

## 79<sup>th</sup> UPDATE – PRACTICE DIRECTION AMENDMENTS

The new Pre-Action Protocols and Amendments to the existing Pre-Action Protocol are approved by the Master of the Rolls as Head of Civil Justice.

The new Pre-Action Protocols and the amendments to the existing Pre-Action Protocol come into force as follows—	
The Pre-Action Protocol for Personal Injury Claims	6 April 2015
The Pre-Action Protocol for the Resolution of Clinical Disputes	6 April 2015
The Pre-Action Protocol for Professional Negligence	6 April 2015
The Pre-Action Protocol for Judicial Review	6 April 2015
The Pre-Action Protocol for Housing Disrepair Cases	6 April 2015
The Pre-Action Protocol for Possession Claims by Social Landlords	6 April 2015
The Pre-Action Protocol for Possession Claims Based on Mortgage or Home Purchase Plan Arrears in Respect of Residential Property	6 April 2015
The Pre-Action Protocol for Low Value Personal Injury (Employers Liability And Public Liability) Claims	6 April 2015

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The Right Honourable The Lord Dyson  
Master of the Rolls and Head of Civil Justice

### **THE PRE-ACTION PROTOCOL FOR LOW VALUE PERSONAL INJURY (EMPLOYERS LIABILITY AND PUBLIC LIABILITY) CLAIMS**

- 1) In paragraph 7.58, for “paragraphs 7.54 or 7.56” substitute “paragraphs 7.55 or 7.57”.

## **“THE PRE-ACTION PROTOCOL FOR PERSONAL INJURY CLAIMS**

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### **1. Introduction**

#### 1.1

1.1.1 This Protocol is primarily designed for personal injury claims which are likely to be allocated to the fast track and to the entirety of those claims: not only to the personal injury element of a claim which also includes, for instance, property damage. It is not intended to apply to claims which proceed under—

- (a) the Pre-Action Protocol for Low Value Personal Injury Claims in Road Traffic Accidents from 31 July 2013;
- (b) the Pre-Action Protocol for Low Value Personal Injury (Employers' Liability and Public Liability) Claims;

- (c) the Pre-Action Protocol for the Resolution of Clinical Disputes; and
- (d) the Pre-Action Protocol for Disease and Illness Claims.

1.1.2 If at any stage the claimant values the claim at more than the upper limit of the fast track, the claimant should notify the defendant as soon as possible. However, the “cards on the table” approach advocated by this Protocol is equally appropriate to higher value claims. The spirit, if not the letter of the Protocol, should still be followed for claims which could potentially be allocated multi-track.

## 1.2

Claims which exit either of the low value pre-action protocols listed at paragraph 1.1.1(a) and (b) (“the low value protocols”) prior to Stage 2 will proceed under this Protocol from the point specified in those protocols, and as set out in paragraph 1.3.

## 1.3

1.3.1 Where a claim exits a low value protocol because the defendant considers that there is inadequate mandatory information in the Claim Notification Form (“CNF”), the claim will proceed under this Protocol from paragraph 5.1.

1.3.2 Where a defendant—

- (a) alleges contributory negligence;
- (b) does not complete and send the CNF Response; or
- (c) does not admit liability,

the claim will proceed under this Protocol from paragraph 5.5.

## 1.4

1.4.1 This Protocol sets out conduct that the court would normally expect prospective parties to follow prior to the commencement of proceedings. It establishes a reasonable process and timetable for the exchange of information relevant to a dispute, sets standards for the content and quality of letters of claim, and in particular, the conduct of pre-action negotiations. In particular, the parts of this Protocol that are concerned with rehabilitation are likely to be of application in all claims.

1.4.2 The timetable and the arrangements for disclosing documents and obtaining expert evidence may need to be varied to suit the circumstances of the case. Where one or both parties consider the detail of the Protocol is not appropriate to the case, and proceedings are subsequently issued, the court will expect an explanation as to why the Protocol has not been followed, or has been varied.

## 1.5

Where either party fails to comply with this Protocol, the court may impose sanctions. When deciding whether to do so, the court will look at whether the parties have complied in substance with the relevant principles and requirements. It will also consider the effect any non-compliance has had on another party. It is not likely to be concerned with minor or technical shortcomings (see paragraphs 13 to 15 of the Practice Direction on Pre-Action Conduct and Protocols).

### Early Issue

## 1.6

The Protocol recommends that a defendant be given three months to investigate and respond to a claim before proceedings are issued. This may not always be possible, particularly where a claimant only consults a legal representative close to the end of any relevant limitation period. In these circumstances, the claimant's solicitor should give as much notice of the intention to issue proceedings as is practicable and the parties should consider whether the court might be invited to extend time for service of the claimant's supporting documents and for service of any defence, or alternatively, to stay the proceedings while the recommended steps in the Protocol are followed.

### Litigants in Person

## 1.7

If a party to the claim does not have a legal representative they should still, in so far as reasonably possible, fully comply with this Protocol. Any reference to a claimant in this Protocol will also mean the claimant's legal representative

## **2. Overview of Protocol – General Aim**

### 2.1

The Protocol's objectives are to—

- (a) encourage the exchange of early and full information about the dispute;
- (b) encourage better and earlier pre-action investigation by all parties;
- (c) enable the parties to avoid litigation by agreeing a settlement of the dispute before proceedings are commenced;

- (d) support the just, proportionate and efficient management of proceedings where litigation cannot be avoided; and
- (e) promote the provision of medical or rehabilitation treatment (not just in high value cases) to address the needs of the Claimant at the earliest possible opportunity.

### **3. The Protocol**

An illustrative flow chart is attached at Annexe A which shows each of the steps that the parties are expected to take before the commencement of proceedings.

Letter of Notification

#### **3.1**

The claimant or his legal representative may wish to notify a defendant and/or the insurer as soon as they know a claim is likely to be made, but before they are able to send a detailed Letter of Claim, particularly, for instance, when the defendant has no or limited knowledge of the incident giving rise to the claim, or where the claimant is incurring significant expenditure as a result of the accident which he hopes the defendant might pay for, in whole or in part.

#### **3.2**

The Letter of Notification should advise the defendant and/or the insurer of any relevant information that is available to assist with determining issues of liability / suitability of the claim for an interim payment and/or early rehabilitation.

#### **3.3**

If the claimant or his legal representative gives notification before sending a Letter of Claim, it will not start the timetable for the Letter of Response. However the Letter of Notification should be acknowledged within 14 days of receipt.

### **4. Rehabilitation**

#### **4.1**

The parties should consider as early as possible whether the claimant has reasonable needs that could be met by medical treatment or other rehabilitative measures. They should discuss how these needs might be addressed.

4.2

The Rehabilitation Code (which can be found at: [http://www.iua.co.uk/UA\\_Member/Publications](http://www.iua.co.uk/UA_Member/Publications)) is likely to be helpful in considering how to identify the claimant's needs and how to address the cost of providing for those needs.

4.3

The time limit set out in paragraph 6.3 of this Protocol shall not be shortened, except by consent to allow these issues to be addressed.

4.4

Any immediate needs assessment report or documents associated with it that are obtained for the purposes of rehabilitation shall not be used in the litigation except by consent and shall in any event be exempt from the provisions of paragraphs 7.2 to 7.11 of this Protocol. Similarly, persons conducting the immediate needs assessment shall not be a compellable witness at court.

4.5

Consideration of rehabilitation options, by all parties, should be an on going process throughout the entire Protocol period.

## **5. Letter of Claim**

5.1

Subject to paragraph 5.3 the claimant should send to the proposed defendant two copies of the Letter of Claim. One copy of the letter is for the defendant, the second for passing on to the insurers, as soon as possible, and, in any event, within 7 days of the day upon which the defendant received it.

5.2

The Letter of Claim should include the information described on the template at Annexe B1. The level of detail will need to be varied to suit the particular circumstances. In all cases there should be sufficient information for the defendant to assess liability and to enable the defendant to estimate the likely size and heads of the claim without necessarily addressing quantum in detail.

### 5.3

The letter should contain a **clear summary of the facts** on which the claim is based together with an indication of the **nature of any injuries** suffered, and the way in which these impact on the claimant's day to day functioning and prognosis. Any financial loss incurred by the claimant should be outlined with an indication of the heads of damage to be claimed and the amount of that loss, unless this is impracticable.

### 5.4

Details of the claimant's National Insurance number and date of birth should be supplied to the defendant's insurer once the defendant has responded to the Letter of Claim and confirmed the identity of the insurer. This information should not be supplied in the Letter of Claim.

### 5.5

Where a claim no longer continues under either low value protocol, the CNF completed by the claimant under those protocols can be used as the Letter of Claim under this Protocol unless the defendant has notified the claimant that there is inadequate information in the CNF.

### 5.6

Once the claimant has sent the Letter of Claim no further investigation on liability should normally be carried out within the Protocol period until a response is received from the defendant indicating whether liability is disputed.

Status of Letters of Claim and Response

### 5.7

Letters of Claim and Response are **not** intended to have the same formal status as a statement of case in proceedings. It would not be consistent with the spirit of the Protocol for a party to 'take a point' on this in the proceedings, provided that there was no obvious intention by the party who changed their position to mislead the other party.

## 6. The Response

#### 6.1

Attached at Annexe B2 is a template for the suggested contents of the Letter of Response: the level of detail will need to be varied to suit the particular circumstances.

#### 6.2

The **defendant must reply within 21 calendar days** of the date of posting of the letter identifying the insurer (if any). If the insurer is aware of any significant omissions from the letter of claim they should identify them specifically. Similarly, if they are aware that another defendant has also been identified whom they believe would not be a correct defendant in any proceedings, they should notify the claimant without delay, with reasons, and in any event by the end of the Response period. Where there has been no reply by the defendant or insurer within 21 days, the claimant will be entitled to issue proceedings. Compliance with this paragraph will be taken into account on the question of any assessment of the defendant's costs.

#### 6.3

The **defendant** (insurer) will have a **maximum of three months** from the date of acknowledgment of the Letter of Claim (or of the CNF where the claim commenced in a portal) **to investigate**. No later than the end of that period, The defendant (insurer) should reply by no later than the end of that period, stating if liability is admitted by admitting that the accident occurred, that the accident was caused by the defendant's breach of duty, and the claimant suffered loss and there is no defence under the Limitation Act 1980.

#### 6.4

Where the accident occurred outside England and Wales and/or where the defendant is outside the jurisdiction, the time periods of 21 days and three months should normally be extended up to 42 days and six months.

#### 6.5

If a **defendant denies liability** and/or causation, their version of events should be supplied. The defendant should also enclose with the response, **documents** in their 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. No charge will be made for providing copy documents under the Protocol.



6.6

An admission made by any party under this Protocol may well be binding on that party in the litigation. Further information about admissions made under this Protocol is to be found in Civil Procedure Rules ("CPR") rule 14.1A.

6.7

Following receipt of the Letter of Response, if the claimant is aware that there may be a delay of six months or more before the claimant decides if, when and how to proceed, the claimant should keep the defendant generally informed.

## **7. Disclosure**

### 7.1 Documents

7.1.1 The aim of early disclosure of documents by the defendant is not to encourage 'fishing expeditions' by the claimant, but to promote an early exchange of relevant information to help in clarifying or resolving issues in dispute. The claimant's solicitor can assist by identifying in the Letter of Claim or in a subsequent letter the particular categories of documents which they consider are relevant and why, with a brief explanation of their purported relevance if necessary.

7.1.2 Attached at Annexe C are **specimen**, but non-exhaustive, **lists** of documents likely to be material in different types of claim.

7.1.3 Pre-action disclosure will generally be limited to the documents required to be enclosed with the Letter of Claim and the Response. In cases where liability is admitted in full, disclosure will be limited to the documents relevant to quantum, the parties can agree that further disclosure may be given. If either or both of the parties consider that further disclosure should be given but there is disagreement about some aspect of that process, they may be able to make an application to the court for pre-action disclosure under Part 31 of the CPR. Parties should assist each other and avoid the necessity for such an application

7.1.4 The protocol should also contain a requirement that the defendant is under a duty to preserve the disclosure documents and other evidence (CCTV for example). If the documents are destroyed, this could be an abuse of the court process.

## Experts

### 7.2

Save for cases likely to be allocated to the multi-track, the Protocol encourages joint selection of, and access to, quantum experts, and, on occasion liability experts e.g. engineers. The expert report produced is not a joint report for the purposes of CPR Part 35. The Protocol promotes the practice of the claimant obtaining a medical report, disclosing it to the defendant who then asks questions and/or agrees it and does not obtain their own report. The Protocol provides for nomination of the expert by the claimant in personal injury claims.

### 7.3

Before any party instructs an expert, they should give the other party a list of the **name(s) of one or more experts** in the relevant speciality whom they consider are suitable to instruct.

### 7.4

Some solicitors choose to obtain medical reports through medical agencies, rather than directly from a specific doctor or hospital. The defendant's prior consent to this should be sought and, if the defendant so requests, the agency should be asked to provide in advance the names of the doctor(s) whom they are considering instructing.

### 7.5

Where a medical expert is to be instructed, the claimant's solicitor will organise access to relevant medical records – see specimen letter of instruction at Annexe D.

### 7.6

**Within 14 days of providing a list of experts** the other party may indicate an **objection** to one or more of the named experts. The first party should then instruct a mutually acceptable expert assuming there is one (this is not the same as a joint expert). It must be emphasised that when the claimant nominates an expert in the original Letter of Claim, the defendant has a further 14 days to object to one or more of the named experts after expiration of the 21 day period within which they have to reply to the Letter of Claim, as set out in paragraph 6.2.

#### 7.7

If the defendant objects to all the listed experts, the parties may then instruct **experts of their own choice**. It will be for the court to decide, subsequently and if proceedings are issued, whether either party had acted unreasonably.

#### 7.8

If the **defendant does not object to an expert nominated** by the claimant, they shall not be entitled to rely on their own expert evidence within that expert's area of expertise unless—

- (a) the claimant agrees;
- (b) the court so directs; or
- (c) the claimant's expert report has been amended and the claimant is not prepared to disclose the original report.

#### 7.9

**Any party may send to an agreed expert written questions** on the report, via the first party's solicitors. Such questions must be put within 28 days of service of the expert's report and must only be for the purpose of clarification of the report. The expert should send answers to the questions simultaneously to each party.

#### 7.10

The cost of a report from an agreed expert will usually be paid by the instructing first party: the costs of the expert replying to questions will usually be borne by the party which asks the questions.

#### 7.11

If necessary, after proceedings have commenced and with the permission of the court, the parties may obtain further expert reports. It would be for the court to decide whether the costs of more than one expert's report should be recoverable.

### **8. Negotiations following an admission**

#### 8.1

8.1.1 Where a defendant admits liability which has caused some damage, before proceedings are issued, the claimant should send to that defendant—

- (a) any medical reports obtained under this Protocol on which the claimant relies; and
- (b) a schedule of any past and future expenses and losses which are claimed, even if the schedule is necessarily provisional. The schedule should contain as much detail as reasonably practicable and should identify those losses that are ongoing. If the schedule is likely to be updated before the case is concluded, it should say so.

8.1.2 The claimant should delay issuing proceedings for 21 days from disclosure of (a) and (b) above (unless such delay would cause his claim to become time-barred), to enable the parties to consider whether the claim is capable of settlement.

## 8.2

CPR Part 36 permits claimants and defendants to make offers to settle pre-proceedings. Parties should always consider if it is appropriate to make a Part 36 Offer before issuing. If such an offer is made, the party making the offer must always try to supply sufficient evidence and/or information to enable the offer to be properly considered.

The level of detail will depend on the value of the claim. Medical reports may not be necessary where there is no significant continuing injury and a detailed schedule may not be necessary in a low value case.

## **9. Alternative Dispute Resolution**

### 9.1

9.1.1 Litigation should be a last resort. As part of this Protocol, the parties should consider whether negotiation or some other form of Alternative Dispute Resolution (“ADR”) might enable them to resolve their dispute without commencing proceedings.

9.1.2 Some of the options for resolving disputes without commencing proceedings are—

- (a) discussions and negotiation (which may or may not include making Part 36 Offers or providing an explanation and/or apology);
- (b) mediation, a third party facilitating a resolution;
- (c) arbitration, a third party deciding the dispute; and
- (d) early neutral evaluation, a third party giving an informed opinion on the dispute.

9.1.3 If proceedings are issued, the parties may be required by the court to provide evidence that ADR has been considered. It is expressly recognised that no party can or should be forced to mediate or enter into any form of ADR but unreasonable refusal to consider ADR will be taken into account by the court when deciding who bears the costs of the proceedings

9.2

Information on mediation and other forms of ADR is available in the *Jackson ADR Handbook* (available from Oxford University Press) or at—

- <http://www.civilmediation.justice.gov.uk/>
- [http://www.adviceguide.org.uk/england/law\\_e/law\\_legal\\_system\\_e/law\\_taking\\_legal\\_action\\_e/alternatives\\_to\\_court.htm](http://www.adviceguide.org.uk/england/law_e/law_legal_system_e/law_taking_legal_action_e/alternatives_to_court.htm)

## **10. Quantification of Loss - Special damages**

10.1

In all cases, if the defendant admits liability, the claimant will send to the defendant as soon as reasonably practicable a schedule of any past and future expenses and losses which he claims, even if the schedule is necessarily provisional. The schedule should contain as much detail as reasonably practicable and should identify those losses that are ongoing. If the schedule is likely to be updated before the case is concluded, it should say so. The claimant should keep the defendant informed as to the rate at which his financial loss is progressing throughout the entire Protocol period.

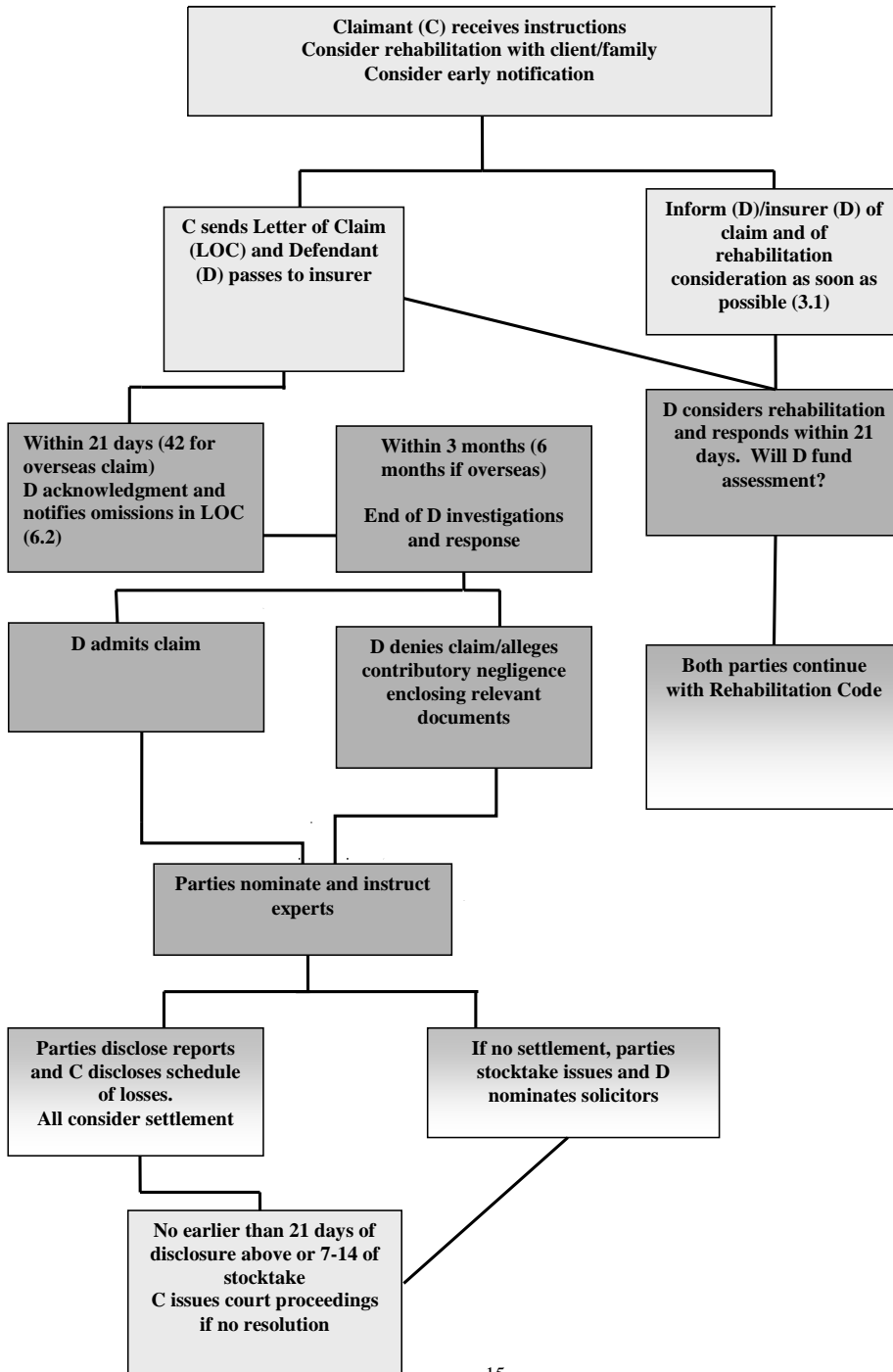
## **11. Stocktake**

11.1

Where the procedure set out in this Protocol has not resolved the dispute between the parties, each party should undertake a review of its own positions and the strengths and weaknesses of its case. The parties should then together consider the evidence and the arguments in order to see whether litigation can be avoided or, if that is not possible, for the issues between the parties to be narrowed before proceedings are issued. Where the defendant is insured and the pre-action steps have been taken by the insurer, the insurer would normally be expected to nominate solicitors to act in the proceedings and to accept service of the claim form and other documents on behalf of the defendant. The claimant or their solicitor is

recommended to invite the insurer to nominate the insurer to nominate solicitors to act in the proceedings and do so 7 to 14 days before the intended issue date.

**ANNEXE A - ILLUSTRATIVE FLOWCHART OF LIKELY PROGRESSION OF THE CLAIM UNDER THIS PROTOCOL**



## **ANNEXE B**

### TEMPLATES FOR LETTERS OF CLAIM AND RESPONSE

#### **B1 Letter of Claim**

To

Defendant

Dear Sirs

**Re: Claimant's full name**

**Claimant's full address**

**Claimant's Clock or Works Number**

**Claimant's Employer (name and address)**

We are instructed by the above named to claim damages in connection with an **accident at work/road traffic accident/tripping accident** on            day    of    **(year)** at **(place of accident which must be sufficiently detailed to establish location)**

Please confirm the identity of your insurers. Please note that the insurers will need to see this letter as soon as possible and it may affect your insurance cover and/or the conduct of any subsequent legal proceedings if you do not send this letter to them.

Clear summary of the facts

The circumstances of the accident are:-

**(brief outline)**

**Liability**

The reason why we are alleging fault is:-

**(simple explanation e.g. defective machine, broken ground)**

**We are obtaining a police report and will let you have a copy of the same upon your undertaking to meet half the fee.**



## **Injuries**

A description of our clients' injuries is as follows:-

**(brief outline) The description should include a non-exhaustive list of the main functional effects on daily living, so that the defendant can begin to assess value / rehabilitation needs.**

### **(In cases of road traffic accidents)**

Our client (state hospital reference number) received treatment for the injuries at name and address of hospital).

Our client is still suffering from the effects of his/her injury. We invite you to participate with us in addressing his/her immediate needs by use of rehabilitation.

## **Loss of Earnings**

He/She is employed as **(occupation)** and has had the following time off work **(dates of absence)**. His/Her approximate weekly income is (insert if known).

**If you are our client's employers, please provide us with the usual earnings details which will enable us to calculate his financial loss.**

## **Other Financial Losses**

We are also aware of the following (likely) financial losses:-

### **Details of the insurer**

We have also sent a letter of claim to **(name and address)** and a copy of that letter is attached. We understand their insurers are **(name, address and claims number if known)**.

At this stage of our enquiries we would expect the documents contained in parts **(insert appropriate parts of standard disclosure list)** to be relevant to this action.

A copy of this letter is attached for you to send to your insurers. Finally we expect an acknowledgment of this letter within 21 days by yourselves or your insurers.

Yours faithfully

## **B2 Letter of response**

To Claimant's legal representative

Dear Sirs

### **Letter of Response**

**[Claimant's name] v [Defendant's name]**

#### **Parties**

We have been instructed to act on behalf of [defendant] in relation to your client's accident on [ ]. We note that you have also written to [defendant] in connection with this claim. We [do/do not] believe they are a relevant party because [ ]. [In addition we believe your claim should be directed against [defendant] for the following reasons:-

#### **Liability**

In respect of our client's liability for this accident we

admit the accident occurred and that our client is liable for loss and damage to the claimant the extent of which will require quantification.

#### **Or**

admit the accident occurred but deny that our client is responsible for any loss or damage alleged to have been caused for the following reasons:-

#### **Or**

do not admit the accident occurred either in the manner described in your letter of claim [or at all] because:-

#### **Limitation**

[We do not intend to raise any limitation defence]

**Documents**

We attach copies of the following documents in support of our client's position:-  
You have requested copies of the following documents which we are not enclosing as we do not believe they are relevant for the following reasons:-

[It would assist our investigations if you could supply us with copies of the following documents]

**Next Steps****In admitted cases**

Please advise us which medical experts you are proposing to instruct.  
Please also supply us with your client's schedule of past and future expenses [if any] which are claimed, even if this can only be supplied on a provisional basis at present to assist us with making an appropriate reserve.  
If you have identified that the claimant has any immediate need for additional medical treatment or other early rehabilitation intervention so that we can take instructions pursuant to the Rehabilitation Code.

**In non-admitted cases**

Please confirm we may now close our file. Alternatively, if you intend to proceed please advise which experts you are proposing to instruct.

**Alternative Dispute Resolution**

Include details of any options that may be considered whether on a without prejudice basis or otherwise

Yours faithfully

## **ANNEXE C**

### PRE-ACTION PERSONAL INJURY PROTOCOL STANDARD DISCLOSURE LISTS

#### RTA CASES

##### **SECTION A**

In all cases where liability is at issue—

- (i) documents identifying nature, extent and location of damage to defendant's vehicle where there is any dispute about point of impact;
- (ii) MOT certificate where relevant;
- (iii) maintenance records where vehicle defect is alleged or it is alleged by defendant that there was an unforeseen defect which caused or contributed to the accident.

##### **SECTION B**

Accident involving commercial vehicle as defendant—

- (i) tachograph charts or entry from individual control book;
- (ii) maintenance and repair records required for operators' licence where vehicle defect is alleged or it is alleged by defendant that there was an unforeseen defect which caused or contributed to the accident.

##### **SECTION C**

Cases against local authorities where highway design defect is alleged—

- (i) documents produced to comply with Section 39 of the Road Traffic Act 1988 in respect of the duty designed to promote road safety to include studies into road accidents in the relevant area and documents relating to measures recommended to prevent accidents in the relevant area;
- (ii) any Rule 43 reports produced at the request of a coroner pursuant to Schedule 5 of the Coroners & Justice Act 2009, for accidents occurring in the same locus as one covered by an earlier report.

#### HIGHWAY TRIPPING CLAIMS

Documents from Highway Authority for a period of 12 months prior to the accident –

- (i) records of inspection for the relevant stretch of highway;
- (ii) maintenance records including records of independent contractors working in relevant area;
- (iii) records of the minutes of Highway Authority meetings where maintenance or repair policy has been discussed or decided;
- (iv) records of complaints about the state of highways;
- (v) records of other accidents which have occurred on the relevant stretch of highway.

#### WORKPLACE CLAIMS

#### GENERAL DOCUMENTS

- (i) accident book entry;
- (ii) 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);
- (iii) first aider report;
- (iv) surgery record;
- (v) foreman/supervisor accident report;
- (vi) safety representative's accident report;
- (vii) RIDDOR (Reporting of Injuries, Diseases and Dangerous Occurrences Regulations) reported to HSE or relevant investigatory agency;
- (viii) back to work interview notes and report;
- (ix) all personnel/occupational health records relating to our client;
- (x) other communications between defendants and HSE or other relevant investigatory agency;
- (xi) minutes of Health and Safety Committee meeting(s) where accident/matter considered;

- (xii) copies of all relevant CCTV footage and any other relevant photographs, videos and/or DVDs;
- (xiii) copies of all electronic communications/documentation relating to the accident;
- (xiv) earnings information where defendant is employer;
- (xv) reports to DWP;
- (xvi) manufacturer's or dealers instructions or recommendations concerning use of the work equipment;
- (xvii) service or maintenance records of the work equipment;
- (xviii) 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;
- (xix) work sheets and all other documents completed by or on behalf of those responsible for implementing the cleaning policy and recording work done;
- (xx) all invoices, receipts and other documents relating to the purchase of relevant safety equipment to prevent a repetition of the accident;
- (xxi) all correspondence, memoranda or other documentation received or brought into being concerning the condition or repair of the work equipment/the premises;
- (xxii) 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;
- (xxiii) work sheets and all other documents recording work done completed by those responsible for maintaining the work equipment/premises;
- (xxiv) all relevant risk assessments;
- (xxv) all reports, conclusions or recommendations following any enquiry or investigation into the accident;
- (xxvi) the record kept of complaints made by employees together with all other documents recording in any way such complaints or actions taken thereon;
- (xxvii) all other correspondence sent, or received, relating to our client's injury prior to receipt of this letter of claim;

(xxviii) documents listed above relating to any previous/similar accident/matter identified by the claimant and relied upon as proof of negligence including accident book entries;

WORKPLACE CLAIMS – DISCLOSURE WHERE SPECIFIC REGULATIONS APPLY

**SECTION A - Management of Health and Safety at Work Regulations 1999**

Documents 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 in implementing the requirements of Regulations 4, and 5;
- (iv) Health Surveillance Records in appropriate cases 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.

**SECTION B- Workplace (Health Safety and Welfare) Regulations 1992**

Documents 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).

**SECTION C – Provision and Use of Work Equipment Regulations 1998**

Documents including—

- (i) manufacturers' specifications and instructions in respect of relevant work equipment establishing its suitability to comply with Regulation 4;
- (ii) maintenance log/maintenance records required to comply with Regulation 5;
- (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) risk assessments/documents required to comply with Regulation 12;
- (vi) any notice, sign or document relied upon as a defence to alleged breaches of Regulations 14 to 18 dealing with controls and control systems;
- (vii) 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;
- (viii) copies of markings required to comply with Regulation 23;
- (ix) copies of warnings required to comply with Regulation 24.

***SECTION D – Personal Protective Equipment at Work Regulations 1992***

Documents including—

- (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.

**SECTION E – Manual Handling Operations Regulations 1992**

Documents 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.

**SECTION F – Health and Safety (Display Screen Equipment) Regulations 1992**

Documents 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.

**SECTION G – Control of Substances Hazardous to Health Regulations 2002**

Documents 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(2A)(h);
- (v) warning signs identifying designation of areas and installations which may be contaminated by carcinogenics to comply with the requirements of Regulation 7(2A)(h);
- (vi) documents relating to the assessment of the Personal Protective Equipment to comply with Regulation 7(3A);
- (vii) documents relating to the maintenance and replacement of Personal Protective Equipment to comply with Regulation 7(3A);
- (viii) record of maintenance procedures for Personal Protective Equipment to comply with Regulation 7(3A);
- (ix) records of tests and examinations of Personal Protective Equipment to comply with Regulation 7(3A);
- (x) documents providing information, instruction and training in relation to the Personal Protective Equipment to comply with Regulation 7(3A);
- (xi) instructions for use of Personal Protective Equipment to include the manufacturers' instructions to comply with Regulation 7(3A);
- (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 documents relating to arrangements and procedures to deal with accidents, incidents and emergencies required to comply with Regulation 13;

(xvii) labels and Health and Safety data sheets supplied to the employers to comply with the CHIP Regulations.

***SECTION H – Construction (Design and Management) Regulations 2007***

Documents including—

(i) notification of a project form (HSE F10) to comply with the requirements of Regulation 7;

(ii) Health and Safety Plan to comply with requirements of Regulation 15;

(iii) Health and Safety file to comply with the requirements of Regulations 12 and 14;

(iv) information and training records provided to comply with the requirements of Regulation 17;

(v) records of advice from and views of persons at work to comply with the requirements of Regulation 18;

(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.

***SECTION I – Construction (Health, Safety & Welfare) Regulations 1996***

Documents including—

(i) documents produced to comply with requirements of the Regulations.

***SECTION J – Work at Height Regulations 2005***

Documents 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.

***SECTION K – Pressure Systems and Transportable Gas Containers  
Regulations 1989***

- (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.

***SECTION L – Lifting Operations and Lifting Equipment Regulations 1998***

Documents including—

(i) records kept to comply with the requirements of the Regulations including the records kept to comply with Regulation 6.

**SECTION M – The Noise at Work Regulations 1989**

Documents 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.

**SECTION N – Control of Noise at Work Regulations 1989**

Documents including—

- (i) documents relating to the assessment of the level of noise to which employees are exposed to comply with Regulation 5;*
- (ii) documents relating to health surveillance of employees to comply with Regulation 9;*
- (ii) instruction and training records provided to employees to comply with Regulation 10.*

**SECTION O – Construction (Head Protection) Regulations 1989**

Documents 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).

**SECTION P – The Construction (General Provisions) Regulations 1961**

Documents including—

- (i) report prepared following inspections and examinations of excavations etc. to comply with the requirements of Regulation 9.

**SECTION Q – Gas Containers Regulations 1989**

Documents 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.

**SECTION R – Control of Noise at Work Regulations 2005**

Documents including—

- (i) risk assessment records required to comply with the requirements of Regulations 4 and 5;
- (ii) all documents relating to steps taken to comply with regulation 6;
- (iii) all documents relating to and/or arising out of actions taken to comply including providing consideration of alternative work that the claimant could have engaged to comply with Regulation 7.

**SECTION S – Mine and Quarries Act 1954**

Documents including—

- (i) documents produced to comply with requirements of the Act.

**SECTION T – Control of Vibrations at Work Regulations 2005**

Documents including—

- (i) risk assessments and documents produced to comply with requirements of Regulations 6 and 8;

(ii) occupational health surveillance records produced to comply with Regulation 7.

## **ANNEXE D LETTER OF INSTRUCTION TO MEDICAL EXPERT**

Dear Sir,

Re: **(Name and Address)**

D.O.B.–

Telephone No.–

Date of Accident –

We are acting for the above named in connection with injuries received in an accident which occurred on the above date. A summary of the main facts of the accident circumstances is provided below.

The main injuries appear to have been **(describe main injuries and functional impact on day to day living as in Letter of Claim)**.

In order to assist with the preparation of your report we have enclosed the following documents:

Enclosures

1. Hospital Records
2. GP records
3. Statement of Events

We have not obtained [ ] records yet but will use our best endeavours to obtain these without delay if you request them.

We should be obliged if you would examine our Client and let us have a full and detailed report dealing with any relevant pre-accident medical history, the injuries sustained, treatment received and present condition, dealing in particular with the capacity for work and giving a prognosis.

It is central to our assessment of the extent of our Client's injuries to establish the extent and duration of any continuing disability. Accordingly, in the prognosis section we would ask you to specifically comment on any areas of continuing complaint or disability or impact on daily living. If there is such continuing disability you should comment upon the level of suffering or inconvenience caused and, if you are able, give your view as to when or if the complaint or disability is likely to resolve.



If our client requires further treatment, please can you advise of the cost on a private patient basis.

Please send our Client an appointment direct for this purpose. Should you be able to offer a cancellation appointment please contact our Client direct. We confirm we will be responsible for your reasonable fees.

We are obtaining the notes and records from our Client's GP and Hospitals attended and will forward them to you when they are to hand/or please request the GP and Hospital records direct and advise that any invoice for the provision of these records should be forwarded to us.

In order to comply with Court Rules we would be grateful if you would insert above your signature, the following statement: "I confirm that I have made clear which facts and matters referred to in this report are within my own knowledge and which are not. Those that are within my own knowledge I confirm to be true. The opinions I have expressed represent my true and complete professional opinions on the matters to which they refer".

In order to avoid further correspondence we can confirm that on the evidence we have there is no reason to suspect we may be pursuing a claim against the hospital or its staff.

We look forward to receiving your report within \_\_\_\_\_ weeks. If you will not be able to prepare your report within this period please telephone us upon receipt of these instructions.

When acknowledging these instructions it would assist if you could give an estimate as to the likely time scale for the provision of your report and also an indication as to your fee.

Yours faithfully,"

## **"PRE-ACTION PROTOCOL FOR THE RESOLUTION OF CLINICAL DISPUTES**

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## 1 INTRODUCTION

### 1.1

This Protocol is intended to apply to all claims against hospitals, GPs, dentists and other healthcare providers (both NHS and private) which involve an injury that is alleged to be the result of clinical negligence. It is not intended to apply to claims covered by—

- (a) the Pre-Action Protocol for Disease and Illness Claims;

- (b) the Pre-Action Protocol for Personal Injury Claims;
- (c) the Pre-Action Protocol for Low Value Personal Injury Claims in Road Traffic Accidents;
- (d) the Pre-Action Protocol for Low Value Personal Injury (Employers' Liability and Public Liability) Claims; or
- (e) Practice Direction 3D – Mesothelioma Claims.

## 1.2

This Protocol is intended to be sufficiently broad-based and flexible to apply to all sectors of healthcare, both public and private. It also recognises that a claimant and a defendant, as patient and healthcare provider, may have an ongoing relationship.

## 1.3

It is important that each party to a clinical dispute has sufficient information and understanding of the other's perspective and case to be able to investigate a claim efficiently and, where appropriate, to resolve it. This Protocol encourages a cards-on-the-table approach when something has gone wrong with a claimant's treatment or the claimant is dissatisfied with that treatment and/or the outcome.

## 1.4

This Protocol is now regarded by the courts as setting the standard of normal reasonable pre-action conduct for the resolution of clinical disputes.

## 1.5

1.5.1 This Protocol sets out the conduct that prospective parties would normally be expected to follow prior to the commencement of any proceedings. It establishes a reasonable process and timetable for the exchange of information relevant to a dispute, sets out the standards for the content and quality of letters of claim and sets standards for the conduct of pre-action negotiations.

1.5.2 The timetable and the arrangements for disclosing documents and obtaining expert evidence may need to be varied to suit the circumstances of the case. Where one or more parties consider the detail of the Protocol is not appropriate to the case, and proceedings are subsequently issued, the court will expect an explanation as to why the Protocol has not been followed, or has been varied.

### **Early Issue**

## 1.6

1.6.1 The Protocol provides for a defendant to be given four months to investigate and respond to a Letter of Claim before proceedings are served. If this is not possible, the claimant's solicitor should give as much notice of the intention to issue proceedings as is practicable. This Protocol does not alter the statutory time limits for starting court proceedings. If a claim is issued after the relevant statutory limitation period has expired, the defendant will be entitled to use that as a defence to the claim. If proceedings are started to comply with the statutory time limit before the parties have followed the procedures in this Protocol, the parties should apply to the court for a stay of the proceedings while they so comply.

1.6.2 The parties should also consider whether there is likely to be a dispute as to limitation should a claim be pursued.

### **Enforcement of the Protocol and sanctions**

## 1.7

Where either party fails to comply with this Protocol, the court may impose sanctions. When deciding whether to do so, the court will look at whether the parties have complied in substance with the Protocol's relevant principles and requirements. It will also consider the effect any non-compliance has had on any other party. It is not likely to be concerned with minor or technical shortcomings (see paragraph 4.3 to 4.5 of the Practice Direction on Pre-Action Conduct and Protocols).

### **Litigants in Person**

## 1.8

If a party to a claim does not seek professional advice from a solicitor they should still, in so far as is reasonably possible, comply with the terms of this Protocol. In this Protocol "solicitor" is intended to encompass reference to any suitably legally qualified person.

If a party to a claim becomes aware that another party is a litigant in person, they should send a copy of this Protocol to the litigant in person at the earliest opportunity.

## 2 THE AIMS OF THE PROTOCOL

### 2.1

The **general** aims of the Protocol are –

- (a) to maintain and/or restore the patient/healthcare provider relationship in an open and transparent way;
- (b) to reduce delay and ensure that costs are proportionate; and
- (c) to resolve as many disputes as possible without litigation.

## 2.2

The **specific** objectives are–

- (a) to encourage openness, transparency and early communication of the perceived problem between patients and healthcare providers;
- (b) to provide an opportunity for healthcare providers to identify whether notification of a notifiable safety incident has been, or should be, sent to the claimant in accordance with the duty of candour imposed by section 20 of the Health and Social Care Act 2008 (Regulated Activities) Regulations 2014;
- (c) to ensure that sufficient medical and other information is disclosed promptly by both parties to enable each to understand the other's perspective and case, and to encourage early resolution or a narrowing of the issues in dispute;
- (d) to provide an early opportunity for healthcare providers to identify cases where an investigation is required and to carry out that investigation promptly;
- (e) to encourage healthcare providers to involve the *National Health Service Litigation Authority* (NHSLA) or their defence organisations or insurers at an early stage;
- (f) to enable the parties to avoid litigation by agreeing a resolution of the dispute;
- (g) to enable the parties to explore the use of mediation or to narrow the issues in dispute before proceedings are commenced;
- (h) to enable parties to identify any issues that may require a separate or preliminary hearing, such as a dispute as to limitation;
- (i) To support the efficient management of proceedings where litigation cannot be avoided;
- (j) to discourage the prolonged pursuit of unmeritorious claims and the prolonged defence of meritorious claims;
- (k) to promote the provision of medical or rehabilitation treatment to address the needs of the claimant at the earliest opportunity; and
- (l) to encourage the defendant to make an early apology to the claimant if appropriate.

## 2.3

This Protocol does not—

- (a) provide any detailed guidance to healthcare providers on clinical risk management or the adoption of risk management systems and procedures;
- (b) provide any detailed guidance on which adverse outcomes should trigger an investigation; or
- (c) recommend changes to the codes of conduct of professionals in healthcare.

## 3 THE PROTOCOL

### 3.1

An illustrative flowchart is attached at Annex A which shows each of the stages that the parties are expected to take before the commencement of proceedings.

#### **Obtaining health records**

### 3.2

Any request for records by the **claimant** should—

- (a) **provide sufficient information** to alert the defendant where an adverse outcome has been serious or has had serious consequences or may constitute a notifiable safety incident;
- (b) be as **specific as possible** about the records which are required for an initial investigation of the claim (including, for example, a continuous copy of the CTG trace in birth injury cases); and
- (c) include a request for any relevant guidelines, analyses, protocols or policies and any documents created in relation to an adverse incident, notifiable safety incident or complaint.

### 3.3

Requests for copies of the claimant's clinical records should be made using the Law Society and Department of Health approved **standard forms** (enclosed at Annex B), adapted as necessary.

### 3.4

3.4.1 The copy records should be provided **within 40 days** of the request and for a cost not exceeding the charges permissible under the Access to Health Records Act 1990 and/or the Data Protection Act 1998. Payment may be required in advance by the healthcare provider.

3.4.2 The claimant may also make a request under the Freedom of Information Act 2000.

3.5

At the earliest opportunity, legible copies of the claimant's medical and other records should be placed in an indexed and paginated bundle by the claimant. This bundle should be kept up to date.

3.6

In the rare circumstances that the defendant is in difficulty in complying with the request within 40 days, the **problem should be explained** quickly and details given of what is being done to resolve it.

3.7

If the defendant fails to provide the health records or an explanation for any delay within 40 days, the claimant or their adviser can then apply to the court under rule 31.16 of the Civil Procedure Rules 1998 ('CPR') for an **order for pre-action disclosure**. The court has the power to impose costs sanctions for unreasonable delay in providing records.

3.8

If either the claimant or the defendant considers **additional health records are required from a third party**, in the first instance these should be requested by or through the claimant. Third party healthcare providers are expected to co-operate. Rule 31.17 of the CPR sets out the procedure for applying to the court for pre-action disclosure by third parties.

### **Rehabilitation**

3.9

The claimant and the defendant shall both consider as early as possible whether the claimant has reasonable needs that could be met by rehabilitation treatment or other measures. They should also discuss how these needs might be addressed. An

immediate needs assessment report prepared for the purposes of rehabilitation should not be used in the litigation except by consent.

(A copy of the Rehabilitation Code can be found at:  
[http://www.iua.co.uk/UA\\_Member/Publications](http://www.iua.co.uk/UA_Member/Publications))

### **Letter of Notification**

#### 3.10

Annex C1 to this Protocol provides a **template for the recommended contents of a Letter of Notification**; the level of detail will need to be varied to suit the particular circumstances.

#### 3.11

3.11.1 Following receipt and analysis of the records and, if appropriate, receipt of an initial supportive expert opinion, the claimant may wish to send a Letter of Notification to the defendant as soon as practicable.

3.11.2 The Letter of Notification should advise the defendant that this is a claim where a Letter of Claim is likely to be sent because a case as to breach of duty and/or causation has been identified. A copy of the Letter of Notification should also be sent to the NHSLA or, where known, other relevant medical defence organisation or indemnity provider.

#### 3.12

3.12.1 On receipt of a Letter of Notification a defendant should—

- (a) acknowledge the letter within 14 days of receipt;
- (b) identify who will be dealing with the matter and to whom any Letter of Claim should be sent;
- (c) consider whether to commence investigations and/or to obtain factual and expert evidence;
- (d) consider whether any information could be passed to the claimant which might narrow the issues in dispute or lead to an early resolution of the claim; and



- (e) forward a copy of the Letter of Notification to the NHSLA or other relevant medical defence organisation/indemnity provider.

3.12.2 The court may question any requests by the defendant for extension of time limits if a Letter of Notification was sent but did not prompt an initial investigation.

### **Letter of Claim**

3.13

Annex C2 to this Protocol provides **a template for the recommended contents of a Letter of Claim**: the level of detail will need to be varied to suit the particular circumstances.

3.14

If, following the receipt and analysis of the records, and the receipt of any further advice (including from experts if necessary – see Section 4), the claimant decides that there are grounds for a claim, a letter of claim should be sent to the defendant as soon as practicable. Any letter of claim sent to an NHS Trust should be copied to the National Health Service Litigation Authority.

3.16

This letter should contain—

- (a) a **clear summary of the facts** on which the claim is based, including the alleged adverse outcome, and the **main allegations of negligence**;
- (b) a description of the **claimant's injuries**, and present condition and prognosis;
- (c) an outline of the **financial loss** incurred by the claimant, with an indication of the heads of damage to be claimed and the scale of the loss, unless this is impracticable;
- (d) confirmation of the method of funding and whether any funding arrangement was entered into before or after April 2013; and
- (e) the discipline of any expert from whom evidence has already been obtained.

3.17

The Letter of Claim **should refer to any relevant documents**, including health records, and if possible enclose copies of any of those which will not already be in

the potential defendant's possession, e.g. any relevant general practitioner records if the claimant's claim is against a hospital.

3.18

**Sufficient information** must be given to enable the defendant to **focus investigations** and to put an initial valuation on the claim.

3.19

Letters of Claim are **not** intended to have the same formal status as Particulars of Claim, nor should any sanctions necessarily apply if the Letter of Claim and any subsequent Particulars of Claim in the proceedings differ.

3.20

**Proceedings should not be issued until after four months from the letter of claim.**

In certain instances it may not be possible for the claimant to serve a Letter of Claim more than four months before the expiry of the limitation period. If, for any reason, proceedings are started before the parties have complied, they should seek to agree to apply to the court for an order to stay the proceedings whilst the parties take steps to comply.

3.21

The claimant may want to make an **offer to settle** the claim at this early stage by putting forward an offer in respect of liability and/or an amount of compensation in accordance with the legal and procedural requirements of CPR Part 36 (possibly including any costs incurred to date). If an offer to settle is made, generally this should be supported by a medical report which deals with the injuries, condition and prognosis, and by a schedule of loss and supporting documentation. The level of detail necessary will depend on the value of the claim. Medical reports may not be necessary where there is no significant continuing injury and a detailed schedule may not be necessary in a low value case.

#### **Letter of Response**

3.22

Attached at Annex C3 is a template for the suggested contents of the **Letter of Response**: the level of detail will need to be varied to suit the particular circumstances.

### 3.23

The defendant should **acknowledge** the Letter of Claim **within 14 days of receipt** and should identify who will be dealing with the matter.

### 3.24

The defendant should, **within four months** of the Letter of Claim, provide a **reasoned answer** in the form of a **Letter of Response** in which the defendant should—

- (a) if the **claim is admitted**, say so in clear terms;
- (b) if only **part of the claim is admitted**, make clear which issues of breach of duty and/or causation are admitted and which are denied and why;
- (c) state whether it is intended that any **admissions will be binding**;
- (d) if the **claim is denied**, include specific comments on the allegations of negligence and, if a synopsis or chronology of relevant events has been provided and is disputed, the defendant's version of those events;
- (e) if supportive expert evidence has been obtained, identify which disciplines of expert evidence have been relied upon and whether they relate to breach of duty and/or causation;
- (f) if known, state whether the defendant requires copies of any relevant medical records obtained by the claimant (to be supplied for a reasonable copying charge);
- (g) provide copies of any additional documents relied upon, e.g. an internal protocol;
- (h) if not indemnified by the NHS, supply details of the relevant indemnity insurer; and
- (i) inform the claimant of any other potential defendants to the claim.

### 3.25

3.25.1 If the defendant requires an extension of time for service of the Letter of Response, a request should be made as soon as the defendant becomes aware that it will be required and, in any event, within four months of the letter of claim.

3.25.2 The defendant should explain why any extension of time is necessary.

3.25.3 The claimant should adopt a reasonable approach to any request for an extension of time for provision of the reasoned answer.

### 3.26

If the claimant has made an offer to settle, the defendant should respond to that offer in the Letter of Response, preferably with reasons. The defendant may also make an offer to settle at this stage. Any offer made by the defendant should be made in accordance with the legal and procedural requirements of CPR Part 36 (possibly including any costs incurred to date). If an offer to settle is made, the defendant should provide sufficient medical or other evidence to allow the claimant to properly consider the offer. The level of detail necessary will depend on the value of the claim.

### 3.27

If the parties reach agreement on liability, or wish to explore the possibility of resolution with no admissions as to liability, but time is needed to resolve the value of the claim, they should aim to agree a reasonable period.

### 3.28

If the parties do not reach agreement on liability, they should discuss whether the claimant should start proceedings and whether the court might be invited to direct an early trial of a preliminary issue or of breach of duty and/or causation.

### 3.29

Following receipt of the Letter of Response, if the claimant is aware that there may be a delay of six months or more before the claimant decides if, when and how to proceed, the claimant should keep the defendant generally informed.

## 4 EXPERTS

### 4.1

In clinical negligence disputes separate **expert opinions** may be needed—

- on breach of duty;
- on causation;
- on the patient's condition and prognosis;
- to assist in valuing aspects of the claim.

#### 4.2

It is recognised that in clinical negligence disputes, the parties and their advisers will require flexibility in their approach to expert evidence. The parties should co-operate when making decisions on appropriate medical specialisms, whether experts might be instructed jointly and whether any reports obtained pre-action might be shared.

#### 4.3

Obtaining expert evidence will often be an expensive step and may take time, especially in specialised areas of medicine where there are limited numbers of suitable experts.

#### 4.4

When considering what expert evidence may be required during the Protocol period, parties should be aware that the use of any expert reports obtained pre-action will only be permitted in proceedings with the express permission of the court.

### 5 ALTERNATIVE DISPUTE RESOLUTION

#### 5.1

Litigation should be a last resort. As part of this Protocol, the parties should consider whether negotiation or some other form of alternative dispute resolution ('ADR') might enable them to resolve their dispute without commencing proceedings.

#### 5.2

Some of the options for resolving disputes without commencing proceedings are—

- (a) discussion and negotiation (which may or may not include making Part 36 Offers or providing an explanation and/or apology)
- (b) mediation, a third party facilitating a resolution ;
- (c) arbitration, a third party deciding the dispute;
- (d) early neutral evaluation, a third party giving an informed opinion on the dispute; and
- (e) Ombudsmen schemes.

#### 5.3

Information on mediation and other forms of ADR is available in the *Jackson ADR Handbook* (available from Oxford University Press) or at—

- <http://www.civilmediation.justice.gov.uk/>
- [http://www.adviceguide.org.uk/england/law\\_e/law\\_legal\\_system\\_e/law\\_taking\\_legal\\_action\\_e/alternatives\\_to\\_court.htm](http://www.adviceguide.org.uk/england/law_e/law_legal_system_e/law_taking_legal_action_e/alternatives_to_court.htm)

#### 5.4

If proceedings are issued, the parties may be required by the court to provide evidence that ADR has been considered. It is expressly recognised that no party can or should be forced to mediate or enter into any form of ADR, but a party's silence in response to an invitation to participate in ADR might be considered unreasonable by the court and could lead to the court ordering that party to pay additional court costs.

### 6 STOCKTAKE

#### 6.1

6.1.1 Where a dispute has not been resolved after the parties have followed the procedure set out in this Protocol, the parties should review their positions before the claimant issues court proceedings.

6.1.2 If proceedings cannot be avoided, the parties should continue to co-operate and should seek to prepare a chronology of events which identifies the facts or issues that are agreed and those that remain in dispute. The parties should also seek to agree the necessary procedural directions for efficient case management during the proceedings.

## ANNEX A

### AN ILLUSTRATIVE FLOWCHART



## ANNEX B

### FORM FOR OBTAINING HEALTH RECORDS

#### Consent form (Releasing health records under the Data Protection Act 1998)

#### About this form

In order to proceed with your claim, your solicitor may need to see your health records. Solicitors usually need to see all your records as they need to assess which parts are relevant to your case. (Past medical history is often relevant to a claim for compensation.) Also, if your claim goes ahead, the person you are making the claim against will ask for copies of important documents. Under court rules, they may see all your health records. So your solicitor needs to be familiar with all your records.

---

#### Part a – your, the health professionals' and your solicitor's or agent's details

Your full name:	
Your address:	
Date of birth:	
Date of incident:	
Solicitor's or agent's name and address:	
GP's name and address (and phone number if known):	

Name (and address if known) of the hospitals you went to in relation to this incident :	
If you have seen any other person or organisation about your injuries (for example, a physiotherapist) or have had any investigations (for example, x-rays) please provide details.	

---

**Part b – your declaration and signature**

Please see the 'Notes for the client' over the page before you sign this form.

**To health professionals**

I understand that filling in and signing this form gives you permission to give copies of all my GP records, and any hospital records relating to this incident, to my solicitor or agent whose details are given above.

Please give my solicitor or agent copies of my health records, in line with the Data Protection Act 1998, within 40 days.

Your signature:

Date:



---

**Part c – your solicitor's or agent's declaration and signature**

Please see the 'Notes for the solicitor or agent' over the page before you sign this form.

**To health professionals**

I have told my client the implications of giving me access to his or her health records. I confirm that I need the full records in this case. I enclose the authorised fee for getting access to records.

Solicitor's or agent's signature:

Date:



### Notes for the client

Your health records contain information from almost all consultations you have had with health professionals. The information they contain usually includes:

- why you saw a health professional;
- details of clinical findings and diagnoses;
- any options for care and treatment the health professional discussed with you;
- the decisions made about your care and treatment, including evidence that you agreed; and
- details of action health professionals have taken and the outcomes.

By signing this form, you are agreeing to the health professional or hospital named on this form releasing copies of your health records to your solicitor or agent. During the process your records may be seen by people who are not health professionals, but they will keep the information confidential.

If you are making, or considering making, a legal claim against someone, your solicitor will need to see copies of all your GP records, and any hospital records made in connection with this incident, so he or she can see if there is anything in your records that may affect your claim. Once you start your claim, the court can order you to give copies of your health records to the solicitor of the person you are making a claim against so he or she can see if any of the information in your records can be used to defend his or her client.

If you decide to go ahead with your claim, your records may be passed to a number of people including:

- the expert who your solicitor or agent instructs to produce a medical report as evidence for the case;
- the person you are making a claim against and their solicitors;
- the insurance company for the person you are making a claim against;
- any insurance company or other organisation paying your legal costs; and
- any other person or company officially involved with the claim.

You do not have to give permission for your health records to be released but if you don't, the court may not let you go ahead with your claim and, in some circumstances, your solicitor may refuse to represent you.

If there is very sensitive information in the records, that is not connected to the claim, you should tell your solicitor. They will then consider whether this information needs to be revealed.

### Notes for the solicitor or agent

Before you ask your client to fill in and sign this form you should explain that this will involve his or her full health records being released and how the information in them may be used. You should also tell your client to read the notes above.

If your client is not capable of giving his or her permission in this form, this form should be signed by:

- your client's litigation friend;
- someone who has enduring power of attorney to act for your

If you find out at any stage that the medical records contain information that the client does not know about (for example, being diagnosed with a serious illness), you should discuss this with the health professional who provided the records.

Unless your client agrees otherwise, you must use his or her health records only for the purpose for which the client signed this form (that is, making his or her claim). Under the Data Protection Act you have responsibilities relating to sensitive information. The entire health record should not be automatically revealed without the client's permission and you should not keep health records for any longer than you need them. You should return them to the client at the end of the claim if they want them. Otherwise, you are responsible for destroying them.

### Notes for the medical records controller

This form shows your patient's permission for you to give copies of his or her full GP record, and any hospital records relating to this incident, to his or her solicitor or agent. You must give the solicitor or agent copies of these health records unless any of the exemptions set out in The Data Protection (Subject Access Modification) (Health) Order 2000 apply. The main exemptions are that you must not release information that:

- is likely to cause serious physical or mental harm to the patient or another person; or
- relates to someone who would normally need to give their permission (where that person is not a health professional who has cared for the patient).

Your patient's permission for you to release information is valid only if that patient understands the consequences of his or her records being released, and how the information will be used. The solicitor or agent named on this form must explain these issues to the patient. If you have any doubt about whether this has happened, contact the solicitor or agent, or your patient.

If your patient is not capable of giving his or her permission, this form should be signed by:

- a 'litigation friend' acting for your patient;
- someone with 'enduring power of attorney' to act for your patient; or
- a receiver appointed by the Court of Protection.

You may charge the usual fees authorised under the Data Protection Act for providing the records.

The BMA publishes detailed advice for doctors on giving access to health records, including the fees that you may charge. You can view that advice by visiting [www.bma.org.uk/ap.nsf/Content/accesshealthrecords](http://www.bma.org.uk/ap.nsf/Content/accesshealthrecords).

**This form is published by the Law Society and British Medical Association. (2<sup>nd</sup> edition, October 2004)**



- client; or
- your client's receiver appointed by the Court of Protection.

When you send this form to the appropriate records controller please also enclose the authorised fees for getting access to records.



## **ANNEX C**

### TEMPLATES FOR LETTERS OF NOTIFICATION, CLAIM AND RESPONSE

#### **C1 Letter of Notification**

**To**

**Defendant**

**Dear Sirs**

#### **Letter of Notification**

**Re: [Claimant's Name, Address, DoB and NHS Number]**

We have been instructed to act on behalf of [Claimant's name] in relation to treatment carried out/care provided at [name of hospital or treatment centre] by [name of clinician(s) if known] on [insert date(s)].

The purpose of this letter is to notify you that, although we are not yet in a position to serve a formal Letter of Claim, our initial investigations indicate that a case as to breach of duty and/or causation has been identified. We therefore invite you to commence your own investigation and draw your attention to the fact that failure to do may be taken into account when considering the reasonableness of any subsequent application for an extension of time for the Letter of Response.

#### **Defendant**

We understand that you are the correct defendant in respect of treatment provided by [name of clinician] at [hospital/surgery/treatment centre] on [date(s)]. If you do not agree, please provide us with any information you have that may assist us to identify the correct defendant. Failure to do so may result in costs sanctions should proceedings be issued.

#### **Summary of Facts and Alleged Adverse Outcome**

[Outline what is alleged to have happened and provide a chronology of events with details of relevant known treatment/care.]

#### **Medical Records**

[Provide index of records obtained and request for further records/information if required.]

**Allegations of Negligence**

[Brief outline of any alleged breach of duty and causal link with any damage suffered.]

**Expert Evidence**

[State whether expert evidence has been obtained or is awaited and, if so, the relevant discipline.]

**Damage**

[Brief outline of any injuries attributed to the alleged negligence and their functional impact.]

**Funding**

[If known, state method of funding and whether arrangement was entered into before or after April 2013.]

**Rehabilitation**

As a result of the allegedly negligent treatment, our client has injuries/needs that could be met by rehabilitation. We invite you to consider how this could be achieved.

**Limitation**

For the purposes of limitation, we calculate that any proceedings will need to be issued on or before [date].

Please acknowledge this letter by [insert date 14 days after deemed receipt] and confirm to whom any Letter of Claim should be sent. We enclose a duplicate of the letter for your insurer.

**Recoverable Benefits**

The claimant's National Insurance Number will be sent to you in a separate envelope.

We look forward to hearing from you.

Yours faithfully,

## **C2 Letter of Claim**

**To**

**Defendant**

**Dear Sirs**

**Letter of Claim**

**[Claimant's name] –v- [Defendant's Name]**

We have been instructed to act on behalf of [Claimant's name] in relation to treatment carried out/care provided at [name of hospital or treatment centre] by [name of clinician(s) if known] on [insert date(s)]. Please let us know if you do not believe that you are the appropriate defendant or if you are aware of any other potential defendants.

### **Claimant's details**

Full name, DoB, address, NHS Number.

### **Dates of allegedly negligent treatment**

- include chronology based on medical records.

### **Events giving rise to the claim:**

- an outline of what happened, including details of other relevant treatments to the client by other healthcare providers.

### **Allegation of negligence and causal link with injuries:**

- an outline of the allegations or a more detailed list in a complex case;
- an outline of the causal link between allegations and the injuries complained of;
- A copy of any supportive expert evidence (optional).

### **The Client's injuries, condition and future prognosis**

- A copy of any supportive expert report (optional);
- Suggestions for rehabilitation;
- The discipline of any expert evidence obtained or proposed.

**Clinical records (if not previously provided)**

We enclose an index of all the relevant records that we hold. We shall be happy to provide copies of these on payment of our photocopying charges.

We enclose a request for copies of the following records which we believe that you hold. We confirm that we shall be responsible for your reasonable copying charges. Failure to provide these records may result in costs sanctions if proceedings are issued.

**The likely value of the claim**

- an outline of the main heads of damage, or, in straightforward cases, the details of loss;
- Part 36 settlement offer (optional);
- suggestions for ADR.

**Funding**

[State method of funding and whether arrangement was entered into before or after April 2013.]

We enclose a further copy of this letter for you to pass to your insurer. We look forward to receiving an acknowledgment of this letter within 14 days and your Letter of Response within 4 months of the date on which this letter was received. We calculate the date for receipt of your Letter of Response to be [date].

**Recoverable Benefits**

The claimant's National Insurance Number will be sent to you in a separate envelope.

We look forward to hearing from you.

Yours faithfully

### **C3 Letter of Response**

**To**

**Claimant**

**Dear Sirs**

#### **Letter of Response**

**[Claimant's name] –v- [Defendant's Name]**

We have been instructed to act on behalf of [defendant] in relation to treatment carried out/care provided to [claimant] at [name of hospital or treatment centre] by [name of clinician(s) if known] on [insert date(s)].

The defendant [conveys sympathy for the adverse outcome/would like to offer an apology/denies that there was an adverse outcome].

#### **Parties**

It is accepted that [defendant] had a duty of care towards [claimant] in respect of [details if required] treatment/care provided to [claimant] at [location] on [date(s)].

However, [defendant] is not responsible for [details] care/treatment provided to [claimant] at [location] on [date(s)] by [name of clinician if known].

#### **Records**

We hold the following records...

We require copies of the following records...

Failure to provide these records may result in costs sanctions if proceedings are issued.

#### **Comments on events and/or chronology:**

We [agree the chronology enclosed with the Letter of Claim] [enclose a revised chronology of events].

We enclose copies of relevant [records/Protocols/internal investigations] in respect of the treatment/care that [claimant] received.

**Liability**

In respect of the specific allegations raised by the claimant, the defendant [has obtained an expert opinion and] responds as follows:-

[each allegation should be addressed separately. The defendant should explain which (if any) of the allegations of breach of duty and/or causation are admitted and why. The defendant should also make clear which allegations are denied and why].

**Next Steps**

The defendant suggests...

[e.g. no prospect of success for the claimant, resolution without admissions of liability, ADR, settlement offer, rehabilitation].

Yours faithfully,"



## “THE PRE-ACTION PROTOCOL FOR PROFESSIONAL NEGLIGENCE

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### INTRODUCTION

#### 1 Scope of the Protocol

1.1 This Protocol is designed to apply when a claimant wishes to claim against a professional (other than construction professionals and healthcare providers) as a result of that professional's alleged negligence or equivalent breach of contract or breach of fiduciary duty. Although these claims will be the usual situation in which the

protocol will be used, there may be other claims for which the protocol could be appropriate.

1.2 'Professional' is deliberately left undefined in the protocol. If it becomes an issue as to whether a respondent to a claim is or is not a professional, parties are reminded of the overriding need to act reasonably (see paragraph 3.3 below). Rather than argue about the definition of 'professional', therefore, the parties are invited to use this Protocol, adapting it where appropriate.

1.3 Allegations of professional negligence are sometimes made in response to an attempt by the professional to recover outstanding fees. Where possible these allegations should be raised before court proceedings have commenced, in which case the parties should comply with the protocol before either party commences court proceedings.

1.4 The protocol is not intended to apply to claims:

- (a) against architects, engineers and quantity surveyors – parties should use the Construction and Engineering Disputes (CED) protocol.
- (b) against healthcare providers – parties should use the pre-action protocol for the Resolution of Clinical Disputes.
- (c) concerning defamation – parties should use the pre-action protocol for defamation claims.

1.5 If at any time prior to the commencement of court proceedings the claimant decides not to proceed with the claim it should notify the professional as soon as reasonably practicable.

## **2 Aims of the Protocol**

2.1 This Protocol sets out a code of good practice and contains the steps which parties should generally follow before commencing court proceedings in respect of a professional negligence claim.

2.2 The aims of the protocol are to enable parties to prospective claims to:

- (a) understand and properly identify the issues in dispute in the proposed claim and share information and relevant documents;
- (b) make informed decisions as to whether and how to proceed;
- (c) try to settle the dispute without proceedings or reduce the issues in dispute;

(d) avoid unnecessary expense and keep down the costs of resolving the dispute; and

(e) support the efficient management of proceedings where court proceedings cannot be avoided.

2.3 This protocol is not intended to replace other forms of pre-action dispute resolution (such as those mentioned in paragraph 12 of this protocol). Where such procedures are available, parties are encouraged to consider whether they should be used. If, however, these other procedures are used and fail to resolve the dispute, the protocol should be used before court proceedings are started, adapting it where appropriate.

### **3 Compliance**

3.1 The courts will treat the standards set out in this protocol as the normal reasonable approach for parties to a professional negligence claim. If court proceedings are started, it will be for the court to decide whether sanctions should be imposed as a result of substantial non-compliance with this protocol. Guidance on the courts' likely approach is given in the Practice Direction – Pre-Action Conduct and Protocols. The court is likely to disregard minor or technical departures from this protocol and so should the parties as between themselves.

3.2 Both in operating the timetable and in requesting and providing information during the protocol period, the parties are expected to act reasonably, in line with the court's expectations of them. Accordingly, in the event that the protocol does not specifically address a problem, the parties should comply with the spirit of the protocol by acting reasonably.

#### **4 Limitation**

4.1 The protocol does not alter the statutory time limits for commencing court proceedings. A claimant is required to start proceedings within those time limits. However, the claimant can request and the parties can agree a standstill agreement to extend the period in which a limitation defence will not be pursued. Alternatively, a claimant may commence court proceedings and invite the professional to agree to an immediate stay of the proceedings to enable the protocol procedures to be followed before the case is pursued.

#### **THE PROTOCOL**

#### **5 Preliminary Notice**

5.1 As soon as the claimant decides there is a reasonable chance that he will bring a claim against a professional, the claimant is encouraged to notify the professional in writing.

5.2 This letter (the "Preliminary Notice") should contain the following information:

- (a) the identity of the claimant and any other parties;
- (b) a brief outline of the claimant's grievance against the professional; and
- (c) if possible, a general indication of the financial value of the potential claim

5.3 The Preliminary Notice should be addressed to the professional and should ask the professional to inform his professional indemnity insurers, if any, immediately.

5.4 The Preliminary Notice should be acknowledged in writing within 21 days of receipt. Where the claimant is unrepresented the acknowledgment should enclose a copy of this protocol.

5.5 If, after 6 months from the date of the Preliminary Notice, the claimant has not sent any further correspondence to the professional regarding the claim, the claimant should notify the professional of its intentions with regard to the claim, i.e. whether the claimant is pursuing the claim, has decided not to pursue it or has yet to reach a decision and, if the latter, when the claimant envisages making a decision.

## **6 Letter of Claim**

6.1 As soon as the claimant decides there are grounds for a claim against the professional, the claimant should write a detailed Letter of Claim to the professional.

6.2 The Letter of Claim will normally be an open letter (as opposed to being 'without prejudice') and should include the following –

- (a) The identity of any other parties involved in the dispute or a related dispute.
- (b) A clear chronological summary (including key dates) of the facts on which the claim is based. Key documents should be identified, copied and enclosed.
- (c) Any reasonable requests which the claimant needs to make for documents relevant to the dispute which are held by the professional.
- (d) The allegations against the professional. What has been done wrong or not been done? What should the professional have done acting correctly?
- (e) An explanation of how the alleged error has caused the loss claimed. This should include details of what happened as a result of the claimant relying upon what the professional did wrong or omitted to do, and what might have happened if the professional had acted correctly.
- (f) An estimate of the financial loss suffered by the claimant and how it is calculated. Supporting documents should be identified, copied and enclosed. If details of the financial loss cannot be supplied, the claimant should explain why and should state when he will be in a position to provide the details. This information should be sent to the professional as soon as reasonably possible. If the claimant is seeking some form of non-financial redress, this should be made clear.
- (g) Confirmation whether or not an expert has been appointed. If so, providing the identity and discipline of the expert, together with the date upon which the expert was appointed.
- (h) A request that a copy of the Letter of Claim be forwarded immediately to the professional's insurers, if any.

6.3 The Letter of Claim is not intended to have the same formal status as a Statement of Case. If, however, the Letter of Claim differs materially from the Statement of Case in subsequent proceedings, the court may decide, in its discretion, to impose sanctions.

6.4 If the claimant has sent other Letters of Claim (or equivalent) to any other party in relation to the same dispute or a related dispute, those letters should be copied to the professional.

## **7 Letter of Acknowledgment**

7.1 The Letter of Claim should be acknowledged in writing within 21 days of receipt.

7.2 Where the claimant is unrepresented, the Letter of Acknowledgment should enclose a copy of this protocol unless provided previously.

## **8 Investigations**

8.1 If the professional considers that, for any reason, the Letter of Claim does not comply with section 6 above, the professional should as soon as reasonably practicable inform the claimant why and identify the further information which the professional reasonably requires.

8.2 The professional will have three months from the date of the Letter of Acknowledgment to investigate and respond to the Letter of Claim by the provision of a Letter of Response and/or a Letter of Settlement (as to which, see paragraph 9 below).

8.3 If the professional is in difficulty in complying with the three month time period, the problem should be explained to the claimant as soon as possible and, in any event, as long as possible before the end of the three month period. The professional should explain what is being done to resolve the problem and when the professional expects to be in a position to provide a Letter of Response and/or a Letter of Settlement. The claimant should agree to any reasonable requests for an extension of the three month period.

8.4 The parties should supply promptly, at this stage and throughout, whatever relevant information or documentation is reasonably requested.

8.5 If the professional intends to claim against someone who is not currently a party to the dispute, that third party should be identified to the claimant in writing as soon as possible.

## **9 Letter of Response and Letter of Settlement**

9.1 As soon as the professional has completed his investigations (and in any event within 3 months of the Letter of Acknowledgment unless an extension has been agreed), the professional should send to the claimant:

(a) a Letter of Response, or

- (b) a Letter of Settlement; or
- (c) both.

## **9.2 The Letter of Response**

9.2.1 The Letter of Response should be an open letter (as opposed to being 'without prejudice') and should be a reasoned answer to the claimant's allegations:

- (a) if the claim is admitted the professional should say so in clear terms.
- (b) if only part of the claim is admitted the professional should make clear which parts of the claim are admitted and which are denied.
- (c) if the claim is denied in whole or in part, the Letter of Response should include specific comments on the allegations against the professional and, if the claimant's version of events is disputed, the professional should provide his version of events.
- (d) if the professional is unable to admit or deny the claim, the professional should explain why and identify any further information which is required.
- (e) if the professional disputes the estimate of the claimant's financial loss, the Letter of Response should set out the professional's estimate. If an estimate cannot be provided, the professional should explain why and when he will be in a position to provide an estimate. The professional's estimate should be sent to the claimant as soon as reasonably possible.
- (f) to the extent not already exchanged in the protocol process, key documents should be identified, copied and enclosed.

9.2.2 The Letter of Response is not intended to have the same formal status as a Defence. If, however, the Letter of Response differs materially from the Defence in subsequent court proceedings, the court may decide, in its discretion, to impose sanctions.

## **9.3 The Letter of Settlement**

9.3.1 Any Letter of Settlement may be an open letter, a without prejudice letter, a without prejudice save as to costs letter or an offer made pursuant to Part 36 of the Civil Procedure Rules and should be sent if the professional intends to make proposals for settlement of all or part of the claim. It should:

- (a) set out the professional's views on the claim identifying those issues which the professional believes are likely to remain in dispute and those which are not. (The Letter of Settlement does not need to include this information if it is already included in a Letter of Response.)

- (b) make a settlement proposal or identify any further information which is required before the professional can formulate its proposal.
- (c) where additional documents are relied upon, copies should be provided.

#### 9.4 Effect of Letter of Response and/or Letter of Settlement

9.4.1 If the Letter of Response denies the claim in its entirety and there is no Letter of Settlement, it is open to the claimant to commence court proceedings.

9.4.2 In any other circumstance, the professional and the claimant should commence negotiations with the aim of resolving the claim within 6 months of the date of the Letter of Acknowledgment (NOT from the date of the Letter of Response).

9.4.3 If the claim cannot be resolved within this period:

- (a) the parties should agree within 14 days of the end of the period whether the period should be extended and, if so, by how long.
- (b) the parties should seek to identify those issues which are still in dispute and those which can be agreed.
- (c) if an extension of time is not agreed it will then be open to the claimant to commence court proceedings.

## 10 Documents

10.1 This protocol is intended to encourage the early exchange of relevant information, so that issues in dispute can be clarified or resolved. The claimant should provide key documents with the Letter of Claim and (at any time) any other documents reasonably requested by the professional which are relevant to the issues in dispute. The professional should provide key documents with the Letter of Response, to the extent not provided by the claimant, and (at any time) any other documents reasonably requested by the claimant which are relevant to the issues in dispute.

10.2 Parties are encouraged to cooperate openly in the exchange of relevant information and documentation. However, the protocol should not be used to justify a 'fishing expedition' by either party. No party is obliged under the protocol to disclose any document which a court could not order them to disclose in the pre-action period under CPR 31.16.

10.3 This protocol does not alter the parties' duties to disclose documents under any professional regulation or under general law.



## **11 Experts**

11.1 In professional negligence disputes, separate expert opinions may be needed on:

- (a) breach of duty;
- (b) causation; and/or
- (c) the quantification of the claimant's claim.

11.2 It is recognised that in professional negligence disputes the parties and their advisers will require flexibility in their approach to expert evidence. The parties should co-operate when making decisions on appropriate expert specialisms, whether experts might be instructed jointly and whether any reports obtained pre-action might be shared and should at all times have regard to the duty in CPR 35.1 to restrict expert evidence to that which is reasonably required to resolve the dispute.

11.3 When considering what expert evidence may be required during the protocol period, parties should be aware that any expert reports obtained pre-action will only be permitted in proceedings with the express permission of the court.

## **12 Alternative Dispute Resolution**

12.1 Court proceedings should be a last resort. The parties should consider whether some form of alternative dispute resolution procedure might enable them to settle their dispute without commencing court proceedings, and if so, endeavour to agree which form to adopt.

12.2 Parties may negotiate to settle a dispute or may use a form of ADR including:

- (a) mediation – a third party facilitating a resolution;
- (b) arbitration – a third party deciding the dispute;
- (c) early neutral evaluation – a third party giving an informed opinion on the dispute;
- (d) adjudication – a process by which an independent adjudicator provides the parties with a decision that can resolve the dispute either permanently or on a temporary basis, pending subsequent court determination; and
- (e) Ombudsmen schemes.

(Information on mediation and other forms of ADR is available in the *Jackson ADR Handbook* (available from Oxford University Press) or at—

- <http://www.civilmediation.justice.gov.uk/>
- [http://www.adviceguide.org.uk/england/law\\_e/law\\_legal\\_system\\_e/law\\_taking\\_legal\\_action\\_e/alternatives\\_to\\_court.htm](http://www.adviceguide.org.uk/england/law_e/law_legal_system_e/law_taking_legal_action_e/alternatives_to_court.htm)

12.3 If court proceedings are issued, the parties may be required by the court to provide evidence that ADR has been considered. A party's refusal to engage or silence in response to an invitation to participate in ADR might be considered unreasonable by the court and could lead to the court ordering that party to pay additional costs.

### **13 Stocktake**

13.1 Where the procedure set out in this protocol has not resolved the dispute between the parties, they should undertake a further review of their respective positions. The parties should consider the state of the papers and the evidence in order to see if proceedings can be avoided and, at the least, narrow the issues between them.

### **14 Court proceedings**

14.1 Unless it is necessary (for example, to obtain protection against the expiry of a relevant limitation period (see paragraph 4 above)) the claimant should not start court proceedings until:

- (a) the Letter of Response denies the claim in its entirety and there is no Letter of Settlement (see paragraph 9.4.1 above); or
- (b) the end of the negotiation period (see paragraphs 9.4.2 and 9.4.3 above).

14.2 If proceedings are for any reason started before the parties have followed the procedures in this protocol, the parties are encouraged to agree to apply to the court for a stay whilst the protocol is followed.

14.3 Where possible 14 days written notice should be given to the professional before proceedings are started, indicating the court within which the claimant is intending to commence court proceedings.

14.4 If proceedings are commenced they should be served in accordance with Part 6 of the Civil Procedure Rules."

## “THE PRE-ACTION PROTOCOL FOR JUDICIAL REVIEW

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ANNEX A – Letter before claim	
ANNEX B – Response to a letter before claim	
ANNEX C – Notes on public funding for legal costs in judicial review	

### Introduction

1. This Protocol applies to proceedings within England and Wales only. It does not affect the time limit specified by Rule 54.5(1) of the Civil Procedure Rules (CPR), which requires that any claim form in an application for judicial review must be filed promptly and in any event not later than 3 months after the grounds to make the claim first arose. Nor does it affect the shorter time limits specified by Rules 54.5(5) and (6), which set out that a claim form for certain planning judicial reviews must be filed within 6 weeks and the claim form for certain procurement judicial reviews must be filed within 30 days.<sup>1</sup>

2. This Protocol sets out a code of good practice and contains the steps which parties should generally follow before making a claim for judicial review.

3. The aims of the protocol are to enable parties to prospective claims to—

- (a) understand and properly identify the issues in dispute in the proposed claim and share information and relevant documents;
- (b) make informed decisions as to whether and how to proceed;
- (c) try to settle the dispute without proceedings or reduce the issues in dispute;

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<sup>1</sup> The court has a discretion to extend time. It cannot be taken that compliance with the protocol will of itself be sufficient to excuse delay or justify an extension of time, but it may be a relevant factor. Under rule 54.5(2), judicial review time limits cannot be extended by agreement between the parties. However, a court will take account of a party's agreement 'not to take a time point' so far as concerns delay while they were responding to a letter before claim.

- (d) avoid unnecessary expense and keep down the costs of resolving the dispute; and
- (e) support the efficient management of proceedings where litigation cannot be avoided.

**4.** Judicial review allows people with a sufficient interest in a decision or action by a public body to ask a judge to review the lawfulness of—

- an enactment; or
- a decision, action or failure to act in relation to the exercise of a public function.<sup>2</sup>

**5.** Judicial review should only be used where no adequate alternative remedy, such as a right of appeal, is available. Even then, judicial review may not be appropriate in every instance. Claimants are strongly advised to seek appropriate legal advice as soon as possible when considering proceedings. Although the Legal Aid Agency will not normally grant full representation before a letter before claim has been sent and the proposed defendant given a reasonable time to respond, initial funding may be available, for eligible claimants, to cover the work necessary to write this. (See Annex C for more information.)

**6.** This protocol will not be appropriate in very urgent cases. In this sort of case, a claim should be made immediately. Examples are where directions have been set for the claimant's removal from the UK or where there is an urgent need for an interim order to compel a public body to act where it has unlawfully refused to do so, such as where a local housing authority fails to secure interim accommodation for a homeless claimant. A letter before claim, and a claim itself, will not stop the implementation of a disputed decision, though a proposed defendant may agree to take no action until its response letter has been provided. In other cases, the claimant may need to apply to the court for an urgent interim order. Even in very urgent cases, it is good practice to alert the defendant by telephone and to send by email (or fax) to the defendant the draft Claim Form which the claimant intends to issue. A claimant is also normally required to notify a defendant when an interim order is being sought.

**7.** All claimants will need to satisfy themselves whether they should follow the protocol, depending upon the circumstances of the case. Where the use of the protocol is appropriate, the court will normally expect all parties to have complied with it in good time before proceedings are issued and will take into account compliance

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<sup>2</sup> Civil Procedure Rules, Rule 54.1(2)

or non-compliance when giving directions for case management of proceedings or when making orders for costs.<sup>3</sup>

**8.** The Upper Tribunal Immigration and Asylum Chamber (UTIAC) has jurisdiction in respect of judicial review proceedings in relation to most immigration decisions.<sup>4</sup> The President of UTIAC has issued a Practice Statement to the effect that, in judicial review proceedings in UTIAC, the parties will be expected to follow this protocol, where appropriate, as they would for proceedings in the High Court.

### **Alternative Dispute Resolution**

**9.** The courts take the view that litigation should be a last resort. The parties should consider whether some form of alternative dispute resolution ('ADR') or complaints procedure would be more suitable than litigation, and if so, endeavour to agree which to adopt. Both the claimant and defendant may be required by the court to provide evidence that alternative means of resolving their dispute were considered. Parties are warned that if the protocol is not followed (including this paragraph) then the court must have regard to such conduct when determining costs. However, parties should also note that a claim for judicial review should comply with the time limits set out in the Introduction above. Exploring ADR may not excuse failure to comply with the time limits. If it is appropriate to issue a claim to ensure compliance with a time limit, but the parties agree there should be a stay of proceedings to explore settlement or narrowing the issues in dispute, a joint application for appropriate directions can be made to the court.

**10.** It is not practicable in this protocol to address in detail how the parties might decide which method to adopt to resolve their particular dispute. However, summarised below are some of the options for resolving disputes without litigation which may be appropriate, depending on the circumstances—

- Discussion and negotiation.
- Using relevant public authority complaints or review procedures.
- Ombudsmen – the Parliamentary and Health Service and the Local Government Ombudsmen have discretion to deal with complaints relating to maladministration. The British and Irish Ombudsman Association provide information about Ombudsman schemes and other complaint handling bodies and this is available from their website at [www.bioa.org.uk](http://www.bioa.org.uk). Parties

<sup>3</sup> Civil Procedure Rules, Practice Directions 44-48

<sup>4</sup> See the Direction made by the Lord Chief Justice dated 21 August 2013 (as amended on 17 October 2014), available in the UTIAC section of the [www.justice.gov.uk](http://www.justice.gov.uk) website. Also, the High Court can order the transfer of judicial review proceedings to the UTIAC.

may wish to note that the Ombudsmen are not able to look into a complaint once court action has been commenced.

- Mediation – a form of facilitated negotiation assisted by an independent neutral party.

11. The Civil Justice Council and Judicial College have endorsed *The Jackson ADR Handbook* by Susan Blake, Julie Browne and Stuart Sime (2013, Oxford University Press). The Citizens Advice Bureaux website also provides information about ADR: [http://www.adviceguide.org.uk/england/law\\_e/law\\_legal\\_system\\_e/law\\_taking\\_legal\\_action\\_e/alternatives\\_to\\_court.htm](http://www.adviceguide.org.uk/england/law_e/law_legal_system_e/law_taking_legal_action_e/alternatives_to_court.htm). Information is also available at: <http://www.civilmediation.justice.gov.uk/>

12. If proceedings are issued, the parties may be required by the court to provide evidence that ADR has been considered. A party's silence in response to an invitation to participate in ADR or refusal to participate in ADR might be considered unreasonable by the court and could lead to the court ordering that party to pay additional court costs.

#### **Requests for information and documents at the pre-action stage**

13. Requests for information and documents made at the pre-action stage should be proportionate and should be limited to what is properly necessary for the claimant to understand why the challenged decision has been taken and/or to present the claim in a manner that will properly identify the issues. The defendant should comply with any request which meets these requirements unless there is good reason for it not to do so. Where the court considers that a public body should have provided **relevant** documents and/or information, particularly where this failure is a breach of a statutory or common law requirement, it may impose costs sanctions.

#### **The letter before claim**

14. In good time before making a claim, the claimant should send a letter to the defendant. The purpose of this letter is to identify the issues in dispute and establish whether they can be narrowed or litigation can be avoided.

15. Claimants should normally use the suggested **standard format** for the letter outlined at Annex A. For Immigration, Nationality and Asylum cases, the Home Office has a standardised form which can be used. It can be found online at:

<https://www.gov.uk/government/publications/chapter-27-judicial-review-guidance-part-1>

**16.** The letter should contain **the date and details of the decision, act or omission being challenged, a clear summary of the facts and the legal basis for the claim**. It should also contain the details of any information that the claimant is seeking and an explanation of why this is considered relevant. If the claim is considered to be an Aarhus Convention claim (see Rules 45.41 to 45.44 and Practice Direction 45), the letter should state this clearly and explain the reasons, since specific rules as to costs apply to such claims. If the claim is considered appropriate for allocation to the Planning Court and/or for classification as “significant” within that court, the letter should state this clearly and explain the reasons.

**17.** The letter should normally contain the **details of any person known to the claimant who is an Interested Party**. An Interested Party is any person directly affected by the claim.<sup>5</sup> They should be sent a **copy** of the letter before claim **for information**. **Claimants are strongly advised to seek appropriate legal advice when considering proceedings which involve an Interested Party and, in particular, before sending the letter before claim to an Interested Party or making a claim.**

**18.** A claim should not normally be made until the proposed reply date given in the letter before the claim has passed, unless the circumstances of the case require more immediate action to be taken. The claimant should send the letter before claim in good time so as to enable a response which can then be taken into account before the time limit for issuing the claim expires, unless there are good reasons why this is not possible.

**19.** Any claimant intending to ask for a protective costs order (an order that the claimant will not be liable for the costs of the defendant or any other party or to limit such liability) should explain the reasons for making the request, including an explanation of the limit of the financial resources available to the claimant in making the claim.

#### **The letter of response**

**20.** Defendants should normally respond within 14 days using the **standard format** at Annex B. Failure to do so will be taken into account by the court and sanctions

<sup>5</sup> See Civil Procedure Rules, Rule 54.1(2)

may be imposed unless there are good reasons.<sup>6</sup> Where the claimant is a litigant in person, the defendant should enclose a copy of this Protocol with its letter.

**21.** Where it is not possible to reply within the proposed time limit, the defendant should send an interim reply and propose a reasonable extension, giving a date by which the defendant expects to respond substantively. Where an extension is sought, reasons should be given and, where required, additional information requested. **This will not affect the time limit for making a claim for judicial review<sup>7</sup>** nor will it bind the claimant where he or she considers this to be unreasonable. However, where the court considers that a subsequent claim is made prematurely it may impose sanctions.

**22.** If the **claim is being conceded in full**, the reply should say so in clear and unambiguous terms.

**23.** If the **claim is being conceded in part or not being conceded at all**, the reply should say so in clear and unambiguous terms, and—

- (a) where appropriate, contain a new decision, clearly identifying what aspects of the claim are being conceded and what are not, or, give a clear timescale within which the new decision will be issued;
- (b) provide a fuller explanation for the decision, if considered appropriate to do so;
- (c) address any points of dispute, or explain why they cannot be addressed;
- (d) enclose any **relevant** documentation requested by the claimant, or explain why the documents are not being enclosed;
- (e) where documents cannot be provided within the time scales required, then give a clear timescale for provision. The claimant should avoid making any formal application for the provision of documentation/information during this period unless there are good grounds to show that the timescale proposed is unreasonable;
- (f) where appropriate, confirm whether or not they will oppose any application for an interim remedy; and
- (g) if the claimant has stated an intention to ask for a protective costs order, the defendant's response to this should be explained.

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<sup>1</sup> See Civil Procedure Rules, Practice Direction – Pre-Action Conduct and Protocols, paragraphs 2-3

<sup>2</sup> See Civil Procedure Rules, Rule 54.5(1)



If the letter before claim has stated that the claim is an Aarhus Convention claim but the defendant does not accept this, the reply should state this clearly and explain the reasons. If the letter before claim has stated that the claim is suitable for the Planning Court and/or categorisation as “significant” within that court but the defendant does not accept this, the reply should state this clearly and explain the reasons.

**24.** The response should be sent to **all Interested Parties**<sup>8</sup> identified by the claimant and contain details of any other persons who the defendant considers are Interested Parties.

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<sup>8</sup> See Civil Procedure Rules, Rule 54.1(2)(f)

## **ANNEX A**

### **Letter before claim**

#### **Section 1. Information required in a letter before claim**

##### **1 Proposed claim for judicial review**

###### **To**

*(Insert the name and address of the proposed defendant – see details in section 2.)*

###### **2 The claimant**

*(Insert the title, first and last name and the address of the claimant.)*

###### **3 The defendant's reference details**

*(When dealing with large organisations it is important to understand that the information relating to any particular individual's previous dealings with it may not be immediately available, therefore it is important to set out the relevant reference numbers for the matter in dispute and/or the identity of those within the public body who have been handling the particular matter in dispute – see details in section 3.)*

###### **4 The details of the claimants' legal advisers, if any, dealing with this claim**

*(Set out the name, address and reference details of any legal advisers dealing with the claim.)*

###### **5 The details of the matter being challenged**

*(Set out clearly the matter being challenged, particularly if there has been more than one decision.)*

###### **6 The details of any Interested Parties**

*(Set out the details of any Interested Parties and confirm that they have been sent a copy of this letter.)*

###### **7 The issue**

*(Set out a brief summary of the facts and relevant legal principles, the date and details of the decision, or act or omission being challenged, and why it is contended to be wrong.)*

###### **8 The details of the action that the defendant is expected to take**

*(Set out the details of the remedy sought, including whether a review or any interim remedy are being requested.)*

#### **9 ADR proposals**

*(Set out any proposals the claimant is making to resolve or narrow the dispute by ADR.)*

#### **10 The details of any information sought**

*(Set out the details of any information that is sought which is related to identifiable issues in dispute so as to enable the parties to resolve or reduce those issues. This may include a request for a fuller explanation of the reasons for the decision that is being challenged.)*

#### **11 The details of any documents that are considered relevant and necessary**

*(Set out the details of any documentation or policy in respect of which the disclosure is sought and explain why these are relevant.)*

#### **12 The address for reply and service of court documents**

*(Insert the address for the reply.)*

#### **13 Proposed reply date**

*(The precise time will depend upon the circumstances of the individual case. However, although a shorter or longer time may be appropriate in a particular case, 14 days is a reasonable time to allow in most circumstances.)*

### **Section 2. Address for sending the letter before claim**

Public bodies have requested that, for certain types of cases, in order to ensure a prompt response, letters before claim should be sent to specific addresses.

**• Where the claim concerns a decision in an Immigration, Asylum or Nationality case (including in relation to an immigration decision taken abroad by an Entry Clearance Officer)—**

The claim should be sent electronically to the following Home Office email address:  
[UKVIPAP@homeoffice.gsi.gov.uk](mailto:UKVIPAP@homeoffice.gsi.gov.uk)

Alternatively the claim may be sent by post to the following Home Office postal address:

Litigation Operations Allocation Hub  
Status Park 2  
4 Nobel Drive  
Harlington  
Hayes  
Middlesex UB3 5EY

The Home Office has a standardised form which claimants may find helpful to use for communications with the Home Office in Immigration, Asylum or Nationality cases pursuant to this Protocol, to assist claimants to include all relevant information and to promote speedier review and response by the Home Office. The Home Office form may be filled out in electronic or hard copy format. It can be found online at:

<https://www.gov.uk/government/publications/chapter-27-judicial-review-guidance-part-1>

• **Where the claim concerns a decision by the Legal Aid Agency—**

The address on the decision letter/notification;

Legal Director  
Corporate Legal Team  
Legal Aid Agency  
102 Petty France  
London SW1H 9AJ

• **Where the claim concerns a decision by a local authority—**

The address on the decision letter/notification; and  
their legal department<sup>9</sup>

• **Where the claim concerns a decision by a department or body for whom Treasury Solicitor acts and Treasury Solicitor has already been involved in the case a copy should also be sent, quoting the Treasury Solicitor's reference, to—**

The Treasury Solicitor,  
One Kemble Street,  
London WC2B 4TS

**In all other circumstances, the letter should be sent to the address on the letter notifying the decision.**

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<sup>9</sup> The relevant address should be available from a range of sources such as the Phone Book; Business and Services Directory, Thomson's Local Directory, CAB, etc.

### **Section 3. Specific reference details required**

Public bodies have requested that the following information should be provided, if at all possible, in order to ensure prompt response. **Where the claim concerns an Immigration, Asylum or Nationality case, dependent upon the nature of the case—**

- The Home Office reference number;
- The Port reference number;
- The Asylum and Immigration Tribunal reference number;
- The National Asylum Support Service reference number; or, if these are unavailable:
- The full name, nationality and date of birth of the claimant.

**Where the claim concerns a decision by the Legal Aid Agency—**

- The certificate reference number.

## **ANNEX B**

### **Response to a letter before claim**

#### **Information required in a response to a letter before claim**

##### **1 The claimant**

*(Insert the title, first and last names and the address to which any reply should be sent.)*

##### **2 From**

*(Insert the name and address of the defendant.)*

##### **3 Reference details**

*(Set out the relevant reference numbers for the matter in dispute and the identity of those within the public body who have been handling the issue.)*

##### **4 The details of the matter being challenged**

*(Set out details of the matter being challenged, providing a fuller explanation of the decision, where this is considered appropriate.)*

##### **5 Response to the proposed claim**

*(Set out whether the issue in question is conceded in part, or in full, or will be contested. Where an interim reply is being sent and there is a realistic prospect of settlement, details should be included. If the claimant is a litigant in person, a copy of the Pre-Action Protocol should be enclosed with the letter.)*

##### **6 Details of any other Interested Parties**

*(Identify any other parties who you consider have an interest who have not already been sent a letter by the claimant.)*

##### **7 ADR proposals**

*(Set out the defendant's position on any ADR proposals made in the letter before claim and any ADR proposals by the defendant.)*

##### **8 Response to requests for information and documents**

*(Set out the defendant's answer to the requests made in the letter before claim including reasons why any requested information or documents are not being disclosed.)*

**9 Address for further correspondence and service of court documents**

*(Set out the address for any future correspondence on this matter)*

## **ANNEX C**

### **Notes on public funding for legal costs in judicial review**

Public funding for legal costs in judicial review is available from legal professionals and advice agencies which have contracts with the Legal Aid Agency. Funding may be provided for—

- **Legal Help** to provide initial advice and assistance with any legal problem;  
or
- **Legal Representation** to allow you to be represented in court if you are taking or defending court proceedings. This is available in two forms—
  - **Investigative Help** is limited to funding to investigate the strength of the proposed claim. It includes the issue and conduct of proceedings only so far as is necessary to obtain disclosure of relevant information or to protect the client's position in relation to any urgent hearing or time limit for the issue of proceedings. This includes the work necessary to write a letter before claim to the body potentially under challenge, setting out the grounds of challenge, and giving that body a reasonable opportunity, typically 14 days, in which to respond.
  - **Full Representation** is provided to represent you in legal proceedings and includes litigation services, advocacy services, and all such help as is usually given by a person providing representation in proceedings, including steps preliminary or incidental to proceedings, and/or arriving at or giving effect to a compromise to avoid or bring to an end any proceedings. Except in emergency cases, a proper letter before claim must be sent and the other side must be given an opportunity to respond before Full Representation is granted.

Further information on the type(s) of help available and the criteria for receiving that help may be found in the Legal Aid Agency's pages on the Ministry of Justice website at: <https://www.justice.gov.uk/legal-aid>

A list of contracted firms and Advice Agencies may be found at: <http://find-legal-advice.justice.gov.uk>"



## “PRE-ACTION PROTOCOL FOR HOUSING DISREPAIR CASES

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### 1 INTRODUCTION

1.1 This Protocol applies to residential property situated in England and Wales. It relates to claims by tenants and others in respect of housing disrepair. Before using the Protocol tenants should ensure that their landlord is aware of the disrepair. The Protocol is intended for those cases where, despite the landlord's knowledge of the disrepair, the matter remains unresolved.

1.2 This Protocol describes the conduct the court will normally expect prospective parties in a housing disrepair claim to follow prior to the start of proceedings. It is intended to encourage the exchange of information between parties at an early stage and to provide a clear framework within which parties in a housing disrepair claim can attempt to achieve an early and appropriate resolution of the issues.

1.3 If a claim proceeds to litigation, the court will expect all parties to have complied with the Protocol as far as possible. The court has power to order parties who have unreasonably failed to comply with the Protocol to pay costs or to be subject to other sanctions.

## **2 AIMS**

2.1 The aims of this Protocol are to–

- (a) avoid unnecessary litigation;
- (b) promote the speedy and appropriate carrying out of any repairs which are the landlord's responsibility;
- (c) ensure that tenants receive any compensation to which they are entitled as speedily as possible;
- (d) promote good pre-litigation practice, including the early exchange of information and to give guidance about the instruction of experts; and
- (e) keep the costs of resolving disputes down.

## **3 THE SCOPE OF THE PROTOCOL**

3.1 A disrepair claim is a civil claim arising from the condition of residential premises and may include a related personal injury claim (see 3.5 below). Although most claims are brought by a tenant against their landlord, this Protocol is not limited to such claims. It covers claims by any person with a disrepair claim including tenants, lessees and members of the tenant's family. The use of the word "tenant" in this Protocol is intended to cover all such people.

3.2 The types of claim which this Protocol is intended to cover include those brought under Section 11 of the Landlord and Tenant Act 1985, Section 4 of the Defective Premises Act 1972, common law nuisance and negligence, and those brought under the express terms of a tenancy agreement or lease. It does not cover claims brought under Section 82 of the Environmental Protection Act 1990 (which are heard in the Magistrates' Court).

3.3 This Protocol does not cover disrepair claims which originate as counterclaims or set-offs in other proceedings i.e. where the tenant is seeking to have the compensation due for disrepair set against money claimed by the landlord (typically in a possession claim for rent arrears). In such cases the landlord and tenant will still be expected to act reasonably in exchanging information and trying to settle the case at an early stage.

3.4 The Protocol should be followed in all cases, whatever the value of the damages claim.

3.5 Housing disrepair claims may contain a personal injury element. If the personal injury claim requires expert evidence other than a General Practitioner's letter, the Personal Injury Protocol should be followed for that element of the disrepair claim. If the personal injury claim is of a minor nature and will only be evidenced by a General Practitioner's letter, it is not necessary to follow the Personal Injury Protocol. If the disrepair claim is urgent, it would be reasonable to pursue separate disrepair and personal injury claims, which could then be case managed together or consolidated at a later date.

## **THE PROTOCOL**

### **4 Alternative dispute resolution**

4.1 The parties should consider whether some form of alternative dispute resolution procedure would be more suitable than litigation and if so, try to agree which form to use. Both the landlord and the tenant may be required by the court to provide evidence that alternative means of resolving their dispute were considered. The courts take the view that litigation should be a last resort, and that claims should not be issued while a settlement is still actively being explored. Parties should be

aware that the court will take into account the extent of the parties' compliance with this Protocol when making orders about who should pay costs.

4.2 Options for resolving a dispute include the following—

(a) mediation: information about mediation can be found at

<http://www.civilmediation.org/contact.php>

(b) for council tenants—

- Local authority repairs, complaints and/or arbitration procedures.
- The Right to Repair Scheme. The scheme is only suitable for small, urgent repairs of less than £250 in value. Information and leaflets about the scheme in England can be obtained from the Department for Communities and Local Government, Eland House, Bressenden Place, London SW1E 5DU. Tel: 0303 444 0000 (<https://www.gov.uk/repair-council-property>).
- Information about the scheme in Wales can be obtained from the National Assembly for Wales, Cardiff Bay, Cardiff, CF99 1NA. Tel. 0845 010 5500 <http://www.assemblywales.org/index.htm>
- In England, the Housing Ombudsman Service 81 Aldwych London WC2B 4HN Tel 0300 111 3000 <http://www.housing-ombudsman.org.uk/>
- In Wales the Public Services Ombudsman for Wales. Tel. 0300 790 0203 <http://www.ombudsman-wales.org.uk>

(c) for housing association tenants and for tenants of qualifying private landlords—

- Any complaints procedure operated by the landlord.
- In England, the Housing Ombudsman Service, 81 Aldwych, London. WC2B 4HN Tel: 0300 111 3000 <http://www.housing-ombudsman.org.uk/>
- In Wales, the National Assembly for Wales, Cardiff Bay, Cardiff, CF99 1NA. Tel. 0845 010 5500 <http://www.assemblywales.org/index.htm>

*Information about repair rights generally is available free of charge from the following web pages: [http://england.shelter.org.uk/get\\_advice/repairs\\_and\\_bad\\_conditions](http://england.shelter.org.uk/get_advice/repairs_and_bad_conditions) and [http://www.communitylegaladvice.org.uk/en/legalhelp/leaflet04\\_1.jsp](http://www.communitylegaladvice.org.uk/en/legalhelp/leaflet04_1.jsp) .*

*The former Department for Transport, Local Government and the Regions issued Good Practice Guidance on Housing Disrepair Legal Obligations in January 2002. Copies of the Guidance (ISBN 185112523X) can be obtained from Communities and Local Government Publications, PO Box 236, Wetherby LS23 7NB. Tel: 0300 123 1124. Fax:0300 123 1125. Textphone: 0870 1207 405. E-mail: [product@communities.gsi.gov.uk](mailto:product@communities.gsi.gov.uk). (free to download from the Communities and Local Government website at <http://www.communities.gov.uk/publications/housing/deliveringhousingadaptations2>).*

*A summary, Housing Research Summary No. 154, is available free on the Communities and Local Government website at the following link <http://www.communities.gov.uk/archived/publications/housing/housingdisrepair>. The Communities and Local Government website <http://www.communities.gov.uk> is a general source of information for landlords and tenants.*

## **5 Tenant's Letter of Claim**

5.1 It is recognised that disrepair cases can range from straightforward to highly complex, and that it is not always possible to obtain detailed information at an early stage. In order to avoid unnecessary delay and to ensure that notice of the claim is given to the landlord at the earliest possible opportunity, particularly where repairs are urgent, it may be appropriate for the tenant to send a letter notifying the landlord of the claim before a detailed Letter of Claim is sent.

5.2 The tenant should send to the landlord a Letter of Claim at the earliest reasonable opportunity. A specimen Letter of Claim is at Annex A. The letter may be suitably adapted as appropriate. The Letter of Claim should contain the following details—

- (a) the tenant's name, the address of the property, the tenant's address if different, the tenant's telephone number and when access is available;
- (b) details of the defects, including any defects outstanding, in the form of a schedule, if appropriate (See Annex C for a specimen schedule which can be used to inform the landlord of the disrepair);
- (c) history of the defects, including any attempts to rectify them;
- (d) details of any notification previously given to the landlord of the need for repair or information as to why the tenant believes that the landlord has knowledge of the need for repair;

- (e) the effect of the defects on the tenant (including any personal injury claim by the tenant);
- (f) the identities of all other persons who plan to make a personal injury claim and brief details of their personal injury claims;
- (g) the details of any special damages (see the form at Annex D);
- (h) the proposed expert(see paragraph 7);
- (i) the proposed letter of instruction to the expert (See Annex B); and
- (j) relevant documents disclosed by the tenant.

5.3 The Letter of Claim should also request disclosure from the landlord of all documents relevant to the disrepair including—

- (a) a copy of the tenancy agreement including the tenancy conditions;
- (b) the tenancy file;
- (c) any documents relating to notice of disrepair given, including copies of any notes of meetings and oral discussions;
- (d) any inspection reports or documents relating to works required to the property; and
- (e) any computerised records.

5.4 Documents relating to rent arrears or other tenancy issues will not normally be relevant. Nothing in the Protocol restricts the right of the tenant to look personally at their file or to request a copy of the whole file. Neither is the landlord prevented from sending to the tenant a copy of the whole file, should the landlord wish.

5.5 A copy of the Protocol should be sent to the landlord if the tenant has reason to believe that the landlord will not have access to the Protocol e.g. because the landlord is an individual or small organisation. If in doubt, a copy should be sent.

## **6 Landlord's Response**

6.1 Where a landlord is not an individual, a person should be designated to act as a point of contact for the tenant (and their solicitor, if one is involved). The designated person's name and contact details should be sent to the tenant and their solicitor as soon as possible after the landlord receives the Letter of Claim from the tenant.

6.2 The landlord should normally reply to the Letter of Claim within 20 working days of receipt. Receipt is deemed to have taken place two days after the date of the letter. The landlord's response should include at least the following—

- (a) copies of all relevant records or documents requested by the tenant; and
- (b) a response to the tenant's proposals for instructing an expert including—
  - i. whether or not the proposed single joint expert is agreed;
  - ii. whether the letter of instruction is agreed;
  - iii. if the single joint expert is agreed but with separate instructions, a copy of the letter of instruction; and
  - iv. if the appointment of a single joint expert is not agreed, whether the landlord agrees to a joint inspection.

6.3 The landlord must also provide a response dealing with the issues set out below, as appropriate. This can be provided either within the response to the Letter of Claim or within 20 working days of receipt of the report of the single joint expert or receipt of the experts' agreed schedule following a joint inspection—

- (a) whether liability is admitted and, if so, in respect of which defects;
- (b) if liability is disputed in respect of some or all of the defects, the reasons for this;
- (c) any point which the landlord wishes to make regarding lack of notice of the disrepair or any difficulty in gaining access;
- (d) a full schedule of intended works, including anticipated start and completion dates and a timetable for the works;
- (e) any offer of compensation; and
- (f) any offer in respect of costs.

6.4 Failure to respond within 20 working days of receipt of the Letter of Claim or at all, is a breach of the Protocol (see paragraph 1.3) and the tenant is then free to issue proceedings.

6.5 The Letter of Claim and the landlord's response are not intended to have the same status as a statement of case in court proceedings. Matters may come to light subsequently which mean that the case of one or both parties may be presented differently in court proceedings. Parties should not seek to take advantage of such discrepancies provided that there was no intention to mislead.

## **7 Experts**

### **General**

### 7.1

- (a) Parties are reminded that the Civil Procedure Rules provide that expert evidence should be restricted to that which is necessary and that the court's permission is required to use an expert's report. The court may limit the amount of experts' fees and expenses recoverable from another party.
- (b) When instructing an expert, the parties must have regard to CPR Practice Direction 35 and the Guidance for the Instruction of Experts in Civil Claims 2014 at <http://www.judiciary.gov.uk>.
- (c) In some cases it might not be necessary to instruct an expert to provide evidence of disrepair, for example, if the only issue relates to the level of any damages claimed. It may be advisable for tenants to take photographs or video footage of any defects before and after works.
- (d) The expert should be instructed to report on all items of disrepair which the landlord ought reasonably to know about, or which the expert ought reasonably to report on. The expert should be asked to provide a schedule of works, an estimate of the costs of repair, and to list any urgent works.

### Single Joint Expert

### 7.2

- (a) If the landlord does not raise an objection to the proposed expert or letter of instruction within 20 working days of receipt of the Letter of Claim, the expert should be instructed as a single joint expert, using the tenant's proposed letter of instruction. (See Annex B for a specimen letter of instruction to an expert.)
- (b) Alternatively, if the parties cannot agree joint instructions, the landlord and tenant should send their own separate instructions to the single joint expert. If sending separate instructions, the landlord should send the tenant a copy of the landlord's letter of instruction with their response to the Letter of Claim.

### Joint Inspection

### 7.3

- (a) If it is not possible to reach agreement to instruct a single joint expert, even with separate instructions, the parties should attempt to arrange a joint inspection, meaning an inspection by different experts instructed by each party to take place at the same time. If the landlord wishes their own expert to



attend a joint inspection, they should inform both the tenant's expert and the tenant's solicitor.

- (b) Should a case come before the court, it will be for the court to decide whether the parties have acted reasonably in instructing separate experts and whether the costs of more than one expert should be recoverable.

### **Time Limits**

#### **7.4**

- (a) Whether a single joint expert or a joint inspection is used, the property should be inspected within 20 working days of the date that the landlord responds to the tenant's Letter of Claim.
- (b) If a single joint expert is instructed, a copy of the expert's report should be sent to both the landlord and the tenant within 10 working days of the inspection. Either party can ask relevant questions of the expert who should send the answers to both parties.
- (c) If there is a joint inspection, the experts should produce an agreed schedule of works detailing--
  - i. the defects and required works which are agreed and a timetable for the agreed works
  - ii. the areas of disagreement and the reasons for disagreement.
- (d) The agreed schedule should be sent to both the landlord and the tenant within 10 working days of the joint inspection.

### **Urgent Cases**

7.5 The Protocol does not prevent a tenant from instructing an expert at an earlier stage if this is considered necessary for reasons of urgency. Appropriate cases may include--

- (a) where the tenant reasonably considers that there is a significant risk to health and safety;
- (b) where the tenant is seeking an interim injunction;
- (c) where it is necessary to preserve evidence.

### **Access**

7.6 Tenants must allow the landlord reasonable access for inspection and repair in accordance with the tenancy agreement. The landlord should give reasonable notice of the need for access, except in the case of an emergency. The landlord must give access to common parts as appropriate, for example, for the inspection of a shared heating system. If the tenant is no longer in occupation of the premises the landlord should take all reasonable steps to give access to the tenant for the purpose of an inspection.

### **Expert's fees**

7.7

- (a) Experts' terms of appointment should be agreed at the outset, including the basis of charging and time for delivery of the report.
- (b) If a single joint expert is instructed, each party will pay one half of the cost of the report. If a joint inspection is carried out, each party will pay the full cost of the report from their own expert.

7.8 Information about independent experts can be obtained from—

- (a) The Chartered Institute of Environmental Health, Chadwick Court, 15 Hatfields, London. SE1 8DJ Tel: 020 7928 6006  
[http://www.cieh.org/about\\_us.html](http://www.cieh.org/about_us.html). Ask for a copy of the Consultants and Trainers Directory;
- (b) The Expert Witness Directory <http://www.sweetandmaxwell.co.uk/our-businesses/directories.aspx>
- (c) The Royal Institution of Chartered Surveyors, 12 Great George Street, Parliament Square, London. SW1P 3AD, Tel: 024 7686 8555  
<http://www.ricsfirms.com/> Ask for a copy of the relevant regional directory.

### **Taking stock**

8 Where the procedure set out in this Protocol has not resolved the dispute between the landlord and the tenant, they should undertake a review of their respective positions to see if proceedings can be avoided and, at the least, to narrow the issues between them.

### **Time limits**

9

- (a) The time scales given in the Protocol are long stops and every attempt should be made to comply with the Protocol as soon as possible. If parties are able to comply earlier than the time scales provided, they should do so.
- (b) Time limits in the Protocol may be changed by agreement. However, it should always be borne in mind that the court will expect an explanation as to why the Protocol has not been followed or has been varied and breaches of the Protocol may lead to costs or other orders being made by the court.

### **Limitation period**

10

- (a) There are statutory time limits for starting proceedings ('the limitation period'). If a tenant starts a claim after the limitation period applicable to that type of claim has expired, the landlord will be entitled to use that as a defence to the claim. In cases where the limitation period is about to expire, the tenant should ask the landlord to agree not to rely on a limitation defence, so that the parties can comply with the Protocol.
- (b) If proceedings have to be started before the parties have complied with the Protocol, they should apply to the court for an order to stay (i.e. suspend) the proceedings until the steps under the Protocol have been completed.

### **Costs**

11 If the tenant's claim is settled without litigation on terms which justify bringing it, the landlord will pay the tenant's reasonable costs. The Statement of Costs Form N260 available on the HMCTS website can be used to inform the landlord of the costs of the claim.

### **ANNEXES**

12 The following documents are annexed to this pre-action protocol—

#### **Annex A**

Letter of Claim

- (a) for use by a solicitor; and
- (b) for use by the tenant.

**Annex B**

Letter of Instruction to Expert

- (a) for use by a solicitor, and
- (b) for use by the tenant.

**Annex C**

Schedule of Disrepair

**Annex D**

Special Damages Form

## **ANNEX A - LETTER OF CLAIM**

### **(a) Letter from solicitor**

**To Landlord**

**Dear Sirs,**

### **RE: TENANT'S NAME AND ADDRESS OF PROPERTY**

We are instructed by your above named tenant. *(Where the tenant is legally aided or a party to a conditional fee agreement entered into before 1 April 2013 insert a sentence stating how their case is being funded.)* We are using the Housing Disrepair Protocol. *We enclose a copy of the Protocol for your information.\**

### **Repairs**

Your tenant complains of the following defects at the property *(set out nature of defects)*.

*We enclose a schedule which sets out the disrepair in each room.\**

The history of the disrepair is as follows: *(set out history of defects)*

You received notice of the defects as follows: *(list details of notice relied on)*.

The defects at the property are causing *(set out the effects of the disrepair on the client and their family, including any personal injury element. Specify if there will be any additional claimants)*.

Please arrange to inspect the property as soon as possible. Access will be available on the following dates and times: *(list dates and times as appropriate)*

Please confirm whether you intend to carry out repairs at this stage or whether you wish to wait until the property has been inspected by the expert(s) as set out below. If you intend to carry out repairs at this stage, please set out a full schedule of intended works including anticipated start and completion dates and a timetable for the works

### **Disclosure**

Please also provide within 20 working days of this letter the following:

All relevant records or documents including:

- (i) a copy of the tenancy agreement including the tenancy conditions
- (ii) the tenancy file
- (iii) documents relating to notice of disrepair given, including copies of any notes of meetings and oral discussions
- (iv) inspection reports or documents relating to works required to the property.
- (iv) computerised records

We enclose a signed authority from our client for you to release this information to us.

We also enclose copies of the following relevant documents from our client:

#### **Expert**

If agreement is not reached about the carrying out of repairs within 20 working days of this letter, we propose that the parties agree to jointly instruct a single joint expert (*insert expert's name and address*) to carry out an inspection of the property and provide a report. We enclose a copy of their CV, plus a draft letter of instruction. Please let us know if you agree to his/her appointment. If you object, please let us know your reasons within 20 working days.

If you do not object to the expert being instructed as a single joint expert, but wish to provide your own instructions, you should send those directly to (*insert expert's name*) within 20 working days of this letter. Please send us a copy of your letter of instruction. If you do not agree to a single joint expert, we will instruct (*insert expert's name*) to inspect the property in any event. In those circumstances, if you wish to instruct your expert to attend at the same time, please let us and (*insert expert's name*) know within 20 working days.

#### **Claim**

We take the view that you are in breach of your repairing obligations. Please provide us with your proposals for compensation. (*Alternatively, set out suggestions for general damages i.e. £x for x years*). *Our client also requires compensation for special damages, and we attach a schedule of the special damages claimed.\**

Yours faithfully,

\* *Delete as appropriate*

## **ANNEX A - LETTER OF CLAIM**

### **(b) Letter from tenant**

**To Landlord**

**Dear Sirs,**

**RE: YOUR NAME AND ADDRESS OF PROPERTY**

I write regarding disrepair at the above address. I am using the Housing Disrepair Protocol. *I enclose a copy of the Protocol for your information. \**

#### **Repairs**

The following defects exist at the property *(set out nature of defects)*.

*I enclose a schedule which sets out the disrepair in each room. \**

The history of the disrepair is as follows: *(set out history of defects)*

You received notice of the defects as follows: *(list details of notice relied on)*.

The defects at the property are causing *(set out the effects of the disrepair on you and your family, including any personal injury element. Specify if there will be any additional claimants)*.

Please arrange to inspect the property as soon as possible. Access will be available on the following dates and times: *(list dates and times as appropriate)*

Please confirm whether you intend to carry out repairs at this stage or whether you wish to wait until the property has been inspected by the expert(s) as set out below. If you intend to carry out repairs at this stage, please set out a full schedule of intended works including anticipated start and completion dates and a timetable for the works.

#### **Disclosure**

Please also provide within 20 working days of this letter the following:

All relevant records or documents including:

- (i) a copy of the tenancy agreement including the tenancy conditions;
- (ii) the tenancy file;
- (iii) documents relating to notice of disrepair given, including copies of any notes of meetings and oral discussions;
- (iv) inspection reports or documents relating to works required to the property;
- (iv) computerised records.

I enclose copies of the following relevant documents:

### **Expert**

If agreement is not reached about the carrying out of repairs within 20 working days of this letter, I propose that we jointly instruct a single joint expert (*insert expert's name and address*) to carry out an inspection of the property and provide a report. I enclose a copy of their CV, plus a draft letter of instruction. Please let me know if you agree to his/her appointment. If you object, please let me know your reasons within 20 working days.

If you do not object to the expert being instructed as a single joint expert, but wish to provide your own instructions, you should send those directly to (*insert expert's name*) within 20 working days of this letter. Please send me a copy of your letter of instruction. If you do not agree to a single joint expert, I will instruct (*insert expert's name*) to inspect the property in any event. In those circumstances, if you wish to instruct your expert to attend at the same time, please let me and (*insert expert's name*) know within 20 working days.

### **Claim**

I take the view that you are in breach of your repairing obligations. Please provide me with your proposals for compensation. (*Alternatively, set out suggestions for general damages i.e. £x for x years*). *I also require compensation for special damages, and I attach a schedule of the special damages claimed.\**

Yours faithfully,

*\* Delete as appropriate*



## **ANNEX B - LETTER OF INSTRUCTION TO EXPERT**

### **(a) Letter from solicitor**

Dear

RE: TENANT'S NAME AND ADDRESS OF PROPERTY

We act for the above named in connection with a housing disrepair claim at the above property. We are using the Housing Disrepair Protocol. *We enclose a copy of the Protocol for your information.\**

Please carry out an inspection of the above property by (date)\*\* and provide a report covering the following points:

- (a) whether you agree that the defects are as claimed;
- (b) whether any of the defects is structural;
- (c) the cause of the defect(s);
- (d) the age, character and prospective life of the property;
- (e) a schedule of works;
- (f) an estimate of the costs of repair.

Access will be available on the following dates and times: *(list dates and times as appropriate)*.

*You are instructed as a single joint expert / The landlord is (landlord's name and details) / The landlord will be providing you with their own instructions direct / The landlord will contact you to confirm that their expert will attend at the same time as you to carry out a joint inspection.\**

Please provide the report within 14 days of the inspection. Please contact us immediately if there are any works which require an interim injunction.

If the case proceeds to court, the report may be used in evidence. Please ensure that the report complies with Civil Procedure Rules Practice Direction 35.3 and the Guidance for the Instruction of Experts in Civil Claims 2014 at <http://www.judiciary.gov.uk>. If you do not have a copy please let us know.

*Insert details as to cost and payment*

Yours sincerely,

*\* Delete as appropriate*

*\*\* The date to be inserted should be 20 working days from the date of the letter*

## **ANNEX B - LETTER OF INSTRUCTION TO EXPERT**

### **(b) Letter from tenant**

Dear

RE: YOUR NAME AND ADDRESS OF PROPERTY

I am currently in dispute with my landlord about disrepair at the above property. I am using the Housing Disrepair Protocol. *I enclose a copy of the Protocol for your information.\**

Please carry out an inspection of the above property by (date)\*\* and provide a report covering the following points:

- (a) whether you agree that the defects are as claimed;
- (b) whether any of the defects is structural;
- (c) the cause of the defect(s);
- (d) the age, character and prospective life of the property;
- (e) a schedule of works;
- (f) an estimate of the costs of repair.

Access will be available on the following dates and times: *(list dates and times as appropriate)*

*You are instructed as a single joint expert / The landlord is (landlord's name and details) / The landlord will be providing you with their own instructions direct / The landlord will contact you to confirm that their expert will attend at the same time as you to carry out a joint inspection.\**

Please provide the report within 14 days of the inspection. Please contact me immediately if there are any works which require an interim injunction.

If the case proceeds to court, the report may be used in evidence. Please ensure that the report complies with Civil Procedure Rules Practice Direction 35.3 and the Guidance for the Instruction of Experts in Civil Claims 2014 at <http://www.judiciary.gov.uk>. If you do not have a copy please let me know.

*Insert details as to cost and payment*

Yours sincerely,

*\* Delete as appropriate*

*\*\* The date to be inserted should be 20 working days from the date of the letter*

**ANNEX C – SCHEDULE OF DISREPAIR**



Adobe Acrobat  
Document

**ANNEX D – SPECIAL DAMAGES FORM”**



Adobe Acrobat  
Document

## **“PRE-ACTION PROTOCOL FOR POSSESSION CLAIMS BY SOCIAL LANDLORDS**

<b>Table of contents</b>	<b>Paragraph</b>
Aims and scope of the protocol	1
Possession claims based upon rent arrears	2
Initial contact	2.1
After service of statutory notices	2.8
Alternative dispute resolution	2.10
Court proceedings	2.11
Mandatory grounds for possession	3

### **PART I AIMS AND SCOPE OF THE PROTOCOL**

1.1. This Protocol applies to residential possession claims by social landlords (such as local authorities, Registered Social Landlords and Housing Action Trusts) and private registered providers of social housing. Part 2 relates to claims which are based solely on claims for rent arrears. Part 3 relates to claims where the Court’s discretion to postpone possession is limited by s89(1) Housing Act 1980. The protocol does not apply to claims in respect of long leases or to claims for possession where there is no security of tenure.

1.2. Part 3 of the protocol does not apply to cases brought by social landlords solely on grounds where if the case is proved, there is a restriction on the Court’s discretion on making an order for possession and/or to which s89 Housing Act 1980 applies.

1.3. Part 2 of the protocol reflects the guidance on good practice given to social landlords and private registered providers in the collection of rent arrears. It recognises that it is in the interests of both landlords and tenants to ensure that rent is paid promptly and to ensure that difficulties are resolved wherever possible without court proceedings.

1.4. Part 3 seeks to ensure that in cases where Article 8 of the European Convention on Human Rights is raised the necessary information is before the Court at the first hearing so that issues of proportionality may be dealt with summarily, if appropriate, or that appropriate directions for trial may be given.

1.5. The aims of the protocol are:

- (a) to encourage more pre-action contact and exchange of information between landlords and tenants;
- (b) to enable the parties to avoid litigation by settling the matter if possible; and
- (c) to enable court time to be used more effectively if proceedings are necessary.

1.6. Courts should take into account whether this protocol has been followed when considering what orders to make. Social Landlords and private registered providers of social housing should also comply with guidance issued from time to time by the Homes and Communities Agency, the Department for Communities and Local Government and the Welsh Ministers.

- (a) If the landlord is aware that the tenant has difficulty in reading or understanding information given, the landlord should take reasonable steps to ensure that the tenant understands any information given. The landlord should be able to demonstrate that reasonable steps have been taken to ensure that the information has been appropriately communicated in ways that the tenant can understand.
- (b) If the landlord is aware that the tenant is under 18 or is particularly vulnerable, the landlord should consider at an early stage—
  - i. whether or not the tenant has the mental capacity to defend possession proceedings and, if not, make an application for the appointment of a litigation friend in accordance with CPR 21;
  - ii. whether or not any issues arise under Equality Act 2010; and
  - iii. in the case of a local authority landlord, whether or not there is a need for a community care assessment in accordance with National Health Service and Community Care Act 1990.

## **PART 2 POSSESSION CLAIMS BASED UPON RENT ARREARS**

### **Initial contact**

2.1 The landlord should contact the tenant as soon as reasonably possible if the tenant falls into arrears to discuss the cause of the arrears, the tenant's financial circumstances, the tenant's entitlement to benefits and repayment of the arrears.

Where contact is by letter, the landlord should write separately to each named tenant.

2.2 The landlord and tenant should try to agree affordable sums for the tenant to pay towards arrears, based upon the tenant's income and expenditure (where such information has been supplied in response to the landlord's enquiries). The landlord should clearly set out in pre-action correspondence any time limits with which the tenant should comply.

2.3 The landlord should provide, on a quarterly basis, rent statements in a comprehensible format showing rent due and sums received for the past 13 weeks. The landlord should, upon request, provide the tenant with copies of rent statements in a comprehensible format from the date when arrears first arose showing all amounts of rent due, the dates and amounts of all payments made, whether through housing benefit, discretionary housing payments or by the tenant, and a running total of the arrears.

2.4 If the tenant meets the appropriate criteria, the landlord should arrange for arrears to be paid by the Department for Work and Pensions from the tenant's benefit.

2.5 The landlord should offer to assist the tenant in any claim the tenant may have for housing benefit, discretionary housing benefit or universal credit (housing element).

2.6 Possession proceedings for rent arrears should not be started against a tenant who can demonstrate that –

- (a) the local authority or Department for Work and Pensions have been provided with all the evidence required to process a housing benefit or universal credit (housing element) claim;
- (b) a reasonable expectation of eligibility for housing benefit or universal credit (housing element); and
- (c) paid other sums due not covered by housing benefit or universal credit (housing element).

The landlord should make every effort to establish effective ongoing liaison with housing benefit departments and DWP and, with the tenant's consent, make direct contact with the relevant housing benefit department or DWP office before taking enforcement action.



The landlord and tenant should work together to resolve any housing benefit or universal credit (housing element) problems.

2.7 Bearing in mind that rent arrears may be part of a general debt problem, the landlord should advise the tenant to seek assistance from CAB, debt advice agencies or other appropriate agencies as soon as possible. Information on debt advice is available on the Money Advice Service website

<https://www.moneyadviceservice.org.uk/en/articles/wheretogo-get-free-advice-debt-advice>.

#### **After service of statutory notices**

2.8 After service of a statutory notice but before the issue of proceedings, the landlord should make reasonable attempts to contact the tenant, to discuss the amount of the arrears, the cause of the arrears, repayment of the arrears and the housing benefit or universal credit (housing element) position and send a copy of this protocol.

2.9 If the tenant complies with an agreement to pay the current rent and a reasonable amount towards arrears, the landlord should agree to postpone issuing court proceedings so long as the tenant keeps to such agreement. If the tenant ceases to comply with such agreement, the landlord should warn the tenant of the intention to bring proceedings and give the tenant clear time limits within which to comply.

#### **Alternative dispute resolution**

2.10 The parties should consider whether it is possible to resolve the issues between them by discussion and negotiation without recourse to litigation. The parties may be required by the court to provide evidence that alternative means of resolving the dispute were considered. Courts take the view that litigation should be a last resort, and that claims should not be issued prematurely when a settlement is still actively being explored.

2.11 The Civil Justice Council and Judicial College have endorsed *The Jackson ADR Handbook* by Susan Blake, Julie Browne and Stuart Sime (2013, Oxford University Press). The Citizens Advice Bureaux website also provides information about ADR:

[http://www.adviceguide.org.uk/england/law\\_e/law\\_legal\\_system\\_e/law\\_taking\\_legal\\_action\\_e/alternatives\\_to\\_court.htm](http://www.adviceguide.org.uk/england/law_e/law_legal_system_e/law_taking_legal_action_e/alternatives_to_court.htm). Information is also available at:

<http://www.civilmediation.justice.gov.uk/>

## **Court proceedings**

2.11 Not later than ten days before the date set for the hearing, the landlord should–

- (a) provide the tenant with up to date rent statements; and
- (b) disclose what knowledge it possesses of the tenant's housing benefit or universal credit (housing element) position to the tenant.

2.12

- (a) The landlord should inform the tenant of the date and time of any court hearing and provide an up to date rent statement and the order applied for. The landlord should advise the tenant to attend the hearing as the tenant's home is at risk. Records of such advice should be kept.
- (b) If the tenant complies with an agreement made after the issue of proceedings to pay the current rent and a reasonable amount towards arrears, the landlord should agree to postpone court proceedings so long as the tenant keeps to such agreement.
- (c) If the tenant ceases to comply with such agreement, the landlord should warn the tenant of the intention to restore the proceedings and give the tenant clear time limits within which to comply.

2.13 If the landlord unreasonably fails to comply with the terms of the protocol, the court may impose one or more of the following sanctions–

- (a) an order for costs; and
- (b) in cases other than those brought solely on mandatory grounds, adjourn, strike out or dismiss claims.

2.14 If the tenant unreasonably fails to comply with the terms of the protocol, the court may take such failure into account when considering whether it is reasonable to make possession orders.

## **PART 3 MANDATORY GROUNDS FOR POSSESSION**

3.1 This part applies in cases where if a social landlord proves its case, there is a restriction on the Court's discretion on making an order for possession and/or to

which s. 89 Housing Act 1980 applies (e.g. non-secure tenancies, unlawful occupiers, succession claims, and severing of joint tenancies).

3.2 In cases where the court must grant possession if the landlord proves its case then before issuing any possession claim social landlords—

- (a) should write to occupants explaining why they currently intend to seek possession and requiring the occupants within a specified time to notify the landlord in writing of any personal circumstances or other matters which they wish to take into account. In many cases such a letter could accompany any notice to quit and so would not necessarily delay the issue of proceedings; and
- (b) should consider any representations received, and if they decide to proceed with a claim for possession give brief written reasons for doing so.

3.3. In these cases the social landlord should include in its particulars of claim, or in any witness statement filed under CPR 55.8(3), a schedule giving a summary—

- (a) of whether it has (by statutory review procedure or otherwise) invited the defendant to make representations of any personal circumstances or other matters which they wish to be taken into account before the social landlord issues proceedings;
- (b) if representations were made, that they were considered;
- (c) of brief reasons for bringing proceedings; and
- (d) copies of any relevant documents which the social landlord wishes the Court to consider in relation to the proportionality of the landlord's decision to bring proceedings."

**“PRE-ACTION PROTOCOL FOR POSSESSION CLAIMS BASED ON  
MORTGAGE OR HOME PURCHASE PLAN ARREARS IN RESPECT OF  
RESIDENTIAL PROPERTY**

<b>Table of contents</b>	<b>Paragraph</b>
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**I INTRODUCTION**

**Definitions**

1.1 In this Protocol–

- (a) ‘possession claim’ means a claim for the recovery of possession of property under Part 55 of the Civil Procedure Rules 1998;
- (b) ‘home purchase plan’ means a method of purchasing a property by way of a sale and lease arrangement that does not require the payment of interest;
- (c) ‘bank holiday’ means a bank holiday under the Banking and Financial Dealings Act 1971;
- (d) ‘business day’ means any day except Saturday, Sunday, a bank holiday, Good Friday or Christmas day; and
- (e) ‘authorised tenant’ means a tenant whose tenancy is authorised as between the borrower and the lender.

**Preamble**

2.1 This Protocol describes the behaviour the court will normally expect of the parties prior to the start of a possession claim within the scope of paragraph 3.1 below.

2.2 This Protocol does not alter the parties' rights and obligations.

2.3 It is in the interests of the parties that mortgage payments or payments under home purchase plans are made promptly and that difficulties are resolved wherever possible without court proceedings. However in some cases an order for possession may be in the interest of both the lender and the borrower.

## **Aims**

3.1 The aims of this Protocol are to–

- (a) ensure that a lender or home purchase plan provider (in this Protocol collectively referred to as 'the lender') and a borrower or home purchase plan customer (in this Protocol collectively referred to as 'the borrower') act fairly and reasonably with each other in resolving any matter concerning mortgage or home purchase plan arrears;
- (b) encourage greater pre-action contact between the lender and the borrower in order to seek agreement between the parties, and where agreement cannot be reached, to enable efficient use of the court's time and resources; and
- (c) encourage lenders to check who is in occupation of the property before issuing proceedings.

3.2 Where either party is required to communicate and provide information to the other, reasonable steps should be taken to do so in a way that is clear, fair and not misleading. If the lender is aware that the borrower may have difficulties in reading or understanding the information provided, the lender should take reasonable steps to ensure that information is communicated in a way that the borrower can understand.

## **Scope**

4.1 This Protocol applies to arrears on–

- (a) first charge residential mortgages and home purchase plans regulated by the Financial Conduct Authority under the Financial Services and Markets Act 2000 (as amended by the Financial Services Act, 2012);
- (b) second charge mortgages over residential property and other secured loans regulated under the Consumer Credit Act 1974 on residential property; and
- (c) unregulated residential mortgages.

4.2 Where a potential claim includes a money claim and a possession claim, this protocol applies to both.

4.3 The protocol does not apply to Buy To Let mortgages

## II ACTIONS PRIOR TO THE START OF A POSSESSION CLAIM

### Initial contact and provision of information

5.1 Where a borrower falls into arrears, the lender must provide the borrower with—

- (a) where appropriate, the required regulatory information sheet or the National Homelessness Advice Service/Shelter/Cymru booklet on mortgage arrears;
- (b) information on the current monthly instalments and the amounts paid for the last 2 years; and
- (c) information on the amount of arrears, which should include—
  - (i) the total amount of the arrears;
  - (ii) the total outstanding of the mortgage or the home purchase plan; and
  - (iii) whether interest or charges have been or will be added, and, where appropriate, details or an estimate of the interest or charges that may be payable.

5.2 The lender should also seek information about whether the property is occupied by an authorised tenant.

**Commented [i1]:** I thought that this was to be in italics??

5.3 The lender must advise the borrower to make early contact with the housing department of the borrower's Local Authority and, should, where relevant refer the borrower to appropriate sources of independent debt advice.

5.4 The parties, or their representatives, must take all reasonable steps to discuss with each other the reasons for the arrears, the borrower's financial circumstances and proposals for repayment of the arrears (see paragraph 7.1). For example, parties should consider whether the reasons for the arrears are temporary or long-term, and whether the borrower may be able to pay the arrears in a reasonable time.

5.5 The lender must consider a reasonable request from the borrower to change the date of regular payment (within the same payment period) or the method by which payment is made. The lender must either agree to such a request or, where it refuses

such a request, it must, within a reasonable period of time, give the borrower a written explanation of its reasons for the refusal.

5.6 The lender must respond promptly to any proposal for payment made by the borrower. If the lender does not agree to such a proposal it should give reasons in writing to the borrower within 10 business days of the proposal.

5.7 If the lender submits a proposal for payment, the borrower must be given a reasonable period of time in which to consider such proposals. The lender must set out the proposal in sufficient detail to enable the borrower to understand the implications of the proposal.

5.8 If the borrower fails to comply with an agreement, the lender should warn the borrower, by giving the borrower 15 business days notice in writing, of its intention to start a possession claim unless the borrower remedies the breach in the agreement.

#### **Postponing the start of a possession claim**

6.1 A lender must not consider starting a possession claim for mortgage arrears where the borrower can demonstrate to the lender that the borrower has—

- (a) submitted a claim to—
  - (i) the Department for Works and Pensions ('DWP') for Support for Mortgage Interest (SMI) or if appropriate Universal Credit; or
  - (ii) an insurer under a mortgage payment protection policy; or
  - (iii) a participating local authority for support under a Mortgage Rescue Scheme, or other means of homelessness prevention support provided by the local authority,
  - (iv) and has provided all the evidence required to process a claim;
  
- (b) a reasonable expectation of eligibility for payment from the DWP or from an insurer or support from the local authority or welfare or charitable organisation such as the Veterans Welfare Scheme or Royal British Legion;
  
- (c) an ability to pay a mortgage instalment not covered by a claim to the DWP or the insurer in relation to a claim under paragraph 6.1(1)(a) or (b);

(d) difficulty in respect of affordability or another specific personal or financial difficulty, and requires time to seek free independent debt advice, or has a confirmed appointment with a debt adviser and

(e) a reasonable expectation, providing evidence where possible, of an improvement in their financial circumstances in the foreseeable future ( for example a new job or increased income from a lodger).

6.2 If a borrower can demonstrate that reasonable steps have been or will be taken to market the property at an appropriate price in accordance with reasonable professional advice, the lender must consider postponing starting a possession claim to allow the borrower a realistic period of time to sell the property. The borrower must continue to take all reasonable steps actively to market the property where the lender has agreed to postpone starting a possession claim.

6.3 Where, notwithstanding paragraphs 6.1 and 6.2, the lender has agreed to postpone starting a possession claim, the borrower should provide the lender with a copy of the particulars of sale, the Energy Performance Certificate ('EPC') or proof that an EPC has been commissioned and (where relevant) details of purchase offers received within a reasonable period of time specified by the lender. The borrower should give the lender details of the estate agent and the conveyancer instructed to deal with the sale. The borrower should also authorise the estate agent and the conveyancer to communicate with the lender about the progress of the sale and the borrower's conduct during the process.

6.4 Where the lender decides not to postpone the start of a possession claim, it must inform the borrower of the reasons for this decision at least 5 business days before starting proceedings.

#### **Further matters to consider before starting a possession claim**

7.1 Starting a possession claim should be a last resort and must not normally be started unless all other reasonable attempts to resolve the situation have failed.. The parties should consider whether, given the individual circumstances of the borrower and the form of the agreement, it is reasonable and appropriate to do one or more of the following–

- (a) extend the term of the mortgage;
- (b) change the type of mortgage;



- (c) defer payment of interest due under the mortgage;
- (d) capitalise the arrears; or
- (e) make use of any Government forbearance initiatives in which the lender chooses to participate.

7.2 Where there is an authorised tenant in occupation of the property, at the possession hearing the court will consider whether—

- (a) further directions are required;
- (b) to adjourn the possession claim until possession has been recovered against the tenant; or
- (c) to make an order conditional upon the tenant's right of occupation.

#### **Complaints to the Financial Services Ombudsman**

8.1 The lender must consider whether to postpone the start of a possession claim where the borrower has made a genuine complaint to the Financial Ombudsman Service ('FOS') about the potential possession claim.

8.2 Where a lender does not intend to await the decision of the FOS, it must give notice to the borrower, with reasons, that it intends to start a possession claim."