CJC PAP Survey questions

Details and experience

1. **Your name**

2. **Your affiliation**

3. **Are you responding on behalf of an organisation?**

   Yes

   No

4. **Which PAP do you have the most experience with? We will assume your subsequent answers relates to this PAP unless you indicate otherwise (there are free text boxes where you can do this).**

   - Pre-action Protocol for Personal Injury Claims
   - Pre-action Protocol for the Resolution of Clinical Disputes
   - Pre-action Protocol for Disease and Illness Claims
   - Pre-action Protocol for Low Value Personal Injury (Employers' Liability and Public Liability) Claims
   - Pre-action Protocol for Low Value Personal Injury Claims in Road Traffic Accidents from 31 July 2013
   - Pre-action Protocol for Resolution of Package Travel Claims
   - Practice Direction – Pre-action Conduct and Protocols

5. **If you have experience with other PAPs, could you please list them here. (free text box)**

   Leave blank

Purpose of PAPs

6. **What do you think the primary purpose of PAPs are?**
   Options:
   - **Allows the parties to confirm there is a legal dispute between them**
   - **Narrow any issues in dispute between the parties**
   - **Promote cooperation between the parties**
   - **Reduce the overall costs of resolving the dispute**
   - **Ensure the parties engage in appropriate ADR methods to try to settle their dispute before going to court**
   - **To stop people with unmeritorious claims from going to court**
   - **To ensure strong claims are paid/settled without the need for litigation**
   - **Other**

7. **What do you think the subsidiary purposes of PAPs are?**
Same options as above – "other" has free text box

Other

We believe that the subsidiary purpose of pre-action protocols is creating a dialogue between the parties and to encourage the early exchange of information and documents. This allows for the parties to be able to progress the claim, particularly if the defendant makes a timely admission of liability as the parties can then move on to investigate quantum and explore settlement.

8. **To what extent do you think PAPs have achieved these objectives?**

Fully Successfully

Partially Successfully

They are sometimes counterproductive

Not at all

If you would like to elaborate on your answers, please do so here (free text box).

APIL would argue that the pre-action protocols are partially successful in achieving their objectives, however our views vary depending on the protocol.

The general view of our working group is that the clinical disputes and disease and illness protocols work well in narrowing the issues in dispute when correspondence between the parties is effective.

The low value road traffic accident (RTA) protocol has also been of some success because decisions are often made on liability quickly by defendants.

On the other hand, the low value employers' liability and public liability (EL/PL) protocol is less successful in achieving its objectives. We know from the figures in the portal that the majority fall out within Stage one[1] as defendants fail to respond to liability. APIL argues that these cases should have remained under the personal injury (PI) protocol, which works well. In order for this protocol to achieve its objectives, it requires a greater steer towards proportionate steps. For example, it requires further information regarding standard disclosure. This protocol also has restrictions due to the level of fixed costs which can prevent claimant representatives from being able to adequately investigate the claim.

[1] APIL analysis of Claims Portal Executive Dashboard data < https://www.claimsportal.org.uk/about/executive-dashboard/ > 51% of EL accident claims, 54% of EL disease claims and 65% of PL claims which settled or exited the portal in 2019 left at stage 1.

It is far too early to say whether the package travel protocol is successful in achieving its objectives. Due to the Covid-19 pandemic, there have been a limited number of new package travel claims due to the restrictions on travel, and therefore there is a relatively small sample of claims to consider in this review. Within this small sample however, we do know that there have been few cases where the defendant has complied with the protocol, specifically in relation to disclosure. APIL reiterates that due to this protocol being relatively new, it is challenging to say whether it is successful as a whole.

The common problem with the protocols is the defendants' failure to engage and co-operate/communicate with claimants. This results in the failure to acknowledge the issues in dispute and therefore failure in narrowing the issues, which is in APIL's opinion the main purpose of the pre-action protocols. Where there is co-operation on both sides the protocols are very successful.

9. What do you think the purpose of PAPs should be?

The purpose of the pre-action protocols is to create a dialogue between the parties to identify the issues in dispute with an aim to narrowing those issues. The purpose should also be to clarify the parties' expectations and highlight both acceptable behaviour and deadlines which should be met.

Fairness of PAPs

10. How burdensome are the requirements of PAPs?

Overly burdensome

About right

Too light

If you wish to elaborate on your answer, please do so here (free text box).

If the purpose of the protocols is to draw out and identify the issues in the case at a pre-issue stage, then that is the burden that we as claimants accept. That is the level of evidence that is required to prove our case to a sufficient standard. Having been involved in the low value clinical negligence discussions we know that the burden on claimants is a burden that defendants are often reluctant to accept, or at least reluctant to accept the costs associated with doing such work.

The requirements under the PI, disease and illness, and clinical disputes protocols are about right in our view in terms of the requirements that they impose on both claimants and defendants.

Package travel claims however are overly burdensome on the claimant due to the extensive disclosure requirement under the protocol, which makes it disproportionate for low value package travel cases.

11. Are PAPs fair to both prospective parties in the obligations they impose?

Yes

No

If you wish to elaborate on your answer, please do so here (free text box).

Although APIL's answer to this question is yes overall, the package travel protocol is an exception to this. The package travel protocol imposes far higher obligations on the claimant, especially in respect of disclosure. This creates an unfair balance of the obligations imposed on both parties as the protocol is far more onerous on the claimant.

12. Is there enough time to comply with PAP requirements, taking into account limitation periods?

Yes

No

If you wish to elaborate on your answer, please do so here (free text box).

Although our answer to this question is yes, we want to highlight that the two-year limitation period under the Athens Convention and the Montreal Convention means that the 6-month time limit for the defendant to respond on liability under the package travel protocol is too long. Once a response on liability is obtained, usually at the end of the protocol period, it allows very little time to obtain medical evidence and submit full details of the claim to the defendant for settlement before limitation becomes a concern. This should be reduced to 3 months in these cases in order to meet the limitation periods. This is specifically crucial for group actions where firms are representing a large number of claimants.

In disease and illness cases, there is generally enough time to comply with the protocol requirements, however it is crucial that claimants are able to issue proceedings sooner in urgent cases. Clause 2.7 of the protocol notes the importance of the ability to depart from the protocol where appropriate in cases of reduced life expectancy and it is crucial that this is retained, if not reinforced, in order to protect the rights of vulnerable, terminally ill claimants to access specialist court systems as soon as possible (notably the Asbestos List in the High Court).

In order to protect vulnerable claimants or those who lack capacity, it is important that the time given to comply with the clinical disputes protocol is not extended beyond four months. The defendant often requests an extension to comply with the protocol, which already provides a significant period in which to conduct preliminary investigations into liability. It is critical for claimants that the time limit to comply is not

extended to ensure that their case is being dealt with efficiently and to compensate them at the earliest opportunity rather than elongating a potentially distressing process.

The time to comply with the low value RTA protocol is about right and no extension of this should be required.

We remain of the view that the EL/PL protocol is unsuccessful in achieving its aims. Our preferred approach would be to have these cases dealt with by the PI protocol. If this is not considered appropriate, then the EL/PL protocol needs to be revised to ensure defendants are complying.

Costs and Funding

13. **Do you believe PAPs help resolve disputes at proportionate cost?**

    Yes

    Most of the time

    Some of the time

    No

    If you wish to elaborate on your answer, please do so here (free text box).

    This depends on the behaviours of the parties. If the parties comply with the requirements under the relevant protocol that will help resolve the dispute at proportionate cost. If, however, the defendant does not engage or comply with the terms of the protocol that conduct is likely to generate costs which may end up being not proportionate.

14. **Do PAPs have the effect of frontloading of costs in cases that are not resolved without reaching court? By "court" we mean the formal commencement of a claim in the civil courts. By "frontloading" we mean the incurring of additional costs that would have been avoided had the claim been directly issued in court.**

    Yes

    No

    If yes, are there ways frontloading might be avoided or minimised? (Free text box).

    Protocols, if complied with, are likely to avoid costs by narrowing the issues and so "frontloading", as defined in the question, is unlikely.

We refer to our comments above: If we accept that the purpose of the protocols is to draw out and identify the issues in the case at a pre-issue stage, then there is a significant amount of work that is required pre-issue in order to prepare the case for issue. Claimant representatives must ensure that the evidence presented is to a sufficient standard to prove their case. Therefore, if the 'frontloading' of costs is to be reviewed, the wider issue of what is required by the CPR will need to be considered.

Most of the requirements under the protocols are requirements that would also be required at some stage by the court rules. They also define what is best practice in a particular area of litigation. Pre-action protocols ensure that cases are not issued on a 'wing and a prayer'. That is beneficial to all involved. There will be circumstances where it is more proportionate to issue the case once the pre-action stages are complete. Litigation is a last resort but this is the step that we need to take.

The protocols outline the actions which the parties should be doing even if the protocol was not in place. APIL is therefore concerned with the reference to proportionality in the previous question because the costs incurred by progressing a claim are inevitable. Proportionality should not be in question. Proportionality is also case dependant. If the parties comply with the protocol, then costs will be proportionate.

Early admissions of liability and narrowing the issues in dispute at an early stage will also avoid "frontloading/additional" costs. Claimants do not intend to "frontload/incur additional" costs and specific effort is made to avoid it.

15. **Where costs are recoverable for complying with PAPs, do the costs fairly reflect the amount of work involved?**

Yes

No

N/A (costs not recoverable)

If you wish to elaborate on your answer, please do so here (free text box).

Assuming that this question is referring to those protocols where fixed costs attach, then the costs recoverable in the low value EL/PL protocol and in the low value RTA protocol do not fairly reflect the amount of work involved. These fairly reflected the amount of work when they were introduced 10 years ago, but the fixed costs are now out-dated. They also do not fairly reflect the amount of work involved due to the actions and behaviour of the defendant in the case. Defendants make the process less viable for claimants by over-complicating the claim and the requirements of the protocol, meaning that more claimant costs are incurred which the fixed recoverable costs do not cover (as these were not anticipated, and allowed for, when those costs were set).

In addition, fixed recoverable costs attached to the package travel protocol were based on the PL fixed recoverable costs. This fails to take into account the additional

work required in such claims, such as local standards, translation of evidence and additional disclosure requirements.

16. **If you are reliant on legal aid to cover compliance with PAPs, does this cover the cost of the work?**

    Yes

    No

    If you wish to elaborate on your answer, please do so here (free text box).

    In our sector, legal aid is still available for some birth injury cases. In our view the fees paid by the Legal Aid Agency for the work involved and the experts required are out of kilter with fees that experts charge. There is a mismatch between the fees paid and the level of work that is required to prove a client's claim. That said, the protocol reflects best practice[2]. In general, they work well to narrow the issues and resolve cases.

Suitability

17. **To what extent do you believe that PAPs are well adapted to the key issues in the litigation to which they relate?**

    Very well adapted

    Could be improved

    Not well adapted

    If you wish to elaborate on your answer, please do so here (free text box).

    We believe that the protocols are generally well adapted to the areas which they relate. The protocols reflect best practice in their particular field.

    We do have one major concern with the package travel protocol. It is not well adapted to those cases that involve Athens and Montreal Convention issues, previously highlighted, due to the limitation period of bringing one of these claims.

    APIL is concerned that the protocols do not deal effectively with lack of compliance with the protocol or poor behaviour by the parties. APIL reiterates the importance of creating a dialogue between the parties. However, where the defendant fails to comply it is rare that sanctions, referred to expressly in the protocols, are applied.

[2] *Carlson v Townsend* [2001] EWCA Civ 511 Brooke LJ '(the protocols) are guides to good litigation and pre-litigations practice, drafted and agreed by those who know all about the difference between good and bad practice'

Imposition of sanctions would encourage better pre-action conduct and help achieve the purposes of the protocols.

18. Are PAPs sufficiently flexible to meet the needs of the prospective parties?

Yes

No, more flexibility needed

If you wish to elaborate on your answer, please do so here (free text box).

APIL considers that the protocols are generally flexible. They give enough time to deal with the issues and take the pre-action steps. APIL deems it important that informal extensions and deadlines are agreed between the parties. However, it is crucial that the protocols are not made to be *too* flexible because the parties must have the ability to comply.

Clarity

19. Are PAPs clear in the obligations they impose (and don't impose)?

Yes

No

If you wish to elaborate on your answer, please do so here (free text box).

20. Are PAPs clear as to the sanctions that can be imposed for breaching them?

Yes

No

If you wish to elaborate on your answer, please do so here (free text box).

The sanctions which can be imposed are not always clear. So, for example, claimants may be forced to make a pre-action disclosure application to the court, which has a reverse costs burden. It is unfair that the claimant should have a costs burden due to the lack of cooperation from the defendant in complying with the protocol.

The low value RTA and EL/PL protocols do make it clear that as a result of non-compliance, the claimant may issue proceedings against the defendant. APIL suggests that this should be made clear in the other protocols. In addition, clear sanctions outlining the consequences of non-compliance should be set out within the individual protocols. Currently the courts appear reluctant to impose sanctions on defendants for non-compliance meaning poor practice, such as failure to engage, frequently occurs.

Although the sanctions are outlined in overarching provisions, the sanctions are available and claimant and defendant should be held to the same obligations to comply with the protocols.

Litigants in person

21. **To what extent do you consider PAPs to be comprehensive to litigants in person?**

    Very clear and easy to understand

    Some aspects are difficult to understand

    They are inaccessible

    If you wish to elaborate on your answer, please do so here (free text box).

    Pre-action protocols are useful for litigants in person because they provide an outline of the process, the deadlines they need to meet and what is required to pursue a personal injury or clinical negligence claim. It provides a step-by-step guide on what is required of them. They do not however emphasise or outline limitation periods which would need to be met.

    The terminology used is also not litigant in person friendly. The term 'pre-action protocol' may not make sense to a litigant in person and they would ultimately need to know that this is the document they need to commence a claim. Although pre-action protocols inform litigants in person what they need, for example – medical records/evidence, they do not inform them *how* to obtain such medical records/evidence.

    Essentially, pre-action protocols are written for legal professionals. They are not a toolkit on how to effectively run a claim.

22. **Do you believe that PAPs are easy to locate for litigants in person?**

    Yes

    No

    If you wish to elaborate on your answer, please do so here (free text box).

    As for the previous question, unless a litigant in person knows what to look for, they will be unlikely to come across a pre-action protocol on an initial search. For example, a litigant in person is unlikely to search 'pre-action protocol' on the internet. They are more likely to type something regarding compensation, personal injury or clinical negligence which will ultimately display law firms. It would therefore be easy for a litigant in person to locate a pre-action protocol if they knew what to search for or knew which websites to access.

It is also crucial to acknowledge that vulnerable litigants in person, such as disabled individuals or children, would struggle to access pre-action protocols and would require additional help to locate and comprehend them. In addition, some people do not have access to the internet. If an individual is unable to access the internet, it would be increasingly challenging to access and locate pre-action protocols.

Compliance and Enforcement

23. Do you believe prospective parties comply appropriately with PAPs?

Compliance is routine

Compliance is variable depending on the identity of the party and whether they are represented

There is often disagreement between the parties about whether they have complied

If you wish to expand on your answer, please do so here (free text box).

APIL argues that appropriate compliance with the protocols depends on the parties. We don't believe that there is often disagreement between the parties regarding non-compliance and it is more often down to how the parties interpret what is expected of the other. APIL also highlights that compliance is often a tick box exercise in the Directions Questionnaire, which is not discussed at a Case Management Conference with the judge.

24. Do you believe courts deal consistently with non-compliance with PAPs when making case management directions or imposing costs orders?

Yes

No

If you wish to elaborate on your answer, please do so here (free text box).

Although APIL has ticked yes to this question, we believe that the courts deal with non-compliance consistently, however the way in which they deal with it is *wrong*. When the defendant's non-compliance is raised as part of a Case Management Conference, judges fail to deal with it appropriately by imposing the sanctions which are available.

25. What do you believe should be the appropriate sanction for non-compliance with PAPs?

The sanctions which are already there, such as indemnity costs, should be imposed. Often the defendants in a case, especially in clinical negligence claims, do not

believe that the claimant will bring a successful claim and therefore do not worry about sanctions being imposed against them for non-compliance. Therefore, APIL argues that these sanctions should be imposed for poor behaviour and non-compliance regardless of the outcome of the claim. This would ensure that parties follow the pre-action protocol like they are supposed to due to the inevitability of sanctions being imposed for non-compliance.

In addition, withdrawing admissions of liability or raising issues which could have been raised sooner should result in sanctions such as striking out the defence. Although an extreme sanction, judges need to impose the same sanctions for the same non-compliance on either side. If stricter sanctions were imposed on defendants for non-compliance, to equal those that are imposed on claimants, it would incentivise defendants to cooperate in the pre-action stage.

Judicial Case Management

26. To what extent does compliance with PAPs lead to more efficient case management if litigation is necessary (eg. Through the narrowing of issues in dispute)?

A lot

A moderate amount

A little

None at all

If you wish to elaborate on your answer, please do so here (free text box).

Compliance with the protocols does go some way in leading to more efficient case management as long as both parties engage with the protocol to narrow the issues in dispute. However, if litigation is necessary, it is clear that the protocols have not been successful in dealing with the dispute. This means that robust case management is still necessary.

27. What more could be done to transfer the benefits of compliance with PAPs to judicial case management if litigation is necessary?

Imposing sanctions on parties with poor conduct. Conduct should be considered in further directions, case management and costs management. Sanctions should be imposed where a party has not complied with the pre-action protocol. This should be the same as sanctions imposed for failing to engage with Alternative Dispute Resolution.

Technology

28. What role should PAPs play in online dispute resolution?

APIL does not understand what this question is asking with reference to 'online dispute resolution'.

29. **Would it be desirable to incorporate PAPs into the steps built into online dispute resolution portals?**

Yes

No

If you wish to elaborate on your answer, please do so here (free text box).

We would like further clarification about what is intended here. We have concerns that putting the pre-action protocols online would significantly impede access to justice for vulnerable users, litigants in person and those who are unable to access the internet.

Priorities for reform

30. **Do you believe PAPs require reform?**

No reform required

Minor reforms would be desirable

Significant reforms required

Major reforms required

31. **What do you believe should be the priorities for reform?**

APIL believes there should be minor reforms to the pre-action protocols, however it is crucial that there is no departure from 20 years of clear practice which overall works well and reflects good litigation and pre-litigation practice[3].

The package travel protocol requires the most reform. This protocol is far too onerous on the claimant and the time limit to comply with the protocol is too long for Montreal and Athens Convention cases due to the reduced limitation period. APIL proposes that there should be specific provisions within the protocol that reduce the time limit to comply in those specific cases to meet the limitation periods. Apart from this, it is generally too early to say whether the package travel protocol works well due to the small sample of cases because of the travel restrictions over the past year.

[3] *Carlson v Townsend* [2001] EWCA Civ 511 Brooke LJ

The protocols require some minor updating. All protocols need to include electronic service to reflect the reality of 21st century litigation and in such unprecedented times which have forced practitioners to work remotely. This will also be a step forward in promoting efficiency across the profession. Updating is also required within the clinical disputes protocol to include new organisations such as the Healthcare Safety Investigations Branch and to ensure that parties can obtain disclosure from independent bodies.

More pressing is for the judiciary to deal with non-compliance with the protocols consistently well. Non-compliance with the protocols is one of the main issues for claimants in personal injury and clinical negligence cases because defendants fail to cooperate, engage and communicate to narrow the issues in dispute and attempt to settle cases pre-action. As previously mentioned, judges fail to discuss non-compliance at Case Management Conferences and impose sanctions. Sanctions are available and judges should use them to incentivise defendants to comply. If defendants complied with the protocols, more issues may be resolved pre-action through admissions of liability and disclosure. This is critical for the protocols to be more successful.

Final Observations

32. Are there any issues not raised above that you believe should be part of the CJC's review of PAPs?

Ultimately, the protocols reflect best practice and the only reforms in relation to the actual protocols are regarding updating. APIL reiterates that the main problem is the lack of sanctions imposed on parties who fail to comply with the protocols which incentivises defendants to not comply because they are aware that there will be no repercussions.

APIL suggests that greater consideration should be given to the Serious Injury Guide. This best practice Guide is designed to assist with the conduct of personal injury cases involving complex injuries, specifically cases with a potential value on a full liability basis of £250,000 and above and that are likely to involve a claim for an element of future continuing loss. The principles of the Guide are also suitable for lower value multi track cases[4]. It is the established method of achieving good practice.

We consider that the PI protocol should specifically state that it is not only suitable for fast-track cases, but also for multi-track cases, reflecting the judgment of Deputy Master Friston in *Scott v Ministry of Justice*[5] and the Court of Appeal in *Cable v Liverpool Victoria Insurance Company Limited [2020] EWCA Civ 1015*.

APIL is concerned that the onerous nature of the package travel protocol should not migrate into other pre-action protocols. As previously highlighted, the package travel protocol is *unfairly* onerous on claimants. It specifically relieves defendants of

[4] The Guide excludes clinical negligence and asbestos related disease cases.
[5] [2019] 12 WLUK 81

protocol obligations and requires more of claimants, which is against the spirit of the protocols.