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)***

X Yes ☐ No ☐ No Preference

Comments We believe that the stated aims and purposes of the current voluntary pre-action protocols, whilst all differing slightly in language, are adequate to comply with the recommendations of the Scottish Civil Courts Review. Currently, the protocols all aim to encourage the exchange of information at an early stage with a view to facilitating settlement of cases without the need for recourse to litigation. That should continue to be the aim, with litigation still available to pursuers if necessary.

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

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

☐ Yes ☐ No X No Preference

Comments

4. Should a compulsory pre-action protocol apply to higher value cases involving fatal or catastrophic injury?

X Yes.

☐ No. If not, what should the "cut off" threshold be?

☐ No Preference

Comments
In principle, we agree that a pre-action protocol should apply to higher value cases involving fatal or catastrophic injury. However, we recognise that such cases can often be complex and involve the ingathering of extensive documentation to allow proper calculation of the value of these claims. Any timescales in a compulsory protocol would require to reflect the need to thoroughly investigate these issues.

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
It is necessary to maintain exceptions for these types of cases. Issues often arise due to the passage of time and the need to identify companies and insurers. Even when insurers are identified, often the timescales set down in the protocol are not adhered to by those insurers. By making the protocols compulsory and perhaps having sanctions for failure to comply, in the event that the cases require to be litigated would be appropriate.

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

Comments

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

X Yes.
☐ No ☐ No Preference

Comments
Whilst there exist protocols in relation to Personal Injury and Professional Negligence cases, no such protocol exists in relation to clinical negligence cases. It is our view that a protocol for such claims should be developed. Currently, such cases take significantly longer for a decision on liability to be reached or for settlement proposals to be forthcoming and often results in litigation. An earlier disclosure of evidence in relation to liability, causation and quantum would bring this in line with Chapter 42A requirements. Any pre-action protocol would aim to reduce unnecessary delays and reduce the need for cases to be litigated. Of those cases that required to be litigated, a clinical negligence protocol would ultimately reduce the time frame of litigation as expert reports are already available.

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

Comments
Any medical negligence protocol should, in our view, be similar to the protocol in professional negligence cases, encouraging early disclosure of the basis of the claim. There should also be clearly agreed timescales as presently, clinical negligence claim are generally subject to significant delays often resulting in litigation in an attempt to drive cases forward. There should also be an agreed scale of costs, adequate to reflect to the often complex nature of these types of claims.

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 X 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.**

X Yes ☐ No ☐ No Preference

Comments
It would make sense to put in place a new pre-action protocol in place prior to the introduction of the specialist Personal Injury Court. By doing so, it would hopefully shorten the time for a litigation to progress through the court.

11. Are you or your organisation aware of variations in awards of expenses where the pre-action protocol has not been adhered to?

X Yes ☐ No ☐ No Preference

Comments
We are aware of variations in awards of expenses where pre-action protocol has not been adhered to. There does not appear to be a consistent approach by the courts in dealing with the question of expenses in such cases. Examples of such cases are *Durie v Sabre Insurance*, Perth Sheriff Court, 27 June 201, *Brown v Sabre Insurance Company Limited* [2013] CSOH 51 and *Lawson v Sabre Insurance Company*, Peterhead Sheriff Court, 2 August 2013. In the first case, an action was raised as the defenders had refused to agree to the claim being conducted under the protocol. The sheriff held that the pursuer had acted reasonably in raising the action without first giving the defenders an opportunity to consider the medical report. In the second case, the sheriff held that the pursuer's agent was entitled to raise an action where the defender had refused to agree to the case being dealt with under the protocol. In the third case however, the sheriff restricted expenses to 40 per cent of the summary cause scale for failing to give the defenders an opportunity to consider the medical report, despite the defenders refusing to agree to dealing under the protocol, including paying protocol fees. A consistent approach is necessary.