26 May 2010

Mrs R Johnston
Secretary to the Civil Justice Reform Committee
Office of the Lord Chief Justice
Royal Courts of Justice
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Practice direction and pre-action protocol for Clinical Negligence claims in the High Court

The Association of Personal Injury Lawyers (APIL) is a not-for-profit organisation whose members help injured people to gain the access to justice they deserve. Our members are mostly solicitors, who are all committed to serving the needs of people injured through the negligence of others. The association is dedicated to campaigning for improvements in the law to enable injured people to gain full access to justice, and promote their interests in all relevant political issues.

APIL welcomes the opportunity to provide written comment relating to the operation of the pre-action protocol. Our suggested amendments are attached. We are suggesting a number of ways to improve the protocol generally, including:

- the promotion of medical treatment or rehabilitation, to address the immediate needs of the injured person;
- the inclusion of sanctions within the protocol for non-complying parties; and
- the creation of a level playing field between the plaintiff and the defendant to promote access to justice.

APIL are concerned about the drafting of certain paragraphs within the pre-action protocols, namely that there appears to be more onus placed on the plaintiff than the defendant. APIL would suggest that the term "should" be changed to "shall". For example, paragraph 14 would then read,

> "*The relevant healthcare provider shall acknowledge the letter of claim within 14 days of receipt and shall identify the solicitor or other legal representative who will be dealing with this matter…"*

This alteration would place the plaintiff and the defendant on a more level playing field, which is essential for access to justice.

APIL members believe that the medical section of the pre-action protocol is generally working well.

We would still suggest that for the protocol to be successful, the Civil Justice Reform Committee should consider incorporating sanctions into the protocol. This would ensure that the complying party has redress against the non-complying party. Sanctions would also assist with controlling costs and the time spent on running a case. Some suggested sanctions include:

- Debarring the defendant from defending his claim; or
- Cost implications for the non-complying party.

APIL welcomes the introduction of paragraph 18, which refers to Alternative Dispute Resolution. However, after more careful consideration, APIL believes that the paragraph may be redrafted to reflect the position of how this is considered in Northern Ireland rather than in England and Wales. Plaintiffs and defendants in Northern Ireland do, generally, consult with each other and occasionally invite the other party for meetings regarding early negotiations and pre-trial settlements. However, APIL have redrafted this section to better reflect the position in Northern Ireland.

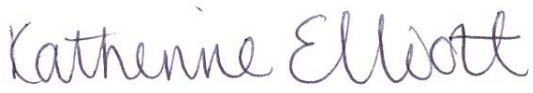
In our suggested amendments we have still included a paragraph on rehabilitation and the inclusion of rehabilitation as an objective of the protocol in paragraph 2. Our members believe that it is most important that rehabilitation is taken into consideration in the drafting of this protocol in order to best place the plaintiff in the position they were in prior to the negligence occurring. A suggested amendment is included in the attached annex at paragraphs 2 and 22.

Further concern has also been expressed by our members regarding paragraph 12. Paragraph 12 requests that the plaintiff should include an initial valuation of the claim unless this is impracticable. Our members have suggested that in the majority, if not all, cases this is impracticable. The reason for this being that, at the start of a claim it can be impossible to place a valuation on an injury which may not have fully developed or healed. APIL would suggest that the following phrase is removed from paragraph 12,

"and to put an initial valuation upon the claim unless this is impracticable."

We hope that our comments prove helpful to the committee and look forward to engaging with you further in the future.

Yours sincerely



Katherine Elliott
Legal Policy Officer

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Pre-action protocol for clinical negligence claims in Northern Ireland.

Suggested amendments

1. Practitioners are reminded of the need to bear in mind the overriding objective set out at Order 1 rule 1(a) of the Rules of the Supreme Court (Northern Ireland) 1980. In order to enable the court to deal justly with litigation that objective requires the court, so far as practicable, to:

(a) Ensure the parties are on an equal footing;

(b) Save expenses;

(c) Deal with the litigation in ways which are proportionate to –

(i) the amount of money involved;

(ii) the importance of the case;

(iii) the complexity of the issues; and

(iv) the financial position of each party.

(d) Ensure that the litigation is dealt with expeditiously and fairly; and

(e) Allocate to the litigation an appropriate share of the courts resources, while taking into account the need to allocate resources to other cases.

2. The objectives of this protocol include;

(i) Early communication between patients and healthcare providers of any perceived problems, concerns or dissatisfactions about treatment.

(ii) The development by healthcare providers of early reporting and investigation systems.

(iii) Disclosure of sufficient information so as to enable patients and healthcare providers to understand the issues and encourage early resolution.

(iv) The early provision of relevant medical records by healthcare providers to patients or their legal representatives.

(v) Placing the parties in a position where they may be able to resolve cases fairly and early without litigation together with the promotion of mediation and/or other appropriate forms of Alternative Dispute Resolution.

(vi) The promotion of an overall "cards on the table" approach to litigation in the interests of keeping the amount invested by the participants in terms of money, time, anxiety and stress to a minimum, consistent with the requirement that the issues be resolved in accordance with the accepted standards of fairness and justice.

(vii) To promote the provision of medical or rehabilitation treatment (not just in high value claims) to address the needs of the plaintiff.

3. Where litigation is appropriate the requirement is that it should be conducted economically, efficiently and in accordance with a realistic and flexible timetable set by the court. Clinical negligence litigation frequently involves complex and technical issues that require time consuming and detailed investigation with the assistance of specialised expert opinion. It also has the potential to be particularly stressful and emotionally demanding upon the parties.

Medical Notes and Records [1]

4. In respect of living patients section 7 of the Data Protection Act 1998 provides a right of access to health records by a patient or certain other parties on behalf of a patient and such requests should be as specific as possible about the records that are required. Article 5 of the Access to Health Records (Northern Ireland) Order 1993 continues to apply in respect of deceased persons.

5. Copies of any records sought ~~should~~ shall be supplied by the relevant healthcare provider within 40 days or such other relevant requisite period at the relevant fee specified in the 1998 Act or the 1993 Order.

6. In the event that a healthcare provider encounters difficulty in complying with the relevant timetable for disclosure of medical notes and records the provider ~~should~~ shall provide the patient and/or his representative with an explanation of the problem together with details of the resolution proposed by the provider.

7. It is important, in the interests of saving costs and time, that potential plaintiffs should be aware of and have recourse to the simplified statutory procedure available under the provisions of the 1998 Act or the 1993 Order. Healthcare providers should make arrangements to ensure that they are able to react positively and expeditiously to inquiries and requests in accordance with that procedure. As a last resort, in the event that the relevant healthcare provider fails to provide disclosure of the relevant hospital notes and records, the patient and/or his representatives should apply for disclosure in accordance with the provisions of section 31 of the Administration of Justice Act 1970 and Order 24 rule 8(1) of the Rules of the Supreme Court (Northern Ireland) 1980.

8. If either the patient or the healthcare provider considers that additional health records are required from a third party in the first instance these should be requested in writing by or through the patient or his or her representatives. The relevant third party health provider ~~should~~ shall reply thereto in writing within 40 days either disclosing the medical notes and records sought or, if a difficulty is encountered, providing a written explanation of the difficulty and the resolution proposed by the third party health provider.

9. It shall be the duty of the party affording initial disclosure to make available clear and complete copies properly paginated.

Medical Notes and Records [2]

10. The parties to clinical negligence litigation must discuss, if necessary, exchange and agree bundles of medical notes, records and medical literature to be relied on prior to the hearing. It shall be the duty of the plaintiffs solicitors to lodge with the court no later than 14 days prior to the hearing a bundle of medical notes , records paginated and medical literature to be relied on with index attached and certified by all parties as agreed. It shall be the joint responsibility of all the parties to ensure the presence of the originals of all such documents in court during the hearing.

Commencement of Proceedings

11. Once a decision has been taken by the patient and/or his or her advisors that there are grounds for a claim, as soon as practicable, a letter of claim should be sent to the relevant healthcare provider/potential defendant. In appropriate cases the decision as to whether there are grounds for a claim may require a report from a relevant medical expert.

12. While the letter of claim is not intended to have the formal status of a pleading it should generally be drafted for the purpose of providing sufficient information as is currently held by the plaintiff to enable the relevant healthcare provider to commence investigations ~~and to put an initial valuation upon the claim~~ unless this is impracticable.

13. Unless there is a limitation problem or some other reason as to why the plaintiff's position needs to be protected by early issue proceedings ~~should~~ shall not generally be issued until 3 months after the date of the letter claim.

The Response

14. The relevant healthcare provider ~~should~~ shall acknowledge the letter of claim within 14 days of receipt and ~~should~~ shall identify the solicitor or other legal representative who will be dealing with the matter. No later than 3 months from the letter of claim the relevant healthcare provider ~~should~~ shall write to the plaintiff's solicitors stating whether liability, breach of duty or causation are denied or admitted. Thereafter it will be appropriate for the plaintiff to issue proceedings. This provision does not apply to cases where time is of the essence.

Expert Reports

15. In clinical negligence cases reports from expert witnesses may be required in relation to –

- the allegations relating to negligence, breach of duty and causation;
- the plaintiff's post incident and subsequent condition and prognosis;
- quantification of the financial loss elements of the claim including care, equipment, structural changes to premises, loss of earnings, profits, prospects of employment etc.

16. Practitioners should have regard to Commercial List Practice Direction No 6/2002 relating to expert evidence for general guidance (see Annex and available at http://www.courtsni.gov.uk/). Copies of this documentation should be provided to each of the experts retained on behalf of the parties to the litigation. In particular, the attention of practitioners is drawn to paragraph 3 of this Practice Direction and they are reminded of the need to give careful consideration to the question of whether evidence from a particular expert is both necessary and appropriate bearing in mind that expert evidence is likely to represent a very substantial proportion of the costs incurred in the course of clinical negligence litigation.

17. Practitioners are also specifically reminded of the fundamental importance of maintaining the independence of expert witnesses which is reflected, in particular, at paragraphs 1, 11, 12 and 18 of the Commercial List Practice Direction and the draft Expert's Declaration annexed thereto

Sanctions

18. If the defendant does not comply with the 3 month deadline to admit liability or to state the reason for his defence of the claim, he should be debarred from defending the case.

19. If the defendant denies liability but does not provide the necessary documents, the plaintiff may either:

(1) apply for an ex parte order for the provision of such documents, the defendant to pay the costs of such application; or

(2) elect to issue proceedings and in such circumstances should the defendant subsequently file a defence which causes the plaintiff to discontinue the proceedings, the defendant should pay the plaintiff's costs of issue.

20. If the defendant does not raise an allegation of contributory negligence, with full reasons given within a three month period he should be debarred from raising such allegations at a later period.

Alternative Dispute Resolution

~~18~~21. The parties should consider whether some form of alternative dispute resolution procedure would be more suitable than litigation and, if so, endeavour to agree which form to adopt. Both the plaintiff and the defendant may be required by the court to produce evidence that they have given consideration to alternative means of resolving their dispute ~~had been considered~~. This is likely to involve evidence of meetings to discuss pre-trial settlements and general early negotiations ~~production to the court of the standard mediation correspondence, a copy of which may be obtained from the Commercial Court website, together with the parties' replies thereto~~. Different forms of alternative dispute resolution are available and a mediation service is provided by the Law Society of Northern Ireland. Generally the courts take the view that litigation should be a last resort and that claims should not be issued prematurely when a settlement is still being actively explored. It is expressly recognised that no party can or should be forced to mediate or enter into any form of alternative dispute resolution.

Rehabilitation

22. The claimant or the defendant or both shall consider as early as possible whether the claimant has reasonable needs that could be met by rehabilitation treatment or other measures. The parties shall consider in such cases how those needs might best be addressed.

~~23~~19. This protocol shall come into operation on the 20th April 2009.

(Note: The protocol shall operate on a pilot basis until further notice consequent upon a review of the protocol which will occur after two terms of operation of the protocol.

At the end of the pilot period all interested parties may submit comments for consideration as part of the review process. Any comments should be addressed to Mrs R Johnston, Secretary of the Civil Justice Reform Committee, Royal Courts of Justice, Belfast.)

Signed this 27th day of February 2009

The Hon. Mr Justice Gillen

Senior Queen's Bench Judge