HER MAJESTY'S COURT SERVICE

CONSULTATION ON PRE-ACTION ADMISSIONS

A RESPONSE BY THE ASSOCIATION OF PERSONAL INJURY LAWYERS (APIL)

OCTOBER 2006

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 5,000 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 objectives 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 whenever they arise;
- To provide a communication network for members

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

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Introduction

APIL welcomes the opportunity to respond to this consultation on pre-action admissions. The decision in *Sowerby* v. *Charlton* [2006] 1 WLR 568, which confirmed that under the Civil Procedure Rules (CPR) no weight is attached to pre-action admissions made in multi track cases, has had far reaching consequences.

It should be noted however, that it is APIL's view that the decision in *Sowerby* does not affect pre-action admissions made in fast track cases and the Association's response in this document in framed by reference to multi-track cases only. By way of confirmation of this view, Lord Justice Brooke commented in *Sowerby* at paragraphs 20 and 21:

> ""The first part of Section 3 of the [pre-action] Protocol [for personal injury claims] is concerned with the letter of claim and the response. Para 3.7 prescribes that the defendant or his insurer is to reply at the end of a period for investigating the claim which should not exceed three months, and in that reply they should state whether liability is denied and, if so, give reasons for their denial of liability. Para 3.9 provides:
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> > "Where liability is admitted, the presumption is that the defendant will be bound by this admission for all claims with a total value of up to £15,000. Where the claimant's investigation indicates that the value of the claim has increased to more than £15,000 since the letter of claim, the claimant should notify the defendant as soon as possible."
>
> It is clear that the Protocol did not intend any such presumption to apply to pre-action admissions of liability in multi-track claims. Indeed, it expressly recognises (at paragraph 2.9) that matters may come to light as a result of investigation after the defendant has responded, and that letters of claim and responses are not intended to have the same status as a statement of case in proceedings."

In other words pre-action admissions in fast track cases are binding but are not binding **in multi track** cases. It recognises that there is a difference, and APIL believes that the difference is recognised deliberately.

The effects of *Sowerby* in practice

There are ongoing cases which are directly affected by the decision: cases in which a pre-action admission has already been made by the defendant. As a result of an admission, a claimant may have stopped investigating liability. If the defendant now withdraws their admission, which, following the decision in *Sowerby* v. *Charlton*, they can do at any time, the claimant's position may be severely prejudiced by having to investigate liability issues years after the event. Documents relating to fault may have been lost, destroyed, or costly to find; memories may have faded; witnesses may have died. One purpose of statute limitation is to protect potential defendants from having to investigate liability years after the event when evidence may have been lost, and yet this is exactly what can happen to claimants in cases where defendants have previously made pre-action admissions and subsequently withdrawn them.

As it has now become clear that claimants can no longer rely on pre-action admissions in multi track cases, claimants' lawyers are ascribing little weight to them as, whilst they still carry evidential weight (see the Court of Appeal decision in *Stoke on Trent v. Walley* [2006] EWCA Civ 1137), they may carry no legal weight in the life of the case. To do otherwise may be negligent. As a result, claimants' lawyers are either advising their clients to issue proceedings as soon as possible, so that any admission that is received is post-action and falls within the scope of CPR part 14, or continuing to investigate liability after a pre-action admission is received, adding to the cost of the case.

Sowerby v. *Charlton* has also made the law anomalous: when contributory negligence is agreed, under *Elizabeth Burdon* v. *Harrods Ltd* [2005] EWHC 410, there will be a contract of compromise, which is binding on both parties. It

seems inconsistent to make what is in effect an admission for a specified proportion of liability binding, except if that proportion is 100 per cent.

Lawyers on both sides of a civil claim are professionals and know what they are doing: withdrawing an admission which has been relied upon can be devastating for the claimant. Clients make decisions on how to run their lives based upon known aspects of their claim and on how they expect to be compensated. Knowing that liability is admitted and that they will be compensated assists the client's physical and mental recovery process. Injured claimants who are uncertain about whether liability will be established may choose to 'hold on' in a job made difficult by their injuries, for example, whereas knowing that liability has been admitted may provide the freedom to make decisions about changing that difficult job. If having made those changes, the admission is withdrawn, the client may suffer additional worry and anxiety which may also affect their long term recovery.

Finally, a trend unrelated to *Sowerby* v. *Charlton*, but relevant to this consultation, is that of insurers raising no issues of contributory negligence when admitting primary liability, but doing so later. The consequences of defendants raising contributory negligence after making seemingly a full admission has the same effect in practice as withdrawing an admission: claimants involved in such cases have to investigate liability again.

For all these reasons, APIL believes the CPR must be changed to make pre-action admissions in multi track cases binding. The issue of streamlining personal injury claims is at the forefront of debate in the industry and this can not be moved forward unless pre-action admissions in multi track cases are reliable. Reliance can only be placed on binding admissions which make clear the extent to which liability is admitted: otherwise claimant lawyers will have to continue to incur costs in investigating admitted matters or issue proceedings early to protect their clients from a withdrawal of an admission or allegations of contributory negligence and from being prejudiced at a later date.

In the case of *Stoke on Trent v Walley*, Lord Justice Brooke said,

"Now that we have made the position clear as it stands under the CPR regime, there would, in my judgment, be great force in giving the status of an admission of liability in response to a pre-action protocol letter before action in a multi-track claim more powerful effect than it at present enjoys. Now that such a valuable pre-action procedure has been introduced in advance of the formalities of litigation procedure, anything that lends uncertainty to the value of a pre-action admission of liability (given in these circumstances) appears to me to run against the grain of the overriding objective, and be likely to lead to avoidable delay, expense and worry." (*paragraph 45*).

If claimants can have proper confidence in pre-action admissions, so that continuing investigations in relation to liability are not necessary, this will reduce the overall cost of proceedings. To ensure this level of confidence, new rules regarding pre-action admissions need to be robust, with withdrawal only being allowed in limited circumstances such as fraud. It is with this in mind that we have responded to the following questions.

Consultation questions

1. Should pre-action admissions be given some weight by the civil procedure rules

a) Should a defendant require the permission of the court to withdraw an admission made before the action proper was commenced (i.e. the claim form was issued)?

Yes. If a defendant is free to withdraw a pre-action admission at any stage of their claim, the claimant may be significantly prejudiced by not continuing to investigate liability. A defendant should therefore require the permission of the court to withdraw any admission, including those made before the action was commenced.

b) *Should a claimant be able to apply for judgment on the basis of a pre-action admission which was withdrawn before the action was commenced?*

Yes. If defendants are free to make and retract admissions before the start of proceedings without consequence, pre-action admissions will continue to be unreliable. A defendant must require the permission of the court to withdraw the admission. This must mean that a pre-action admission is still 'live' at the time proceedings are issued, and a claimant should therefore be able to enter judgment on this basis. If a defendant successfully applies for the admission to be withdrawn, there will be no admission on which the claimant can rely for judgment. If however a defendant's application is not successful, the admission will stand and a claimant should be able to apply for judgment on this basis.

c) *It could be generally assumed that the continued investigation of an admitted point by the claimant following an admission on that point will carry adverse cost consequences, to be ordered under the court's general powers at 44.3. Should a specific costs exclusion also be created?*

It should only be assumed that continued investigation of an admitted point will usually carry adverse costs consequences if the rules make that admission reliable. This admission must only be capable of being withdrawn in extreme circumstances (i.e., fraud) and must make clear whether it is a full admission or whether contributory negligence is alleged.

There should be no absolute rule on costs – this should always be left to the discretion of the courts. Rule 44 already allows such discretion. Rule 44.3(5)(b) says the court must have regard to the conduct of the parties, which includes "whether it was reasonable for a party to…pursue…a particular…issue". This would seem to cover continued investigation of an admitted point. However, introducing a specific rule would place

emphasis on the point and may encourage early admissions by defendants.

2. What constitutes an admission

a) *How strictly should a revised rule circumscribe the form of an admission? For example, it could specify that a Part 14 admission be made in writing, or possibly via a practice form.*

An inadvertent admission is not helpful to either the claimant or the defendant as it makes matters uncertain. There should be an identifiable form of wording so that both claimant and defendant understand what is being said, i.e. that it is binding.

An admission should therefore be made in writing, and should refer, for example, to the specific practice rule in relation to admissions (eg Part 14). It would then be very clear that an admission has been made.

We feel that using a practice form would be an unnecessary addition to this procedure.

b) *Should such a written admission only be applicable if made after receipt of a pre-action letter?*

No. There may be confusion as to what constitutes a “pre-action” letter. Formal letters are sometimes written prior to “pre-action protocol” letters. For example, a letter may be written to a defendant by way of early notification of a claim, before the claimant is ready to send a pre-action protocol letter because he is waiting for expert evidence. In addition, insurers sometimes write to claimants directly with an admission before a pre-action protocol letter has been sent.

Our suggestion made in answer 2 a) above would ensure that an inadvertent admission could not be made. Weight should be given to an admission made intentionally, whether before or after a pre-action letter.

3. Should a test for withdrawal be introduced

a) *Should the current rule at 14.1(5) be strengthened by inclusion of a test for withdrawal?*

Yes. A test for withdrawal should be introduced, but it must be stringent, for admissions to be reliable.

b) *Would a simple, factual test be appropriate, for example that new evidence has come to light which alters the defendant's prospects of success?*

No. A simple factual test would be inappropriate. It may encourage defendants to admit liability early without investigating all the facts, only to continue to investigate and apply to withdraw the admission on the basis of the new evidence found.

c) *Would a more detailed, balancing test be appropriate, such as that set out by Sumner J in Braybrook v. Basildon & Thurrock University NHS Trust* [2004] EWHC 3352*.*

The general rule should start from the position that admissions should be difficult to withdraw, and on that basis the test should be the same as the one that is currently applied upon applications to set aside a regular (i.e. not default) judgment which was made on the basis of an admission.

d) *Should different tests be applicable to withdrawal of pre- and post-action admissions?*

No - the rule should be the same whether pre- or post-action. There are various reasons why proceedings may not be issued: waiting for medical evidence or other reports, for example. There should be no link between admissions and issuing proceedings.

e) *Should the court have the power to refuse withdrawal in the interests of the administration of justice, even if all parties agree that an admission should be withdrawn?*

Yes. Although we find it difficult to envisage any circumstance in which a claimant would agree to an admission being withdrawn when the courts think this is against the interests of justice, we think the court should retain overall control of the cases before it.

4. Specific defence situations

a) *What should be the consequences of a defence of limitation after an admission being made?*

If the defence of limitation could have been relied upon at the time the admission was made, the defendant should not be able to rely on this at a later date.

If an admission is made, and sufficient time passes that a defence of limitation arises before proceedings are issued, the court can be asked to apply its discretion under section 33 of the Limitation Act 1980 as it does now.

b) *What should be the consequences if a new defence is exposed?*

If a new defence is introduced, for example by way of statute, a defendant should not be allowed to withdraw an admission unless it meets the same requirements as would need to be met to enable a regular judgment to be overturned if a new defence was exposed. It is contrary to the interests of justice to allow any other consequence to follow. Both parties should be able to rely on the law as it stands when the admission is made and the court should ask itself whether a regular judgment, entered on admissions, based on the law at that time would have been overturned.

c) *What should be the consequence of a defence which only becomes apparent after an admission has been made (e.g. new evidence)?*

This should only be relevant – and the admission be allowed to be withdrawn – if the new evidence has been suppressed fraudulently by the claimant or a third party.

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Association of Personal Injury Lawyers