ANNEX B INFORMATION GATHERING EXERCISE QUESTIONNAIRE

1. **Are the stated aims and purposes of the current voluntary pre-action protocols adequate to comply with the recommendations of the Scottish Civil Courts Review if made compulsory?** ***(Please tick as appropriate)***

☐ Yes ☒ No ☐ No Preference

Comments
The Voluntary Pre-Action Protocol was a useful first step toward improving pre litigation behaviour of civil litigants, however, practices now need to be governed by a more robust set of rules which provide a real sanction to both parties if not complied with. We consider the current review to be an opportunity to embrace technology to create a process to deliver a speedier and more cost effective outcome for all participants. The current voluntary protocol provides a framework of rules but fails to deliver any penalty to parties who do not follow its provisions. As a result, practitioners may select circumstances where they consider they (but perhaps not their client) may be better served by not following the protocol. In addition, a compulsory pre action protocol is required to create greater consistency between pre and post litigation procedures.

2. **If not, what changes, if any, should be made to the voluntary pre-action protocols to make them more effective in achieving their stated aims and purposes?**

Comments

We have experience of the civil litigation process in both Scotland and England & Wales. We have used the Ministry of Justice Portal to deal with personal injury claims valued at up to £25,000 in the England & Wales jurisdiction and find that the process works very well. We consider that an internet based portal similar to that operated by the Ministry of Justice in England & Wales could be a beneficial development for Scotland also.

We would envisage an electronic process, similar to the Ministry of Justice Portal operating as follows:

1. The Pursuer's representative intimates claim when they are ready to do so within the limitation period using electronic notification form where specified information must be provided;
2. The Defendant's representative must respond on liability with 15 working days for motor claims and 40 days for EL/PL claims;
3. Any liability admission made through the electronic process would be binding where the value of the claim is less than £25,000;
4. Where liability is denied, or contributory negligence alleged, the claim drops out of the electronic process and reverts to a set of rules similar to the current voluntary protocol but with sanctions for poor conduct;
5. Where liability is admitted, the Pursuer may take the time they require, again subject to limitation, to investigate liability and put together a settlement pack to include medical evidence and supporting documentation for any out of pocket losses and expenses which is then presented to the Defender along with the claimant's offer of settlement;
6. The Defender would then have 20 working days to consider the offer and accept it or make a counter offer;
7. Where the offer was not accepted and a counter offer made, there should be a further 15 working days permitted for negotiation;
8. Where agreement cannot be reached, both parties would submit their "best offer" along with supporting documentation to be referred for judicial review (on paper only) with a view to a determination on quantum being provided which would be binding on both parties.

We consider that the process outlines above could deliver significant efficiency savings on the current regime and may utilise less judicial time and resource.

We are of the view that only evidence produced while the claim is going through the electronic process may be presented for judicial review on quantum.

As part of the judicial review of evidence, the sheriff will have the ability to impose sanction for poor pre litigation conduct or behaviour that may have resulted in delayed settlement. In addition, the sheriff should have the ability to impose sanction where a party has inappropriately failed to enter into meaningful negotiation aimed at pre litigation settlement.

We consider that a fixed recoverable costs regime could be developed alongside the compulsory pre litigation procedure with a view to reducing costs overall. In line with the provisions of the recent Taylor Review on funding of civil litigation, qualified one way costs shifting could be implemented to remove the potential barrier of an adverse costs order preventing a Pursuer from seeking damages to which they have an entitlement.

The current voluntary pre action protocol promotes, but does not require, that parties enter into meaningful discussions with a view to settling claims without the need for litigation. The purpose of any pre action protocol should be to encourage parties to engage fully in pre litigation attempts to resolve the matter without litigation. Where parties fail to engage, there should be repercussions. For the Defender, this should entail an additional payment of 10% on Solatium to the Pursuer. For the Pursuer's agent, this should entail foregoing part or all of their entitlement to expenses.

A compulsory process, linked to real sanctions, and embracing technology that has become available would be a positive development for civil procedure in Scotland.

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

☒ Yes ☐ No ☐ No Preference

Comments
The compulsory pre action protocol should enshrine the Pursuer's entitlement to enter into the litigation process for themselves but also identify their right to seek appropriate legal advice at any stage.

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

☐ Yes.

☒ No. If not, what should the "cut off" threshold be?

☐ No Preference

Comments

We believe that where both parties are agreeable, higher value claims could be dealt with in accordance with the provisions of the protocol, however, some claims worth in excess of £25,000 may benefit from more in depth investigation, either in relation to liability or quantum, or judicial guidance to settle disputes that may arise.

We also believe that pre litigation offers should attract costs consequences, similar to post litigation tenders currently, to promote negotiation.

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

☐ Yes ☐ No ☒ No Preference

Comments
We have no experience of dealing with these types of claim and can offer no comment.

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

Comments
We have no experience of dealing with these types of claim and can offer no comment.

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

☐ Yes.
☐ No ☒ No Preference

Comments
We have no experience of dealing with these types of claim and can offer no comment.

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

Comments
N/A

9. **Are there are any issues relating to the operation of the Pre-action Protocol for the Resolution of Clinical Disputes in England and Wales that should be taken into account?**

☐ Yes ☐ No ☒ No Preference

Comments
We have no experience of dealing with these types of claim and can offer no comment.

10. **Should a new pre-action protocol regime be introduced in advance of the creation of the specialist Personal Injury Court? Please give reasons for your answer.**

☒ Yes ☐ No ☐ No Preference

Comments

We consider that a compulsory pre action protocol would be complemented by the creation of a specialist Personal Injury Court but that the protocol could smooth the creation of such forum to resolve disputes that cannot be settled pre litigation.

We have indicated at Question 1 above that we consider that a compulsory pre action protocol should create greater consistency between pre and post litigation conduct and, as such, consider that a compulsory pre action protocol must be put in place before the creation of a specialist court. Such development would ensure that appropriate pre litigation conduct occurred, allowing the court to build upon this foundation in resolving disputes quickly and efficiently where its input was required.

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

☒ Yes ☐ No ☐ No Preference

Comments

There have been varied results in awards of expenses where the voluntary pre action protocol has not been adhered to. We consider that different sheriffs deal with matters at their discretion and as a result, there is no consistency as regards awards.

Some cases where awards have been made are:

McIlvaney vs. Gordon, 2010

Brown vs. Sabre Insurance, 2013

Lawson vs. Sabre Insurance, 2013

We consider that all parties, both pursuers and defenders and their agents would benefit from a more consistent approach to clearly defined sanctions in relation to expenses. The creation of a compulsory pre action protocol is an opportunity to lay out what those sanctions could be.