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Dear Sir/Madam

Practice Direction for Personal Injury and Damage Only Civil Ligation Actions in the High Court

APIL welcomes the opportunity to comment on the Shadow Civil Justice Council's proposed Practice Direction for Personal Injury and Damage Only Civil Ligation Actions in the High Court. APIL is supportive of the Practice Direction and its objectives overall. We highlight below our concerns and recommended amendments.

Definition of 'parties'

There is currently no definition, nor any clear statement that the words 'parties' and 'practitioners' referenced within the proposed practice direction that encompasses insurance companies, who will stand in the shoes of the defendant tortfeasor. Without such a statement or definition, plaintiff solicitors will have to comply with the practice direction, but insurance companies who may not see themselves as 'parties' or 'practitioners' will not. Members report that it is common for defendant insurance companies to engage in 'third-party-capture', contacting unrepresented plaintiffs directly to settle the claim. They must be compelled to provide unrepresented plaintiffs with a copy of the practice direction, and the plaintiff should be made aware that they can and should seek independent legal advice before engagement with the insurer. It is important that the terms 'parties' and 'practitioners' are defined in paragraph 1 to include defendant insurance companies, so that it is clear that insurance companies should be complying with the practice direction, and where the plaintiff is a litigant in person, they are required to share a copy of the practice direction with them, as per paragraph 3.2.

Paragraph 2

We suggest that there should be an objective to include the promotion of rehabilitation treatment (not just in high-value cases) for optimal litigation practice in section 2.3:

We propose the following amendment: f) The promotion of the provision of medical or rehabilitation treatment to address the needs of the plaintiff;

Paragraph 4

Paragraph 4.2

We welcome the wording on 4.2 g) “details of any financial loss incurred, even where such details are necessarily provisional”. APIL had suggested this amendment in a 2015 response on improvements to the County Court protocol¹, as we believe that this clarification ensures that time is not wasted on gathering exact details of loss before the claim has even begun.

Paragraph 4.3

In relation to paragraph 4.3, we would suggest ‘depreciation’ at sub para (l) is replaced with ‘diminution in market value’. We would also suggest that the words ‘if relevant’ be inserted after each of the items in sub-paras (q) – (u).

Paragraph 4.6

The word ‘received’ should be replaced with ‘agreed’ as this is a more relevant consideration. Our members report that it often takes several days and sometimes longer for plaintiffs to fully consider the motor assessors valuation and to provide instructions.

Paragraph 4.9

We recognise that ‘impecuniosity’ has been referred to in the sphere of credit hire litigation for over two decades, however there is no specific test set out to indicate whether or not a plaintiff should be deemed ‘impecunious’. We understand that the courts need only to have some cogent evidence of impecuniosity – this may be achieved with different evidence than that set out in paragraph 4.9. We therefore suggest that the phrase ‘or such other material that would meet the evidential burden’, is inserted before ‘if available’.

Paragraph 4.10

We also suggest an amendment (underline) to section 4.10 regarding the letter of claim: “Solicitors are recommended to use a standard format for such a letter. An example is given at Appendix A to this Practice Direction; this may be amended to suit the particular case. This should also be accompanied by a request for documents required for disclosure.

Paragraph 4.11

Paragraph 4.11 can be amalgamated with paragraph 4.1 We suggest that paragraph 4.11 is omitted, and 4.1 is amended as follows:

“As soon as reasonably practicable after the writing of any preliminary notification letter to the defendant, or their legal or corporate representative, the plaintiff’s solicitors should send to any legal or corporate representative of the proposed defendant a detailed letter of claim as soon as sufficient information is available to substantiate a claim and before issues of quantum are addressed in detail...”

It would not be appropriate to send a letter of claim to the defendant directly, which would contain the plaintiff’s full name and address. The plaintiff’s personal information should only be provided to the insurer (and/or legal/corporate representative) due to data protection and to ensure the safety of the plaintiff.

Paragraph 4.15 and 4.16

Regarding section 4.15 and 4.16 where it states that “the defendant will have a maximum of four months from the date of acknowledgement of the letter of claim to investigate.” We

¹ APIL response: Northern Ireland County Court Rules Committee initial consultation on scale costs and recent practice and procedural changes in the county court
<https://www.apil.org.uk/files/pdf/ConsultationDocuments/3079.pdf>

would suggest that the previously established three-month period should be maintained. Our members report that the three-month deadline is working effectively at the moment, and there is no reason to change it in practice. Further, this could mean that the plaintiff has to wait an additional month to see progress in their claim.

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Paragraph 4.17

We welcome the wording proposed for section 4.17 b) “if liability and/or causation is denied, the defendant should explain with sufficient clarity and precision the reasons for such denial - including an indication of any facts upon which the defendant is likely to rely upon in support of any substantive defence”. APIL had suggested that amendment in our response to the County Court Rules Committee’s consultation mentioned above.² We believe there should be greater clarity as to what is meant by an admission of liability, to ensure that defendants provide sufficient information to the plaintiff’s solicitor pre-trial. We also agree with 4.17 c).

Disclosure before proceedings have started is desirable in order to dispose fairly of the anticipated proceedings, assist the dispute to be resolved without proceedings, or save costs. Attached at Appendix A to this consultation is a specimen, but non-exhaustive, list of documents likely to be material in different types of claims. If the documents are not available, the defendant should provide detail on if/when it will become available.

Paragraph 5

We strongly support the introduction of a rehabilitation section in this Practice Direction. We agree with the wording in section 5.1. APIL advocates a holistic approach to personal injury claims, with rehabilitation being considered in every case - in many cases, all that the injured person wants is to return to their life before their accident, and rehabilitation is a key aspect of this. Research has shown that in many cases, rehabilitation can help injured people recover more quickly, have a better quality of life and return to work sooner.

Paragraph 7

There may on occasions be some circumstances in Northern Ireland where alternatives to judicial determination may be suitable, but these alternatives should be for the parties involved to explore. Mediation or alternative dispute resolution should never be compulsory or a tick-box exercise; to do this will simply increase costs and will not provide any progress towards settlement.

Personal injury claims are already dealt with in a proportionate manner through the system of scale costs in the County Court in Northern Ireland. There is already a great deal of work undertaken by Northern Irish practitioners before and after issue, to ensure that claims do not go to court unnecessarily. Further, there is no cost benefit to any party dragging out a case unnecessarily and it is already common for practitioners in Northern Ireland to have pre-trial consultations between parties to facilitate negotiations and settlement.

We are concerned that parties will be required to produce evidence that they have suggested mediation in every case, or they will incur sanctions. There should be no cost penalties for failure to engage in alternative means of resolution. It should be the plaintiff’s decision based on the specific circumstances of the case. We suggest that there should be

² APIL response: Northern Ireland County Court Rules Committee initial consultation on scale costs and recent practice and procedural changes in the county court
<https://www.apil.org.uk/files/pdf/ConsultationDocuments/3079.pdf>

confirmation in relation to mediation costs being the responsibility of the defendant, and that costs and outlays will be paid by the defendant if the claim settles pre-proceedings.

Paragraph 10

We welcome that there will be cost sanctions and procedural penalties for failure to comply with the protocol. The protocol needs “teeth” in order to be effective. However, there is no mention in the Practice Direction of what the available sanctions would be. We believe the sanctions considered should be clearly set out to ensure that section 10 is not just a vague statement on sanctions and that there is compliance with the objectives of the Practice Direction.

Paragraph 11

Further clarity is needed concerning the intention of paragraph 11.6.

Paragraph 14

Exchange of evidence should be based on a case-by-case approach. It should arise from an agreement between parties to disclose rather than being a mandatory requirement or included in the court’s directions.

Paragraph 17

We welcome the new paragraph 17.4.

Paragraph 21

We strongly agree with this section regarding interim payments - it is important that a reference to this is included in the Practice Direction.

Paragraph 22 and 23

Regarding 22.1 and 23.3, our members report that it can be challenging to get agreement from defendants on the bundle no less than seven days before the trial. We query the options available for plaintiff solicitors if defendants do not cooperate and the bundle cannot be agreed upon with the other party. We suggest that there should be a reference to the need to agree on a core bundle in the Directions given by the Master, in particular under ‘General’ on page 58.

As mentioned above, the Practice Direction needs to have ‘teeth’, including clear sanctions for non-compliance and clear directions given by the Masters to ensure that all parties adhere to its requirements.

Appendix D

We suggest that the directions given by the Master in Appendix D should include a requirement for each party to file their experts’ availability within 14 days or 28 days from the date of this order, early on in the litigation. We suggest this could be included under General, along with our proposed amendment regarding the agreement of a bundle.

We hope our comments prove useful.

Yours sincerely,



Ana Ramos

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Appendix A – Recommended pre-action disclosure list

- 1) Accident book entry.
- 2) Other entries in the book, or other accident books, relating to accidents or injuries similar to those suffered by our client (and if it is contended there are no such entries please confirm we may have facilities to inspect all accident books).
- 3) First aider report.
- 4) Surgery record.
- 5) Foreman/supervisor accident report.
- 6) Safety representatives accident report
- 7) RIDDOR (Reporting of Injuries, Diseases and Dangerous Occurrences Regulations) report to HSENI or relevant investigatory agency.
- 8) Back to work interview notes and report.
- 9) All personnel/occupational health records relating to our client.
- 10) Other communications with the HSENI or relevant investigatory agency (including local authorities).
- 11) Minutes of Health and Safety Committee meeting(s)
- 12) Copies of all relevant CCTV footage and any other relevant photographs, videos and/or DVDs.
- 13) Copies of all electronic communications/documentation relating to the accident.
- 14) All documents within the above categories relating to other similar accidents including any for which entries in accident books are disclosed.
- 15) Manufacturer's or dealer's instructions or recommendations concerning use of the work equipment.
- 16) Service or maintenance records of the work equipment.
- 17) All documents recording arrangements for detecting, removing or cleaning up any articles or substances on the floor of the premises likely to cause a trip or slip.
- 18) Work sheets and all other documents completed by or on behalf of those responsible for the implementing cleaning policy recording work done.
- 19) All invoices, receipts and other documents relating to the purchase of relevant safety equipment to prevent a repetition of the accident.
- 20) All correspondence, memoranda or other documentation received or brought into being concerning the condition or repair of the work equipment/the premises.
- 21) All correspondence, instructions, estimates, invoices and other documentation submitted or received concerning repairs, remedial works or other works to the work equipment / the premises since the date of that accident.
- 22) Work sheets and all other documents recording work done completed by those responsible for maintaining the work equipment/premises.

23) All relevant risk assessments.

24) All reports, conclusions or recommendations following any enquiry or investigation into the accident.

25) The record kept of complaints made by employees together with all other documents recording in any way such complaints or action taken thereon.

26) All other correspondence sent, or received, relating to our client's injury prior to receipt of this letter of claim.

27) Documents produced to comply with requirements of the Management of Health and Safety at Work Regulations (Northern Ireland) 2000 1999 including:

- i. Pre-accident risk assessment required by Regulation 3(1).
- ii. Post-accident re-assessment required by Regulation 3(2).
- iii. Accident investigation report prepared to meet the requirements of Regulations 4 and 5.
- iv. Any health surveillance records required by Regulation 6.
- v. Documents relating to the appointment of competent persons to assist required by Regulation 7.
- vi. Documents relating to the employees health and safety training required by Regulation 8.
- vii. Documents relating to necessary contacts with external services required by Regulation 9.
- viii. Information provided to employees under Regulation 10.

28) Documents produced to comply with requirements of the Workplace (Health, Safety and Welfare) Regulations (Northern Ireland) 1993 including:

- i. Repair and maintenance records required by Regulation 5.
- ii. Housekeeping records to comply with the requirements of Regulation 9.
- iii. Hazard warning signs or notices to comply with Regulation 17 (Traffic Routes).

29) Documents produced to comply with requirements of the Provision and Use of Work Equipment Regulations (Northern Ireland) 1999 including:

- i. Manufacturers' specifications and instructions in respect of relevant work equipment establishing its suitability to comply with Regulation 5.
- ii. Maintenance log/maintenance records required to comply with
- iii. Documents providing information and instructions to employees to comply with Regulation 8.
- iv. Documents provided to the employee in respect of training for use to comply with Regulation 9.
- v. Any notice, sign or document relied upon as a defence to alleged breaches of Regulations 14 to 18 dealing with controls and control systems.
- vi. Instruction/training documents issued to comply with the requirements of Regulation 22 insofar as it deals with maintenance operations where the machinery is not shut down.

vii. Copies of markings required to comply with Regulation 23.

viii. Copies of warnings required to comply with Regulation 24.

30) Documents produced to comply with requirements of the Personal Protective Equipment at Work Regulations (Northern Ireland) 1993 including:

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i. Documents relating to the assessment of the Personal Protective Equipment to comply with Regulation 6.

ii. Documents relating to the maintenance and replacement of Personal Protective Equipment to comply with Regulation 7.

iii. Record of maintenance procedures for Personal Protective Equipment to comply with Regulation 7.

iv. Records of tests and examinations of Personal Protective Equipment to comply with Regulation 7.

v. Documents providing information, instruction and training in relation to the Personal Protective Equipment to comply with Regulation 9.

vi. Instructions for use of Personal Protective Equipment to include the manufacturers' instructions to comply with Regulation 10.

31) Documents produced to comply with requirements of the Manual Handling Operations Regulations (Northern Ireland) 1992 including:

i. Manual Handling Risk Assessment carried out to comply with the requirements of Regulation 4(1)(b)(i).

ii. Re-assessment carried out post-accident to comply with requirements of Regulation 4(1)(b)(i).

iii. Documents showing the information provided to the employee to give general indications related to the load and precise indications on the weight of the load and the heaviest side of the load if the centre of gravity was not positioned centrally to comply with Regulation 4(1)(b)(iii).

iv. Documents relating to training in respect of manual handling operations and training records.

32) Documents produced to comply with requirements of the Health and Safety (Display Screen Equipment) Regulations (Northern Ireland) 1992 including:

i. Analysis of work stations to assess and reduce risks carried out to comply with the requirements of Regulation 2.

ii. Re-assessment of analysis of work stations to assess and reduce risks following development of symptoms by the claimant.

iii. Documents detailing the provision of training including training records to comply with the requirements of Regulation 6.

iv. Documents providing information to employees to comply with the requirements of Regulation 7.

33) Documents produced to comply with requirements of the Control of

Substances Hazardous to Health Regulations (Northern Ireland) 2003 including:

- i. Risk assessment carried out to comply with the requirements of Regulation 6.
- ii. Reviewed risk assessment carried out to comply with the requirements of Regulation 6.
- iii. Documents recording any changes to the risk assessment required to comply with Regulation 6 and steps taken to meet the requirements of Regulation 7.
- iv. Copy labels from containers used for storage handling and disposal of carcinogenics to comply with the requirements of Regulation 7.
- v. Warning signs identifying designation of areas and installations which may be contaminated by carcinogenics to comply with the requirements of Regulation 7.
- vi. Documents relating to the assessment of the Personal Protective Equipment to comply with Regulation 7.
- vii. Documents relating to the maintenance and replacement of Personal Protective Equipment to comply with Regulation 7(3A).
- viii. Records of maintenance procedures for Personal Protective Equipment to comply with Regulation 7.
- ix. Records of tests and examinations of Personal Protective Equipment to comply with Regulation 7.
- x. Documents providing information, instruction and training in relation to the Personal Protective Equipment to comply with Regulation 7.
- xi. Instructions for use of Personal Protective Equipment to include the manufacturers' instructions to comply with Regulation 7.
- xii. Air monitoring records for substances assigned a maximum exposure limit or occupational exposure standard to comply with the requirements of Regulation 7.
- xiii. Maintenance examination and test of control measures records to comply with Regulation 9.
- xiv. Monitoring records to comply with the requirements of Regulation 10.
- xv. Health surveillance records to comply with the requirements of Regulation 11.
- xvi. Documents detailing information, instruction and training including training records for employees to comply with the requirements of Regulation 12.
- xvii. All documentation relating to arrangements and procedures to deal with accidents, incidents and emergencies required to comply with Regulation 13.
- xviii. Labels and Health and Safety data sheets supplied to the employers to comply with the CHIP Regulations.

34) Documents produced to comply with requirements of the Construction (Design and Management) Regulations (Northern Ireland) 2007 including:

- i. Notification of a project form (HSE F10).
- ii. Health and Safety Plan.
- iii. Health and Safety file.

- iv. Information and training records provided.
- v. Records of advice from and views of persons at work.
- vi. Reports of inspections made in accordance with Regulation 33.
- vii. Records of checks for the purposes of Regulation 34.
- viii. Emergency procedures for the purposes of Regulation 39.

35) Documents produced to comply with requirements of the Construction (Health, Safety & Welfare) Regulations (Northern Ireland) 1996.

36) Documents produced to comply with requirements of the Work at Height Regulations (Northern Ireland) 2005 including:

- i. Documents relating to planning, supervision and safety carried out for Regulation 4.
- ii. Documents relating to training for the purposes of Regulation 5.
- iii. Documents relating to the risk assessment carried out for Regulation 6.
- iv. Documents relating to the selection of work equipment for the purposes of Regulation 7.
- v. Notices or other means in writing warning of fragile surfaces for the purposes of Regulation 9.
- vi. Documents relating to any inspection carried out for Regulation 12.
- vii. Documents relating to any inspection carried out for Regulation 13.
- viii. Reports made for the purposes of Regulation 14.
- ix. Any certificate issued for the purposes of Regulation 15.

37) Documents produced to comply with requirements of the Pressure Systems and Transportable Gas Containers Regulations 1989 including:

- i. Information and specimen markings provided to comply with the requirements of Regulation 5.
- ii. Written statements specifying the safe operating limits of a system to comply with the requirements of Regulation 7.
- iii. Copy of the written scheme of examination required to comply with the requirements of Regulation 8.
- iv. Examination records required to comply with the requirements of Regulation 9.
- v. Instructions provided for the use of operator to comply with Regulation 11.
- vi. Records kept to comply with the requirements of Regulation 13.
- vii. Records kept to comply with the requirements of Regulation 22.

38) Documents produced to comply with requirements of the Lifting Operations and Lifting Equipment Regulations (Northern Ireland) 1999 including the record kept to comply with the requirements of Regulation 6.

39) Documents produced to comply with requirements of the Noise at Work Regulations 1989 including:

i. Any risk assessment records required to comply with the requirements of Regulations 4 and 5.

ii. Manufacturers' literature in respect of all ear protection made available to claimant to comply with the requirements of Regulation 8.

iii. All documents provided to the employee for the provision of information to comply with Regulation 11.

40) Documents produced to comply with requirements of the Construction (Head Protection) Regulations (Northern Ireland) 1990 including:

i. Pre-accident assessment of head protection required to comply with Regulation 3(4).

ii. Post-accident re-assessment required to comply with Regulation 3(5).

41) Documents produced to comply with requirements of the Construction (General Provisions) Regulations 1961 including any report prepared following inspections and examinations of excavations etc to comply with the requirements of Regulation 9.

42) Documents produced to comply with requirements of the Gas Containers Regulations 1989 including:

i. Information and specimen markings provided to comply with the requirements of Regulation 5.

ii. Written statements specifying the safe operating limits of a system to comply with the requirements of Regulation 7.

iii. Copy of the written scheme of examination required to comply with the requirements of Regulation 8.

iv. Examination records required to comply with the requirements of Regulation 9.

v. Instructions provided for the use of operator to comply with Regulation 11.

43) Documents produced to comply with the Control of Noise at Work Regulations (Northern Ireland) 2006 including:

i. Risk assessment records required to comply with the requirements of Regulation 5

ii. All documents relating to and/or arising out of actions taken to comply with Regulation