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

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
While the stated aims and purposes of the VPAP are adequate, changes are required to make the protocol more effective. It is submitted that a compulsory protocol will require: • a compulsory period for negotiation, so that litigation after the first unacceptable offer is no longer protocol compliant; • longer timescales in which insurers require to make an offer in settlement following receipt of medical evidence in certain cases. The current 5 week period allowed under the VPAP is likely to be insufficient to allow investigation in higher value or more complex claims; • the option for parties to agree to extension of timescales; • a consistent approach by the courts to sanction for non compliance.

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

☐ Yes ☒ No ☐ No Preference

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

We agree in principle that a compulsory pre-action protocol should apply to higher value cases involving fatal or catastrophic injury. We recognise, however, that in practice it may be difficult for parties to strictly comply with the protocol due to the complex nature of high value claims. However in our view it would be preferable for high value claims to be included within the categories of cases to which the compulsory pre-action protocol is to apply, but with the proviso that the parties to the claim can mutually agree either that the particular claim will not be dealt with in terms of the compulsory protocol, or agree that required steps, or compliance with time limits, laid down in the compulsory protocol should be varied. Ultimately the purpose behind a compulsory pre-action protocol is to drive appropriate and reasonable behavior and that may be all the more important in higher value cases.

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

There are already separate voluntary protocols for personal injury claims and industrial disease claims. It is our view that there should be an additional protocol for mesothelioma.

Over the course of the last 10 years it has been recognised by everyone involved in the handling of asbestos related disease claims, and in particular mesothelioma claims, that there is a requirement for change. Historically there have been delays in dealing with claims at a pre-litigation stage as well as during litigation. These delays can be attributed to the civil justice system in Scotland, as well as the behaviours of the legal representatives on both sides of these claims.

The current voluntary disease protocol is not entirely suitable for the handling of mesothelioma claims. An informal arrangement is currently in place which deals with the vast majority of mesothelioma claims. This is perhaps less formal than a protocol, but does encourage the appropriate behaviour to ensure that the claimant's interests are at the centre of the mesothelioma claim. Expeditious exchange of information between parties allows for swifter settlement of claims and is capable of achieving settlement during the lifetime of the mesothelioma sufferer.

This arrangement is voluntary. It is not adopted by everyone involved in the handling of mesothelioma claims. There is no reason why this should not be the case. The introduction of a compulsory mesothelioma pre-action protocol would enable the benefits of the voluntary arrangement to be available in all mesothelioma claims. A protocol tailored to the particular circumstances of mesothelioma claims will ensure that the benefits seen by those participating in the voluntary arrangement can be rolled out across every mesothelioma claim.

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

Comments

In respect of the professional negligence protocol there has been very limited uptake due to the low threshold in place. Few pursuer agents seek its application.

The voluntary pre-action protocol for disease claims is also very rarely used. There are a large number of claims which could be dealt with under the protocol,

but are not.

One explanation for this is that pleural plaques claims are dealt with in terms of a framework agreement which was set up involving joint consultation with all parties involved in the handling of pleural plaques claims. This arrangement is, again, less formal than a protocol, but sets out the behavior to be adopted in the handling of pleural plaques claims and again encourages early exchange of information in order to allow the claim to progress to settlement. An appropriately worded disease pre-action protocol could achieve the same result.

Given the progress that has been made in the handling of pleural plaques and mesothelioma claims, there is no reason why similar progress cannot be made for all types of disease claim were a compulsory pre-action protocol to be put in place.

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

☒ Yes.
☐ No ☐ No Preference

Comments

First, a PAP for medical negligence would be of great assistance to provide for timely exchange of information, enhanced opportunity for resolution without litigation and the narrowing of areas of dispute when litigation proves necessary.

Secondly, timescales for investigation and in gathering reports can be longer in medical negligence claims. It would be appropriate to have timescales reflecting that and allowing for parties to extend the protocol timescales in appropriate circumstances.

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

Comments

1. Requirement for precise and detailed allegations in the letter of claim, with full chronology, description of injuries and heads of loss.
2. Requirement for disclosure of medical records.
3. Reasonable period for letter of response. Four months would be appropriate.
4. Option for parties to agree an extension to timescales.
5. Schedule of loss should be sufficiently detailed and accompanied by relevant

supporting material.

6. In light of the proposal to extend the prescriptive period to five years, the PAP should not act to suspend the passage of time.
   The English system can create a scattergun approach to allegations, causing a need for extensive investigation in a short period of time. Hence the need for detailed, focused allegations in the letter of claim.

   The English system can also result in very extensive costs being built up by claimants' solicitors at the protocol stage. Any Scottish PAP should provide for proper control and limitation upon expenses.

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 English system can create a scattergun approach to allegations, causing a need for extensive investigation in a short period of time. Hence the need for detailed, focused allegations in the letter of claim.

The English system can also result in very extensive costs being built up by claimants' solicitors at the protocol stage. Any Scottish PAP should provide for proper control and limitation upon expenses.

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 believe that any new Pre Action Protocol should be implemented as soon as it is reasonably practicable to do so. This would allow the new regime to bed in" prior to the establishment of the specialist Personal Injury Court. We hope this would then allow the new PI Court to be better placed to consider and review pre litigation behavior and practice, particular in the event it is asked to hear disputes arising out of the non compliance of the CPAP.

Assuming the CPAP is a success then we also consider that it should lead to the reduction in the volume of litigated PI claims which we hope may relieve the burden on any new PI Court. This should allow the new Court to deal only with cases that have to be litigated, not ones that are perhaps being raised prematurely or unnecessarily.

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 frequently instructed by insurance clients to run expenses arguments – particularly where there is evidence to suggest that the spirit of the Voluntary Pre Action Protocol has not been followed: we can argue that litigation has been raised prematurely or unnecessarily. In these circumstances it is often argued that the successful party should only be awarded restricted expenses. However we have found there is inconsistency in relation to judicial decisions determining the arguments, issued by either the Court of Session or Sheriff Court.

We are aware of variations in awards where a party can show that the Pre Action Protocol has not been adhered to and we can provide examples of particular cases if necessary. However, we would like to see a more consistent approach from the Bench and this ties in with our answer at question 10 – in the event the Specialist Personal Injury Court is created, that should help to address this matter.