# LORD CHANCELLOR'S DEPARTMENT CONSULTATION

# GENERAL PRE-ACTION PROTOCOL

## A RESPONSE BY THE ASSOCIATION OF PERSONAL INJURY LAWYERS

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The executive committee would like to acknowledge the assistance of following people for assisting with the preparation of this response:

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1. The Association of Personal Injury Lawyers (APIL) was formed in 1990 and represents more than 5150 solicitors, barristers, legal executives and academics whose interest in personal injury work is predominantly on behalf of injured claimants. The aims of the association are:

- To promote full and prompt compensation for all types of personal injury;
- To improve access to our legal system by all means including education, the exchange of information and the enhancement of law reform;
- To alert the public to dangers in society such as harmful products and dangerous drugs;
- To provide a communication network exchanging views formally and informally.

2. APIL welcomes the opportunity to comment upon the LCD's consultation paper regarding a draft general pre-action protocol. Most personal injury cases are covered by the personal injury protocol. There is currently, however, no pre-action protocol for disease and illness claims. Our response, therefore, concentrates on the draft general protocol only in so far as it relates to disease and illness claims. APIL does not consider that a general pre-action protocol would be successful in achieving its objectives as regards disease and illness claims, particularly in relation to pre-action settlement. APIL urges the LCD to introduce the pre-action protocol for disease and illness claims as soon as possible.

**THE GENERAL PRE-ACTION PROTOCOL**

3. Initial findings suggest that the personal injury protocol works well in practice, encouraging early settlement and enhancing predictability. A survey of our members, acknowledged by the LCD and presented to the Civil Justice Council, found that 48 per cent of respondents felt that earlier settlement had been reached and that in 33 per cent of cases, litigation had been avoided (LCD Emerging Findings, March 2001). In his Final Report on Access to

Justice, Lord Woolf stated that pre-action protocols "are not intended to provide a comprehensive code for all pre-litigation behaviour, but will deal with specific problems in specific areas" (chapter 10, p108). APIL is deeply concerned that a general pre-action protocol would not be successful in achieving pre-action settlement in disease and illness claims, which are excluded from the personal injury protocol. The general protocol, as drafted, does not address the issues specific to disease and illness claims.

**DISEASE AND ILLNESS CLAIMS**

4. Claims for disease and illness have been specifically excluded from the personal injury protocol because of their complexity and on the basis that a separate protocol has been drafted. If a general pre-action protocol were to be introduced, however, APIL considers it more appropriate that the scope of the personal injury protocol be widened to include disease and illness claims. This is because the personal injury protocol reflects more realistically the practicalities of a disease and illness claim. We must stress, however, that APIL considers the only satisfactory option to be the implementation of the disease and illness protocol.

5. The general pre-action protocol, in the current draft form, would present a number of problems in disease and illness claims. Of particular concern is the lack of specific disclosure requirements. The draft disease and illness protocol encourages disclosure of specific documents, which are hugely important in the early stages of a claim. Under this protocol, all relevant records, including health and personnel records should be disclosed between the parties. The disease and illness protocol contains a template enquiry letter, which assists with the provision of this information and will enable defendants to carry out investigations regarding events which have occurred over a considerable period of time. In the general protocol, there is no requirement for specific documents to be disclosed. The lack of guidance as to which documents are relevant to the claim will delay settlement and add to costs for both parties because information will not have become available to the parties at an early stage. In disease and illness claims, experience suggests that documentation is

rarely forthcoming from a potential defendant in the preliminary stages of a claim. Specific provisions as to disclosure of documents are needed in a protocol for these claims. Without such provisions, there would be little encouragement to resolve preliminary and basic factual and medical issues at an appropriately early stage. The result would be that weaker claims could be pursued longer than they should (until disclosure of documents after the service of a defence and allocation to track), and stronger claims would not be settled as early as they could.

6. Secondly, there is no appropriate guidance on the use of experts in the general protocol. In disease and illness claims, there is a need for expert evidence on causation (as well as quantum) at an early stage, in order to consider whether there is a case at all. Practitioners for both claimants and defendants have agreed that it is essential to have guidance and assistance on the most suitable ways of utilising experts. This issue is covered in depth by the draft disease and illness protocol.

7. In addition, due to the complexities of many disease and illness claims, the disease and illness protocol acknowledges that often, it is not appropriate to instruct single joint experts. The draft general protocol, in contrast, does not appear to envisage anything but the instruction of joint experts. This, in all likelihood, would lead to disputes in the mode of instruction of experts, resulting in greater cost and delay, and/or the eventual instruction of parties' own experts after litigation begins, again with the potential for greater cost and delay.

8. Thirdly, disease and illness claims often present complexities relating to insurance, not considered in sufficient detail by the general pre-action protocol, which envisages that a claim has recently arisen. By way of example, a disease and illness claim for an asbestos-related disease, the cause of which may have occurred 40 years ago, presents problems in tracing the liability insurer if the employer has ceased trading. The general protocol offers no guidance on good, standard practice in this area, whereas the disease and

illness protocol would require, where possible, the proposed defendant to identify the relevant insurer to the claimant.

9. A specific objective of the disease and illness protocol is “to encourage employers to develop systems of early reporting and investigation of suspected occupational health problems.” The draft general protocol is unlikely to achieve this legitimate aim. It would do little to improve employers’ attitude to occupational health and safety.

10. The general pre-action protocol does not represent good practice in disease and illness claims. The general protocol would not encourage parties to adopt a sensible and timely approach to pre-action settlement, nor would it allow parties to identify and refine issues at an early stage. APIL considers that disease and illness claims should be subject to their own, separate protocol.