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 introduced in 2006 and as a first step to improve pre-litigation behaviour.

Since then developments in the legal landscape and advancements in technology create opportunities to introduce a more streamlined, proportionate and effective protocol to the benefit of the consumer and all stakeholders.

In recent years, our experience has been that the current voluntary protocols leave a distinct gulf between the pre-litigation behaviour and what occurs when a case litigates.

As insurers, we see cases litigate for reasons that are largely irrelevant to the facts of the case such as solicitors writing to incorrect or out of date addresses for an insurer and then litigating over the lack of response – we then see examples where the litigation papers also then go to the incorrect address and only then is the problem investigated and realised.

Essentially, the overriding objective should be that a Compulsory Pre-Action Protocol facilitates a genuine attempt by all parties to resolve the matter without resorting to litigation and where litigation cannot be avoided the process should promote a narrowing of the issue(s) to be dealt with in litigation.

A fundamental outcome for mandatory protocols should be a transparent process which encourages both sides to have an early exchange of information and evidence, to facilitate dialogue and agreement and create a compulsory legacy that can be used if the case litigates without parties starting the process afresh.

We have experience in other jurisdictions which have moved to more developed models.

This is a valuable opportunity to improve access to justice and speed of compensation for the injured innocent victim.

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

An electronic based procedure (similar to that used in England and Wales following the Ministry of Justice Reforms) would create efficiency savings for both Pursuers Solicitors and Defender Insurers alike whilst also speeding up liability decisions and compensation payments.

An electronic based portal would be used (by both sides) to:

Action	*Who carries out the action?*	*Timescale (working days)*
Intimate the claim with allegations and heads of claim	Pursuer	no timescale – within limitation period
Response on liability	Defender	Motor - 15 days, EL – 30 days and PL – 40 days
Submission of medical evidence and supporting evidence of all other heads of claim with a statement of valuation which would be acceptable to the Pursuer	Pursuer	no timescale – within limitation period
Consideration of evidence and response with counter offers	Defender	20 days
Negotiation period if required	Pursuer & Defender	15 days
If agreement is not reached, proceed to litigation on areas of disagreement – using the evidence already gathered	Pursuer	no timescale – within limitation period
The Sheriff should then be able to impose sanctions on either party who have displayed inappropriate behaviour or delayed settlement unfairly. All medical evidence obtained during this period must be disclosed pre-litigation NB: a Compulsory Pre-Action Protocol must compel parties to negotiate pre-litigation to be effective in implementation, otherwise there is always the temptation for either side to depart from the Protocol and it's aims		

There is a similar portal already in operation in England and Wales – here are the Pre-Action Protocols here:

Low Value Personal Injury claims in RTA:

http://www.justice.gov.uk/courts/procedure-rules/civil/protocol/pre-action-protocol-for-low-value-personal-injury-claims-in-road-traffic-accidents-31-july-2013

Low Value Personal Injury Claims (Employers & Public Liability):

http://www.justice.gov.uk/courts/procedure-rules/civil/protocol/pre-action-protocol-for-low-value-personal-injury-employers-liability-and-public-liability-claims

We would propose mirroring the limits in existence in England and Wales namely limiting the Compulsory Protocol to damages of £25,000 or less.

The operators of the current Ministry of Justice Portal, CRIF would be willing to provide a demonstration of what a web based portal could provide if appropriate.

To enable the Compulsory Pre-Action Protocol to meet the aim of settling cases without the need for litigation, a balance needs to be struck between remunerating the Pursuers Solicitor but at the same time, reducing the potential conflict of interest that is awarding expenses directly linked to the damages as a percentage of the settlement figure – expenses should be proportionate to the matter at hand.

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

In England and Wales, 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.

The current fixed costs in England and Wales are detailed overleaf:

Fixed costs in relation to the RTA Protocol			
Where the value of the claim for damages is not more than £10,000		**Where the value of the claim for damages is more than £10,000, but not more than £25,000**	
Stage 1 fixed costs *	£200	Stage 1 fixed costs *	£200
Stage 2 fixed costs **	£300	Stage 2 fixed costs **	£600
Total	£500	Total	£800
(Plus VAT and outlays)		(Plus VAT and outlays)	
The stages are cumulative with * Stage 1 being the investigation stage and ** Stage 2 being when medical evidence is submitted and offers are being made			

Fixed costs in relation to the EL/PL Protocol			
Where the value of the claim for damages is not more than £10,000		**Where the value of the claim for damages is more than £10,000, but not more than £25,000**	
Stage 1 fixed costs *	£300	Stage 1 fixed costs *	£300
Stage 2 fixed costs **	£600	Stage 2 fixed costs **	£1300
Total	£900	Total	£1600
(Plus VAT and outlays)		(Plus VAT and outlays)	
The stages are cumulative with * Stage 1 being the investigation stage and ** Stage 2 being when medical evidence is submitted and offers are being made			

For any Compulsory Pre-Action Protocol to work in practice, there should be sanctions on a party which fails to comply with the Protocol. This would prevent cases litigating without reason and also ensuring proper negotiations are occurring.

Firstly, to bridge the current gulf between what occurs pre and post litigation, all pre-litigation offers should be treated as 'pre-litigation tenders' with either expenses consequences running from the date of that offer or other financial consequences.

We would suggest the following:

1. Breach by Defender entitles the Pursuer to litigate without penalty

2. If the Pursuer litigates in breach of the Compulsory Pre-Action Protocol, their expenses should be modified to 'nil' (unless there are limitation issues)

3. If the Pursuer fails to subsequently beat a Defenders Pre-litigation offer, their litigation expenses should be modified to 'nil'

4. If a Pursuer beats a Defenders Pre-litigation offer, the Pursuers damages should be uplifted by 10%

5. In the case of unreasonable conduct by the pursuer and/or their agents, the defender will be entitled to recover the expenses of the litigation

6. Pre-litigation admissions of liability should be binding as long as the claim value remains under £25,000

7. Additional heads of claim added once the claim litigates should be at the Sheriff's discretion and in exceptional circumstances only

We consider that the practice of pre-litigation offers to be treated as 'pre-litigation tenders' would be equally applicable to claims exceeding the limits of the Compulsory Pre-Action Protocol.

Pre-litigation admissions of liability in claims worth more than £25,000 ought not to be binding upon the defender.

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

☒ Yes ☐ No ☐ No Preference

Comments

The ABI has a voluntary code of conduct for Insurers when dealing with unrepresented claimants:

https://www.abi.org.uk/~/media/Files/Documents/Publications/Public/Migrated/Motor/ABI%20code%20of%20practice%20-%20third%20party%20assistance.ashx

Such unrepresented claimants are free to seek legal advice or representation at any time.

It would be entirely possible to re-work the Voluntary code of conduct into a branch of the Pre-Action Protocol suitable for party litigants

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
Whilst higher value cases could be dealt with in the spirit of any Compulsory Pre-Action Protocol, it may be that such cases are too complex, require greater investigation or simply require the intervention of the courts to resolve areas of dispute. 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 Compulsory Pre-Action Protocol.

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

Mesothelioma is a devastating and unique condition which deserves to be treated as an exception to other industrial disease claims with its own separate protocol tailored to the specific needs of the sufferer and their families. The current voluntary disease protocol is not fully suited to handling of these claims.

It is recognised by all concerned that claims for mesothelioma are a 'special case' and there is a need for change and improvements in the claims handling process. In chief, there have been unnecessary delays in progressing claims to resolution during both pre-litigation and post-litigation. This has been due not only to the legal system itself but also the historical behaviour of parties on both sides. Procedural as well as cultural change is required.

A dedicated mesothelioma protocol would provide a speedier, standardised and structured process. A shorter timetable than in the current voluntary disease protocol would be required to enable settlement within a victim's limited lifetime.

Some insurers already participate in a voluntary arrangement which caters for a large majority of mesothelioma claims. This allows for a much shorter timetable with voluntary exchange of key information between the parties, leading to much earlier settlement and importantly, without the need for litigation. Significantly, there is early disclosure of a Pursuer's witness statement (not provided for in the voluntary disease protocol) and which is often vital for insurers to consider the scope and extent of any liability.

The success of this voluntary arrangement evidences the fact that the present process could be improved with a compulsory and dedicated mesothelioma protocol along similar lines, to the benefit of both Pursuers and Defenders.

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

Comments

Disappointingly, the voluntary industrial disease pre-action protocol is very rarely used but there are a considerable number of claims which are suitable for and would benefit from handling under the protocol.

A number of major insurers have developed in informal framework agreement with some of the leading Pursuer's Agents for the handling and settlement of pleural plaques claims. This encourages co-operative behaviour between the parties and early exchange of evidence allowing early decision making and progress to a much speedier settlement. This done without the need for costly and time consuming litigation. This supports the proposal that a suitably constructed but compulsory disease pre-action protocol would achieve similar benefits.

Success of the pleural plaques voluntary framework and voluntary mesothelioma arrangement show that a changed approach and different behaviours between the parties is possible but would need some compulsion of a pre-action protocol to have more wide-spread effect.

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

☐ Yes.
☐ No ☒ No Preference

Comments

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

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 view the introduction of a Compulsory Pre-Action Protocol as being first and foremost for the benefit of the injured claimant. As such, any progress we make in this area to streamline, simplify and enhance the process should be implemented at the earliest available opportunity.

This is required to dovetail into the Courts Reform Bill proposals to assist in the aim of freeing up court resource.

A Compulsory Pre-Action Protocol in the format we've envisaged would also be very important to successful implementation of Sheriff Principal Taylor's recommendations in his Cost and Funding of Civil Litigation Review.

It is important to recognise how a Compulsory Pre-Action Protocol would work as a component part of the current Courts Reform Bill and any legislation designed to enact Sheriff Principal Taylor's recommendations.

Our preference is to have a Compulsory Pre-Action Protocol which effectively prepares cases for the courts prior to litigation (with issues narrowed) and lends itself to lower value personal injury claims being suitable for the proposed simplified procedure to ensure that injured persons get access to justice, quicker resolution of their cases and proportionate use of resources expended by the parties throughout.

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 are aware 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.