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## **Personal injury litigation process**

### **Abstract**

**This paper considers the claims process for personal injury matters, both prior to and post commencement of litigation. There is an examination of the personal injury pre-action protocol and thereafter, the actions required to commence legal proceedings. Flowing from this is a step by step guide to the actions required to prepare a case for trial. It concludes with a summary of the trial process, in the event that the case is not resolved by other means.**

### **Key Words**

Personal injury pre action protocol; proceedings; defence; questionnaire; case management conference; disclosure; statements; medical evidence; pre trial checklist; settlement meetings; trial.

### **Introduction**

Personal injury claims a generation ago were quite different from the current approach to injury litigation. It was once the case that a solicitor, in acting for a seriously injured Claimant, (the injured party, who brings the claim) would gather evidence about their client's case and, having commissioned the pertinent medical and non medical evidence, proceed to value and thereafter negotiate a settlement of their client's claim. At that point, it was likely to be the case that the relationship would cease and thereafter there would be no further contact between the client and their lawyer. Along the way, the solicitor would assist the client to bring in care workers and obtain evidence as to occupational therapy requirements. However, those relationships were also likely to be of a relatively short duration and there was no guarantee that the Claimant (and his

family) would maintain the support from the care workers after settlement, perhaps seeking to save their compensation, to ensure the damages would last for the remainder of their lives.

Much has changed for the better. First, the courts have given birth to a much more sophisticated settlement model, in the form of periodical payments, which are much more suited to those with long term neurological needs. Secondly, there is greater involvement from the solicitor in meeting the needs of their client, ensuring that full support is in place for the duration of the claim and beyond. Finally, the litigation process has changed, moving away from an adversarial approach to more of a consensus objective, with both parties (to the litigation) seeking to narrow the issues in dispute throughout the lifetime of the case, rather than proceed pell-mell to court.

The purpose of this article is to examine the rules relating to the personal injury litigation process, in order to assist stakeholders who are also, by association, part of that process. The case manager, occupational therapist, care worker, speech and language therapist and others are integral to the success of a claimant's claim. Not only do they provide professional assistance to the client and solicitor, as the latter builds the client's claim, to ensure their client's reasonable needs are met, but those health professionals also act as key evidence witnesses. Further, whilst the solicitor will answer the client's questions about the litigation process, it is essential that the health professional feels comfortable with the framework of litigation, so that they can understand the client's anxieties. Therefore it is important that those same professionals are familiar with the personal injury litigation process, to enhance their role and contribution to a case, to the benefit of the mutual client.

This article will ignore previous practices as the current litigation regime has now been in force for over 10 years. Therefore, reference alone will be made to the Civil Procedure Rules.

### **Pre Action Protocol**

The pre action protocol was part of the series of reforms promoted by Lord Justice Woolf, designed to remove elements of the adversarial nature of personal injury claims. It had been the case that Claimants could give very limited information to an opponent, the Defendant, before

commencing legal proceedings. That has now gone.

The Claimant's conduct is measured against the protocol and if they do not abide by the rules then they may find themselves criticised by a judge, to the extent that they either lose an element of or have to pay part of their opponent's legal costs.

Although the personal injury pre action protocol is designed to address relatively low value cases, it is still the case that in larger matters, i.e. those where there is a significant long term neurological disability, the parties are expected to comply with the protocol as far as possible, for example in respect of letters before action, exchanging information and documents and agreeing experts.

The aim of the pre-action protocol is:

- more pre-action (ie before legal proceedings) contact between the parties
- better and earlier exchange of information
- better pre-action investigation by both sides
- to put the parties in a position where they may be able to settle cases fairly and early without litigation
- to enable proceedings to run to the court's timetable and efficiently, if litigation does become necessary
- to promote the provision of medical or rehabilitation treatment to address the needs of the claimant

The pre action protocol requires a Claimant to set out details of his claim. The injured party, through his solicitor, must give details of the incident giving rise to the claim for damages (compensation), to enable the other party to understand the mechanics of the incident and the basis of the claim. Coupled with a description of the event, the Claimant must also set out the allegations or complaints, either as breaches of statute and regulation, or a failure to comply with the common law rules of behaviour, i.e. identify the negligent acts of the Defendant (wrongdoer). All these particulars are set out in a letter of claim to the Defendant.

The priority at letter of claim stage is for the claimant to provide sufficient information for the Defendant to assess liability. Sufficient information should also be provided to enable the Defendant to estimate the likely size of the claim.

The letter of claim will ask the Defendant to identify and provide documents pertinent to the claim, usually those touching the issue of liability. The aim of the 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 Defendant should reply within 21 calendar days of the date of posting of the letter, identifying the insurer (if any) and, if necessary, identifying specifically any significant omissions from the letter of claim.

If there has been no reply by the Defendant or insurer within 21 days, the claimant will be entitled to issue proceedings. However, in reality, this is unlikely to happen, particularly where the claim is advanced relatively soon after the index event. At such an early stage, the Claimant's recovery may be minimal and thus little would be gained from commencing legal proceedings. Indeed, premature litigation is likely to be criticised by a court. The courts expect and demand that parties work with each other, within the rules of court and the protocol, rather than take technical points, which do nothing to advance a Claimant's case.

Following acknowledgement of the letter of claim the Defendant has a maximum of three months from the date of acknowledgment of the claim to investigate. Not later than the end of that period the Defendant or their insurer shall reply, stating whether liability is denied and, if so, giving reasons for their denial of liability including any alternative version of events relied upon. With the letter of claim the Claimant will include some details of his losses, although in a neurological case these will be largely unknown while the Claimant remains hospitalised and in the early stages of rehabilitation. Nevertheless, the protocol requires the Claimant to send to the Defendant as soon as practicable a Schedule of Special Damages with supporting documents, particularly where the Defendant has admitted liability. This Schedule is no more than a list of the financial losses and expenses that the Claimant has or is likely to incur in consequence of their injuries.

It is also a requirement of the protocol, as subsequently amended, that the Claimant or the Defendant or both shall consider as early as possible whether the claimant has reasonable needs that could be met by rehabilitation treatment or other measures. Consideration applies to all cases, but in complex cases of neurological injury, rehabilitation will be at the forefront of the Claimant's solicitor's mind. In the case of severe injury, the Claimant is likely to be hospitalized for some while and thus the rehabilitation work will not be immediately initiated. However, when the treating staff have progressed the Claimant towards rehabilitation, the Claimant solicitor will consider how, if at all, the Claimant's rehabilitation can be improved by additional funding and support beyond the state suppliers. A case manager is likely to be appointed, notably where liability is admitted and there is a guarantee that the case manager's services can be funded by the damages, and more so by way of an interim payment of compensation.

### **Commencement of Legal Proceedings**

The majority of personal injury claims are settled by way of a compromise, without resorting to litigation. This is because the injuries are relatively minor and the parties have complied with the pre action protocol. Compliance means an exchange of information and evidence, resulting in discussions between the parties. That in turn means that a compromise can be sought by the parties without having to involve the judicial system.

However, in severe head and spinal injury cases, the cases are very likely to be resolved by way of legal proceedings. There can be several reasons for this.

First, even if terms are agreed in such cases, then if the head injury has resulted in the claimant losing legal capacity to litigate without the assistance of another, known as a Litigation Friend, then the rules of court, i.e. the Civil Procedure Rules require those settlements, however well endorsed by the Claimant's solicitors and barrister, to be approved by a judge. An application will be made to the court. Thereafter the judge will review the terms of settlement to ensure the compromise is in the client's best interests.

Another reason for litigation is that whilst liability has been agreed or resolved by way of a split on liability, with the client accepting some deduction from his damages to reflect his culpability,

known as contributory negligence, quantum remains in dispute and thus a trial is required for the court to assess the correct level of damages.

## **Limitation**

The most frequent reason for commencing litigation is that the limitation period is about to expire. It is a rule of law that a personal injury victim must commence legal proceedings within 3 years of the accident. If they fail to do so, then their right of action fails, whatever the merits of their claim. There are exceptions to this rule, particularly in head injury cases, where the client lacks legal capacity, in which the 3 year rule is relaxed and time does not run against the injured party.

However, even in those cases, proceedings will be commenced within 3 years, as the solicitors acting will want to progress the case and will look to seek a compromise with the opponent's lawyers as soon as possible. Clients (and their families) with neurological injury are keen to put the claim behind them as soon as possible. They want to take control of their lives

Another reason for commencing litigation is to obtain an interim payment of damages, to pay for such heads of loss as care, which the insurer cannot be forced to pay without a court order. Indeed, even where the opponent agrees to make an interim payment, the Civil Procedure Rules require such payments to be approved by the court. Therefore, even with a willing insurer, the solicitor will be required to commence litigation, to obtain approval to the interim payment.

Once those legal proceedings are issued, the claimant has 4 months to serve, or send, them to the opponent, the Defendant. The proceedings sent, comprise of a document called a Claim Form, which summarises the case, the Particulars of Claim which expands upon that summary, a Schedule of Special Damages and a medical report, covering the injuries sustained.

Again if the proceedings are not sent within 4 months, the claim fails. After the proceedings have been sent, then the Defendant has to serve a Defence, to indicate if they admit liability or deny responsibility. In the event of the latter, if the claimant's case is likely to take some years to resolve, because the prognosis is unknown, then the court may order a split trial on liability to

determine if the claimant should succeed.

### **Case Management Conference**

In addition to the Defendant sending a copy of their Defence to the Claimant, one will be lodged with the court, which will prompt the latter to send questionnaires to each party. That questionnaire invites each party to identify the evidence required and the time table, in order to resolve the case. These documents will be considered by the court. The latter are then likely to call both parties solicitors to the court, for hearing, when a judge will hear submissions about the evidence sought and the time table proposed.

At the hearing, known as a case management conference, the court will set a timetable for the case to be resolved and identify the steps that must be taken before the case can proceed to a hearing. The most common steps are set out below.

### **Documents**

Both sides have a duty to tell their opponent about documents they have which are relevant to the claim. This is addressed by compiling a List of Documents. The documents will cover matters pertaining to liability, where this is still disputed, and evidence of financial losses and expenses, in relation to quantum. The latter will comprise invoices, receipts and quotes, as well as salary slips to support loss of earning claims.

### **Statements**

Before a trial takes place both sides exchange witness statements. The statements will be from witnesses covering the issues in dispute, i.e. liability and or quantum. The statements will cover factual matters, which the individual can speak to. When those witness statements are exchanged with the Defendant each party will consider their opponents statements and assess the impact on their client's case.

### **Medical Evidence**

In severe neurological cases the court will give permission for both sides to obtain their own medical reports. The Claimant and Defendant's solicitors will commission medical reports from

those experienced in giving evidence in civil cases, covering the various injuries sustained. There will frequently be a high number of examinations.

After each examination the consultant (commissioned within the litigation process) will write a report. That report will be considered by the Claimant and if they consider it helps their case, to support the nature, extent and severity of injuries, this will be sent to the Defendant, as part of the evidence. Similarly, if the Defendant wants to use the report they have obtained they will have to send a copy to the Claimant.

After the parties have exchanged the various medical and non medical reports (such as those covering the issues of care, occupational therapy and accommodation) the experts of like discipline are required to talk to each other and to identify what aspects of their reports they agree about and where they hold a different opinion. They will then prepare a joint statement covering those points and they will need to send that joint statement to both parties. Those joint statements then assist the parties' solicitors to identify what issues, or parts of the claim, are really in dispute. Only where there are disputed issues, do the experts attend court to give oral evidence at trial, for the judge to decide which evidence he prefers, for the purposes of assessing the value of the case. In the event that experts agree on all points, then their respective reports will be placed before the judge at trial. He will read the reports to make his judgement on the particular matter addressed by the medical (or non medical) experts.

### **Schedule of Special Damage**

Under the terms of the personal injury pre action protocol, the Claimant is to provide a schedule of special damages, that is financial losses. That document should be sent to the Defendant again, in an updated form, when the legal proceedings are commenced. However, it is most unlikely in a serious case, that the losses would have crystallised at that stage, particularly as the medical prognosis, so key to resolution of personal injury claims, will have been guarded.

At the case management conference the court will give the Claimant an opportunity to update that schedule, to take account of developments in the medical evidence and expenses incurred since the schedule was first prepared. The final schedule, most importantly, will identify

recurring losses and, where appropriate, extrapolate the cost over life.

As to the detail likely to be contained in a Schedule of Special Damages reference should be made to Calculating Damages Claims.

### Questionnaire

Once all these steps have been taken, the court requires both parties' solicitors to file another questionnaire, known as a Pre Trial Checklist. The purpose of this questionnaire is to confirm to the court that all steps have been taken to prepare the case for trial, or to indicate what remains outstanding and why. If the latter, the court will set a revised timetable for the outstanding steps to be addressed. This is common in cases involving a long term neurological injury. Indeed, it is quite usual for there to be two or three case management conferences, before the case is ready for trial.

Once all steps have been completed, then the court will fix a date for trial. This is a hearing either to decide if the accident was the fault of the Defendant and if so, the level of damages the Claimant should receive; or it will be a trial solely to determine the amount of damages the Defendant should pay to the Claimant.

At the first case management conference or subsequent one, it will be ordered that the trial take place between two dates. This is known as the trial window. When the Pre Trial Checklist is filed with the court, the latter will set a specific date for the trial to commence.

To ensure that a date is fixed which is convenient to the parties and their witnesses, both expert and lay witnesses, the solicitors will take instructions in respect of inconvenient dates, before the Pre Trial Checklist is filed at court.

These are the key steps that are taken in order to prepare a case for trial. However, much effort is directed to negotiated compromises either achieved with a settlement meeting between the parties and their lawyers, or by formal mediation, with an independent mediator. An agreement is reached to resolve the case without the parties or the witnesses having to attend court in well

over 90% of cases.

## **Trial**

Of those cases that do not result in a negotiated compromise the court will hear evidence from both parties, before delivering judgement. If a trial is required, there are surprisingly few people in court. Those attending will be the Claimant, the solicitor, witnesses who support the Claimant and the Claimant's barrister (known as counsel) who will be the Claimant's advocate and speak in court. The barrister is likely to wear a wig and gown. Also at court will be any expert witnesses for the Claimant, for example the consultant who examined the Claimant. In addition, there will also be the witnesses who the Defendant will ask to give evidence against the Claimant's case. The Defendant will also have their solicitor and barrister at court, as well as any expert witnesses. Finally, the judge, who hears the case, will be assisted by the court usher or clerk.

## **Procedure at Trial**

The barrister will tell the Judge what the case is about. The barrister will then "call" the Claimant (if they are medically able) to give evidence from the witness box on oath. The 'cross examination' will start with the barrister asking questions. This is to allow the Claimant to tell the Judge what happened. The barrister for the Defendant will then ask some questions. . The Claimant's barrister may then ask the Claimant a few more questions to tidy up any loose ends. After that, the Claimant will have finished giving evidence.

The barrister will then call any other witnesses who support the Claimant's case and the same process of questioning will take place, including cross examination by the Defendant's barrister. If there are any experts then they will give their evidence in the same way.

The Defendant will then call their witnesses and the Claimant's barrister may cross examine them.

When all the evidence has been given, both barristers will sum up the case to the Judge. The Judge may then take a break to think about the evidence, or he may give his decision

immediately. His decision is called the 'Judgement'. Delivery of the judgment can sometimes take a long time. This is because he will talk about the evidence he has heard, to satisfy everyone that he has understood the case. If the Claimant has won the case the judgement will include the level of award that the Defendant is to pay the Claimant.

## **Conclusion**

The actual steps and timetable for the resolution of personal injury neurological cases will vary and be dictated by the particular facts of each case. However, they will all broadly follow the approach outlined, with compliance with the pre action protocol before commencement of proceedings. Those proceedings will then be tightly managed by a judge through one or more case management conferences before a trial will proceed. The health professionals play an important role in understanding that process, not only to appreciate the actions taken by the solicitor for the benefit of the client, but also for their own benefit, as it is possible that they too will be called upon to give evidence to support the Claimant's case.

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