

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

Whilst the stated aims and purposes of each of the current voluntary pre-action protocols slightly differ in their language and emphasis, it is clear that the core, common purposes and aims of all the protocols exist to:

- encourage the exchange of information and meaningful discussions about the claim between the parties at an early stage;
- promote the identification of the real issues in a dispute and once identified to focus on and narrow those issues;
- to facilitate the resolution and settlement of meritorious claims pre-litigation;
- save court time and expense being wasted on unnecessary litigation; and
- set out good practice.

We understand the SCCR, by making its recommendations in chapter 8, endorses the stated aims and purposes of the current voluntary pre-action protocols. We likewise endorse them and accordingly have answered this question in the affirmative.

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       No Preference

Comments

**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 pre-action protocol should apply to higher value cases involving fatal or catastrophic injury. However, compliance with a pre-action protocol is likely to considerably front-load the costs in these types of claims. We consider that regard ought to be had to the effect of this front-loading in practice where the person making the claim or their representative (“the claimant”) would be entitled to civil legal aid but not advice and assistance. In that situation it may be very difficult for the claimant to comply with a pre-litigation protocol which required him to obtain and produce the necessary reports to support his claim in full which may often include vocational, rehabilitation, actuarial, medical reports on quantum and care reports prior to the grant of a legal aid certificate.

**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

Yes. Our organisation’s members generally become involved in claims at or after the stage when they commence to be litigated. Accordingly as an organisation we do not have experience of the practical application of the protocols. However, we can foresee potential complications in certain types of disease claims particularly mesothelioma where a tension may exist between a need to raise proceedings quickly to preserve rights of a dying claimant (and to try to achieve a settlement for that claimant so that they may benefit from it while they are still alive) and the aims of the protocol. For that reason it may be appropriate for exceptions to be maintained in mesothelioma claims.

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

We are not in a position to respond to this question as we do not have sufficient first-hand knowledge of these protocols operating in practice to form a considered view.

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

Yes.

No

No Preference

Although we agree that in principle a pre-action protocol should apply to medical negligence cases our observations in Answer 4 apply here also.

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

In our view the key features for such a protocol should be very similar to those currently featuring in the voluntary pre-action protocol for professional negligence. Letters of claim should include the points described in the professional negligence protocol (at paragraph 2.2.1) and should also describe the patient's injuries, present condition and prognosis. Letters of response should also be as detailed as provided for by paragraph 2.5.2 of the professional negligence protocol so as to allow a defender to make clear that, for example, causation remains in issue albeit that fault is conceded.

9. Are there 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

We are of the view that this is a matter more appropriately to be commented on by those with experience of working with the protocols in practice.

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

Standing our support for compulsory pre-action protocols in principle, we consider that it would be best to introduce the regime as soon as reasonably practicable. Introduction of the regime in advance of the specialist Personal Injury Court should mean that only claims which truly require to be litigated are raised in the specialist PI court thereby preventing the PI court from being overburdened and allowing it to be more efficient.

**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

Reference is made to the case of *Ross Brown v Sabre Insurance Company Limited* [2013] CSOH 51 and *Emma Lawson v Sabre Insurance Company* (judgement of Sheriff Murray, Peterhead Sheriff Court on 2 August 2013)