Civil Procedure Rule Committee

Standard disclosure in workplace claims

A response by the Association of Personal Injury Lawyers

July 2023

Introduction

APIL welcomes the opportunity to respond to the Civil Procedure Rule Committee consultation on amendments to annex C of the pre-action protocol for personal injury claims, relating to standard disclosure in workplace claims. We agree with the need to update the annex to reflect current regulations and health and safety obligations. However, we are concerned that the changes proposed are an oversimplification of the disclosure requirements, at odds with the Civil Procedure Rules (CPR), and ultimately could create confusion and delay for all parties involved in workplace claims, as well as the courts. The current annex C, and the rules around disclosure embodied in CPR Part 31, assist all parties to a claim with enquiring as to the documents that should and should not be made available. Appropriate disclosure is of great assistance in leading to the efficient resolution of claims, and the timely abandonment of unmeritorious claims. The changes proposed will likely lead to increased instances of ineffective disclosure and the withholding of important information whether intentionally or non-intentionally.

"Evidence and proportionality" and "acceptable sources of evidence"

We do not think that the text relating to proportionality is necessary. The paragraphs contain a number of ambiguous phrases with no clear definition which, we believe, misrepresent the test for standard disclosure in the rules, and will lead to confusion, delays, and make it more difficult for parties to assess a case.

The Management of Health and Safety at Work Regulations 1999 provide the framework for risk assessment that all employers and self-employed persons, save for those excluded in regulation 2, must follow. The wording in the initial two paragraphs of the amended annex, and the introduction of "proportionality" provides an impression that smaller companies do not have to comply with the regulations and do not have to fulfil reporting requirements or properly risk assess. This is incorrect, misleading and is not reflective of the health and safety framework. There is also a misconception that size inversely correlates to risk. In fact, there are many smaller businesses e.g. in the construction and agricultural sectors, with a single self-employed person who works with sub-contractors. The construction and agricultural sectors are extremely high risk[1]. Common sense is already applied by the parties when claims are brought against small defendant organisations. The claimant solicitor will know that they will not have as many records or extensive documents as a larger firm, and will adapt their expectations in relation to disclosure as appropriate. The addition of these paragraphs is therefore unnecessary, and likely to cause confusion.

Further, the reference to proportionality here is at odds with the test for standard disclosure set out in the CPR. CPR 31.6 sets out the test for standard disclosure:

[1] HSE Statistics 2021/22 show that these industries represent the highest rates of non-fatal workplace injury.

31.6 *Standard disclosure requires a party to disclose only–*

(a) the documents on which he relies; and

b) the documents which –

i) adversely affect his own case;

(ii) adversely affect another party's case; or

(iii) support another party's case; and

(c) the documents which he is required to disclose by a relevant practice direction.

and CPR 31.3(2) provides:

(2) Where a party considers that it would be disproportionate to the issues in the case to permit inspection of documents within a category or class of document disclosed under rule 31.6(b) –

(a) he is not required to permit inspection of documents within that category or class; but

(b) he must state in his disclosure statement that inspection of those documents will not be permitted on the grounds that to do so would be disproportionate.

The starting point in the CPR is, therefore, that all documents are to be disclosed unless a party states that it would be disproportionate to disclose a particular document. The new text added to the annex instead gives the impression that the starting point is that only documents that the party deems proportionate will need to be disclosed. This will lead to delays and parties taking up a greater amount of court time, with busy first-instance judges facing competing arguments from the parties when applying the test for pre-action disclosure under CPR 31.16[2] as the proposed amendments in Annex C contradict the requirements in that test.

The wording in the added paragraphs will also lead to disclosure being less effective, with ambiguous wording such as "smaller organisation", and "relevant", being used to justify why particular information should not be disclosed. If key information is withheld, it will not be possible to properly assess whether a case is worth pursuing. As stated above, the

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[2] **31.16**

(1) This rule applies where an application is made to the court under any Act for disclosure before proceedings have started[1].

(2) The application must be supported by evidence.

(3) The court may make an order under this rule only where–

(a) the respondent is likely to be a party to subsequent proceedings;

(b) the applicant is also likely to be a party to those proceedings;

(c) if proceedings had started, the respondent's duty by way of standard disclosure, set out in rule 31.6, would extend to the documents or classes of documents of which the applicant seeks disclosure; and

(d) disclosure before proceedings have started is desirable in order to –

(i) dispose fairly of the anticipated proceedings;

(ii) assist the dispute to be resolved without proceedings; or

(iii) save costs.

(4) An order under this rule must –

(a) specify the documents or the classes of documents which the respondent must disclose; and

(b) require him, when making disclosure, to specify any of those documents –

(i) which are no longer in his control; or

(ii) in respect of which he claims a right or duty to withhold inspection.

(5) Such an order may –

(a) require the respondent to indicate what has happened to any documents which are no longer in his control; and

(b) specify the time and place for disclosure and inspection.

disclosure requirements in the CPR are key to ensuring both that unmeritorious cases are not pursued and meritorious ones are brought to a conclusion as efficiently as possible. Court time should not be wasted through the pursuit of unmeritorious cases or where the issues could have been narrowed earlier.

Further, we do not believe advice around proportionality is appropriate within an annex to a pre-action protocol. This content is more appropriate for general guidance issued by the Health and Safety Executive. The pre-action protocol already clearly states in section 7.1.2 that annex C is a non-exhaustive list of documents – there is simply no need to introduce comments on proportionality here. Further, the wording "Only the 'significant findings' of a risk assessment need be recorded" is not relevant to disclosure. Information and advice on how businesses should conduct themselves to comply with health and safety law have no place in either a pre-action protocol or an annex to a protocol. To include it here simply creates confusion and clouds the objective of the protocol in clearly setting out civil procedure.

If the intention of the introduction of these paragraphs is to improve clarity for the parties in what should and should not be disclosed, we suggest instead that the main body of the pre-action protocol for personal injury claims should signpost to CPR 31.6 and 31.16. We would also suggest that instead of the additional paragraph on "acceptable forms of evidence", there should be a signpost in the pre-action protocol to CPR 31.4, which defines a document as anything in which any information of any description is recorded – this includes electronic recordings. Again, examples and guidance for duty holders should be instead included in documents issued by the Health and Safety Executive, and not in this annex.

Addition of the wording "relevant" throughout the annex

We do not agree with the addition of the word "relevant" throughout the annex. This, again, is at odds with the wording of the rules around standard disclosure. The rules state that the claimant solicitor should set out in the letter of claim the documents that they consider relevant and why, in helping to clarify or resolve the issues in dispute (Paragraph 7.1). The addition of relevant here in this annex places the decision as to what is relevant and disclosable instead with the defendant. This addition will simply create a friction point, encouraging arguments over whether a particular document in a set of documents needs to be disclosed. Additionally, there are other means to access an entire set of records, so even in a situation where a defendant is refusing to disclose all records of a particular type, this information can be obtained by the claimant instead by a Subject Access Request. Again, the amendments will simply lead to the delay in settlement of a meritorious claim, or abandonment of an unmeritorious claim.

Table of regulations

We agree with the need to bring the list of standard disclosure documents up to date and to ensure that they reflect current health and safety regulations. However, we believe that the table approach and lack of detail included, are an oversimplification of the disclosure requirements and will lead to documents that should be disclosed being withheld. For example, it is not clear at a glance which parts of Regulation 3 of the Management of Health and Safety at Work Regulations contain the documents that should be disclosed – there are a number of sub-sections of Regulation 3, and simply pointing to "Regulation 3" may mean that some documents are missed. Already, at present, defendants may disclose a post-accident risk assessment, but will not disclose a pre-accident risk assessment. The need for both is clearly set out in the list of documents, yet this omission regularly still occurs. It will occur even more frequently if the only information the defendant has is a vague reference to

the regulation in a table. Again, this will just cause delays and creates more work for all parties and increased costs being incurred.

A table format also fails to highlight the hierarchy of the health and safety framework. Regulation 3 of the Management of Health and Safety at Work Regulations 1999 *"requires the employer to carry out a suitable and sufficient risk assessment for the purposes of identifying the measures he needs to take to comply with the requirements and prohibitions imposed upon him by or under the relevant statutory provisions"*[3] and is the "*blueprint for action"*[4][5] Then a further specific risk assessment may be required to comply with those *"relevant statutory provisions"* depending on the type of activity undertaken. A risk assessment is not one size fits all, yet the table does not make this clear.

Further, there is a specific duty at regulation 16 of the Management of Health and Safety at Work Regulations 1999 to risk assess in relation to new or expectant mothers: "**.—(**

> **1) Where—**
>
> (a)the persons working in an undertaking include women of child-bearing age; and
>
> (b)the work is of a kind which could involve risk, by reason of her condition, to the health and safety of a new or expectant mother, or to that of her baby, from any processes or working conditions, or physical, biological or chemical agents, including those specified in Annexes I and II of Council Directive 92/85/EEC F1 on the introduction of measures to encourage improvements in the safety and health at work of pregnant workers and workers who have recently given birth or are breastfeeding, **[**F2as amended by Directive 2014/27/EU,**]**
>
> the assessment required by regulation 3(1) shall also include an assessment of such risk
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> (2) Where, in the case of an individual employee, the taking of any other action the employer is required to take under the relevant statutory provisions would not avoid the risk referred to in paragraph (1) the employer shall, if it is reasonable to do so, and would avoid such risks, alter her working conditions or hours of work.
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> (3) If it is not reasonable to alter the working conditions or hours of work, or if it would not avoid such risk, the employer shall, subject to section 67 of the 1996 Act suspend the employee from work for so long as is necessary to avoid such risk.
>
> (4) In paragraphs (1) to (3) references to risk, in relation to risk from any infectious or contagious disease, are references to a level of risk at work which is in addition to the level to which a new or expectant mother may be expected to be exposed outside the workplace."

We are also concerned that there are a number of sub-sections that are marked as deleted from the annex, but do not appear in the table, for example "information provided to employees under regulation 10" of the Management of Work regulations is deleted from the list, but not replicated in the table format. Though annex C is "non-exhaustive", we would not want existing examples of the sorts of regulations that need to be complied with being removed from the list – as set out above, disclosure is helpful for all parties – if a defendant can show that the employee was provided with information about the risk assessment, as

[3] Allison v London Underground Ltd - [2008] EWCA Civ 71 Smith LJ Paragraph 57
[4] Ibid
[5] As approved in Kennedy v Cordia (Services) LLP [2016] UKSC 6 Paragraph 89

per regulation 10, for example, then this will help them defend the case. Removing some of the regulations from the list in the name of simplification will most likely lead to delay, or the pursuit of an unmeritorious claim because the claimant solicitor was not able to get the full picture.

Simplification of the disclosure list and condensation into a table format overlooks the assistance derived from this annex by all those practising in this area. This includes representatives for both claimant and defendant, barristers, solicitors, insurers and the judiciary. The detail within the annex, providing the relevant sections of each regulation, provides a useful guide and starting point as to the legislative framework that applies in this area of law. This is useful to claimant practitioners in formulating letters of claim, and also assists case handlers within insurance companies with requesting documents from their insured, with it being manifestly clear to the insured as to what is required of them in terms of disclosure. At a time of increasing pressures upon the costs of litigation, removal of the existing format would inevitably lead to an increase in costs being incurred whether pre-proceedings or during litigation, with more court time being required, all of which would benefit no-one, least of all injured people.

Below is an example scenario to demonstrate the benefits of the current annex and dangers of moving to a table format.

> *The claimant suffered catastrophic injuries as a result of a faulty lift at work. Disclosure of documents relating to the lift were essential for the assessment of liability and were requested in the letter of claim. These related to those documents relevant to the specific Workplace Regulations on which the claim relied, including: the accident book entry; other entries relating to similar accidents; CCTV footage; pre and post-accident service; repairs and maintenance records; risk assessments; complaints and worksheets. Disclosure was piecemeal and there were documents that were not disclosed that one would expect to be available. The claimant solicitor requested the defendant provide a signed witness statement confirming that a reasonable search had been carried out and confirmation that no further documents were available. This was provided and enabled the claimant solicitor to instruct an expert engineer to inspect and report on the lift with the confidence that all documents available had been provided pre issue. This allowed an assessment of liability to take place at the earliest possible time and prior to issuing court proceedings.*
>
> *Under the Proposed Changes to Annex C the following documents relevant to specific Workplace Regulations may not be disclosed:*
>
> - *Management of Health and Safety at Work Regulations 1999*
> - o *The oversimplification of referring to "risk or other assessment" could lead to either or both of the following not being disclosed:*
> - ▪ *Pre-Accident Risk Assessment required by Regulation 3(1)*
> - ▪ *Post-Accident Risk Assessment required by Regulations 3(2)*
> - o *Regulations 4 and 5 are not mentioned within the table and could lead to accident investigation reports prepared in implementing the requirements made under these regulations to be left out of disclosure.*
>
> - *Workplace (Health, Safety and Welfare) Regulations 1992*
> - o *Stating that disclosure with regards to "<u>evidence of</u> maintenance and inspection system/records" could lead to confusion over what actually*

needs to be disclosed under regulation 5. It would fall to what the disclosing party determined to be "evidence" and they may not actually disclose the appropriate records.

- *Provision and Use of Work Equipment Regulations 1998*
  - *With regards to Regulation 4 the table states the evidence required is "General Information, instruction and training". This is an oversimplification and could lead to key-specific documents not being disclosed.*
  - *With regards to Regulation 5 we would ordinarily expect disclosure of maintenance logs and maintenance records, as above, the proposed change to "evidence of" could mean the specific logs and records themselves are not disclosed.*

This is a non-exhaustive list of examples which demonstrates how the proposed changes could bring confusion into the disclosure exercise within workplace claims. Further, it is unclear whether the claimant solicitor would still be able to obtain the signed witness statement confirming that a reasonable search for specific documents had been carried out and that they did not exist. Instead, would the disclosing party simply be able to refuse to sign the statement because the documents are no longer specifically referred to within Annex C?

With ineffective disclosure and without the signed statement the claimant solicitor would have had no option but to either abandon a meritorious claim or involve the courts by issuing a potentially unmeritorious claim before being able to properly assess liability pre-action. Situations such as this could lead to increased costs, wasted court time and could potentially also have an impact on Qualified One-Way Costs Shifting (QOCS) as a result of unmeritorious claims being pursued.

Changes to update the list in line with current regulations

As stated above, we welcome that the list will be updated to reflect current regulations. We suggest that the list format should remain, with updated current regulations included.

However, the older versions of regulations should remain within the list. Older regulations that are no longer law will still be relevant in cases of, for example, longtail disease, and provide valuable guidance for the appropriate documents required for disclosure in these types of case. Those handling these sorts of cases are signposted directly to annex C, as per 7.3 of the Pre-action Protocol for Disease and Illness Claims, which states:

> "…if the claim is not admitted in full, the defendant should enclose with his 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 proceedings. Reference can be made to the documents annexed to the personal injury protocol".

This clear direction to the annex suggests that the list specifically relates to disease claims as well as other work-related accidents. It is important, therefore, that the list includes older regulations that may be important in long-tail cases.

Any queries relating to this response should, in the first instance, be directed to:

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