the alleged causal link between the detailed breach(es) of duty of care and the injury complained of by the patient. For example, consider whether, or not, factual causation needs to be dealt with, that is, does the patient say that had an earlier referral been made, the patient would have undergone a less invasive or different course of treatment and, if so, how would that have affected the outcome.]*

**Alleged injuries/current condition and prognosis**

*[Provide details of the patient's injuries sustained <u>as a result of</u> the alleged negligence of <u>each</u> of the proposed defendants.*

*Provide details as to the patient's current condition (post-alleged negligence) and his/her prognosis (with reference to the medical notes, when possible).]*

**Request for clinical notes (if not previously provided)**

*[Provide details of any further medical notes that you anticipate will need to be obtained/disclosed and what steps, if any, have been taken to obtain such notes. Where possible, medical notes, as referred to in the Chronology of Events (if prepared), and medical notes that are not already in the possession of the proposed defendant (for example, GP notes, if the claim is against a HSC Trust or vice versa) should also be disclosed with the Letter of Claim.]*

At this stage of our enquiries, we would expect you to disclose any further documentation that you/your client [*delete as appropriate*] holds relevant and material to this action.

**Quantum**

*[Provide an outline of the main heads of damage, for example, past and future care, accommodation costs, loss of earnings (providing details of his/her annual net income), loss of services etc, identifying (if possible and if it is considered appropriate) the loss claimed under each head.]*

**Proposed Co-defendants**

We have also sent a Letter of Claim to [*insert name and address*] and a copy of that letter is attached. We understand they are represented by [*insert name, address and file reference, if known*].

**Meetings/discussions**

*[If it is considered appropriate, an offer of a meeting between the parties' legal representatives to narrow the issues or settle the claim should be made. Consideration should be given as to whether this is a claim that is suitable for mediation/ADR and, if so, offered.]*

**Action required**

Under the Pre Action Protocol for Clinical Negligence Litigation ('the Protocol'), you/your client [*delete as appropriate*] are obliged to acknowledge receipt of this correspondence within **14 days** and to provide a detailed Letter of Response to each of the allegations/headings detailed within **4 months**. You will note that we have enclosed two copies of this correspondence. We suggest that you forward a copy of it immediately to your legal representatives/medical defence organisation/professional indemnity insurer [*delete as appropriate*].

We look forward to receiving both your/your client's [*delete as appropriate*] acknowledgment and Letter of Response in accordance with the Protocol, failing which we will have no alternative but to issue proceedings without further reference to yourselves.

We consider that this correspondence provides sufficient information to enable you/your client [*delete as appropriate*] to commence investigations and to put an initial valuation upon the claim.

Finally, you will be aware that the Protocol makes clear that this correspondence is not intended to have the formal status of a pleading and, therefore, we reserve the right to provide further information under each of the headings above in due course.

Yours faithfully

***[NB If the patient's claim is likely to be statute barred (either currently or very shortly in the future), protective proceedings should be issued in the usual way unless a standstill agreement has been agreed (in writing) between the parties' legal representatives.]***

**Annex 2**

## CLINICAL NEGLIGENCE LITIGATION

TEMPLATE RESPONSE LETTER

*[As with the Letter of Claim, practitioners' attention is drawn to the headings contained within the template letter of response. Practitioners are expected to address each heading in correspondence and where unable to do so, the party must clearly state why that is so. Alternatively, if practitioners are unable to provide a response in compliance with Protocol and the template then consideration should be given to seeking an agreed extension of time for compliance. Where a request by the defendant for an extension of time to provide a letter of response is refused by the intended plaintiff, the defendant can submit a letter of response setting out under each heading the reasons they cannot provide responses in some areas and what information is not available.]*

Dear Sirs

Your Client –

Our Client –

Your letter of claim dated (insert date) refers. As you are aware we are instructed by (insert name of healthcare provider).

**The facts**

*[If the chronology of events or facts, as described in the letter of claim, are disputed, the basis of the dispute should be provided. Details should be provided, as accurately as possible from the proposed plaintiff's medical notes / instructions from the treating clinician(s). If the proposed plaintiff has provided a chronology, the healthcare provider may supply an annotated version of same. If the healthcare provider has further information or documentation on which it proposes to rely, then these should be provided. In the event the chronology of treatment is disputed, then this should be indicated. If the proposed defendant disputes the interpretation of any medical record, then this should be made clear at this time.]*

**Breach of Duty**

*[In the event breach of duty is accepted, this should be advised. In the event breach of duty is disputed, provide an outline, in a numbered/bullet-point fashion, where necessary, of the basis upon which such repudiation is grounded. A bare denial is not sufficient. If the healthcare provider has other explanations for what happened, details (which, if considered appropriate, include reference to other information/documentation held by the healthcare provider/other third party/any corroborative witnesses) should be provided, at least, in outline. Reference can also be made, if it is considered appropriate, to any supportive expert evidence obtained by the healthcare provider.]*

**Causation**

*[In the event causation is accepted, this should be advised. In the event causation is disputed, provide an outline, in a numbered/bullet-point fashion, where necessary, of the basis upon which such repudiation is grounded. A bare denial is not sufficient. If the healthcare provider has other explanations for what happened these should be given in sufficient detail to permit the proposed plaintiff to consider the basis of the repudiation.]*

**Alleged Injuries – Condition and Prognosis**

*[If the proposed defendant has any observation to make concerning the injuries sustained by the proposed plaintiff then this should be provided.]*

**Provision of Records (Not previously provided)**

*[If records previously provided to the proposed plaintiff are incomplete, full copies should now be provided and the proposed plaintiff's advisers should be afforded the opportunity to inspect the originals, if required. The healthcare provider may also wish, if considered appropriate, to refer to/disclose any other information/documentation held by it/any third party/any corroborative witness.]*

**Quantum**

*[If the proposed defendant has any observation to make concerning quantum then this should be provided. If liability is admitted then quantum evidence should be requested at this time.]*

**Third Party / Co-defendants**

*[In the event the proposed defendant repudiates liability for the allegedly negligent act on the basis that a third party was responsible for same, then this should be clearly indicated in this letter or response. If in a position to do so, the name and address of the third party should be provided.]*

**Meetings/discussions**

*[If it is considered appropriate, an offer of a meeting between the parties' legal representatives to narrow the issues or settle the claim should be made. Consideration should be given as to whether this is a claim that is suitable for mediation/ADR and, if so, offered.]*

**Conclusion**

*[In the event liability is not accepted then confirmation of the arrangements for service should be provided. If an agreement was made concerning the extension of the limitation period in favour of the proposed plaintiff, pending provision of the letter of response to the claim, then the proposed defendant should advise of the date when such agreement will terminate. Reasonable notice, to permit the proposed plaintiff to take such action as may be required, should be given. Such notice should be not less than 1 month.]*

Finally, you will be aware that the Protocol makes clear that this correspondence is not intended to have the formal status of a pleading and, therefore, we reserve the right to provide further information under each of the above headings in due course.

Yours faithfully

**Annex 3**

## CLINICAL NEGLIGENCE LITIGATION

TEMPLATE LETTER OF INSTRUCTION TO EXPERT

Our Ref

Your Ref

**PRIVATE AND CONFIDENTIAL**

Dear

**Re:** *[Name of Client, Date of Birth, Address*

*Date of Accident*

*Title of Proceedings]*

We act on behalf of *[insert name of client]*.

**The circumstance of the claim**

*[Insert full details of the case to include full facts and a detailed chronology of the care provided. Identify the nature of the injury sustained by the patient, and the patient's present circumstances.]*

**Documentation**

*[List all documents enclosed with instructions including, but not limited to, the Protocol, Practice Direction on Expert Evidence in Clinical Negligence Cases, medical notes and records, witness statements (if any), complaint documentation, serious adverse incident investigation documentation, pre-action protocol correspondence, pleadings, documents which form part of disclosure, expert reports relevant to the report, etc.]*

**Your instructions**

*[Specify the purpose of the report, a description of the matter(s) to be investigated, the issues to be addressed, and the identity of all parties. Confirm in the instructions the nature of the expertise required and specify whether the report is expected to address the existence of a duty of care, breach of the duty of care, causation, or damage including condition and prognosis.]*

**Form of the expert report**

Please note that in preparing your report it should be noted that the report must:

1. Set out details of all your relevant expert qualifications.
2. Give details of any literature or other material which has been relied on in making the report.
3. Provide a statement setting out the substance of all facts and instructions which are material to the opinions expressed in the report and upon which those opinions are based.
4. Make clear which of the facts stated in the report are within your own knowledge.
5. Where there is a range of opinion on the matters dealt with in the report:
    i. Summarise the range of opinions.
    ii. Give reasons for your own opinion.
    iii. Provide a summary of the conclusions reached.
    iv. If you are unable to give an opinion without qualification, please state the qualification.
6. Contain a statement that you understand your duty to the Court and that you have complied with that duty.
7. Be verified by signing and dating the Expert Declaration *[Appendix 3, Practice Direction on Expert Evidence in Clinical Negligence Cases]*
8. Provide a timetable for the provision of your advice.

*[Advise the expert of any dates of any Directions issued by the Judge, negotiations, mediation, court hearing, limitation dates as appropriate, any requirements for the attendance of experts at or the production of information by experts for any meetings, hearings or reviews, dates fixed by the Court or agreed between the parties for the exchange of expert reports, and any other relevant deadlines to be adhered to.]*

**Acceptance of instructions by expert**

*[Ask the expert to confirm, without delay, whether they have any knowledge of the parties involved in the matter and, if so, the extent of that knowledge; whether they have identified*

*any conflict of interest having had sight of the records; whether they accept their instructions; and when they will expect to furnish their report in the matter. If they are unable to complete their instruction, then the expert should make that clear immediately.]*

**Costs**

*[Ask the expert for an estimate of their fees to undertake their report and advise the expert not to commence work in the case until it is confirmed to them that authority has been granted to incur same.]*

*[If a fee estimate has already been agreed advise the expert of this authority, and that they must revert immediately if it becomes apparent that their fee estimate is likely to increase, such that consent can be secured from the relevant funder to incur same, before any further work is undertaken.]*

Yours sincerely

**Annex 4**

**IN THE COUNTY COURT OF NORTHERN IRELAND**

No:

Between:

**PLAINTIFF**

**AND**

**DEFENDANT**

# Guidelines on Experts Meetings in the Context of Clinical Negligence Litigation

1. Experts are referred to the Protocol for Clinical Negligence Litigation and Practice Direction for Experts.

2. Unless otherwise agreed by the parties, a detailed agenda (example at page 25) should be settled between the parties in advance of the expert meeting. Unless the parties agree otherwise, the agenda should be prepared by the plaintiff's lawyers (with or without expert assistance) and supplemented by the defendant's lawyers, if so advised, and mutually agreed. The agenda should consist of, as far as possible, closed questions; that is, questions which can be answered with "yes" or "no". Questions should be clearly stated and relate directly to the legal and factual issues in the case. Where there is a dispute or lack of agreement between the parties as to the agenda, then each party should set out those matters which it would wish discussed for responses from their respective expert.

3. The experts should be provided, in a timely manner in advance of the meeting, with the medical records and such expert opinion as has been exchanged. If any publications, materials research etc have been relied upon or are potentially going to be relied upon or are considered relevant then those materials should be provided in a timely manner in advance of the discussions unless already attached to the expert reports provided.

4. The experts should confirm their understanding that their primary duty is to

the court which takes priority over any duties owed to the party by whom they have been engaged. The experts recognise and accept the obligation to include and take account of any matter which might adversely affect the interest of the party on whose behalf they have been retained.

5. Where there is agreement between the experts on the issues raised and discussed, their joint conclusion/approach on those issues should be stated.

6. Where there is a dispute or lack of agreement between the experts, then each expert should set out his individual opinion and the grounds or basis for it. If any materials, publication, research etc have been relied upon then that should be stated clearly and the materials identified.

7. A formal document setting out the areas of agreement and disagreements shall be produced at the conclusion of the discussion and each expert shall confirm it as being a true and accurate account of the discussion. This document shall be made available to the parties as soon as possible thereafter. The minute should be agreed and signed by all the parties to the discussion at the conclusion of the meeting, and when this is not possible, the minute should be prepared as soon as possible after the meeting has concluded and within 7 days of the date of the experts' meeting. The minute must not be circulated to any party, including the parties' legal representatives, prior to it being agreed and signed by all of the experts present at the meeting.

8. In the event that any of the experts either separately or jointly identifies an issue which he considers relevant, and which is not referred to in the agenda, then that issue should be dealt with in a similar manner to the issues set out in the agenda and should be contained in the formal document referred to above.

9. In the event of disagreement, the experts should specify what action, if any, which may be taken to resolve the outstanding points of disagreement.

**AGENDA for Expert Discussion Between**

1.