

**PRE-ACTION
PROTOCOL**

**FOR PERSONAL
INJURY CLAIMS**

December 1998

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1

INTRODUCTION

- 1.1 | Lord Woolf in his final Access to Justice Report of July 1996 recommended the development of pre-action protocols:
- ‘To build on and increase the benefits of early but well informed settlement which genuinely satisfy both parties to dispute.’
- 1.2 The aims of pre-action protocols are:
- more pre-action contact between the parties
 - better and earlier exchange of information
 - better pre-action investigation by both sides
 - to put the parties in a position where they may be able to settle cases fairly and early without litigation
 - to enable proceedings to run to the court’s timetable and efficiently, if litigation does become necessary.
- 1.3 The concept of protocols is relevant to a range of initiatives for good litigation and pre-litigation practice, especially:
- predictability in the time needed for steps pre-proceedings
 - standardisation of relevant information, including documents to be disclosed.
- 1.4 The Courts will be able to treat the standards set in protocols as the normal reasonable approach to pre-action conduct. If proceedings are issued, it will be for the court to decide whether non-compliance with a protocol should merit adverse consequences. Guidance on the court’s likely approach will be given from time to time in practice directions.
- 1.5 If the court has to consider the question of compliance after proceedings have begun, it will not be concerned with minor infringements, e.g. failure by a short period to provide relevant information. One minor breach will not exempt the ‘innocent’ party from following the protocol. The court will look at the effect of non-compliance on the other party when deciding whether to impose sanctions.

2

NOTES OF GUIDANCE

- 2.1 | The protocol has been kept deliberately simple to promote ease of use and general acceptability. The notes of guidance which follow relate particularly to issues which arose during the piloting of the protocol.

SCOPE OF THE PROTOCOL

- 2.2 | This protocol is intended to apply to all claims which include a claim for personal injury and to the entirety of those claims: not only to the personal injury element of a claim which also includes, for instance, property damage.
- 2.3 This protocol is primarily designed for those road traffic, tripping and slipping and accident at work cases which include an element of personal injury with a value of less than £15,000 which are likely to be allocated to the fast track. This is because time will be of the essence, after proceedings are issued, especially for the defendant, if a case is to be ready for trial within 30 weeks of allocation. Also, proportionality of work and costs to the value of what is in dispute is particularly important in lower value claims. For some claims within the value 'scope' of the fast track some flexibility in the timescale of the protocol may be necessary, see also paragraph 3.8.
- 2.4 However, the 'cards on the table' approach advocated by the protocol is equally appropriate to some higher value claims. The spirit, if not the letter of the protocol, should still be followed for multi-track type claims. In accordance with the sense of the civil justice reforms, the court will expect to see the spirit of reasonable pre-action behaviour applied in all cases, regardless of the existence of a specific protocol.
- 2.5 The timetable and the arrangements for disclosing documents and obtaining expert evidence may need to be varied to suit the circumstances of the case. Where one or both parties consider the detail of the protocol is not appropriate to the case, and proceedings are subsequently issued, the court will expect an explanation as to why the protocol has not been followed, or has been varied.

EARLY NOTIFICATION

- 2.6 | The claimant's legal representative may wish to notify the defendant and/or his insurer as soon as they know a claim is likely to be made, but before they are able to send a detailed letter of claim, particularly for instance, when the defendant has no or limited knowledge of the incident giving rise to the

claim or where the claimant is incurring significant expenditure as a result of the accident which he hopes the defendant might pay for, in whole or in part. If the claimant's representative chooses to do this, it will not start the timetable for responding.

THE LETTER OF CLAIM

2.7

The specimen letter of claim at Annex A will usually be sent to the individual defendant. In practice, he/she may have no personal financial interest in the financial outcome of the claim/dispute because he/she is insured. Court imposed sanctions for non-compliance with the protocol may be ineffective against an insured. This is why the protocol emphasises the importance of passing the letter of claim to the insurer and the possibility that the insurance cover might be affected. If an insurer receives the letter of claim only after some delay by the insured, it would not be unreasonable for the insurer to ask the claimant for additional time to respond.

REASONS FOR EARLY ISSUE

2.8

The protocol recommends that a defendant be given three months to investigate and respond to a claim before proceedings are issued. This may not always be possible, particularly where a claimant only consults a solicitor close to the end of any relevant limitation period. In these circumstances, the claimant's solicitor should give as much notice of the intention to issue proceedings as is practicable and the parties should consider whether the court might be invited to extend time for service of the claimant's supporting documents and for service of any defence, or alternatively, to stay the proceedings while the recommended steps in the protocol are followed.

STATUS OF LETTERS OF CLAIM AND RESPONSE

2.9

Letters of claim and response are not intended to have the same status as a statement of case in proceedings. Matters may come to light as a result of investigation after the letter of claim has been sent, or after the defendant has responded, particularly if disclosure of documents takes place outside the recommended three-month period. These circumstances could mean that the 'pleaded' case of one or both parties is presented slightly differently than in the letter of claim and response. It would not be consistent with the spirit of the protocol for a party to 'take a point' on this in the proceedings, provided that there was no obvious intention by the party who changed their position to mislead the other party.

DISCLOSURE OF DOCUMENTS

2.10

The aim of the early disclosure of documents by the defendant is not to encourage 'fishing expeditions' by the claimant, but to promote an early

exchange of relevant information to help in clarifying or resolving issues in dispute. The claimant's solicitor can assist by identifying in the letter of claim or in a subsequent letter the particular categories of documents which they consider are relevant.

EXPERTS

- 2.11 | The protocol encourages joint selection of, and access to, experts. Most frequently this will apply to the medical expert, but on occasions also to liability experts, e.g. engineers. The protocol promotes the practice of the claimant obtaining a medical report, disclosing it to the defendant who then asks questions and/or agrees it and does not obtain his own report. But it maintains the flexibility for each party to obtain their own expert's report, if necessary after proceedings have commenced, with the leave of the court. It would also be for the court to decide whether the costs of more than one expert's report should be recoverable.
- 2.12 | Some solicitors choose to obtain medical reports through medical agencies, rather than directly from a specific doctor or hospital. The defendant's prior consent to the action should be sought and, if the defendant so requests, the agency should be asked to provide in advance the names of the doctor(s) whom they are considering instructing.

NEGOTIATIONS/SETTLEMENT

- 2.13 | Parties and their legal representatives are encouraged to enter into discussions and/or negotiations prior to starting proceedings. The protocol does not specify when or how this might be done but parties should bear in mind that the courts increasingly take the view that litigation should be a last resort, and that claims should not be issued prematurely when a settlement is in reasonable prospect.

STOCKTAKE

- 2.14 | Where a claim is not resolved when the protocol has been followed, the parties might wish to carry out a 'stocktake' of the issues in dispute, and the evidence that the court is likely to need to decide those issues, before proceedings are started. Where the defendant is insured and the pre-action steps have been conducted by the insurer, the insurer would normally be expected to nominate solicitors to act in the proceedings and the claimant's solicitor is recommended to invite the insurer to nominate solicitors to act in the proceedings and do so 7–14 days before the intended issue date.

3

THE PROTOCOL

LETTER OF CLAIM

- 3.1 The claimant shall send to the proposed defendant two copies of a letter of claim, immediately sufficient information is available to substantiate a realistic claim and before issues of quantum are addressed in detail. One copy of the letter is for the defendants, the second for passing on to his insurers.
- 3.2 The letter shall contain a **clear summary of the facts** on which the claim is based together with an indication of the **nature of any injuries** suffered and of **any financial loss incurred**.
- 3.3 Solicitors are recommended to use a **standard format** for such a letter – an example is at Annex A: this can be amended to suit the particular case.
- 3.4 The letter should ask for **details of the insurer** and that a copy should be sent by the proposed defendant to the insurer where appropriate. If the insurer is known, a copy shall be sent directly to the insurer.
- 3.5 **Sufficient information** should be given in order to enable the defendant's insurer/solicitor to commence investigations and at least put a broad valuation on the 'risk'.
- 3.6 The **defendant should reply within 21 calendar days** of the date of posting of the letter identifying the insurer (if any). If there has been no reply by the defendant or insurer within 21 days, the claimant will be entitled to issue proceedings.
- 3.7 The **defendant**(’s insurers) will have a **maximum of three months** from the date of acknowledgment of the claim **to investigate**. No later than the end of that period the defendant (insurer) shall reply, stating whether liability is denied and, if so, giving reasons for their denial of liability.
- 3.8 Where the accident occurred outside England and Wales and/or where the defendant is outside the jurisdiction, the time periods of 21 days and three months may reasonably be extended up to 42 days and six months.
- 3.9 Where **liability is admitted**, the presumption is that the defendant will be bound by this admission for all claims with a total value of up to £15,000.

DOCUMENTS

- 3.10 If the **defendant denies liability**, he should enclose with the letter of reply, **documents** in his possession which are **material to the issues** between the parties, and which would be likely to be ordered to be disclosed by the court, either on an application for pre-action disclosure, or on disclosure during proceedings.
- 3.11 Attached at Annex B are **specimen**, but non-exhaustive, **lists** of documents likely to be material in different types of claim. Where the claimant's investigation of the case is well advanced, the letter of claim could indicate which classes of documents are considered relevant for early disclosure. Alternatively these could be identified at a later stage.
- 3.12 Where the defendant admits primary liability, but alleges contributory negligence by the claimant, the defendant should give reasons supporting those allegations and disclose those documents from Annex B which are relevant to the issues in dispute. The claimant should respond to the allegations of contributory negligence before proceedings are issued.

SPECIAL DAMAGES

- 3.13 The claimant will send to the defendant as soon as practicable a Schedule of Special Damages with supporting documents, particularly where the defendant has admitted liability.

EXPERTS

- 3.14 Before any party instructs an expert he should give the other party a list of the **name(s)** of **one or more experts** in the relevant speciality whom he considers are suitable to instruct.
- 3.15 Where a medical expert is to be instructed the claimant's solicitor will organise access to relevant medical records – see specimen letter of instruction at Annex C.
- 3.16 **Within 14 days** the other party may indicate **an objection** to one or more of the named experts. The first party should then instruct a mutually acceptable expert.
- 3.17 If the second party objects to all the listed experts, the parties may then instruct **experts of their own choice**. It would be for the court to decide subsequently, if proceedings are issued, whether either party had acted unreasonably.
- 3.18 If the **second party does not object to an expert nominated**, he shall not be entitled to rely on his own expert evidence within that particular speciality unless:

- (a) the first party agrees,
- (b) the court so directs, or
- (c) the first party's expert report has been amended and the first party is not prepared to disclose the original report.

3.19 **Either party may send to an agreed expert written questions** on the report, relevant to the issues, via the first party's solicitors. The expert should send answers to the questions separately and directly to each party.

3.20 The cost of a report from an agreed expert will usually be paid by the instructing first party: the costs of the expert replying to questions will usually be borne by the party which asks the questions.

3.21 Where the defendant admits liability in whole or in part, before proceedings are issued, any medical report obtained by agreement under this protocol should be disclosed to the other party. The claimant should delay issuing proceedings for 21 days from disclosure of the report, to enable the parties to consider whether the claim is capable of settlement. The Civil Procedure Rules Part 36 permit claimants and defendants to make offers to settle pre-proceedings.

LETTER OF CLAIM

To

Defendant

Dear Sirs

Re: Claimant's full name
Claimant's full address
Claimant's National Insurance Number
Claimant's Date of Birth
Claimant's Clock or Works Number
Claimant's Employer (name and address)

We are instructed by the above named to claim damages in connection with *an accident at work/ road traffic accident / tripping accident* on _____ day _____ of _____ (year) at *(place of accident which must be sufficiently detailed to establish location)*

Please confirm the identity of your insurers. Please note that the insurers will need to see this letter as soon as possible and it may affect your insurance cover and/or the conduct of any subsequent legal proceedings if you do not send this letter to them.

The circumstances of the accident are:-
(brief outline)

The reason why we are alleging fault is:
(simple explanation e.g. defective machine, broken ground)

A description of our clients' injuries is as follows:-
(brief outline)

He is employed as *(occupation)* and has had the following time off work *(dates of absence)*. His approximate weekly income is *(insert if known)*.

If you are our client's employers, please provide us with the usual earnings details which will enable us to calculate his financial loss.

We are obtaining a police report and will let you have a copy of the same upon your undertaking to meet half the fee.

We have also sent a letter of claim to *(name and address)* and a copy of that letter is attached. We understand their insurers are *(name, address and claims number if known)*.

At this stage of our enquiries we would expect the documents contained in parts (*insert appropriate parts of standard disclosure list*) to be relevant to this action.

A copy of this letter is attached for you to send to your insurers. Finally we expect an acknowledgment of this letter within 21 days by yourselves or your insurers.

Yours faithfully

PRE-ACTION PERSONAL INJURY PROTOCOL

STANDARD DISCLOSURE LISTS

FAST TRACK DISCLOSURE

RTA CASES

SECTION A

In all cases where liability is at issue –

- (i) Documents identifying nature, extent and location of damage to defendant's vehicle where there is any dispute about point of impact.
- (ii) MOT certificate where relevant.
- (iii) Maintenance records where vehicle defect is alleged or it is alleged by defendant that there was an unforeseen defect which caused or contributed to the accident.

SECTION B

Accident involving commercial vehicle as potential defendant –

- (i) Tachograph charts or entry from individual control book.
- (ii) Maintenance and repair records required for operators' licence where vehicle defect is alleged or it is alleged by defendants that there was an unforeseen defect which caused or contributed to the accident.

SECTION C

Cases against local authorities where highway design defect is alleged.

- (i) Documents produced to comply with Section 39 of the Road Traffic Act 1988 in respect of the duty designed to promote road safety to include studies into road accidents in the relevant area and documents relating to measures recommended to prevent accidents in the relevant area.

HIGHWAY TRIPPING CLAIMS

Documents from Highway Authority for a period of 12 months prior to the accident –

- (i) Records of inspection for the relevant stretch of highway.
- (ii) Maintenance records including records of independent contractors working in relevant area.

- (iii) Records of the minutes of Highway Authority meetings where maintenance or repair policy has been discussed or decided.
- (iv) Records of complaints about the state of highways.
- (v) Records of other accidents which have occurred on the relevant stretch of highway.

WORKPLACE CLAIMS

- (i) Accident book entry.
- (ii) First aider report.
- (iii) Surgery record.
- (iv) Foreman/supervisor accident report.
- (v) Safety representatives accident report.
- (vi) RIDDOR report to HSE.
- (vii) Other communications between defendants and HSE.
- (viii) Minutes of Health and Safety Committee meeting(s) where accident/matter considered.
- (ix) Report to DSS.
- (x) Documents listed above relative to any previous accident/matter identified by the claimant and relied upon as proof of negligence.
- (xi) Earnings information where defendant is employer.

Documents produced to comply with requirements of the Management of Health and Safety at Work Regulations 1992 –

- (i) Pre-accident Risk Assessment required by Regulation 3.
- (ii) Post-accident Re-Assessment required by Regulation 3.
- (iii) Accident Investigation Report prepared in implementing the requirements of Regulations 4, 6 and 9.
- (iv) Health Surveillance Records in appropriate cases required by Regulation 5.
- (v) Information provided to employees under Regulation 8.
- (vi) Documents relating to the employees health and safety training required by Regulation 11.

WORKPLACE CLAIMS – DISCLOSURE WHERE SPECIFIC REGULATIONS APPLY

SECTION A – WORKPLACE (HEALTH SAFETY AND WELFARE) REGULATIONS 1992

- (i) Repair and maintenance records required by Regulation 5.
- (ii) Housekeeping records to comply with the requirements of Regulation 9.
- (iii) Hazard warning signs or notices to comply with Regulation 17 (Traffic Routes).

SECTION B – PROVISION AND USE OF WORK EQUIPMENT REGULATIONS 1992

- (i) Manufacturers' specifications and instructions in respect of relevant work equipment establishing its suitability to comply with Regulation 5.
- (ii) Maintenance log/maintenance records required to comply with Regulation 6.
- (iii) Documents providing information and instructions to employees to comply with Regulation 8.
- (iv) Documents provided to the employee in respect of training for use to comply with Regulation 9.
- (v) Any notice, sign or document relied upon as a defence to alleged breaches of Regulations 14 to 18 dealing with controls and control systems.
- (vi) Instruction/training documents issued to comply with the requirements of Regulation 22 insofar as it deals with maintenance operations where the machinery is not shut down.
- (vii) Copies of markings required to comply with Regulation 23.
- (viii) Copies of warnings required to comply with Regulation 24.

SECTION C – PERSONAL PROTECTIVE EQUIPMENT AT WORK REGULATIONS 1992

- (i) Documents relating to the assessment of the Personal Protective Equipment to comply with Regulation 6.
- (ii) Documents relating to the maintenance and replacement of Personal Protective Equipment to comply with Regulation 7.
- (iii) Record of maintenance procedures for Personal Protective Equipment to comply with Regulation 7.
- (iv) Records of tests and examinations of Personal Protective Equipment to comply with Regulation 7.

- (v) Documents providing information, instruction and training in relation to the Personal Protective Equipment to comply with Regulation 9.
- (vi) Instructions for use of Personal Protective Equipment to include the manufacturers' instructions to comply with Regulation 10.

SECTION D – MANUAL HANDLING OPERATIONS REGULATIONS 1992

- (i) Manual Handling Risk Assessment carried out to comply with the requirements of Regulation 4(1)(b)(i).
- (ii) Re-assessment carried out post-accident to comply with requirements of Regulation 4(1)(b)(i).
- (iii) Documents showing the information provided to the employee to give general indications related to the load and precise indications on the weight of the load and the heaviest side of the load if the centre of gravity was not positioned centrally to comply with Regulation 4(1)(b)(iii).
- (iv) Documents relating to training in respect of manual handling operations and training records.

SECTION E – HEALTH AND SAFETY (DISPLAY SCREEN EQUIPMENT) REGULATIONS 1992

- (i) Analysis of work stations to assess and reduce risks carried out to comply with the requirements of Regulation 2.
- (ii) Re-assessment of analysis of work stations to assess and reduce risks following development of symptoms by the claimant.
- (iii) Documents detailing the provision of training including training records to comply with the requirements of Regulation 6.
- (iv) Documents providing information to employees to comply with the requirements of Regulation 7.

SECTION F – CONTROL OF SUBSTANCES HAZARDOUS TO HEALTH REGULATIONS 1988

- (i) Risk assessment carried out to comply with the requirements of Regulation 6.
- (ii) Reviewed risk assessment carried out to comply with the requirements of Regulation 6.
- (iii) Copy labels from containers used for storage handling and disposal of carcinogenics to comply with the requirements of Regulation 7(2A)(h).

- (iv) Warning signs identifying designation of areas and installations which may be contaminated by carcinogenics to comply with the requirements of Regulation 7(2A)(h).
- (v) Documents relating to the assessment of the Personal Protective Equipment to comply with Regulation 7(3A).
- (vi) Documents relating to the maintenance and replacement of Personal Protective Equipment to comply with Regulation 7(3A).
- (vii) Record of maintenance procedures for Personal Protective Equipment to comply with Regulation 7(3A).
- (viii) Records of tests and examinations of Personal Protective Equipment to comply with Regulation 7(3A).
- (ix) Documents providing information, instruction and training in relation to the Personal Protective Equipment to comply with Regulation 7(3A).
- (x) Instructions for use of Personal Protective Equipment to include the manufacturers' instructions to comply with Regulation 7(3A).
- (xi) Air monitoring records for substances assigned a maximum exposure limit or occupational exposure standard to comply with the requirements of Regulation 7.
- (xii) Maintenance examination and test of control measures records to comply with Regulation 9.
- (xiii) Monitoring records to comply with the requirements of Regulation 10.
- (xiv) Health surveillance records to comply with the requirements of Regulation 11.
- (xv) Documents detailing information, instruction and training including training records for employees to comply with the requirements of Regulation 12.
- (xvi) Labels and Health and Safety data sheets supplied to the employers to comply with the CHIP Regulations.

SECTION G – CONSTRUCTION (DESIGN AND MANAGEMENT) REGULATIONS 1994

- (i) Notification of a project form (HSE F10) to comply with the requirements of Regulation 7.
- (ii) Health and Safety Plan to comply with requirements of Regulation 15.
- (iii) Health and Safety file to comply with the requirements of Regulations 12 and 14.
- (iv) Information and training records provided to comply with the requirements of Regulation 17.

- (v) Records of advice from and views of persons at work to comply with the requirements of Regulation 18.

SECTION H – PRESSURE SYSTEMS AND TRANSPORTABLE GAS CONTAINERS REGULATIONS 1989

- (i) Information and specimen markings provided to comply with the requirements of Regulation 5.
- (ii) Written statements specifying the safe operating limits of a system to comply with the requirements of Regulation 7.
- (iii) Copy of the written scheme of examination required to comply with the requirements of Regulation 8.
- (iv) Examination records required to comply with the requirements of Regulation 9.
- (v) Instructions provided for the use of operator to comply with Regulation 11.
- (vi) Records kept to comply with the requirements of Regulation 13.
- (vii) Records kept to comply with the requirements of Regulation 22.

SECTION I – LIFTING PLANT AND EQUIPMENT (RECORDS OF TEST AND EXAMINATION ETC.) REGULATIONS 1992

- (i) Record kept to comply with the requirements of Regulation 6.

SECTION J – THE NOISE AT WORK REGULATIONS 1989

- (i) Any risk assessment records required to comply with the requirements of Regulations 4 and 5.
- (ii) Manufacturers' literature in respect of all ear protection made available to claimant to comply with the requirements of Regulation 8.
- (iii) All documents provided to the employee for the provision of information to comply with Regulation 11.

SECTION K – CONSTRUCTION (HEAD PROTECTION) REGULATIONS 1989

- (i) Pre-accident assessment of head protection required to comply with Regulation 3(4).
- (ii) Post-accident re-assessment required to comply with Regulation 3(5).

SECTION L – THE CONSTRUCTION (GENERAL PROVISIONS) REGULATIONS 1961

- (i) Report prepared following inspections and examinations of excavations etc. to comply with the requirements of Regulation 9.
- (ii) Report prepared following inspections and examinations of work in cofferdams and caissons to comply with the requirements of Regulations 17 and 18.

N.B. Further Standard Discovery lists will be required prior to full implementation.

LETTER OF INSTRUCTION TO MEDICAL EXPERT

Dear Sir,

Re: *(Name and Address)*

D.O.B. –

Telephone No. –

Date of Accident –

We are acting for the above named in connection with injuries received in an accident which occurred on the above date. The main injuries appear to have been **(main injuries)**.

We should be obliged if you would examine our Client and let us have a full and detailed report dealing with any relevant pre-accident medical history, the injuries sustained, treatment received and present condition, dealing in particular with the capacity for work and giving a prognosis.

It is central to our assessment of the extent of our Client's injuries to establish the extent and duration of any continuing disability. Accordingly, in the prognosis section we would ask you to specifically comment on any areas of continuing complaint or disability or impact on daily living. If there is such continuing disability you should comment upon the level of suffering or inconvenience caused and, if you are able, give your view as to when or if the complaint or disability is likely to resolve.

Please send our Client an appointment direct for this purpose. Should you be able to offer a cancellation appointment please contact our Client direct. We confirm we will be responsible for your reasonable fees.

We are obtaining the notes and records from our Client's GP and Hospitals attended and will forward them to you when they are to hand/or please request the GP and Hospital records direct and advise that any invoice for the provision of these records should be forwarded to us.

In order to comply with Court Rules we would be grateful if you would insert above your signature a statement that the contents are true to the best of your knowledge and belief.

In order to avoid further correspondence we can confirm that on the evidence we have there is no reason to suspect we may be pursuing a claim against the hospital or its staff.

We look forward to receiving your report within _____ weeks. If you will not be able to prepare your report within this period please telephone us upon receipt of these instructions.

When acknowledging these instructions it would assist if you could give an estimate as to the likely time scale for the provision of your report and also an indication as to your fee.

Yours faithfully

PRE-ACTION
PROTOCOL FOR THE
RESOLUTION OF
CLINICAL DISPUTES

CLINICAL DISPUTES
FORUM

December 1998

