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 aim is not achieved due to the voluntary nature of the current pre-action protocols. Neither party is obliged to comply with the protocol or enter into any meaningful negotiations prior to the commencement of litigation.

Weightmans supports the use of pre-action protocols and further agrees that such protocols should be mandatory to ensure compliance.

The voluntary pre-action protocols came into being in 2006 and have had a long period of bedding in. It was hoped that the voluntary pre-action protocols would see the parties work in a more constructive manner with a view to reducing the number of claims that litigate and thus free up some of the court's valuable time.

Unfortunately, whilst a number of the honest good have adhered to the nature and spirit of the protocols, a large number have not. As an insurer, Co-operative Insurance sees a large number of claims each year and a number of these claims are brought by firms who do not adhere to the voluntary pre-action protocols. Firms are serving documents at the wrong address meaning that compliance by the insurer is almost impossible and this is used as an excuse for not following the voluntary pre-action protocol.

Mandatory pre-action protocols have been in force in England and Wales for a number of years now and go someway to tempering unreasonable behaviour of the parties, encouraging a co-operative approach to dealing with injury claims. The mandatory pre-actions protocols will aid in the reduction of both costs and litigation.

We would also recommend that not only are the pre-actions protocols made mandatory, but an electronic method of communication is introduced as per the Low Value PI Protocol in England and Wales which sees the pre-action protocol managed via a computer system which has been in place since 2010. Claims have become streamlined, the conduct of the parties has become more reasonable on the whole and the number of claims proceeding to litigation under the protocol have significantly reduced with the claims settled at proportionate cost. This system is administered by CRIF Design Solutions Limited and we would recommend a demonstration.

In the present Voluntary Pre-Action Protocol in Scotland, where a Pursuer suffers a whiplash injury which lasts for say 3-4 months the settlement could be in the region of £1,600. The expenses would be £1,210 plus VAT and outlays, adding a medical report, the expenses are likely to be more than the damages.

In England and Wales, uinder the Low Value PI Protocol which applies to claims up to £25K in value, the same claim would see a fixed fee of £500 plus VAT (40% of the equivalent Scottish Fee) and outlays for a Road Traffic Accident or £900 plus VAT (74% of the equivalent Scottish Fee) and outlays for an Employers or Public Liability claim.

There should also be sanctions for non-compliance as there currently is in England and Wales.

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
Weightmans repeats it's answer in question 1.

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

☐ Yes ☒ No ☐ No Preference

Comments
In England and Wales, unrepresented claimants are unable to use the electronic portal through which the Low Value Pre-Action Protocol is administered. It is recommended that should Scotland adopt a similar process that unrepresented claimants are not excluded from the process. Further, the ABI has published a code of conduct for dealing with unrepresented claimants which allows them to obtain independent legal advice at any stage. We would recommend that this code is incorporated into any Scottish protocol to ensure that these potentially vulnerable class of claimants are protected.

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

Weightmans submits that the mandatory pre-action protocols should be limited to claims with a value of no more than £25K. Cases over £25K could be dealt with on a voluntary basis, however, mandatory inclusion could be difficult having regard to the complex nature of these claims.

We do however consider that the practice of pre-litigation offers to be treated as 'pre-litigation tenders' should be equally applied to claims exceeding the limits of the mandatory pre-action protocol.

Weightmans endorses the vie of the Forum of Insurance Lawyers in how such a protocol may work, namely:

- Claims dealt with over this level would require to be dealt with on a case by case basis and as a matter of agreement between the parties.

- We would consider the following as a good basis for negotiating settlement on higher value claims, and as a potential framework for a new voluntary pre-action protocol for claims over the above level:-

1. A period of three months from any letter of claim for the defender to admit or deny liability.
2. If there is any admission of liability (in whole or in part) the pursuer will provide the defender with a statement of valuation of claim that details each head of claim together with a valuation for each head of claim. There must be supporting vouching to support all heads of claim.
3. Upon receipt of the statement of valuation of claim (and all necessary vouching) the defender would have 20 working days to make a settlement offer. There would then be a period of 2 months for settlement discussions to take place between the parties. There should be a genuine attempt between the parties to settle the claim.
4. All pre-litigation offers ought to be treated as a "pre-litigation tender", with expenses consequences running from the date of that offer.
5. The consequences of breach should be severe so as to discourage unnecessary litigation and ensure that proper negotiations occur. We suggest:

(A) Breach by the defender entitles the pursuer to litigate without penalty.
(B) If the pursuer litigates in breach of the CPAP, the pursuer's agent's expenses will be reduced to nil;
(C) In the event of any other breach of the CPAP by the pursuer, the pursuer's agent's expenses shall be modified by 50%;
(D) In the case of unreasonable conduct by the pursuer or his/her agent, the defender will be entitled to recover the expenses of litigation.

5. Pre-litigation admissions of liability in claims worth over £25,000 ought not to be binding upon the defender.
6. We would propose that fees are dealt with on the same basis as the current Voluntary Pre-action Protocol scale.

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
Weightmans sees benefit in these types of claim being subject to a pre-action protocol, however, it is difficult at this stage to imagine how this would work. We would be willing to consult further on this matter if this was an area which was to be realistically explored.

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

Comments

Disease

Weightmans understand from the Forum of Insurance Lawyers and the Federation of Scottish Claims Managers that the Law Society's voluntary pre-action protocol for disease is currently underused, although there is increased use in deafness claims. In respect of asbestos, this is principally due to the existence of other agreed processes – namely:

(i) the Lord President's practice direction for pleural plaques actions in the Court of Session;
(ii) the pleural plaques framework agreement which sets down a range of figures for damages and costs; and
(iii) the mesothelioma arrangement which marries elements of the pleural plaques practice direction and the voluntary disease pre-action protocol but with increased document disclosure and scope for an interim payment.

These processes have successfully avoided litigation in the majority of cases. Although the practice direction covers only litigated Court of Session cases, our understanding is that parties are adhering to its terms in most pleural plaques claims. The practice direction currently has no end date but in any event, when the court reforms are implemented, it is probable pleural plaques claims will need to be raised in the Sheriff Court and so will not be covered by the practice direction. A compulsory protocol would avoid any issues arising from this and would help to ensure consistency and reduced litigation in all disease claims

Professional Negligence

Weightmans understand from the Forum of Insurance Lawyers and the Federation of Scottish Claims Managers that the Law Society's voluntary pre-action protocol for professional negligence claims is also underused. Most parties cite the complexity of professional negligence claims as the primary reason for its underuse. The current protocol should be revisited with a view to reducing the complexity of the claims allowing a degree of flexibility.

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

☒ Yes.
☐ No ☐ No Preference

Comments
Medical Negligence claims are complex by their very nature. A separate pre-action protocol would go someway to standardising these types of claim, again, with the aim of reducing costs and the burden upon the Court's time.

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

Comments
Weightmans believes that any medical negligence pre-action protocol should include the following provisions: 1. Early disclosure of medical and clinical records relating to the injury; 2. Rule surrounding the appointment of a medical expert ensuring independence and allowing both parties to jointly instruct where possible. The key being to drive the claim towards an early resolution.

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
The main issue is in relation to the exchange of information. This could be less adversarial in nature.

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
The pre-action protocol regime should be introduced in advance of the new Personal Injury Court to allow there to be sufficient cases for the new Court to hear. If they were launched at the same time, we would envisage a period of a few months before any cases became litigated, this would be a waste of the Court's valuable resources. Whilst we submit that they should be brought in at the same time, they should be staged to allow the claims to flow through the process efficiently and at minimum cost.

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

We have been made aware by the Federation of Scottish Claims Managers of a very wide range of results in the courts on the issue of expenses. This is perhaps not surprising in light of the fact that expenses are always at the sole discretion of the sheriff who hears the submissions.

Some insurers (and self-insuring bodies) who have not wanted to use the Voluntary Pre-Action Protocol ("VPAP") have been penalised for not following it (even when it is supposed to be voluntary). In other identical situations the same insurers have been fully vindicated in choosing not agree to the VPAP.

Different Courts and /or Sheriffdoms have taken different approaches.

Some of the main cases being:

McIlvaney v A Gordon & Co Ltd, 2010 CSOH 118

Thomson v Aviva, unreported, Livingston Sh Ct, 10 June 2010

Ewan Graham v Douglas Bain, unreported, Cupar Sh Ct, 17 Sept 2012

McDade v Skyfire , unreported, Glasgow Sh Ct, 21 August 2013

Ross Brown v Sabre Insurance Company, 2013 CSOH 51

Emma Lawson v Sabre Insurance Company, 2013 PD4/13

Greater certainty is required and a Compulsory Pre-Action Protocol with clear sanctions for non-compliance would give that greater certainty.