Ministry of Justice

Consultation Paper

Practice Direction on Pre-Action Behaviour

A response by the Association of Personal Injury Lawyers

25 November 2008

The Association of Personal Injury Lawyers (APIL) was formed by claimant lawyers with a view to representing the interests of personal injury victims. APIL currently has around 4,500 members in the UK and abroad. Membership comprises solicitors, barristers, legal executives and academics whose interest in personal injury work is predominantly on behalf of injured claimants.

The aims of the Association of Personal Injury Lawyers (APIL) are:

- To promote full and just compensation for all types of personal injury;
- To promote and develop expertise in the practice of personal injury law;
- To promote wider redress for personal injury in the legal system;
- To campaign for improvements in personal injury law;
- To promote safety and alert the public to hazards wherever they arise;
- To provide a communication network for members.

APIL's executive committee would like to acknowledge the assistance of the following members in preparing this response:

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Executive Summary

APIL is extremely concerned that there are serious inconsistencies between the Practice Direction, as drafted, and the Personal Injury Pre-Action Protocols for personal injury, clinical negligence and disease claims. One fundamental inconsistency is that it has not been made abundantly clear whether the Practice Direction, or the relevant Pre-Action Protocol will take precedence if there is a conflict.

APIL is particularly concerned about the implementation of Annex C to the Practice Direction as we believe this envisages the joint *instruction* of experts as being the normal practice rather than the joint *selection* of experts as it currently stands under the pre-action protocols. APIL strongly opposes any attempts to remove the claimant's right to instruct its own expert in personal injury, clinical negligence and disease claims.

APIL believes that this Practice Direction needs only to focus on compliance in order to be an effective litigation tool. There is an opportunity for the provisions relating to sanctions to be strengthened, as this is the one area where the current pre-action protocols are lacking, particularly in the area of disclosure of documents.

APIL believes that Annex C is the part of the proposed Practice Direction that is likely to lead to most confusion and satellite litigation where a pre-action protocol contains different provisions. The personal injury pre-action protocols already contain detailed provisions as to the instruction of experts which differ significantly to the provisions in Annex C.

Introduction

APIL welcomes the opportunity to respond to the Ministry of Justice's consultation on the proposed Practice Direction (PD) on pre-action behaviour.

APIL has serious concerns, however, about the PD as drafted which, despite indicating that a default General Pre-Action Protocol (GPAP) had been abandoned, is, in fact, a default GPAP, albeit by another name.

APIL believes that there are some fundamental inconsistencies between the PD as drafted and the Pre-Action Protocols in personal injury, clinical negligence and disease and illness claims.

General observations on the consultation

APIL responded to the original Civil Justice Council (CJC) consultation paper on a proposed GPAP in May 2008 and was reassured to discover that the majority of respondents to the consultation were opposed to the CJC's suggestion of a GPAP and that as a result, the CJC would no longer be recommending its introduction. In it's response to consultation the CJC proposed instead to continue with some aspects of the original consultation, after many respondents acknowledged the need for more detailed information and guidance on pre-action behaviour and for greater clarity about the enforcement of protocols.

The CJC response recommended at that stage that a general practice direction ought to set out clearly the general principles of pre-action behaviour in all cases, these being supplemented by specific requirements in the individual pre-action protocols. It was also envisaged by the CJC that the practice direction would set out the court's approach to non-compliance with the general CPR as well as the protocols.

The draft practice direction on pre-action behaviour

Section I

There is a clear inconsistency within section I which needs to be addressed.

> **2.6 "Section IV contains requirements that apply to all cases including those subject to the pre-action protocols (unless a relevant pre-action protocol contains a different provision). It is supplemented by Annex C which sets out guidance on instructing experts.**

APIL's primary concern in relation to this clause as drafted is that while the first sentence indicates that it is designed to apply in all cases, including those where a pre-action protocol (PAP) already exists, unless an existing PAP contains a different provision, there is no suggestion that Annex C only applies in such circumstances. Our reading of this clause is that Annex C applies in all cases, in which case, there are clear inconsistencies between the provision for instructing experts in Annex C and the relevant provisions in the PAPs applying in personal injury, clinical negligence and disease and illness claims (hereinafter referred to, collectively, as the 'PI PAPs').

In the PI PAPs there is provision for joint *selection* of experts, rather than joint *instruction* of experts. APIL strongly opposes any attempts to remove the claimant's right to instruct its own expert in PI, clinical negligence and disease claims.

The wording relating to the scope of this draft PD suggests that despite indicating that a default pre-action protocol had been abandoned, this PD is, in fact, a default PAP, albeit by another name.

Section II – The approach of the courts

Section I clause 2.3 states that Section II (paragraphs 4 and 5) applies to all types of court claim including those already covered by a PAP.

However, in section II, clause 4.2, the PD states that the court will expect the parties to have complied with this PD or any relevant PAP. There is no suggestion in this clause that the claim-specific PAP is given precedence over this PD, which is an invitation to satellite litigation over which document – the specific PAP or this PD - has and/or should have been complied with in the instant case.

In addition, clause 4.4(3) states, "The court may decide that there has been a failure of compliance by a party because, for example, that party has –

> …(3) Unreasonably refused to consider ADR (see paragraph 8);"

The explicit mention of paragraph 8 (which is contained in Part III – the principles governing the behaviour of the parties in cases not subject to a pre-action protocol) within section II (which applies to all cases) means that a refusal to engage in ADR is immediately considered a non-compliance issue in all cases, not only those which are not subject to a pre-action protocol. Once again, there is no suggestion in this clause that the claim-specific PAP is given precedence over this PD, which is an invitation to satellite litigation over which document – the specific PAP or this PD - has and/or should have been complied with in the instant case.

Sanctions for non-compliance

APIL's view is that this PD needs only to focus on compliance in order to be an effective litigation tool. There is an opportunity for the provisions relating to sanctions to be strengthened, as this is the one area where the current PI PAPs are lacking.

Clauses 4.5 and 4.6 of the PD set out the provisions relating to sanctions and we are concerned that these sanctions are poorly drafted and lack 'teeth'.

Clause 4.5 indicates that if the overall effect of non-compliance has led to a claim being started which might have otherwise settled pre-issue, etc, then the court will consider whether to impose sanctions. The use of the words 'might otherwise have been avoided' is particularly confusing in this context and gives the court too much discretion, making it difficult for the parties to predict whether sanctions will be imposed.

Clause 4.6 should contain stronger wording in order to be an effective deterrent to rule-breaking. It states that the court **may** impose sanctions (our emphasis). We believe that the PD should set out the sanctions that the court **should** impose unless there are compelling reasons not to do so. APIL suggests that the wording as proposed by this paper simply reflects the current state of play and courts singularly fail to exercise their power to impose effective sanctions. The parties should be in no doubt that failure to comply with the provisions in a PAP (or the PD, subject to what we have said earlier) will almost certainly lead to sanctions being imposed.

Section IV – Requirements that apply in all cases

APIL believes that it is absolutely fundamental for the draft PD to make it abundantly clear that if there is a conflict between the provisions of the PD and any PAP, that the PAP will take precedence to avoid confusion and satellite litigation.

Clause 9.1 is not particularly helpful to users of the existing pre-action protocols for specific types of claim. These PAPs will contain provisions which deal with disclosure, information about funding arrangements and experts. These provisions will not match, exactly, the nature of the clauses inserted into this draft PD. They will, however, be more comprehensive and have been tested many times since their introduction. We are concerned that the current wording of this clause will be

used to suggest that where there is no exact match for the clause, then the clause in this PD will also apply.
There is great danger in departing from the existing procedures contained in the existing PAPs which work so well. See our comments below relating to the instruction of experts in Annex C, for example.

Disclosure

The greatest area of non-compliance for personal injury lawyers is the failure by defendants to disclose relevant documents pursuant to the personal injury PAP and the inconsistent response of the courts to the claimants' pre-action disclosure applications which inevitably follow.

This draft PD misses a great opportunity to ensure that the pre-action disclosure requirements of the various PAPs are adhered to and/or enforced by the court. We would like to see protocol-specific commentary on this issue. For example, if the defendant in a highway tripping claim fails to disclose the relevant documents listed in Annex B of the personal injury PAP, within the prescribed time limits, then this PD should clearly identify the sanction which the court should (not may) impose.

Not only would this discourage serial rule breaking, but it would substantially reduce the number of pre-action disclosure applications made to the court, and other related satellite litigation.

Time limits

The other greatest area of non-compliance, from the personal injury lawyer's perspective, is the silence which often follows the letter of claim. It is commonplace for no response to be received from the defendant within the specified time limits or at all.

APIL's view is that non-action is the same as a denial and should be treated as such by this PD. Not only does this delay progress of the claim, in many instances it leaves the claimant with no alternative but to issue proceedings, with all the additional expense and delay which that incurs.

Again, APIL takes the view that protocol-specific commentary on such behaviour, with sanctions for non-compliance clearly spelt out.

Limitation periods

APIL does not see why clauses 9.5 and 9.6 have been included in this PD. It was clear from all the responses to the CJC consultation on a general PAP that PDs and PAPs should steer away from limitation issues.
In its summary of responses to the consultation, the CJC published a comment made by the Chancery Division as follows:

> "Parliament has with the benefit of detailed advice declared the law on limitation. It is not for Courts by procedural devices to encourage parties to disapply that law and to substitute for the considered provisions of the Act and of the CPR bargains of their own making."

APIL agrees with the Chancery Division and would urge that this PD avoids the issue of limitation.

Annex C

APIL believes that Annex C is the part of the proposed PD which is likely to lead to most confusion and satellite litigation where a PAP contains different provisions. The PI PAPs already contain detailed provisions as to the instruction of experts which differ significantly to the provisions in Annex C.

The PI PAPs do not envisage the instruction of a 'single joint expert' but rather a 'mutually acceptable expert'. It is stated, quite categorically, that this is not the

same as a joint expert and the PI PAPs do not contain any sanctions whatsoever for refusing to instruct a single joint expert at the protocol stage.

Annex C, on the other hand, envisages the parties trying to agree the nomination of a single joint expert – paragraph 4 suggests that a list of experts being provided, with a view to obtaining an 'agreed expert', is appropriate only if '…the parties do not agree that the nomination of a single joint expert is appropriate'.

Whilst it is arguable that the PAP takes precedence (see earlier) this is by no means clear and one can envisage satellite litigation where one party wishes to instruct an 'agreed' expert under the PAP whereas the other party wishes to instruct a 'joint' expert under Annex C.
Paragraph 3 of Annex C talks about '… minimising expense …' (as does paragraph 9.4 in section III) and this suggests that expense is the overriding criterion for the decision as to whether a single joint expert or an agreed expert is chosen. Parties should not be fettered in this way in preparing their respective cases.

Even in a situation where an 'agreed' expert is nominated, the provisions of Annex C differ significantly to the PI PAPs. Paragraph 5 of Annex C indicates that a party 'must' instruct an expert from the list of experts if any remain upon it. There is no such stipulation in the PI PAPs – simply that a party 'should' instruct a mutually acceptable expert.

APIL believes that the PI PAPs already contain provisions about the instruction of experts that are working well in practice and the introduction of Annex C will lead to confusion. Annex C is irrelevant and unnecessary where a PAP already applies and this should be clearly stated.