

PRE-ACTION PROTOCOL

Re:

Road Traffic Accidents and Personal Injury Claims

1. GENERAL

- 1.1.** The aims of the pre-action protocols are:
 - (a)* to foster more pre-action contact between the parties, to encourage better and earlier exchange of information and facilitate better pre-action investigation by both sides;
 - (b)* to put the parties in a position where they may be able to settle cases fairly and early without litigation;
 - (c)* to enable proceedings to run in accordance with the Court's timetable and efficiently, if litigation does become necessary.
- 1.2.** This protocol is designed primarily for road traffic accidents that include property damage and personal injury. However, the substance of the protocol should be followed for all personal injury cases. Further, parties are urged to follow the substance of the protocol so far as it may be applicable to claims arising out of road traffic accidents where there is no personal injury.
- 1.3.** The Court will treat the standards set in this protocol as the normal, reasonable approach to pre-action conduct. If proceedings are issued, the Court will decide whether non-compliance with the protocol should merit adverse consequences.

- 1.4. If the Court has to consider the question of compliance after proceedings have begun, it will not be concerned with minor infringements, e.g. failure by a short period to provide relevant information. One minor breach will not exempt the “innocent” party from following the protocol. The Court will look at the effect of non-compliance on the other party when deciding whether to impose sanctions.
- 1.5. However, the timetable and the arrangements for disclosing documents and obtaining expert evidence may need to be varied to suit the circumstances of the cases. Where one or both parties consider the details of the protocol are not appropriate to the case, and proceedings are subsequently issued, the Court will expect an explanation as to why the protocol has not been followed, or has been varied.

2. THE LETTER BEFORE CLAIM

- 2.1. The specimen letter of claim at Appendix A will usually be sent to the individual defendant. In practice, he/she may have no personal financial interest in the financial outcome of the claim/dispute because he/she is insured. Court imposed sanctions for non-compliance with the protocol may be ineffective against an insured. This is why the protocol emphasises the importance of passing the letter of claim to the insurer and the possibility that the insurance cover might be affected. If an insurer receives the letter of claim only after some delay by the insured, it would not be unreasonable for the insurer to ask the claimant for additional time to respond.
- 2.2. The purpose of a letter of claim is for the claimant to provide sufficient information for the defendant to assess liability. Sufficient but concise information should also be provided to enable the defendant to estimate the likely amount of the claim.

2.1. Reasons for Early Issue

The protocol recommends that a defendant be given 28 days to investigate and respond to a claim before proceedings are issued. This may not always be possible, particularly where a claimant consults an attorney-at-law only close to the end of any relevant limitation period. In these circumstances, the claimant's attorney should give as much notice of the intention to issue proceedings as is practicable and the parties should consider whether the Court might be invited to extend the time for service of the claimant's supporting documents and for service of any defence, or alternatively, to stay the proceedings while the recommended steps are followed.

2.2. Status of Letters of Claim and Response

Letters of claim and response are not intended to have the same status as a statement of case in proceedings. Matters may come to light as a result of investigation after the letter of claim has been sent, or after the defendant has responded, particularly if disclosure of documents takes place outside the recommended 28 day period. These circumstances may mean that the pleaded case of one or both parties is presented slightly differently than in the letter of claim and response. It would not be consistent with the spirit of the protocol for a party to take a point on this in the proceedings, provided that there was no obvious intention by the party who changed his position to mislead the other party.

3. DISCLOSURE OF DOCUMENTS

- 3.1.** The aim of the early disclosure of documents by the defendant is not to encourage “fishing expeditions” by the claimant, but to promote an early exchange of relevant information to help in clarifying or resolving issues in dispute. The claimant’s attorney-at-law can assist by identifying in the letter of claim or in a subsequent letter, the particular categories of documents which he considers are relevant.

4. EXPERTS

- 4.1.** The protocol encourages joint selection of, and access to, experts. Most frequently this will apply to the medical expert but, on occasions, it may involve other experts on the issue of liability. The protocol promotes the practice of the claimant’s obtaining a medical report and disclosing it to the defendant who then asks questions and/or agrees it and does not obtain his own report.
- 4.2.** The protocol provides for nomination of the expert by the claimant in personal injury claims because of the early stage of the proceedings and the particular nature of such claims. If proceedings have to be issued, a medical report must be attached to the proceedings. However, if necessary, after proceedings have commenced and, with the permission of the Court, the parties may obtain further expert reports. It will be for the Court to decide whether more than one expert’s evidence should be admitted or whether the costs of more than one expert’s report should be recoverable.

5. **THE PROTOCOL**

Letter of Claim

- 5.1.** The claimant must send to the proposed defendant two copies of a letter of claim as soon as sufficient information is available to substantiate a realistic claim and whether or not he is able to address issues of quantum in detail. One copy of the letter is for the defendant, the second for passing on to his insurers.
- 5.2.** The letter shall contain -
- (a) a clear summary of the facts on which the claim is based;
 - (b) an indication of the nature of any injuries suffered;
 - (c) information about the place of treatment and the attending physician;
 - (d) the date(s) of treatment;
 - (e) the extent of injuries as known at the date of the letter;
 - (f) details of property damage;
 - (g) an indication of the quantum of the overall claim with particulars of same and supporting documents if information on quantum is available; and
 - (h) any other relevant information specific to the individual case.
- 5.3.** Attorneys-at-law are recommended to use a standard format for such a letter. An example is at Appendix A but this may be amended to suit the particular case.

- 5.4. Sufficient information should be given in order to enable the defendant's insurer/attorneys-at-law to commence investigations and at least put a broad valuation on the proposed claim.
- 5.5. If the claimant has information relating to the identity of the defendant's insurers, he may also send a copy of the letter of claim directly to the insurers together with a letter to the insurers enquiring as to their position with respect to the prospective claim. Where the claimant intends, in road traffic accidents, to institute proceedings against the insurers, the claimant may, in his letter to the insurers, give them any notice of his intention to do so as required by law.

6. **LETTER IN RESPONSE**

- 6.1. The defendant or his insurers will have 28 days (or such longer period as may be agreed) from the date of receipt of the letter of claim to investigate the claim and reply to the letter, stating whether liability is accepted and if not, giving reasons for denial of liability including any alternative version of events relied upon. If there is no reply by the defendant or insurers within 28 days, the claimant is entitled to issue proceedings.
- 6.2. If the defendant or his insurers require more time to investigate the claim and reply fully to the letter of claim, the parties may of course agree to extend the time. Parties are expected to act reasonably in requesting and/or agreeing to further time.
- 6.3. Where liability is admitted, the presumption is that the defendant will be bound by this admission for all claims.
- 6.4. Where it is the intention of the claimant to institute proceedings against the insurers under the *Road Traffic Act, Cap.295*, the claimant is reminded of the requirement to give to the insurers written notice within the time limit specified in the Act.

7. DOCUMENTS

- 7.1.** If the defendant denies liability, he should enclose with the letter of reply, documents in his possession which are material to the issues between the parties, and which would be likely to be ordered to be disclosed by the Court, either on an application for pre-action disclosure, or on disclosure during legal proceedings.
- 7.2.** Where the defendant admits some liability, but alleges contributory negligence by the claimant, the defendant should give reasons supporting those allegations and disclose any documents which are relevant to the issues in dispute. The claimant should respond to the allegations of contributory negligence before proceedings are issued.

8. SPECIAL DAMAGES

- 8.1.** Where the claimant has not addressed the question of quantum in the letter of claim, the claimant should send to the defendant, as soon as he has sufficient information on which to compute quantum, a Schedule of Damages with supporting documents, particularly where the defendant has admitted liability.

9. EXPERTS

- 9.1.** The general rule is that parties must give instructions to a single expert. So that before any party instructs an expert the parties should attempt to agree the appointment of a joint expert.
- 9.2.** Where parties instruct experts of their own choice it will be for the Court to decide subsequently, if proceedings are issued, whether either party acted unreasonably in instructing their own experts. (Part 33 of the RSC deals, *inter alia*, with experts' evidence and the power of the Court to permit parties to call an expert witness and to put into evidence an expert's report).