
Pre-action Protocol for Defamation

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1 Introduction

- 1.1 Lord Irvine of Lairg, in his foreword to the Pre-Action Protocol for Personal Injury Claims identified the value of creating Pre-Action Protocols as a key part of the Civil Justice Reforms. He hoped that Pre-Action Protocols would set effective and enforceable standards for the efficient conduct of pre-action litigation.
- 1.2 Lord Irvine went on to state that –
The protocol aims to improve pre-action communication between the parties by establishing a timetable for the exchange of information relevant to the dispute and by setting standards for the content of correspondence. Compliance with the protocol will enable parties to make an informed judgement on the merits of their cases earlier than tends to happen today, because they will have earlier access to the information they need. This will provide every opportunity for improved communications between the parties designed to lead to an increase in the number of pre-action settlements.
- 1.3 It is against this background that a Pre-Action Protocol for Claims in Defamation is submitted. This Protocol is intended to encourage exchange of information between parties at an early stage and to provide a clear framework within which parties to a claim in defamation, acting in good faith, can explore the early and appropriate resolution of that claim.
- 1.4 There are important features which distinguish defamation claims from other areas of civil litigation, and these must be borne in mind when both applying, and reviewing the application of, the Pre-Action Protocol. In particular, time is always ‘of the essence’ in defamation claims; the limitation period is (uniquely) only 1 year, and almost invariably, a Claimant will be seeking an immediate correction and/or apology as part of the process of restoring his/her reputation.
- 1.5 This Pre-Action Protocol embraces the spirit of the reforms to the Civil Justice system envisaged by Lord Woolf, and now enacted in the Civil Procedure Rules. It aims to incorporate the concept of the overriding objective, as provided by the Rules at Part 1, before the commencement of any Court proceedings, namely:
dealing with a case justly includes, so far as is practicable:
 - ensuring that the parties are on an equal footing;
 - saving expense;

dealing with the case in ways which are proportionate:-

- to the amount of money involved;
- to the importance of the case;
- to the complexity of the issues; and
- to the financial position of each party;
- ensuring that it is dealt with expeditiously and fairly; and
- allotting to it an appropriate share of the Court's resources, while taking into account the need to allot resources to other cases.

2 Aims of the Protocol

2. ● This protocol aims to set out a code of good practice which parties should follow when litigation is being considered.
 - It encourages early communication of a claim.
 - It aims to encourage both parties to disclose sufficient information to enable each to understand the other's case and to promote the prospect of early resolution.
 - It sets a timetable for the exchange of information relevant to the dispute.
 - It sets standards for the content of correspondence.
 - It identifies options which either party might adopt to encourage settlement of the claim.
 - Should a claim proceed to litigation, the extent to which the protocol has been followed both in practice and in spirit by the parties will assist the Court in dealing with liability for costs and making other Orders.
 - Letters of claim and responses sent pursuant to this Protocol are not intended to have the same status as a Statement of Case in proceedings.
 - It aims to keep the costs of resolving disputes subject to this protocol proportionate.

3 Pre-action protocol

Letter of Claim

- 3.1 The Claimant should notify the Defendant of his/her claim in writing at the earliest reasonable opportunity.
- 3.2 The Letter of Claim should include the following information:-
 - name of Claimant;

- sufficient details to identify the publication or broadcast which contained the words complained of;
- the words complained of and, if known, the date of publication; where possible, a copy or transcript of the words complained of should be enclosed;
- factual inaccuracies or unsupportable comment within the words complained of; the Claimant should give a sufficient explanation to enable the Defendant to appreciate why the words are inaccurate or unsupportable;
- the nature of the remedies sought by the Claimant.
- Where relevant, the Letter of Claim should also include:-
- any facts or matters which make the Claimant identifiable from the words complained of;
- details of any special facts relevant to the interpretation of the words complained of and/or any particular damage caused by the words complained of.

3.3 It is desirable for the Claimant to identify in the Letter of Claim the meaning(s) he/she attributes to the words complained of.

Defendant's Response to Letter of Claim

3.4 The Defendant should provide a full response to the Letter of Claim as soon as reasonably possible. If the Defendant believes that he/she will be unable to respond within 14 days (or such shorter time limit as specified in the Letter of Claim), then he/she should specify the date by which he/she intends to respond.

3.5 The Response should include the following:-

- whether or to what extent the Claimant's claim is accepted, whether more information is required or whether it is rejected;
- if the claim is accepted in whole or in part, the Defendant should indicate which remedies it is willing to offer;
- if more information is required, then the Defendant should specify precisely what information is needed to enable the claim to be dealt with and why;
- if the claim is rejected, then the Defendant should explain the reasons why it is rejected, including a sufficient indication of any facts on which the Defendant is likely to rely in support of any substantive defence;
- It is desirable for the Defendant to include in the Response to the Letter of Claim the meaning(s) he/she attributes to the words complained of.

Proportionality of Costs

3.6 In formulating both the Letter of Claim and Response and in taking any subsequent steps, the parties should act reasonably to keep costs proportionate to the nature and gravity of the case and the stage the complaint has reached.

Alternative Dispute Resolution

3.7 Both the Claimant and Defendant will be expected by the Court to provide evidence that alternative means of resolving their dispute were considered. It is not practical in this protocol to address in detail how the parties might decide which method to adopt to resolve their particular dispute. However, summarised below are some of the options for resolving disputes without litigation.

- Determination by an independent third party (for example, a lawyer experienced in the field of defamation or an individual experienced in the subject matter of the claim) whose name and fees, along with the precise issues which are to be determined, will have been agreed by the parties in advance.
 - Mediation or any other form of Alternative Dispute Resolution.
- Arbitration (which does of course carry statutory implications)