**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 has contributed towards improving parties' pre-litigation conduct. However, our view is that there is a need for a binding pre-action protocol which will compel parties to work towards a resolution of the action before litigation is necessary, where possible. At present, our experience is that the voluntary nature of the present protocol means that litigation is sometimes commenced by the Pursuer before the parties have had a realistic chance properly to explore settlement.<br><br>We believe that a compulsory pre-action protocol, allowing for an early exchange of information/evidence, will properly enable both sides in a dispute to gauge the strengths and weaknesses of their respective cases. This will enable substantive settlement negotiations, or at least a narrowing of the issues between the parties, to take place. The compulsory nature of the protocol would increase the chance of genuine negotiations toward settlement taking place because the parties would know that sanctions could be applied should they not engage properly with the protocol process.<br><br>Our experience of using the pre-action protocols in force in England and Wales is that these have contributed to the early settlement of claims without recourse to premature or unnecessary litigation and have kept the level of expenses lower than would have been the case had the claim been litigated. |

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 endorse the views of the Forum of Scottish Claims Managers in response to this question in general and have the following particular points to make:

**Electronic Portal** - Our view is that a system along the lines of the electronic "portal" set up in England and Wales which includes EL and PL claims as well as Motor up to a value of £25,000 would serve the best interests of parties to litigation in Scotland. It would put the onus on parties to make decisions regarding liability more quickly and will put the onus on the parties to enter into pre-litigation negotiations as a matter of course. We agree with the views of the Forum of Scottish Claims Managers with respect to this as well as its comments on the desirability of instituting a fixed-costs regime similar to that in force in England and Wales.

**Court sanctions** - It follows that, as the new protocol will be compulsory, the courts must be given powers to impose sanctions on parties which have deliberately ignored the protocol terms or provisions or have otherwise behaved unreasonably.

**Pre-litigation tenders** – The fact that binding tenders cannot be made pre-litigation is, in our view, a real bar to achieving settlements before proceedings are raised. We support the introduction of pre-litigation tenders which can be made by either party and which would have consequences in terms of expenses for a party which ignored a reasonable pre-litigation tender or failed to beat such a tender at proof.

**Pre-litigation settlement meetings** – In order for a compulsory pre-action protocol to be truly effective, there must be a provision compelling the parties to meet to discuss settlement, as a pre-litigation equivalent to the PTM. if one party refuses to take part or prepare for this then the court should have the power to impose expenses sanctions.

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

☒ Yes ☐ No ☐ No Preference

Comments

We refer to the ABI Code of Practice (CoP) for insurers when dealing with unrepresented Claimants and believe this works well in practice. Under the CoP, a party litigant is able to seek legal advice at any time. We, as an organisation, always actively encourage party litigants to do so.

We believe that the CoP could easily be incorporated into a new compulsory pre-action protocol.

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

There is no reason why, in our view, the terms of a compulsory pre-action protocol should not apply to all personal injury claims. The way in which a claim is dealt with, pre-litigation, should not necessarily be dictated by its expected value. The need for parties to exchange information, give early disclosure and be encouraged to work towards settlement as early as possible apply as much to higher value claims as to those with a lower value.

Claims which are very complex, need markedly more detailed investigation or otherwise require one or other of the parties to approach the courts for resolution of issues at an early stage may formally fall outside the scope of the protocol but the presumption should be that its terms will be observed so far as is possible even in this context.

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

Comment:

In our view, the use of a compulsory pre-action disease protocol along the lines of that used in England and Wales would be of benefit to the parties involved in disease claims in Scotland. Our experience is that this protocol does work but the absence of any fixed-fee provision along the lines of the personal injury protocol is something which has led to a marked increase in the number of Noise Induced Hearing Loss claims being made.

Link as follows: http://www.justice.gov.uk/courts/procedure-rules/civil/protocol/prot_dis

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

Comments

We have no information which would enable us to answer this question.

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

☐ Yes.
☐ No ☐ No Preference

Comments

We do not routinely deal with this type of claim.

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 do not routinely deal with this type of claim.

**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 purpose of the compulsory pre-action protocol is to make sure that those claims which are not capable of being settled are prepared properly for litigation and for those which are suitable for settlement are dealt with expeditiously and cost-effectively before litigation becomes necessary.

We believe that the instituting of a compulsory pre-action protocol need not be delayed until the setting-up of the specialist personal injury court. The effectiveness of the one is not a function of or dependent on the other.

**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 is, in our experience, little consistency from court to court in the awarding of judicial expenses dependent on whether or not the parties have observed the voluntary protocols. Our expectation is that a compulsory pre-action protocol will remove this inconsistency by setting out the criteria for the application of sanctions for non-compliance with its terms.