

PRE-ACTION
PROTOCOL FOR
DISEASE AND
ILLNESS CLAIMS

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INTRODUCTION

- 1.1 Lord Woolf in his final Access to Justice Report of July 1996 recommended the development of 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 these protocols are:
 - more contact between the parties
 - better and earlier exchange of information
 - better 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 claims practice, especially:
 - predictability in the time needed for steps to be taken
 - 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. 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.

SCOPE OF THE PROTOCOL

- 2.1 This protocol is intended to apply to all personal injury claims where the injury is not as the result of an accident but takes the form of an illness or disease.
- 2.2 This protocol covers disease claims which are likely to be complex and frequently not suitable for fast-track procedures even though they may fall within fast track limits. Disease for the purpose of this protocol primarily covers any illness physical or psychological, any disorder, ailment, affliction, complaint, malady, or derangement other than a physical or psychological injury solely caused by an accident or other similar single event.
- 2.3 This protocol is not limited to diseases occurring in the workplace but will embrace diseases occurring in other situations for example through occupation of premises or the use of products. It is not intended to cover those cases, which are dealt with as a 'group' or 'class' action.
- 2.4 The 'cards on the table' approach advocated by the personal injury protocol is equally appropriate to disease claims. The spirit of that protocol, and of the clinical negligence protocol is followed here, in accordance with the sense of the civil justice reforms.
- 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. If a party considers the detail of the protocol to be inappropriate they should communicate their reasons to all of the parties at that stage. If proceedings are subsequently issued, the court will expect an explanation as to why the protocol has not been followed, or has been varied. In a terminal disease claim with short life expectancy, for instance for a claimant who has a disease such as mesothelioma, the time scale of the protocol is likely to be too long. In such a claim, the claimant may not be able to follow the protocol and the defendant would be expected to treat the claim with urgency.

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THE AIMS OF THE PROTOCOL

- 3.1 | The *general* aims of the protocol are –
- to resolve as many disputes as possible without litigation;
 - where a claim cannot be resolved to identify the relevant issues which remain in dispute.
- 3.2 The *specific* objectives are –

OPENNESS

- to encourage early communication of the perceived problem between the parties or their insurers;
- to encourage employees to voice any concerns or worries about possible work related illness as soon as practicable;
- to encourage employers to develop systems of early reporting and investigation of suspected occupational health problems and to provide full and prompt explanations to concerned employees or former employees;
- to apply such principles to perceived problems outside the employer/employee relationship, for example occupiers of premises or land and producers of products;
- to ensure that sufficient information is disclosed by both parties to enable each to understand the other's perspective and case, and to encourage early resolution;

TIMELINESS

- to provide an early opportunity for employers (past or present) or their insurers to identify cases where an investigation is required and to carry out that investigation promptly;
- to encourage employers (past or present) or other defendants to involve and identify their insurers at an early stage;

- to ensure that all relevant records including health and personnel records are provided to employees (past or present) or their appointed representatives promptly on request, by any employer (past or present) or their insurers. This should be complied with to a realistic timetable;
- to ensure that relevant records which are in the claimant's possession are made available to the employers or their insurers by claimants or their advisers at an appropriate stage;
- to proceed on a reasonable timetable where a resolution is not achievable to lay the ground to enable litigation to proceed at a reasonable and proportionate cost, and to limit the matters in contention;
- to communicate promptly where any of the requested information is not available or does not exist;
- to discourage the prolonged pursuit of unmeritorious claims and the prolonged defence of meritorious claims.
- To encourage all parties, at the earliest possible stage, to disclose voluntarily any additional documents which will assist in resolving any issue.

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THE PROTOCOL

This protocol is not a comprehensive code governing all the steps in disease claims. Rather it attempts to set out **a code of good practice** which parties should follow.

OBTAINING OCCUPATIONAL RECORDS INCLUDING HEALTH RECORDS

- 4.1 In appropriate cases, a **potential claimant** may request Occupational Records including Health Records and Personnel Records before sending a Letter of Claim.
- 4.2 Any request for records by the **potential claimant** or his adviser should **provide sufficient information** to alert the **potential defendant** or his insurer where a possible disease claim is being investigated; Annex A1 provides a suggested form for this purpose for use in cases arising from employment. Similar forms can be prepared and used in other situations.
- 4.3 The copy records should be provided **within a maximum of 40 days** of the request at no cost. Although these will primarily be occupational records, it will be good practice for a **potential defendant** to disclose product data documents identified by a **potential claimant** at this stage which may resolve a causation issue.
- 4.4 In the rare circumstances that the **potential defendant** or his insurer is in difficulty in providing information quickly details should be given of what is being done to resolve it with a reasonable time estimate for doing so.
- 4.5 If the **potential defendant** or his insurer fails to provide the records including health records within 40 days and fails to comply with paragraph 4.4 above, the **potential claimant** or his adviser may then apply to the court for an **order for pre-action disclosure**. The Civil Procedure Rules make pre-action applications to the court easier. The court also has the power to impose costs sanctions for unreasonable delay in providing records.

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COMMUNICATION

- 5.1 | If either the **potential claimant** or his adviser considers **additional records are required from a third party**, such as records from previous employers or general practitioner records, in the first instance these should be requested by the **potential claimant** or their advisers. Third party record holders would be expected to co-operate. The Civil Procedure Rules enable parties to apply to the court for pre-action disclosure by third parties.
- 5.2 As soon as the records have been received and analysed, the **potential claimant** or his adviser should consider whether a claim should be made. General practitioner records will normally be obtained before a decision is reached.
- 5.3 If a decision is made not to proceed further at this stage against a party identified as a **potential defendant**, the **potential claimant** or his adviser should notify that **potential defendant** as soon as practicable.

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LETTER OF CLAIM

- 6.1 | Where a decision is made to make a claim, the claimant shall send to the proposed defendant two copies of a letter of claim, as soon as sufficient information is available to substantiate a realistic claim and before issues of quantum are addressed in detail. One copy is for the defendants, the second for passing on to his insurers.
- 6.2 This letter shall contain a **clear summary of the facts** on which the claim is based, including details of the illness alleged, and the **main allegations of fault**. It shall also give details of present condition and prognosis. The **financial loss** incurred by the claimant should be outlined. Where the case is funded by a conditional fee agreement, notification should be given of the existence of the agreement and where appropriate, that there is a success fee and insurance premium, although not the level of the success fee or premium.
- 6.3 Solicitors are recommended to use a **standard format** for such a letter – an example is at Annex B: this can be amended to suit the particular case, for example, if the client has rehabilitation needs these can also be detailed in the letter.
- 6.4 A **chronology** of the relevant events (e.g. dates or periods of exposure) should be provided. In the case of alleged occupational disease an appropriate employment history should also be provided, particularly if the claimant has been employed by a number of different employers and the illness in question has a long latency period.
- 6.5 The letter of claim should identify any **relevant documents**, including health records not already in the defendant's possession e.g. any relevant general practitioner records. These will need to be disclosed in confidence to the nominated insurance manager or solicitor representing the defendant following receipt of their letter of acknowledgement. Where the action is brought under the Law Reform Act 1934 or the Fatal Accidents Act 1976 then **relevant documents** will normally include copies of the death certificate, the post mortem report, the inquest depositions and if obtained by that date the grant of probate or letters of administration.
- 6.6 The letter of claim should indicate whether a claim is also being made against any **other potential defendant** and identify any known insurer involved.

- 6.7 Sufficient information should be given to enable the defendant's insurer/solicitor to commence **investigations** and at least to put a broad valuation on the 'risk'.
- 6.8 It is not a requirement for the claimant to provide **medical evidence** with the letter of claim, but the claimant may choose to do so in very many cases.
- 6.9 **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 or 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.
- 6.10 **Proceedings should not be issued until after three months from the date of acknowledgement** (see paragraph 7), unless there is a limitation problem and/or the claimant's position needs to be protected by early issue. (See paragraph 2.5)

THE RESPONSE

- 7.1 The defendant should **send an acknowledgement within 21 calendar days** of the date of posting of the letter of claim, identifying the liability insurer (if any) who will be dealing with the matter and, if necessary, identifying specifically any significant omissions from the Letter of Claim. If there has been no acknowledgement by the defendant or insurer within 21 days, the claimant will be entitled to issue proceedings.
- 7.2 The identity of all relevant insurers, if more than one, should be notified to the claimant by the insurer identified in the acknowledgement letter, within one calendar month of the date of that acknowledgement.
- 7.3 The defendant or his representative should, **within three months of the date of the acknowledgement letter**, provide a **reasoned answer**: –
- if the **claim is admitted**, they should say so in clear terms;
 - if only **part of the claim is admitted** they should make clear which issues of fault and/or causation and/or limitation are admitted and which remain in issue and why;
 - if the **claim is not admitted in full**, they should explain why and should, **for example**, include comments on the employment status of the claimant, (including job description(s) and details of the department(s) where the claimant worked), the allegations of fault, causation and of limitation, and if a synopsis or chronology of relevant events has been provided and is disputed, their version of those events;
 - if the **claim is not admitted in full**, the defendant should enclose with his 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. Reference can be made to the documents annexed to the personal injury protocol.
 - where more than one defendant receives a letter of claim, the timetable will be activated for each defendant by the date on the letter of claim addressed to them. If any defendant wishes to extend the timetable because the number of defendants will cause complications, they should seek agreement to a different timetable as soon as possible.
- 7.4 If the parties reach agreement on liability and/or causation, but time is needed to resolve other issues including the value of the claim, they should aim to agree a reasonable period.

- 7.5 Where it is not practicable for the defendant to complete his investigations within 3 months, the defendant should indicate the difficulties and outline the further time needed. Any request for an extension of time should be made, with reasons, as soon as the defendant becomes aware that an extension is needed and normally before the 3 month period has expired. Such an extension of time should be agreed in circumstances where reasonable justification has been shown. Lapse of many years since the circumstances giving rise to the claim does not, by itself, constitute reasonable justification for further time.
- 7.6 Where the relevant negligence occurred outside England and Wales and/or where the defendant is outside the jurisdiction, the time periods of 21 days and three months should normally be extended up to 42 days and six months.

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SPECIAL DAMAGES

- 8.1 | 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.

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EXPERTS

- 9.1 In disease claims expert opinions will usually be needed: –
- on knowledge, fault and causation;
 - on condition and prognosis;
 - to assist in valuing aspects of the claim.
- 9.2 The civil justice reforms and the Civil Procedure Rules encourage economy in the use of experts and a less adversarial expert culture. It is recognised that in disease claims, the parties and their advisers will require flexibility in their approach to expert evidence. Decisions on whether experts might be instructed jointly, and on whether reports might be disclosed sequentially or by exchange, should rest with the parties and their advisers. Sharing expert evidence may be appropriate on various issues including those relating to the value of the claim. However, this protocol does not attempt to be prescriptive on issues in relation to expert evidence.
- 9.3 Obtaining expert evidence will often be an expensive step and may take time, especially in specialised areas where there are limited numbers of suitable experts. Claimants, defendants and their advisers, will therefore need to consider carefully how best to obtain any necessary expert help quickly and cost-effectively.
- 9.4 The protocol recognises that a flexible approach must be adopted in the obtaining of medical reports in claims of this type. There will be very many occasions where the claimant will need to obtain a medical report before writing the letter of claim. In such cases the defendant will be entitled to obtain their own medical report. In some other instances it may be more appropriate to send the letter of claim before the medical report is obtained. Defendants will usually need to see a medical report before they can reach a view on causation.
- 9.5 Where the parties agree the nomination of a single expert is appropriate, 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. The parties are encouraged to agree the instruction of a single expert to deal with discrete areas such as cost of care.
- 9.6 **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. If the Claimant nominates an expert in the original letter of claim, the 14 days is in addition to the 21 days in paragraph 7.1.

- 9.7 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.
- 9.8 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:
- the first party agrees,
- the court so directs, or
- the first party's expert report has been amended and the first party is not prepared to disclose the original report.
- 9.9 **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.
- 9.10 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.
- 9.11 Where the defendant admits liability in whole or in part, before proceedings are issued, any medical report obtained under this protocol which **the claimant** relies upon, should be disclosed to the other party.
- 9.12 Where the defendant admits liability in whole or in part before proceedings are issued, any medical report obtained under this protocol which **the defendant** relies upon, should be disclosed to the claimant.

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RESOLUTION OF ISSUES

- 10.1 | The Civil Procedure Rules Part 36 enable claimants and defendants to make formal offers to settle before proceedings are started. Parties should consider making such an offer, since to do so often leads to settlement. If such an offer is made, the party making the offer must always supply sufficient evidence and/or information to enable the offer to be properly considered.
- 10.2 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.
- 10.3 Prior to proceedings it will be usual for all parties to disclose those expert reports relating to liability and causation upon which they propose to rely.
- 10.4 The claimant should delay issuing proceedings for 21 days from disclosure of reports to enable the parties to consider whether the claim is capable of settlement.
- 10.5 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 to do so 7-14 days before the intended issue date.

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LIMITATION

- 11.1 | If by reason of complying with any part of this protocol a claimant's claim may be time-barred under any provision of the Limitation Act 1980, or any other legislation which imposes a time limit for bringing an action, the claimant may commence proceedings without complying with this protocol. In such circumstances, a claimant who commences proceedings without complying with all, or any part, of this protocol may apply to the court on notice for directions as to the timetable and form of procedure to be adopted, at the same time as he requests the court to issue proceedings. The court will consider whether to order a stay of the whole or part of the proceedings pending compliance with this protocol.



LETTER REQUESTING OCCUPATIONAL RECORDS INCLUDING HEALTH RECORDS

LETTER REQUESTING OCCUPATIONAL RECORDS INCLUDING HEALTH RECORDS

Dear Sirs,

We are acting on behalf of the above-named who has developed the following **(insert disease)**. We are investigating whether this disease may have been caused: -

- ***during the course of his employment with you / name of employer if different***
- ***whilst at your premises at (address)***
- ***as a result of your product (name)***

We are writing this in accordance with the Protocol for Disease and Illness Claims

We seek the following records: -

(Insert details e.g. personnel / occupational health)

Please note your insurers may require you to advise them of this request.

We enclose a request form and expect to receive the records within 40 days.
If you are not able to comply with this request within this time, please advise us of the reason.

Yours faithfully

APPLICATION ON BEHALF OF A POTENTIAL CLAIMANT FOR USE WHERE A DISEASE CLAIM IS BEING INVESTIGATED

APPLICATION ON BEHALF OF A POTENTIAL CLAIMANT FOR USE WHERE A DISEASE CLAIM IS BEING INVESTIGATED

This should be completed as fully as possible

Company
Name
And
Address

1 a)	Full name of claimant (including previous surnames)	
b)	Address now	
c)	Address at date of termination of employment, if different	
d)	Date of birth (and death, if applicable)	
e)	National Insurance number, if available	
2	Department(s) where claimant worked	
3.	This application is made because the claimant is considering	
a)	a claim against you as detailed in para 4	YES/NO
b)	Pursuing an action against someone else	YES/NO
4	If the answer to Q3(a) is 'Yes' details of	
	a) the likely nature of the claim, eg dermatitis	
	b) grounds for the claim, eg exposure to chemical	
	c) approximate dates of the events involved	

5	If the answer to Q3(b) is 'Yes' insert	
	a) the names of the proposed defendants	
	b) have legal proceedings been started?	YES/NO
	c) if appropriate, details of the claim and action number	
6	Any other relevant information or documents requested	
	Signature of Solicitor	
	Name	
	Address	
	Ref.	
	Telephone Number	
	Fax number	
<p>I authorise you to disclose all of your records relating to me/the claimant to my solicitor and to your legal and insurance representatives.</p> <p>Signature of Claimant</p>		
<p>Signature of personal representative where claimant has died</p>		

TEMPLATE FOR LETTER OF CLAIM

TEMPLATE FOR 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 a claim for: - ***Specify occupational disease***

We are writing this letter in accordance with the pre-action protocol for disease and illness claims.

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

The Claimant was employed by you ***(if the claim arises out of public or occupiers' liability give appropriate details)*** as ***job description*** from ***date*** to ***date***. During the relevant period of his employment he worked: -
description of precisely where the Claimant worked and what he did to include a description of any machines used and details of any exposure to noise or substances

The circumstances leading to the development of this condition are as follows: -
Give chronology of events

The reason why we are alleging fault is: -
Details should be given of contemporary and comparable employees who have suffered from similar problems if known; any protective equipment provided; complaints; the supervisors concerned, if known.

Our client's employment history is attached.

We have also made a claim against: -
Insert details
Their insurers' details are: -
Insert if known

We have the following documents in support of our client's claim and will disclose these in confidence to your nominated insurance manager or solicitor when we receive their acknowledgement letter.

e.g. Occupational health notes; GP notes

We have obtained a medical report from (name) and will disclose this when we receive your acknowledgement of this letter.

(This is optional at this stage)

From the information we presently have: -

- (i) the Claimant first became aware of symptoms on (insert approximate date)***
- (ii) the Claimant first received medical advice about those symptoms on (insert date) (give details of advice given if appropriate)***
- (iii) the Claimant first believed that those symptoms might be due to exposure leading to this claim on (insert approximate date)***

A description of our client's condition is as follows: -

This should be sufficiently detailed to allow the Defendant to put a broad value on the claim

He has the following time off work: -

Insert dates

He is presently employed as a ***job description*** and his average net weekly income is £

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

Please note that we have entered into a conditional fee agreement with our client dated in relation to this claim which provides for a success fee within the meaning of section 58(2) of the Courts and Legal Services Act 1990. Our client has taken out an insurance policy dated with (name of insurance company) to which section 29 of the Access to Justice Act 1999 applies in respect of this claim.

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

Yours faithfully