PRE-ACTION PROTOCOLS UPDATE

Introduction

Revised and updated pre-action protocols came into effect on 6 April 2015 with little advance warning.

The terms of the updated protocols are important for practitioners, whether acting for claimants or defendants, as there are some important changes and the protocols now have the potential for added "teeth".

The most significant pre-action protocols for readers of the Journal of Personal injury Law are the Pre-Action Protocol for the Resolution of Clinical Disputes, the Pre-Action Protocol for Personal Injury Claims and the Pre-Action Protocol for Professional Negligence. This article will, accordingly, be confined to the terms of those updated protocols which will be considered in turn.

Pre-Action Protocol for the Resolution of Clinical Disputes

The original Pre-Action Protocol for the Resolution of Clinical Disputes (the "Clinical Negligence Protocol") was introduced in 1998 ahead of, and anticipating, the CPR.

The reason for the protocol was identified in paragraph 1.1 of that protocol which stated:

> "The number of complaints and claims against hospitals, GPs, dentists and private healthcare providers is growing as patients become more prepared to question the treatment they are given, to seek explanations of what happened, and to seek appropriate redress. Patients may require further treatment, an apology, assurances about future action, or compensation. These trends are unlikely to change. The Patients' Charter encourages patients to have high expectations, and a revised NHS Complaints Procedure was implemented in 1996. The civil justice reforms and new Rules of Court should make litigation quicker, more user-friendly and less expensive."

The protocol continued:

> "It is clearly in the interests of patients, healthcare professionals and providers that patients' concerns, complaints and claims arising from their treatment are resolved as quickly, efficiently and professionally as possible. A climate of mistrust and lack of openness can seriously damage the patient/clinician relationship, unnecessarily prolong disputes (especially litigation), and reduce the resources available for treating patients. It may also cause additional work for, and lower the morale of, healthcare professionals."

On this basis the protocol went on to observe:

> "If that mistrust is to be removed, and a more co-operative culture is to develop –
>
> - healthcare professionals and providers need to adopt a constructive approach to complaints and claims. They should accept that concerned patients are entitled to an explanation and an apology, if warranted, and to appropriate redress in the event of negligence. An overly defensive approach is not in the long-term interest of their main goal: patient care;
>
> - patients should recognise that unintended and/or unfortunate consequences of medical treatment can only be rectified if they are brought to the attention of the healthcare provider as soon as possible."

The protocol then set out a process, with timescales, which provided for disclosure of health records, obtaining expert evidence, a letter of claim and a response.

Subsequently, some minor modifications were made to the protocol, in particular extending time for the healthcare provider to respond to the letter of claim from 3 months to 4 months.

2015 Protocol

The updated Clinical Negligence Protocol came into effect on 6 April 2015. This version preserves the basic structure, and timescales, of the existing protocol but brings it up to date, reflecting other procedural changes, and makes some other modifications.

Whilst not changing the context in which the protocol was first introduced the updated version, sensibly, omits much of that background and focuses more on the detail of the information that should be exchanged between the parties.

Introduction

The scope of the protocol is confirmed by paragraph 1.1 which states:

> "This Protocol is intended to apply to all claims against hospitals, GPs, dentists and other healthcare providers (both NHS and private) which involve an injury that is alleged to be the result of clinical negligence."

The protocol still expressly recognises the parties, as patient and healthcare provider, may well have an ongoing relationship and hence paragraph 1.3 states:

> It is important that each party to a clinical dispute has sufficient information and understanding of the other's perspective and case to be able to investigate a claim efficiently and, where appropriate, to resolve it. This Protocol encourages a cards-on-the-table approach when something has gone wrong with a claimant's treatment or the claimant is dissatisfied with that treatment and/or the outcome.

It would appear that the word "perspective" was chosen to emphasise the importance of trying to clarify exactly what each party is actually trying to achieve (for example whether an apology and/or an explanation is going to be just as important as financial compensation) and to identify any misunderstandings that might prevent resolution (for example, a patient's interpretation of an entry in the medical records may be completely different to that of the clinician who wrote it)".

Objectives

Paragraph 2.2 identifies specific objectives of the protocol.

- Openness, transparency and early communication of perceived problems between patients and healthcare providers.

- To help healthcare providers identify whether notification of a notifiable safety incident has been, or should be, sent to the claimant in accordance with a duty of candour under Section 20 Health and Social Care Act 2008 (Regulated Activities) Regulations 2014.

- Prompt disclosure of information to encourage early resolution or narrowing of the issues in dispute so healthcare providers can identify cases whether an investigation is required and involve the NHSLA or relevant defence organisation at an early stage.

- Exploring mediation before issue of proceedings.

- Identifying issues that may require a preliminary hearing.

- Supporting efficient management of proceedings where litigation cannot be avoided.

- Discouraging the prolonged pursuit of unmeritorious claims.

- Discouraging the prolonged defence of meritorious claims.

- Promoting rehabilitation.

- Encouraging an early apology where appropriate.

Compliance and Sanctions

The protocol now expressly reflects the importance attached to compliance with its terms and deals with sanctions that may be imposed in the event of default.

Paragraph 1.4 confirms:

> "This Protocol is now regarded by the courts as setting the standard of normal reasonable pre-action conduct for the resolution of clinical disputes."

Consequently, paragraph 1.7 explains:

> "Where either party fails to comply with this Protocol, the court may impose sanctions. When deciding whether to do so, the court will look at whether the parties have complied in substance with the Protocol's relevant principles and requirements. It will also consider the effect any non-compliance has had on any other party. It is not likely to be concerned with minor or technical shortcomings (see paragraph 4.3 to 4.5 of the Practice Direction on Pre-Action Conduct)."

The express reference now made to the Practice Direction - Pre-Action Conduct makes that Practice Direction even more significant and, accordingly, its terms will be returned to later in this article.

Whilst paragraph 1.5 confirms the protocol "sets out the conduct that prospective parties would normally be expected to follow prior to the commencement of any proceedings", it is recognised that the timetable may need to be varied to suit the circumstances of the case. Consequently, the stages of the protocol, and associated timescales, need to be read with this in mind.

Records

The first stage of investigation remains the obtaining of health records by the patient.

The protocol now expressly provides that this stage may include a request for any relevant guidelines, analyses, protocols or policies and any documents created in relation

to an adverse incident, notifiable safety incident or complaint. This should avoid arguments that such documents are only subject to disclosure when that stage of any court proceedings is reached.

The spirit, if not the letter, of the revised protocol should also embrace any documents which relate to the duty of candour (under the terms of the Care Act 2014 and the Health and Social Care Act 2008 (Regulated Activities) Regulations 2014).

There is no change to the standard forms seeking records or the 40 day time limit.

The protocol, anticipating model directions given in most clinical negligence claims, now expressly provides, in paragraph 3.5, that:

> At the earliest opportunity, legible copies of the claimant's medical and other records should be placed in an indexed and paginated bundle by the claimant. This bundle should be kept up to date.

The protocol still requires the healthcare provider to explain quickly any problem in disclosure of records within 40 days but now goes on to state in paragraph 3.7 that:

> If the defendant fails to provide the health records or an explanation for any delay within 40 days, the claimant or their adviser can then apply to the court under rule 31.16 of the Civil Procedure Rules 1998 ('CPR') for an order for pre-action disclosure. The court has the power to impose costs sanctions for unreasonable delay in providing records.

Paragraph 3.8 deals with additional relevant health records required from a third party. These should be requested by the claimant. The protocol specifically provides that third party healthcare providers should cooperate and refers to Part 31.17 CPR where third party disclosure is required.

Other Information

Paragraph 3.4.2 confirms that the claimant may, in addition to seeking records, make a request under the Freedom of Information Act 2000.

Rehabilitation

The need to consider rehabilitation at the earliest opportunity is now expressly reflected in the protocol, at paragraph 3.9.

Accordingly, this protocol now reflects the importance attached to rehabilitation in the PI Protocol.

There is a link through to the Rehabilitation Code. That code is under review so the link will be updated with any revised version for continued ease of reference where the protocol is accessed electronically.

Letter of Notification

Paragraph 3.10 introduces a new stage to the protocol, the letter of notification.

The protocol gives guidance on the use and significance of any letter of notification.

- The letter is not mandatory but may be sent by the claimant on receipt of initial supportive expert evidence.

- As well as prompting an acknowledgement, within 14 days, identifying who will be dealing with the matter the sending of a letter of notification will require the defendant to consider whether to commence investigations and to pass any information to the claimant which might narrow the issues.

The advantage, to the claimant, of sending a letter of notification is that this may mean it is more difficult for the defendant to seek an extension of time, beyond 4 months from the letter of claim, if no initial investigation followed the letter of notification. For the defendant receipt of this letter is confirmation that this is a case which will require

resources to be deployed for the purposes of investigation, if that has not already been done.

A template letter of notification is found in annexe C to the protocol, confirming that only limited information will be provided at this stage.

Care may be required in the event the defendant makes an admission of liability in response to a letter of notification as, technically, that would not be a letter of claim for the purposes of Part 14.1A CPR.

Letter of Claim

The letter of claim remains an important stage of the protocol.

Paragraph 3.16 provides that the letter of claim should still contain:

- a clear summary of the facts (including alleged adverse outcome);
- the main allegations of negligence;
- a description of the claimant's injuries (and present condition and prognosis); and
- an outline of the financial loss incurred (with an indication of heads of damage and scale of loss unless impracticable).

Paragraph 3.16 now also provides that the letter of claim should confirm the method of funding and whether any funding arrangement was entered into before April 2013. This provision reflects legal aid regulations, if the claimant is legally aided, and the CPR and Costs Practice Direction as in force on 31 March 2013 (which still apply, under the transitional arrangements, to a claim funded by a "pre-commencement funding arrangement").

If the claim is funded by a conditional fee agreement made on or after 1 April 2013 but the claimant will seek to recover part of an ATE insurance premium, in accordance with

the Recovery of Costs Insurance Premiums in Clinical Negligence Proceedings (No 2) Regulations 2013, it may still be necessary for notice of funding to be given and that will, in any event, ensure the protocol is complied with.

Consequently, notice of issue or notice of funding, where appropriate, ought to suffice to comply with this requirement.

Usually, in other situations, it will not be necessary to give details of the funding arrangements made.

Paragraph 3.16 also stipulates the letter of claim should contain the discipline of any expert from whom evidence has already been obtained. It is notable this requires provision of the "discipline" not the "identity" of the expert. Relevant disciplines, at this stage, are likely to be those dealing with breach of duty and causation. Indeed, the claimant may have carried out only limited investigations into quantum at this stage which was accepted as appropriate, and amounting to compliance with the protocol, in Thompson –v- Bruce [2011] EWHC 2228 (QB).

Offers

Paragraph 3.21 confirms that at the stage of the letter of claim the claimant may want to make an offer to settle.

This paragraph now expressly contemplates an offer on liability as well as an offer to settle the whole claim. That reference to offers on liability in the protocol, and for such offers to be made under Part 36, endorses the view these are appropriate in clinical negligence claims, even though there may still be issues about causation, and that such offers should thus have potential for carrying the usual costs consequences. Consequently, it is surely inappropriate to treat any such offer as not being a genuine attempt to resolve the claim, so the consequences provided for by Part 36 would be "unjust", when expressly envisaged by the protocol.

In the event of an offer to settle the whole claim the protocol suggests that should generally be supported by a report dealing with condition and prognosis and a schedule

of loss with supporting documentation. The protocol recognises, however, such documentation should not be necessary where there is no significant continuing injury and/or the claim is of low value. That acknowledges the sense of providing an early letter of claim, with offer to settle, in a case of modest value, before significant costs have been incurred.

Whilst the protocol suggests possibly including any costs incurred to date care is necessary to ensure that such information, if given, is purely for clarification and not regarded as part of the offer, as that would then be a term on costs which might invalidate the offer under Part 36: Mitchell -v- James [2004] 1WLR 158; Shepherd Investments Ltd –v- Walters [2007] EWCA Civ 292.

Letter of Response

Paragraph 3.24 deals with the letter of response and identifies both timescale the matters that this letter should deal with.

- The letter should be sent within 4 months of the letter of claim.
- If the claim is admitted the response should say so in clear terms.
- If only part of the claim is admitted the letter should make clear which issues of breach of duty and/or causation are admitted and which are denied and why.
- The letter should state whether it is intended that any admissions will be binding.
- If the claim is denied the letter should include specific comments on the allegations of negligence and if a chronology of relevant events has been provided, and is disputed, the defendant's version of those events.
- If supportive expert evidence has been obtained the letter should identify which disciplines have been relied upon and whether they relate to breach of duty and/or causation.

- The letter should indicate whether the defendant requires copies of any relevant medical records obtained by the claimant.

- The defendant should provide with the letter copies of any additional documents relied on, such as an internal protocol.

- If the healthcare provider is not indemnified by the NHS the letter should give details of the relevant indemnity insurer.

- The letter should inform the claimant of any other potential defendants to the claim.

Consequently, there are some additional useful provisions, particularly that the defendant give information on expert evidence and relevant insurance cover.

The new protocol replicates the provision, in the 1998 protocol, that the response state whether it is intended that any admissions be binding. However, the original protocol pre-dated the amendment to the CPR when pre-action admissions were introduced by the new Part 14.1A. That provides admissions made in response to a letter of claim will be binding, unless the party to whom the admission was made agrees otherwise or the court gives permission for the admission to be withdrawn. The terms of the CPR should prevail where there is a "pre-action admission" for the purposes of Part 14.1A.

Paragraph 3.26 confirms, once again, that if the claimant has made an offer to settle the defendant should respond to that offer in the letter of response and may want to make an offer which it is envisaged will be in accordance with Part 36. There is, curiously, a reference to giving details of costs when, at least at this stage, such costs may not be recoverable. Nevertheless, as the protocol provides that this information be given, it may be sensible to ensure this is given in appropriate cases.

If an extension of time, to the 4 month period from the letter of claim, is required a request should be made as soon the defendant becomes aware that will be required, and in any event within 4 months.

Paragraph 3.27 allows the parties if they wish to explore the possibility of resolution with no admission on liability to agree a reasonable timescale for that to be investigated. There may be occasions when exploring settlement with no admission is appropriate but usually the claimant will want to see a decision on liability from the defendant to know how the case stands and to ensure that, where possible, this issue is disposed of. Accordingly, this provision may be of most significance in a low value claim where the focus is on early, and proportionate, resolution and a formal decision on liability may not be necessary for that purpose.

Paragraph 3.28 expressly provides that where no agreement is reached on liability the parties should discuss whether the claimant should start proceedings and the court be invited to direct an early trial of a preliminary issue whether that be breach of duty and/or causation. This appears to endorse the appropriateness of a split trial where liability is an issue in a clinical negligence claim.

Paragraph 3.29 states that, on receipt of the letter of response, if the claimant is aware there may be a delay of 6 months or more before deciding if, when and how to proceed then the claimant should keep the defendant informed generally.

Experts

Section 4 of the protocol deals with experts, recognising the need for expert evidence on a number of issues.

- Breach of duty.
- Causation.
- Condition and prognosis.
- Valuing aspects of the claim.

ADR

Section 5 of the protocol deals with ADR, identifying the need to consider a number of different potential methods which are listed.

- Discussion and negotiation.
- Mediation.
- Arbitration.
- Early neutral evaluation.
- Ombudsman schemes.

Paragraph 5.4 provides that if court proceedings are issued the parties may be required to provide evidence that ADR has been considered and that, whilst recognising a party cannot be forced to enter any form of ADR, silence in response to an invitation to participate in ADR may be considered unreasonable and lead to the court ordering that party to pay "additional court costs".

Stocktake

Section 6 is a new part of the protocol providing, in line with the PI Protocol, for a stocktake.

- The parties should review their positions before proceedings are issued.
- If proceedings cannot be avoided the parties should continue to co-operate and prepare a chronology of events identifying facts or issues that are agreed and those that remain in dispute as well as procedural directions for efficient case management.

The stocktake is a useful opportunity for the claimant to check that the defendant has complied with the protocol, and particularly the requirements found in paragraph 3.24 concerning the letter of response. If not, the claimant may wish to remind the defendant

about outstanding matters and of the potential consequences of failing to comply with the protocol under the terms of the Practice Direction – Pre-Action Conduct.

Wales

The protocol is part of the Law of England and Wales although, of course, the introduction of the Redress Scheme means that many Welsh claims will be dealt with in a different way to English claims.

What might be regarded as developing Welsh jurisprudence is not yet reflected in the protocol but may yet be dealt with by a future amendment.

The Pre-Action Protocol for Personal Injury Claims

The Pre-Action Protocol for Personal Injury Claims (the "PI Protocol"), like the Clinical Negligence Protocol, was introduced in 1998 anticipating the introduction of the CPR.

The protocol, as it originally read, had a number of key features including the following.

- A letter of claim, providing the defendant with information necessary to decide liability.
- A time limit for the defendant to make a decision on liability.
- Provision, where liability was admitted, for the defendant to be given information on quantum and then have a window in which to settle the claim, so as to avoid court proceedings.
- Clear timescales which if not met by the defendant would justify the claimant issuing court proceedings.
- Better provision of information, where liability was not admitted, so the claimant could properly assess the merits of any defence before incurring the costs of court proceedings, including reasons for any denial as well as any alternative case and the provision of documents relevant to liability.

- Joint selection of experts (reflecting the intention of the Practice Direction – Pre-Action Conduct that the parties should try to agree a single expert, even if not a joint expert, wherever possible).
- Encouragement towards ADR.

2015 Protocol

The revised PI Protocol, again effective from 6 April 2015, contains a number of important changes to the original protocol.

Linkage with the RTA Protocol and the EL/PL Protocol

The PI Protocol remains significant even with the subsequent introduction of the portal protocols, namely the RTA Protocol and the EL/PL Protocol. These new protocols are collectively now described in the PI Protocol as the "low value protocols" (although it is important to remember where claims start will not just depend on value but also the type of claim).

Claims may enter the PI Protocol in a number of ways.

- Claims which enter, but then leave, a low value protocol will usually go into the PI Protocol.
- Claims which might be suitable for a low value protocol in terms of value but are otherwise excluded will enter the PI Protocol from the outset.
- Clams which are likely to exceed the relevant upper limit of a low value protocol (that is potential multi-track claims) will go straight into the PI Protocol.

Paragraph 1.1.1 of the PI Protocol makes clear that its terms do not apply while a claim is proceeding under a low value protocol.

Starting the Claim

How the claim starts within the PI Protocol will depend on whether the claim is an ex-low value protocol claim or a non-low value protocol claim.

Ex-Low Value Protocol

Paragraph 1.3.1 of the PI Protocol confirms that where a claim exits a low value protocol because the defendant considers there is inadequate mandatory information in the CNF the claim will proceed on the basis the claimant must send a letter of claim in accordance with the PI Protocol.

In other circumstances paragraph 1.3.2 confirms the claim will proceed under the PI Protocol on the basis the CNF will be treated as the letter of claim.

The claimant may wish, even if a letter of claim is not required, to raise matters with the defendant that would have been raised in the letter of claim including disclosure, if liability is not admitted, and arrangements for expert evidence.

Paragraph 1.2 of the PI Protocol confirms that claims which exit a low value protocol prior to stage 2 will proceed on the basis of the terms of the protocol from which the claim has exited as well as the terms of the PI Protocol. The low value protocols specifically identify circumstances in which Part 7 proceedings can be commenced, so nothing in the PI Protocol should be seen as undermining those provisions.

Where the low value protocol does not expressly provide for Part 7 proceedings to be issued, the terms of the PI Protocol will determine when that is appropriate (important in

such cases as these are likely still to be subject to fixed costs and hence a very important consideration is when the next stage in the costs matrix can be reached).

Non-Low Value Protocol

If a claim is not within the scope of either the RTA Protocol or the EL/PL Protocol, but is covered by the scope of the PI Protocol, a letter of claim, complying with the terms of the PI Protocol, should be sent at the outset.

Letter of Claim and Response

There may be a letter of claim sent under the PI Protocol or, given the terms of the protocol, a CNF sent under one of the low value protocols which will stand as the letter of claim.

Unless there has been an "insurer response", whilst the claim is still in one of the low value protocols, the defendant will need to provide a response to the letter of claim, or CNF standing as a letter of claim, which accords with the requirements of the revised PI Protocol.

Letter of Claim

A revised template for the letter of claim is found in the protocol at Annexe A. Using this template should ensure the requirements of a letter of claim, set out in paragraphs 5.1 to 5.4, are complied with.

Key features of the protocol requirements for the letter of claim include the following.

- The letter does not require the claimant's national insurance number to be given, many practitioners have already been holding back details of this kind until a

letter has been received from the relevant insurer to minimise the risk of identity theft.

- The letter should state the functional limitations of the injury suffered by the claimant, as that will help the defendant allocate the claim to the appropriate level of claims handler and also help assess rehabilitation needs.

- The letter should now identify the documents, from the standard lists in the protocol, considered relevant, which is intended to avoid the defendant having to spend time tracking down unnecessary documents to provide by way of disclosure.

Letter of Response

The PI Protocol now provides a template letter of response. That is helpful as it should ensure consistency of approach by insurers, in the same way that defendants have had a consistency of approach from use of the standard letter of claim by claimants. Furthermore, a standard format of response will allow any deficiencies to be more readily identified and ensure the claimant knows exactly what the defendant's stance on liability really is.

There are some important points to note from the template letter of response.

- The response should now help identify any parties against whom the claim should be directed. This is important in the era of QOCS, given the risk for a claimant who succeeds against one defendant but fails against another defendant.

- The letter provides standard wording, reflecting the terms of the protocol, so there is no ambiguity about the nature of any admission of liability.

- There is reference, in admitted cases, to information about medical experts the claimant proposes to instruct. It is worth emphasising this does not change the

current practice of the claimant nominating a number of experts for the purpose of joint selection, without being obliged to identify which experts are instructed.

Liability and Quantum

The PI Protocol, like the low value protocols, ensures that a defendant who narrows the issues by admitting liability will be given the opportunity to settle the claim, because the claimant must then provide information on quantum and give the defendant reasonable time to put forward proposals for settlement.

Liability

Paragraph 6.3 provides that the defendant will have a maximum of 3 months from the date of acknowledgement of the letter of claim (or of the CNF where the claim commenced in a low value protocol) to investigate and no later than the end of that period must reply stating whether liability is admitted.

Picking up the clarity of the approach to admissions of liability in the low value protocols the PI Protocol now states that an "admission of liability" means:

- the accident was caused by the defendant's breach of duty;

- the claimant suffered loss (which clearly means loss in the sense of some damage which is caused by the breach of duty); and

- there is no defence under the Limitation Act 1980.

If the defendant denies liability (the protocol goes on to state "and/or causation" but this really amounts to the same thing) the defendant must give disclosure of documents material to the issues. The claimant, anticipating the possible need for disclosure, should have identified documents from the standard lists in the letter of claim.

The protocol, in paragraph 6.6, expressly refers to Part 14.1A CPR and gives a reminder that an admission by the defendant may, as a result of this provision in the CPR, be binding.

Quantum

Paragraph 8.1.1 provides that where a defendant admits liability (which the protocol emphasises means a breach of duty that must have caused some damage) the claimant should send to the defendant:

- any medical reports obtained under the protocol on which the claimant relies; and

- a schedule of any past and future expenses and losses, even if the schedule is necessarily provisional.

The reference to a provisional schedule is new, and helpful, recognising a definitive schedule may not be possible at this stage. The schedule should, nevertheless, contain as much detail as reasonably practicable and identify those losses which are ongoing as well as indicating whether the schedule is likely to be updated before the case is concluded. In many cases a provisional schedule, identifying figures for past losses to date and estimating broad heads of likely future loss, should suffice at this stage.

Paragraph 8.1.2 requires the claimant to delay issuing proceedings for 21 days from the disclosure of medical evidence and schedule (unless necessary for limitation reasons).

Paragraph 10.1 clarifies an ambiguity in the former version of the protocol by confirming the claimant will send the defendant a schedule only if the defendant admits liability. There is, once again, recognition that the schedule may be provisional.

Negotiate or Issue?

The claim may have left the RTA Protocol or the EL/PL Protocol in circumstances where that protocol confirms Part 7 proceedings can be issued, which is reflected by the terms of paragraph 1.2 of the PI Protocol.

In other circumstances the claimant will need to have regard to the terms of the PI Protocol and the Practice Direction – Pre-Action Conduct to determine the stage at which Part 7 proceedings can be commenced.

Disclosure

Paragraph 7.1 of the PI Protocol deals with disclosure of documents by the defendant, with paragraph 6.4 confirming relevant documents should be disclosed where liability is denied.

Annexe C contains non-exhaustive lists of documents likely to be relevant in different types of claim. These lists, as well as giving guidance about the scope of pre-action disclosure, are highly relevant to the scope of standard disclosure in any subsequent proceedings, given that Part 31.6 (c) includes within that definition documents a party is required to disclose by a relevant practice direction (and the PI Protocol is supported by the Practice Direction – Pre-Action Conduct).

It is notable Annexe C, as revised and updated, continues to include documents relevant to workplace health and safety regulations, confirming that the terms of the Enterprise and Regulatory Reform Act 2013 do not render those regulations irrelevant to EL claims brought under common law (as those regulations remain part of the criminal law they are likely to at least inform the nature and scope of the defendant's common law duty).

The protocol also now emphasises that the defendant is under a duty to preserve documents subject to disclosure and specifically identifies CCTV, observing that if documents are destroyed this could be an abuse of the court process. Defendants need

to be very aware of this as a breach of this provision might, in an appropriate case, lead to an application by the claimant to strike out the defence (deploying arguments, now bolstered by the terms of the protocol, of the kind of advanced by the defendant in Matthews -v- Herbert Collins & Sons [2013] EWHC 2952 (QB)).

Experts

The PI Protocol continues to encourage joint selection of quantum experts and, on occasion, liability experts.

The protocol now has the proviso that this is save for cases likely to be allocated to the multi-track. The claimant must, therefore, decide whether or not to nominate experts in such cases.

The court may, even if there has been joint selection, allow a further expert, in the same field of expertise, when giving case management directions. Part 35.4 (3A), however, provides that where a claim has been allocated to the fast track permission for expert evidence will normally be given for evidence from only one expert on a particular issue. In such circumstances the "one expert" ought surely to be the jointly selected expert, where there has been such selection. Consequently, joint selection under the protocol may be significant.

The potential risk of nominating experts for the purposes of joint selection is that should the claimant then obtain, but not rely upon, evidence from a jointly selected expert the court may, as a condition of giving permission to rely on expert evidence when giving case management directions, impose a condition that the claimant waive privilege and produce the evidence of the jointly selected expert: Edwards-Tubb -v- JD Weatherspoon Plc [2011] EWCA Civ 136.

A further potential advantage of nominating experts for joint selection, even in a multi-track case, is that a court can take this into account in deciding whether the defendant

reasonably requires expert evidence in the same field of expertise. Furthermore, nomination should fulfil any obligation to have considered the use of a jointly instructed expert.

Settlement

Paragraph 8.1.1 of the PI Protocol provides that where a defendant admits liability (and again the protocol expressly recites that this means breach of duty causing some damage) then, before proceedings are issued, the claimant should send any medical reports obtained under the protocol on which the claimant relies and a schedule of losses and expenses with as much detail as reasonably practicable, indicating whether the schedule is likely to be updated before the case is concluded.

Paragraph 8.1.2 provides the claimant should delay issuing proceedings for 21 days from disclosure of medical evidence and schedule so the parties can consider whether the claim is capable of settlement.

Paragraph 8.2 states that the parties should always consider whether it is appropriate to make a Part 36 offer before issuing. As with the earlier version of the protocol the requirement is to "consider", rather than necessarily make, a Part 36 offer at this stage.

Paragraph 9 deals specifically with ADR expressly identifying potential methods, and explaining what these mean, as the following.

- Discussions and negotiation (which may or may not include making Part 36 offers).
- Mediation (a third party facilitating a resolution).
- Arbitration (a third party deciding the dispute).
- Early neutral evaluation (a third party giving an informed opinion on the dispute).

The protocol recognises that if proceedings are issued the parties may be required by the court to provide evidence that ADR has been considered.

Compliance and Sanctions

Paragraph 1.5 of the PI Protocol confirms that where either party fails to comply with the terms of the protocol the court may impose sanctions and express reference is made to the terms of the Practice Direction – Pre-Action Conduct.

Accordingly, as with the Clinical Negligence Protocol, sanctions may be applied by the court in the event of non-compliance.

A defendant who ignores a claim or fails to respond in accordance with the terms of the relevant protocol is now clearly at risk of sanctions being imposed.

Rehabilitation

The protocol continues to emphasise the importance of rehabilitation, particularly at an early stage.

Paragraph 4.1 provides that the parties should consider as early as possible whether the claimant has reasonable needs that could be met by medical treatment or other rehabilitative measures and should discuss how these needs might be addressed.

The protocol, like the Clinical Negligence Protocol, has, in electronic form, a link through to the Rehabilitation Code (which again will readily allow update as and when that code is changed).

Paragraph 4.4 confirms any immediate needs assessment report or documents associated with that obtained for the purposes of rehabilitation shall not be used in the litigation except by consent and any person involved in that assessment will not be a compellable witness at court.

The Pre-Action Protocol for Professional Negligence

A number of personal injury and clinical negligence practitioners may undertake professional negligence work and so need to be familiar with the terms of the Professional Negligence Protocol.

Paragraph 2 now describes the protocol as a "code of good practice" containing "the steps which parties should generally follow before commencing court proceedings in respect of a professional negligence claim".

Paragraph 3 confirms that, in these circumstances, the court must decide whether any sanctions should be imposed on a party as a result of substantial non-compliance.

Paragraph 6 deals with the letter of claim and has some new provisions.

- The letter of claim should now include any reasonable requests which the claimant needs to make for documents relevant to the dispute and which are held by the professional.

- The letter of claim should explain how the alleged error has caused the loss claimed, including details of what happened as a result of the claimant relying upon what the professional did or omitted to do and what might have happened if the professional had acted correctly.

If the professional considers the letter of claim does not comply with Section 6 that should be stated as soon as reasonably practicable and the claimant informed of the reasons and what information the professional reasonably requires.

Key documents are now to be identified in the letter of response with copies enclosed.

A new section on documents encourages the parties to cooperate in the exchange of relevant information and documentation.

ADR, in this protocol, is identified as including the following.

- Mediation.

- Arbitration.
- Early neutral evaluation.
- Adjudication (an independent adjudicator providing the parties with a decision that can resolve the dispute either permanently or on a temporary basis pending subsequent court determination).

There is also now a stocktake provision in this protocol.

Practice Direction – Pre-Action Conduct

As the pre-action protocols now make express reference to this Practice Direction it is worth reviewing the main provisions.

The Practice Direction – Pre-Action Conduct links compliance with the pre-action protocols to sanctions which may be applicable under the CPR, at the appropriate stage, in the event of default.

Paragraph 2.1 confirms the Practice Direction describes the conduct the court will normally expect of prospective parties prior to the start of proceedings.

Paragraph 4.1 is a reminder that, once proceedings have commenced, the extent of compliance with the protocol will be relevant to case management of claims, in accordance with Part 3.1 CPR, and to costs, under Part 44.3 (5) (a).

The focus should, however, be upon compliance with the substance of the protocol rather than minor or technical shortcomings. Specific examples of non-compliance, which are more likely to attract sanctions, include the following.

- Failing to provide sufficient information to enable the other party to understand the issues.
- Failing to act within a time limit set out in the protocol.

- Unreasonably refusing to consider ADR.
- Failing to disclose documents without good reason.

Accordingly, tactical manoeuvring about technical non-compliance, and efforts to try and show a failure to comply when the alleged failing can have had no significant effect, should be avoided.

It remains important, however, to highlight, and deal appropriately with, a material failure which does have consequences on the other party. This is also reflected in the general principles, set out in paragraph 6, about the need for proportionality and to avoid the generation of unnecessary costs in relation to compliance with the Practice Direction.

Paragraph 4.6 of the Practice Direction specifically identifies sanctions the court may impose which include:

> "(1) staying (that is suspending) the proceedings until steps which ought to have been taken have been taken;
>
> (2) an order that the party at fault pays the costs, or part of the costs, of the other party or parties (this may include an order under rule 27.14 (2) (g) in cases allocated to the small claims track);
>
> (3) an order that the party at fault pays those costs on an indemnity basis (rule 44.3 (3) sets out the definition of the assessment of costs on an indemnity basis);
>
> (4) if the party at fault is the claimant in whose favour an order for the payment of a sum of money is subsequently made, an order that the claimant is deprived of interest on all or part of that sum, and/or that interest is awarded at a lower rate than would otherwise have been awarded;

(5) if the party at fault is a defendant, and an order for the payment of a sum of money is subsequently made in favour of the claimant, an order that the defendant pay interest on all or part of that sum at a higher rate, not exceeding 10% above base rate, than would otherwise have been awarded."

If proceedings are started the claimant, to comply with paragraph 9.7, should state in the claim form or particulars of claim whether the Practice Direction, and protocol, have been complied with.

Conclusion

The revised pre-action protocols bring these better into line with the current terms of the CPR.

The terms of the protocols, particularly now there is direct reference to the Practice Direction – Pre-Action Conduct, are likely to be important in the future as the courts focus on the need for compliance.

The amendments to the protocols are, therefore, of real importance to both claimant and defendant practitioners.