CIVIL JUSTICE COUNCIL (CJC)

CONSOLIDATED PRE ACTION PROTOCOL

A RESPONSE BY THE ASSOCIATION OF PERSONAL INJURY LAWYERS

APRIL 2007

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 aims 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 wherever they arise;
- To provide a communication network for members.

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

Martin Bare	APIL President
Cenric Clement-Evans	Secretary, APIL Occupational Health Special Interest Group
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Frances McCarthy	APIL Past President
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Introduction

APIL can, of course, only respond to this consultation in respect of the protocols with which its members are familiar: the Pre-Action Protocols for Personal Injury Claims, the Resolution of Clinical Disputes, and Disease and Illness Claims ("the personal injury protocols").

Despite our knowledge being limited to these three protocols, they do affect a significant amount of claimants: 58 per cent of cases set down for trial in the county courts are claims for personal injury, as a result of negligence (Table 4.14, Judicial Statistics Annual Report 2005).

As will become apparent from our answers to the questions below, we do not think that a consolidated protocol has benefits for the injured person. Given that these injured people constitute well over half of people whose case is set down for trial in county courts, APIL would urge the CJC to think again about consolidating the personal injury protocols.

APIL does however support the principles of a clear, consistent system of protocols which carry sanctions for non-compliance, which the CJC is advocating. We simply disagree that this system would be best achieved by consolidating the protocols, and think a system whereby experienced practitioners review, update and improve the current protocols would be more beneficial.

1. Is a consolidated protocol thought to be beneficial?

APIL is concerned that a consolidated protocol will not be beneficial. This is because:

- we do not think that a "one size fits all" approach will work in such diverse areas of law as personal injury, rent arrears and defamation. Different areas of law have conflicting needs;

- it will be more difficult for a consolidated protocol to be changed, in the event that this is necessary for one particular area of law;
- it may restrict the ability to introduce a new protocol, that does not follow the same basic steps as are set out in the consolidated document, such as the mesothelioma protocol which is currently being prepared; and
- the process of adopting a new consolidated protocol will in itself cause the type of problems and potential satellite litigation that the protocols themselves seek to avoid. What, for example, would happen where the new protocol conflicts with the old one?

APIL also questions whether a consolidated protocol is necessary, when the existing personal injury protocols are working well. Our members have not reported any significant problems with the existing protocols, nor are we aware that the Association of District Judges has indicated that its constituents have had difficulties in using the current protocols. If the existing system is working well, why change this?

Despite the concerns about the consolidated protocol, we do agree with some of the principles behind the CJC's proposals. We can see that there are advantages in:

- having a consistency of style across the protocols;
- having a review of protocols to ensure they are up to date and continue to be relevant; and
- adding increased weight to the sanctions which may be applied if the protocols are not followed. At the moment, the way in which sanctions for breaches of personal injury protocols are applied varies according to the region in which the court sits. This inconsistent use of sanctions for non-compliance with the protocols could be dealt with by including tougher sanctions with clearer direction for their use, within the protocols themselves.

2. To achieve a consistency of style and content should the consolidated protocol include full precedents, such as letters of claim or letters of response (as in the personal injury protocol for example)? Is it preferable to have templates (as in the clinical negligence protocol)? Is it better to have general guidance (as in the judicial review protocol)?

APIL supports the inclusion of templates within the personal injury protocols. The use of templates means that both claimant and defendant solicitors know what to expect.

If new templates are to be introduced, however, it is crucial that practitioners and insurers work on these together.

3. Is there material from the current protocols included in the appendices which can now be dispensed with in the interest of brevity, consistency and continuing relevance? One example is the continued inclusion in annex D of the protocol for the Resolution of Clinical Disputes of Lord Woolf's recommendations from 1996. It is submitted that this is no longer necessary to aid the effectiveness of that protocol.

Without examining all the existing protocols in depth, APIL agrees that there may be some material in the protocols which is out of date. The example given in the question is a good illustration of this.

Much of the material, though, is still invaluable, such as that which is currently attached to the Pre-Action Protocol for Personal Injury Claims.

Some of the material is bound to become out dated from time to time, when regulations are replaced, or as practice develops. This, however, is not necessarily an issue to be addressed in considering a consolidated protocol.

A regular review could keep the protocols up to date. This should be carried out by practitioners with the relevant experience. This could easily be achieved by selecting practitioners though the relevant body (for example, with APIL choosing the PI practitioners to review the relevant protocols from the claimant perspective) to form a panel to regularly review the protocols with which they are familiar. This would be more effective than a one off review now.

4. The practice direction on the pre action protocols provides specifically for sanctions where proceedings are commenced as a result of non-compliance with a protocol. The protocols themselves refer broadly to the court's power to apply sanctions for non-compliance without specificity. It is said by many interested parties that the protocols would benefit from the inclusion of sanctions to assist in dealing with parties who fail to fulfil the requirements of the protocol. Do you agree with this view? If so, what form should such sanctions take? If not why not?

APIL believes that the protocols will benefit from sanctions for substantive breaches of the protocol and that these need to be specific.

The personal injury protocols act as guides to procedure, which, if followed, ensure cases are properly prepared, to make it easier to settle or to bring the matter to trial in a state of readiness. The more weight afforded to the protocols, the more likely it is that they are followed. Including sanctions for non compliance can only improve personal injury law and give injured people certainty that if a party does not play by the rules, they will be penalised accordingly.

This might be achieved by altering the protocols so that there is a rebuttable presumption that orders (for example, for pre-action disclosure) for compliance with the protocol will be made on the application of the party who is alleging non-compliance. This application could be on a simple form.

The burden to show why the order should not be made would then fall on the party who is alleged not to have complied with the protocol, not the other way around.

It is also suggested that if a party does not comply with a request for pre-action disclosure and an application is required, then the party in breach should be required to show why he should not pay the costs of the application, rather than the party who made the application showing that the costs order should be made.

5. Are there parts of the pre-action protocol that should be simplified or removed because they add more cost than benefit? If so, which parts and why?

APIL does not think that there are parts of the protocol which add more costs than benefit. The personal injury protocols have, since their introduction, contributed to a significant reduction in the number of cases litigated, which has saved costs for all parties involved.

The fundamentals of the protocols should therefore not be changed.

6. What other areas of civil litigation, if any, would benefit from subject specific requirements appended to the consolidated protocol?

We can not comment on this other from the perspective of personal injury lawyers.

Within personal injury law, two further protocols are the subject of development between claimant and defendant lawyers and insurers: the mesothelioma protocol and the multi track code.

In view of the concerns we have expressed above about the consolidated protocol in general, we do not think that these, or the other personal injury protocols, would benefit from being included in a consolidated document. There are, however, very specific procedures to be followed, within these two new codes, which are very distinct from any other protocols. If the consolidated protocol is to be produced, these two areas of law would need their own extensive appendices, in due course.

7. Do you have any other comments?

APIL has no further comments, except to thank the CJC for the opportunity to respond to its proposals.