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 first introduced in 2006 following negotiation between the Forum of Scottish Claims Managers and the Law Society of Scotland and was a tentative first step to guide pre-litigation conduct and behaviour.

The changes proposed in the Courts Reform (Scotland) Bill together with advancements in technology create an opportunity to introduce more forward thinking compulsory Pre-Action Protocols to complement and assist the changing legal landscape and make access to justice more accessible, proportionate and efficient.

The current voluntary protocols leave a distinct gap between pre-litigation behaviours and what occurs when a case litigates. On many occasions the case and evidence gathering starts again from the beginning when a case litigates rather than having a legacy body of evidence from the voluntary protocol upon which to progress the case.

Aviva sees examples of cases which litigate for reasons that are largely irrelevant to the facts of the case. An example being when solicitors frequently write to an incorrect or out of date address for an insurer and then litigate over the perceived lack of response. We even see examples where the litigation papers also then go to the incorrect address and only then are the problems investigated and realised.

We also see current behaviour where solicitors choose to comply with the current voluntary protocols on their own terms. One tactic we see frequently is the gaining of an early admission of liability (as the protocol encourages) and then litigating with little or no effort made to negotiate or find consensus as to quantum. We believe this is simply a tactic to maximise fee income rather than genuinely attempt to settle the claim pre-litigation.

Aviva has collected data on settlement of Employers and Public Liability cases settled since November 2012 to demonstrate this point. The data does not include any industrial disease or asbestos related claims and it should also be noted that the cases were not high value personal injury matters – in other words, these are exactly the cases that the Courts Reform Bill will be dealing with in the new personal injury Sheriff Court system.

We have produced a table of the top 10 by number of cases litigated which is contained at **Appendix 1** at the end of this document.

You will see from the table that the top firm chose to litigate on 36 out of 77 cases or 46.75% of the time – this should be seen in context of the overall totals for all cases where the average is that 14.59% of cases litigate.

We would submit that if the overriding objective of a Compulsory Pre-Action Protocol is to facilitate genuine attempts by all parties to resolve the matter efficiently and proportionately before resorting to litigation then this is simply not happening presently.

A key outcome for a compulsory protocol 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 legacy of evidence that can be used if the case litigates without parties starting the process anew.

To help provide context, we can share our experiences in other jurisdictions which have moved to a model which manages this transition.

We have a genuine opportunity at this point in time to truly improve access to justice and efficiency for the injured innocent victim in a proportionate way by making positive change to compliment the changing court system.

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 believe that an electronic "portal" based procedure (similar to that introduced in 2010 in England and Wales by the Ministry of Justice Reforms) would create efficiency savings for both Pursuers Solicitors and Defender Insurers alike.

It would also dramatically reduce the instances referred to in Answer 1 where we frequently see solicitors writing to incorrect or out of date addresses and litigating when they do not receive a response. An electronic based procedure would alleviate this problem entirely.

A portal based system with a framework of mandatory disclosure of evidence and fixed time scales for response would facilitate great improvement.

Aviva is fully supportive of the introduction in Scotland of a system similar to that currently operating successfully in England and Wales. In doing so we fully support the submission to the Personal Injury Committee proposed by the Forum of Scottish Claims Managers (in their response to the Pre-Action Protocol Information Gathering Exercise)

It is also of note that since the introduction of the RTA Portal and reductions in the legal costs payable due to the efficiency of this process England and Wales has seen the average fully comprehensive motor insurance premium fall by 14% since February 2012. [1]

To enable the Compulsory Pre-Action Protocol to meet the aim of settling cases without the need to resort to 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 damages 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 total expenses are likely to be more than the damages. This cannot be correct.

[1] http://blog.abi.org.uk/2014/05/licence-to-claim-five-reflections-on-laspo-and-where-were-going-on-whiplash-reform/

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 at **Appendix 2.**

The Ministry of Justice in England & Wales is currently consulting to improve the quality of medical evidence and fix the recoverable costs of medical reports in low value road traffic cases. We request the Scottish Civil Justice Council evaluate this reform equally.

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 (and encouraged) 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, we are of the opinion that such cases are too complex, require greater / more detailed investigation or simply require the intervention of the courts to resolve some 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. We are aware of the existence of a 'multi-track code' in England and Wales which could be relevant if there was a desire for a Compulsory Protocol on higher value claims: http://www.apil.org.uk/multi-track-code

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 are aware of a "disease protocol" in use in England and Wales and believe something similar could be introduced in Scotland. Anecdotal evidence from England and Wales is that this protocol works well, but is hampered by the lack of any fixed fee provision. As a result, insurers in England have seen a large upsurge in Noise Induced Hearing Loss claim intimations – many of which are never progressed past the intimation stage.

The Disease Protocol is detailed here:
http://www.justice.gov.uk/courts/procedure-rules/civil/protocol/prot_dis

We do believe there should be a separate protocol for mesothelioma claims.

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 main delay has been due to lack of information provided by Pursuer at an early stage. When dealing with events which happened 20+ years ago a defendant will often rely upon information provided by the pursuer upon which to base investigations. The provision of such evidence e.g. by way of precognition is often delayed.

Delays are in no-one's best interests.

To combat this, an informal arrangement has currently been agreed between defendant insurers and Pursuers' solicitors which rightly puts the mesothelioma sufferer and the family at the centre of the process. This is perhaps less formal than a protocol, but does encourage the appropriate behaviours.

This process targets an expeditious exchange of information between parties allows for swifter settlement of claims – aiming to achieve settlement during the lifetime of the mesothelioma sufferer.

Thus far there has been a significant reduction in the time taken to settle these claims using the informal arrangement. Claims which proceed under the arrangement are capable of settlement on average within five months of receipt of the letter of claim of the mesothelioma sufferer's solicitor. Prior to the introduction of the arrangement, the average time was twenty-two months.

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 our experience the voluntary pre-action protocol for disease claims is 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 behaviour 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.

As well as the framework agreement, discussions between the various stakeholders in the handling of pleural plaques claims also resulted in judicial involvement when the Lord President issued Practice Direction No. 2 of 2012.

This dealt with the backlog of pleural plaques claims which were sisted in the Court of Session. It also deals with new pleural plaques claims going forward. The claims handling process in terms of pleural plaques claims as set out in the Practice Direction mirrors the content of the Framework Agreement.

Both processes put the claimant at the centre of the system. There is no issue in relation to access to justice. The early exchange of information ensures swift settlement for the vast majority of cases. There is no reason why these informal arrangements should not be converted into mandatory protocols to ensure that the benefits are available to all.

This example shows where better links can be built between the pre and post litigation arenas.

An appropriately worded disease pre-action protocol could and should achieve the same results.

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

This is outwith our area of expertise

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 This is outwith our area of expertise

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 Court Reform Bill proposals to assist in the aim of freeing up court resource. A Compulsory Pre-Action Protocol in the format we have envisaged would also be very important to the 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 Court 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. This would lend itself to higher volume/lower value personal injury claims which are most suitable for the proposed simplified procedure. This will 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.

Appendix 1.

EL & PL accident Cases settled from November 2012 to January 2014 - not including high value claims or Industrial Disease/Asbestos related

Top 10 Table of Litigated cases	Not Litigated	Litigated	Grand Total	Percentage Litigated?	Percentage Not-Litigated?
Digby Brown	41	36	77	46.75%	53.25%
Thompsons Solicitors	59	18	77	23.38%	76.62%
Watermans Solicitors	30	8	38	21.05%	78.95%
Bonnar & Company	14	6	20	30.00%	70.00%
Brodies LLP	19	6	25	24.00%	76.00%
Russell Jones & Walker	11	5	16	31.25%	68.75%
Lawford Kidd	30	5	35	14.29%	85.71%
Thorntons Solicitors	55	5	60	8.33%	91.67%
Unrepresented Claimants	277	5	282	1.77%	98.23%
Lefevre Litigation	0	3	3	100.00%	0.00%
Overall Totals (not just including the top 10)	790	135	925	14.59%	85.41%

Appendix 2.

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