

## Pre-action protocol for disease and illness claims



### Introduction

When the Civil Procedure Rules (CPR) were introduced on 26 April 1999, there was the promise that the pre-action protocol for personal injury claims would be the first of a number of other protocols including disease and illness claims. Lord Woolf recommended the development of pre-action protocols 'to build on and increase the benefits of early, but well informed, settlements which genuinely satisfy both parties to a dispute.'

The protocol relating to the pre-litigation handling of disease and illness claims was originally scheduled for implementation during 2001 but was subsequently deferred. This has received the approval of the Head of Civil Justice, and is effective 8 December 2003 and applies solely to England and Wales.

The protocols will have a major impact upon policyholders, who will need to consider how they will respond following implementation.

### Objectives and aims of the pre-action protocol for disease and illness claims

In line with the Personal Injury Protocol, the main objectives of this latest Protocol include:

- more pre-action contact and discussion between claimants and defendants (or their representatives)
- earlier exchange and provision of information and documentation
- better pre-action investigation by both parties to enable consideration to settle fairly and earlier without a need to litigate
- if litigation necessary, to ensure this is less complex, more efficient and timescale to be shorter
- providing predictability in the time needed for the various stages prior to proceedings and to standardise relevant information and what documentation needs to be disclosed.

The protocol main aims are to encourage an open approach to problems so that:

- there is early communication between the parties about perceived disease problems
- employees are encouraged to voice concerns about the possibility of work related illness
- employers will devise and develop systems of early reporting and investigation of suspected occupational health problems.

### Scope of the pre-action protocol for disease and illness claims

The protocol applies to:

- Personal injury claims where the injury is as a result of disease or illness. The protocol is not restricted to diseases occurring in the workplace but will embrace diseases occurring in other situations e.g. through occupation of a premises or by use of a product. The protocol will not apply to Group or Class Actions.

■ Disease, defined as :

*“any illness, physical or psychological, any disorder, ailment, affliction, complaint, malady or derangement other than physical or psychological injury solely caused by an accident or other single event.”*

## Practical application of the protocol

### Enquiry letter

A potential claimant (or more likely his legal adviser) may request from an employer occupational records, including health records and personnel files. The request for records should always include authority for their employers, the insurers and legal advisers to see the documents.

Any such request should provide sufficient information to alert the potential defendant to the possibility that a claim is being investigated and may be intimidated.

Records have to be provided within 40 calendar days at no cost to the potential claimant. Whilst such records will primarily be occupational records, the potential defendant is also expected to produce product data documents which have been identified by the potential claimant.

If the defendant experiences difficulty in providing information they should inform the potential claimant of the action they are taking to resolve such difficulties and set a reasonable time estimate or limit for the provision of such information.

Failure to provide the requested information/documentation within 40 calendar days, may result in the potential claimant applying to the Court for an Order to compel pre-action disclosure. The Court will have powers to impose cost sanctions for any unreasonable delays.

The potential claimant can also seek additional records from another party e.g. previous employer, General Practitioner all of whom will be expected to co-operate.

If the potential claimant decides not to pursue a claim against a potential defendant whilst they should notify that defendant, there is in fact nothing within the Protocol to compel the potential claimant to do so.

### Letter of claim

Where a decision is made to bring a claim, in line with the existing personal injury protocols, the claimant will send to the proposed defendant two copies of the letter of claim.

The letter should contain a clear summary of the facts, details of the illness/disease and the main allegations of fault. It must also contain details of the present medical condition and prognosis and an outline of the claimant's financial losses incurred to date.

A chronology of the relevant events e.g. dates or periods of alleged exposure linked to employment should be provided with an appropriate employment history (particularly if the claimant has been employed by a number of different employers) and the illness/disease has a long latency period.

The letter should identify any relevant documentation which might be disclosed.

Where the claim is funded by a conditional fee agreement, notification should be given of the existence of such an agreement.

The claimant is not obliged to provide medical evidence at this stage although may choose to do so.

### Response to the letter of claim

The defendant or insurer must reply within 21 calendar days of the date on which the letter of claim was posted and identify the insurer who will be co-ordinating the claim.

The co-ordinating insurer is expected to identify all other relevant insurers within one calendar month of the acknowledgement.

Within three calendar months from the date of acknowledgement of the letter of claim, the co-ordinating insurer must provide a reasoned answer stating if the claim is 1) admitted 2) in part only or 3) not admitted. As far as 2) and 3) are concerned full details and documentation must be provided.

Where more than one defendant receives a letter of claim, the timescales will be activated for each defendant by the date on the letter addressed to them.

Where any defendant believes their answer is dependent on the response of a co-defendant or more than one insurer, they must make this clear to the claimant and seek agreement that differing timescales will apply. Where it is not practical for the defendant to complete investigations within three calendar months the defendant should indicate the difficulties and outline the further time needed. This should be done as soon as the defendant becomes aware that an extension is needed and normally before the expiry of the three calendar month period. Reasonable justification has to be shown for such an extension. Lapse of years since the circumstances giving rise to the claim does not itself constitute reasonable justification for an extension of time.

### Use of experts

Expert evidence will usually be required on:

- knowledge, fault and causation
- condition and prognosis
- to assist in valuing aspects of the claim.

The CPR encourages economy in the use of experts and a less adversarial expert culture.

Where a single expert is agreed upon, the claimant will give the defendant a list of experts for agreement, who are considered to be suitable before any instructions are given. Any objections must be made within 14 calendar days.

If the listed experts are all rejected, each party will be free to instruct experts of their choice but it may be for the Court to decide whether or not each party had acted reasonably.

If the defendant does not object to a nominated expert they will not be entitled to rely upon evidence from their own expert unless the claimant agrees and the court so directs.

Either party may question the experts in writing via the claimants' solicitors.

The cost of the report will be borne by the claimant although costs levied by the expert in answering any questions will be met by the questioning party.

Where liability is admitted in part or whole, any medical report obtained under the protocol and relied upon by either the claimant or defendant should be disclosed before any Court proceedings are issued. The timescale is 21 calendar days following the disclosure of the report to enable the parties to consider whether the case is capable of settlement.

#### Variation to the timetable

For claims involving illness and disease there may be circumstances where it is necessary to vary the timetable to suit the individual claim, although in the event of proceedings being issued the Court may require an explanation as to why the protocol has been varied or not complied with. An example might be in a case of mesothelioma where the claimant's life expectancy is very short. Protocol timescales may be considered too long and the defendant would be expected to treat such a case with urgency.

#### Potential difficulties arising from the protocol

The protocols will apply to all illness and disease claims. Time and effort will have to be expended in investigating such claims regardless of seriousness or potential value.

The protocol appears to ignore the very real difficulties in tracing past insurer/company history particularly where the defendant, broker and insurer may have gone through various mergers or takeovers. Some companies may have ceased trading years ago. Only 21 calendar days are provided to identify the co-ordinating insurer from the date the letter of claim was posted and only one calendar month from the date of acknowledgement, in respect of other potential insurers.

The defendant only has three calendar months to decide upon liability whereas the claimant has up to three years to put his case together from the date of knowledge he is suffering from any illness or disease.

Appointment of single experts may not be appropriate for all disease claims.

It is possible that all relevant insurers may not be identified within the three month timescale.

#### Conclusion

Whilst there is no doubt that the existing protocols relating to non-illness and injury have proven to be workable and have achieved many of the aims and objectives outlined in Lord Woolf's recommendations in his report 'Access to Justice', the experience gained from such protocols do not appear to have taken into account the difficulties highlighted above. These difficulties will probably be resolved when the Courts look at the practicalities of compliance. As soon as an enquiry letter has been received it should immediately be copied to your usual Marsh claims handler, together with a copy of your reply to the potential claimants solicitors. Receipt of the enquiry letter will enable Marsh to commence the process whereby insurer history is determined, wherever possible, and for identified insurers to be notified.

Should a formal letter of claim be received this must be forwarded immediately, unanswered, to your usual Marsh claims handler.

If however you report your claims direct to insurers and these include disease and illness claims, it is important to respond immediately to the insurer(s) but also please copy in and discuss further with your local Marsh contact or nominated Claims Executive.

If you require to know more about the issues or wish to discuss your concerns, please contact your local Marsh office or Account Executive.

The pre-action protocol for disease and illness claims can be viewed by following this link:

[http://www.lcd.gov.uk/civil/procrules\\_fin/pdf/protocols/prot\\_dis.pdf](http://www.lcd.gov.uk/civil/procrules_fin/pdf/protocols/prot_dis.pdf)



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