UPDATE ON THE PERSONAL INJURY PROTOCOL

INTRODUCTION

The introduction of the Civil Procedure Rules in 1999 was linked with the Pre-action Protocol for Personal Injury Claims coming fully into force. This, like other similar Protocols, is designed to encourage both consistency and best practice.

The various protocols, in different practice areas, have, perhaps, had mixed success. However, the experience of personal injury practitioners is that the protocol, at least when embraced by all parties, has proved successful.

The courts clearly regard the protocols as reflecting best practice. In Carlson -v- Townsend [2001] EWCA Civ 511 Brooke LJ observed:

> "(The Protocols) are guides to good litigation and pre-litigation practice, drafted and agreed by those who know all about the difference between good and bad practice."

With the future of the protocols being reviewed and with some recent changes to the Civil Procedure Rules, which have a bearing on the protocol, it is timely to review some of the important aspects of the pre-action protocol for personal injury claims.

LETTER OF CLAIM

The initial step for the Claimant under the protocol is to send the Defendant a letter of claim.

Two copies of the letter should be sent with a request that one copy be sent on to the relevant insurer and that details of that insurer be given. This is important given that the individual Defendant may have no stake in the outcome of the claim. If the insurer is known a copy should be sent direct.

Liability should be dealt with by the letter containing a clear summary of the facts. Although the letter will not have the formality of a statement of case it should set out the claim in appropriate detail. This should allow the insurer to assess risk properly.

Quantum should be dealt with by an indication of the nature of any injuries suffered and of any financial loss incurred. This should allow the insurer to make a proper reserve on the claim.

Amendments to the Civil Procedure Rules, effective from 1 October 2009, have had an important bearing on the information which must be given concerning funding when the letter of claim is sent.

If the Claimant wishes to recover additional liabilities it will be necessary to provide information about funding, in the letter of claim, to comply with the Practice Direction: Pre-action Conduct in the CPR which, in turn, requires compliance with paragraph 19.4 Costs Practice Direction and Part 44.3B CPR.

- If the funding arrangement is a conditional fee agreement the party must state:
    - The date of the agreement
    - The claim or claims to which it relates, including Part 20 claims if any.
- Where the funding arrangement is an insurance policy the party must:
    - State the name and address of insurer.
    - State the policy number.
    - State the date of the policy.
    - Identify the claim or claims to which it relates, including Part 20 claims if any.
    - State the level of cover provided (if the policy was entered into on or after 1 October 2009).
    - State whether the insurance premiums are staged and, if so, the points at which an increased premium is payable (which reflects the approach to staged premiums adopted in Rogers –v- Merthyr Tydfil County Borough Council [2006] EWCA Civ 1134).
- Where the funding arrangement is an arrangement with a relevant body (a collective conditional fee agreement) the party must:
    - State the name of the body.
    - Set out the date and terms of the undertaking it has given.
    - Identify the claim or claims to which it relates, including Part 20 claims if any.

Paragraph 9.3 of the Practice Direction: Pre-action Conduct provides that where a party has entered a relevant funding arrangement, that party must inform other parties about such arrangement as soon as possible and in any event either within 7 days of entering into the funding arrangement concerned or, where a claimant enters into a funding arrangement before sending a letter before claim, in the letter before claim.

The sanction, for failing to give such information, is found in Part 44.3B of the Civil Procedure Rules which states that unless the court orders otherwise a party may not recover:

- Any additional liability for any period during which that party failed to provide information about a funding arrangement as required by any rule, practice direction or court order.

- Any insurance premium where that party has failed to provide information about the insurance policy in question by the time required by any rule, practice direction or court order (and specific reference is then made to paragraph 9.3 of the Practice Direction: Pre-action Conduct).

Form N251, Notice of Funding, makes provision for all this information to be given in a convenient format and can usefully be completed and enclosed with the letter of claim. Paragraph 19.4 (5) Costs Practice Direction makes clear that one such notice can be used to give information about more than one relevant funding arrangement.

If Notice of Funding has not been properly given appropriate notice should be given at the earliest opportunity, given that the court can grant relief from sanctions. Moreover, if there is any change to the funding arrangements, once notice has been served, a further notice should be served within 7 days of that change.

ACKNOWLEDGEMENT

In accordance with paragraph 3.6 of the Protocol the Defendant should within 21 days (42 days if the accident occurred outside England and Wales and/or where the Defendant is outside the jurisdiction) of the date of posting of the letter of claim have:

- Acknowledged that letter;

- Identified the relevant insurer (if any);

- Identified specifically any omissions.

Accordingly, if the Defendant wishes to contend the letter of claim does not comply with the Protocol, so that the timetable is not running, it will be necessary to raise this promptly when giving an acknowledgement. Otherwise the time limit, in particular for giving a decision on liability, will run from the date the letter of claim is posted.

DEFENDANT'S RESPONSE

In accordance with paragraph 3.7 of the Protocol the Defendant must no later than 3 months (6 months if the accident occurred outside England and Wales and/or where

the Defendant is outside the jurisdiction) from the date of acknowledgement of the letter of claim have completed investigations and:

- Replied;
- Stated, in the reply, whether liability is denied and if so:
    - Given reasons and any alternative version of events relied upon; and
    - Enclosed documents in the possession of the Defendant material to the issues between the parties.

The protocol no longer provides for a presumption the Defendant will be bound by an admission. However, Part 14.1A Civil Procedure Rules provides for a pre-action admission where this is made after receipt of a letter of claim sent in accordance with the protocol or where it is stated to be made under CPR Part 14.

A pre-action admission may be withdrawn, by giving notice in writing, before commencement of proceedings, if the person to whom the admission was made agrees, or after commencement of proceedings either with agreement of all concerned or the permission of the court.

Once proceedings have been commenced any party may apply for judgment on the pre-action admission but the party who made it may apply to withdraw it. Paragraph 7 of the Practice Direction to Part 14 sets out factors relevant to the exercise of discretion to allow withdrawn of an admission which include:

- The grounds upon which the applicant seeks to withdraw the admission including whether or not new evidence has come to light which was not available at the time the admission was made.
- The conduct of the parties, including any conduct which led the party making the admission to do so.
- The prejudice that may be caused to any person if the admission is withdrawn.
- The prejudice that may be caused to any person if the application is refused.
- The stage in the proceedings at which the application to withdraw is made, in particular in relation to the date or period fixed for trial.
- The prospects of success (if the admission is withdrawn) of the claim or part of the claim in relation to which the offer was made.
- The interest of the administration of justice.

Where there is a full admission of liability this may constitute a binding compromise if all the elements of a compromise are present: Telling –v- OCS Group Limited (LTL 02/06/2008).

If an infant or a protected party is involved any compromise will only become binding when the Court has given approval: Drinkall -v- Whitwood [2003] EWCA Civ 1547.

EXPERTS

The Protocol encourages joint selection (as opposed to joint instruction) of experts. The distinction is not just a matter of semantics. Indeed paragraph 2.14 of the Protocol specifically provides the report is not a joint report for the purposes of Part 35 Civil Procedure Rules.

The opportunity to jointly select, in accordance with the Protocol, is a very effective tool for the Claimant and should always be utilised.

The importance of the distinction between joint selection and joint instruction was highlighted in Carlson where the Court of Appeal that:

- the Protocol does not provide for joint instruction, but rather joint selection;
- the Protocol provides for a practice whereby experts objectionable to one party are eliminated at the outset;
- a report obtained from such an expert does not have to be disclosed to the Defendant as the Protocol does not override the substantive law with regard to privilege (while privilege will not attach to a report prepared on the basis of joint instruction).

The protocol itself only provides that where has been joint selection the party who has not objected will not be able to rely on corresponding expert evidence unless the court so directs.

Part 35 CPR clarifies the approach the Court should take towards experts at the stage of case management and, of course, as compliance with the protocol is, any event, a relevant consideration for the Court when deciding what directions to give.

Part 35.2 confirms the term “single joint expert” will not encompass an expert who has simply been the subject of joint selection. Rather, to be a single joint expert, it will be necessary for the expert to have jointly instructed by two or more of the parties, including the Claimant.

However, Part 35.4 (3A) provides that where a claim has been allocated to the fast track then if permission is given for expert evidence it will normally be given for evidence from only one expert on a particular issue. That, coupled with the requirement for the court now consider whether the protocol has been complied with, may mean it is difficult, at least if the case is to remain in the fast track, for a

Defendant, where there has been joint selection even if that is by default, to gain permission from the court to rely on the evidence of a corresponding expert. It is worth noting this rule uses the phrase "one expert" rather than the term "single joint expert", and hence does not necessarily exclude a jointly selected expert.

SANCTIONS

The Practice Direction Pre-Action Conduct links compliance with the protocol and 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 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 likely to be relevant include:

- 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. However, it remains important to highlight, and deal with in the appropriate way, 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.

ADR

Paragraph 8 of the Practice Direction Pre-Action Conduct indicates proceedings should not normally be started when a settlement is still actively being explored.

If the Defendant has not complied with the protocol the parties will not usually be at a stage where settlement is "actively being explored". If the protocol has been complied with, and some negotiations have taken place but the claim not yet been resolved, difficulties can arise in determining whether the terms of the Practice

Direction make the issue of proceedings premature, as if so that may have a bearing on the costs of those proceedings.

For these purposes caselaw indicates the Courts should not speculate what would have happened if one or other party had made an offer which, in fact, was not made.

In Ellison -v- Fairclough (Liverpool County Court 30 July 2007) the court, when considering costs in a case of alleged premature issue, followed the guidance given by the Court of Appeal on this topic in Straker -v- Tudor Rose [2007] EWCA Civ 368. The claim arose out of a road traffic accident in which liability was admitted and the Claimant disclosed details on quantum with an invitation for settlement to be made within the 21 day period. The Defendant made an offer of £1,100. The Claimant invited an improved offer and warned proceedings would be issued in default. Following issue the claim settled, within a month, for £1,700. Allowing an appeal from the decision of the District Judge, that only predicable costs be awarded, the Circuit Judge followed Straker on the basis the Claimant had complied with the protocol and the Defendant had made an offer which was outside a reasonable bracket meaning that the Claimant was entitled to issue proceedings. There was no basis for departing from the general rule the Claimant was entitled to costs on the standard basis in these circumstances, for the reasons given by Waller LJ in Straker when he held:

> "If the judge is finding that the case would have settled as opposed to finding that there was a chance it would have settled, that could not have been other than a speculation. In my view it does not come well from a defendant who has paid money into court to argue that if a claimant had been more reasonable he would have offered more. An investigation as to how negotiations would have gone is precisely the form of investigation which should be avoided. In a case about money a defendant has the remedy in his own hands where a claimant is being intransigent. He can pay into court the maximum sum he is prepared to pay."

In contrast, however, the claimant, though on the basis these would be assessed, recovered only partial costs in Bellison -v- McKay (Exeter County Court 11 March 2008) and was restricted to predictable costs in Turner -v- Gribbon (Bristol County Court 27 August 2008).

As an alleged breach of the protocol would be "conduct", under Part 44 CPR, on which the paying party would seek to rely in relation to costs, that party may be prevented from relying on such conduct if it could, but was not, raised prior to assessment: Aaron -v- Shelton [2004] EWHC 1162 (QB).

THE FUTURE

The protocols, certainly in personal injury litigation, remain effective and surely still represent best practice.

It would be regrettable, therefore, if changes were made simply for the sake of change when, with refinements added over the years, these continue to be an effective way of identifying the issues and, where possible, achieving the resolution of claims without the need for court proceedings.