

## PRACTICE DIRECTION

# PROTOCOLS

## GENERAL

- 1.1** This Practice Direction applies to the pre-action protocols which have been approved by the Head of Civil Justice.
- 1.2** The pre-action protocols which have been approved are set out in para 5.1. Other pre-action protocols may subsequently be added.
- 1.3** Pre-action protocols outline the steps parties should take to seek information from and to provide information to each other about a prospective legal claim.
- 1.4** The objectives of pre-action protocols are:
  - (1)** to encourage the exchange of early and full information about the prospective legal claim,
  - (2)** to enable parties to avoid litigation by agreeing a settlement of the claim before the commencement of proceedings,
  - (3)** to support the efficient management of proceedings where litigation cannot be avoided.

## COMPLIANCE WITH PROTOCOLS

- 2.1** The Civil Procedure Rules enable the court to take into account compliance or non-compliance with an applicable protocol when giving directions for the management of proceedings (see CPR rules 3.1(4) and (5) and 3.9(e)) and when making orders for costs (see CPR rule 44.3(a)).
- 2.2** The court will expect all parties to have complied in substance with the terms of an approved protocol.
- 2.3** If, in the opinion of the court, non-compliance has led to the commencement of proceedings which might otherwise not have needed to be commenced, or has led to costs being incurred in the proceedings that might otherwise not have been incurred, the orders the court may make include:
  - (1)** an order that the party at fault pay the costs of the proceedings, or part of those costs, of the other party or parties;
  - (2)** an order that the party at fault pay those costs on an indemnity basis;
  - (3)** if the party at fault is a claimant in whose favour an order for the payment of damages or some specified sum is subsequently made, an order depriving that party of interest on such sum and in respect of such period as may be specified, and/or awarding interest at a lower rate than that at which interest would otherwise have been awarded;
  - (4)** if the party at fault is a defendant and an order for the payment of damages or some specified sum is subsequently made in favour of the claimant, an order awarding interest on such sum and in respect of such period as may be specified at a higher rate, not exceeding 10% above base rate (cf. CPR rule 36.21(2)), than the rate at which interest would otherwise have been awarded.
- 2.4** The court will exercise its powers under paragraphs 2.1 and 2.3 with the object of placing the innocent party in no worse a position than he would have been in if the protocol had been complied with.

- 3.1** A claimant may be found to have failed to comply with a protocol by, for example:
- (a) not having provided sufficient information to the defendant, or
  - (b) not having followed the procedure required by the protocol to be followed (e.g. not having followed the medical expert instruction procedure set out in the Personal Injury Protocol).
- 3.2** A defendant may be found to have failed to comply with a protocol by, for example:
- (a) not making a preliminary response to the letter of claim within the time fixed for that purpose by the relevant protocol (21 days under the Personal Injury Protocol, 14 days under the Clinical Negligence Protocol),
  - (b) not making a full response within the time fixed for that purpose by the relevant protocol (3 months of the letter of claim under the Clinical Negligence Protocol, 3 months from the date of acknowledgement of the letter of claim under the Personal Injury Protocol),
  - (c) not disclosing documents required to be disclosed by the relevant protocol.
- 3.3** The court is likely to treat this practice direction as indicating the normal, reasonable way of dealing with disputes. If proceedings are issued and parties have not complied with this practice direction or a specific protocol, it will be for the court to decide whether sanctions should be applied.
- 3.4** The court is not likely to be concerned with minor infringements of the practice direction or protocols. The court is likely to look at the effect of non-compliance on the other party when deciding whether to impose sanctions.
- 3.5** This practice direction does not alter the statutory time limits for starting court proceedings. A claimant is required to start proceedings within those time limits and to adhere to subsequent time limits required by the rules or ordered by the court. If proceedings are for any reason started before the parties have followed the procedures in this practice direction, the parties are encouraged to agree to apply to the court for a stay of the proceedings while they follow the practice direction.

## PRE-ACTION BEHAVIOUR IN OTHER CASES

- 4.1** In cases not covered by any approved protocol, the court will expect the parties, in accordance with the overriding objective and the matters referred to in CPR 1.1(2)(a), (b) and (c), to act reasonably in exchanging information and documents relevant to the claim and generally in trying to avoid the necessity for the start of proceedings.
- 4.2** Parties to a potential dispute should follow a reasonable procedure, suitable to their particular circumstances, which is intended to avoid litigation. The procedure should not be regarded as a prelude to inevitable litigation. It should normally include –
- (a) the claimant writing to give details of the claim;
  - (b) the defendant acknowledging the claim letter promptly;
  - (c) the defendant giving within a reasonable time a detailed written response; and
  - (d) the parties conducting genuine and reasonable negotiations with a view to settling the claim economically and without court proceedings.
- 4.3** The claimant's letter should –
- (a) give sufficient concise details to enable the recipient to understand and investigate the claim without extensive further information;
  - (b) enclose copies of the essential documents which the claimant relies on;
  - (c) ask for a prompt acknowledgement of the letter, followed by a full written response within a reasonable stated period;

- (For many claims, a normal reasonable period for a full response may be one month.)
- (d) state whether court proceedings will be issued if the full response is not received within the stated period;
  - (e) identify and ask for copies of any essential documents, not in his possession, which the claimant wishes to see;
  - (f) state (if this is so) that the claimant wishes to enter into mediation or another alternative method of dispute resolution; and
  - (g) draw attention to the court's powers to impose sanctions for failure to comply with this practice direction and, if the recipient is likely to be unrepresented, enclose a copy of this practice direction.
- 4.4** The defendant should acknowledge the claimant's letter in writing within 21 days of receiving it. The acknowledgement should state when the defendant will give a full written response. If the time for this is longer than the period stated by the claimant, the defendant should give reasons why a longer period is needed.
- 4.5** The defendant's full written response should as appropriate –
- (a) accept the claim in whole or in part and make proposals for settlement; or
  - (b) state that the claim is not accepted.
- If the claim is accepted in part only, the response should make clear which part is accepted and which part is not accepted.
- 4.6** If the defendant does not accept the claim or part of it, the response should –
- (a) give detailed reasons why the claim is not accepted, identifying which of the claimant's contentions are accepted and which are in dispute;
  - (b) enclose copies of the essential documents which the defendant relies on;
  - (c) enclose copies of documents asked for by the claimant, or explain why they are not enclosed;
  - (d) identify and ask for copies of any further essential documents, not in his possession, which the defendant wishes to see; and
- (The claimant should provide these within a reasonably short time or explain in writing why he is not doing so.)
- (e) state whether the defendant is prepared to enter into mediation or another alternative method of dispute resolution.
- 4.7** The parties should consider whether some form of alternative dispute resolution procedure would be more suitable than litigation, and if so, endeavour to agree which form to adopt. Both the Claimant and Defendant may be required by the Court to provide evidence that alternative means of resolving their dispute were considered. The Courts take the view that litigation should be a last resort, and that claims should not be issued prematurely when a settlement is still actively being explored. Parties are warned that if the protocol is not followed (including this paragraph) then the Court must have regard to such conduct when determining costs.
- It is not practicable 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:
- Discussion and negotiation.
  - Early neutral evaluation by an independent third party (for example, a lawyer experienced in that field or an individual experienced in the subject matter of the claim).
  - Mediation – a form of facilitated negotiation assisted by an independent neutral party.
- The Legal Services Commission has published a booklet on 'Alternatives to Court', CLS Direct Information Leaflet 23 ([www.clsdirect.org.uk/legalhelp/leaflet23.jsp](http://www.clsdirect.org.uk/legalhelp/leaflet23.jsp)), which lists a number of organisations that provide alternative dispute resolution services.

It is expressly recognised that no party can or should be forced to mediate or enter into any form of ADR.

- 4.8** Documents disclosed by either party in accordance with this practice direction may not be used for any purpose other than resolving the dispute, unless the other party agrees.
- 4.9** The resolution of some claims, but by no means all, may need help from an expert. If an expert is needed, the parties should wherever possible and to save expense engage an agreed expert.
- 4.10** Parties should be aware that, if the matter proceeds to litigation, the court may not allow the use of an expert's report, and that the cost of it is not always recoverable.

## INFORMATION ABOUT FUNDING ARRANGEMENTS

- 4A.1** Where a person enters into a funding arrangement within the meaning of rule 43.2(1)(k) he should inform other potential parties to the claim that he has done so.
- 4A.2** Paragraph 4A.1 applies to all proceedings whether proceedings to which a pre-action protocol applies or otherwise.

(Rule 44.3B(1)(c) provides that a party may not recover any additional liability for any period in the proceedings during which he failed to provide information about a funding arrangement in accordance with a rule, practice direction or court order).

## COMMENCEMENT

- 5.1** The following table sets out the protocols currently in force, the date they came into force and their date of publication:

<i>Protocol</i>	<i>Coming into force</i>	<i>Publication</i>
Personal Injury	26 April 1999	January 1999
Clinical Negligence	26 April 1999	January 1999
Construction and Engineering Disputes	2 October 2000	September 2000
Defamation	2 October 2000	September 2000
Professional Negligence	16 July 2001	May 2001
Judicial Review	4 March 2002	3 December 2001
Disease and Illness	8th December 2003	September 2003
Housing Disrepair	8th December 2003	September 2003

- 5.2** The court will take compliance or non-compliance with a relevant protocol into account where the claim was started after the coming into force of that protocol but will not do so where the claim was started before that date.
- 5.3** Parties in a claim started after a relevant protocol came into force, who have, by work done before that date, achieved the objectives sought to be achieved by certain requirements of that protocol, need not take any further steps to comply with those requirements. They will not be considered to have not complied with the protocol for the purposes of paragraphs 2 and 3.

- 5.4** Parties in a claim started after a relevant protocol came into force, who have not been able to comply with any particular requirements of that protocol because the period of time between the publication date and the date of coming into force was too short, will not be considered to have not complied with the protocol for the purposes of paragraphs 2 and 3.

