

# **PRE-ACTION PROTOCOL FOR DISEASE AND ILLNESS CLAIMS**



## **Introduction**

Lord Woolf recommended the establishment of a number of pre-action protocols in his “Access to Justice” report of July 1996. The intention of these protocols was to encourage better pre-action investigation and to improve the exchange of information between both sides of a legal action. By doing so, it was hoped that the number of cases going to court could be reduced. Those that did go to court could be managed more efficiently by the judicial system.

The first protocols came into force on 26<sup>th</sup> April 1999, and covered Clinical Negligence and Personal Injury. Since then, protocols have been established for Construction and Engineering Disputes, Defamation, Professional Negligence and Judicial Review. Two new protocols will come into force on 8<sup>th</sup> December 2003, covering Housing Disrepair and Disease and Illness. It is the latter that this briefing note addresses.

## **Pre-Action Protocol for Personal Injury Claims**

Most claims for bodily injury arise out of one single incident and the Personal Injury Protocol, describing procedures to follow for these claims, has been in place for over four years. The Personal Injury Protocol specifically excluded claims for injury caused by industrial disease and, until now, all parties involved in disease claims have simply been required to adopt a reasonable attitude. In practice, many solicitors have used the Personal Injury Protocol as the basis for what would be acceptable to the courts.

The Personal Injury Protocol requires that the claimant or their representative must send a formal letter of claim in a particular format. The defendant (or their insurer) must answer this letter within 21 days. The insurers then have only three months in which to investigate the claim and to admit liability or to verify why liability is being denied (whether in whole or in part).

The protocol goes into some depth with regard to what information needs to be exchanged and what action the respective sides must take before a case goes to court.

## The new Pre-Action Protocol for Disease and Illness

From the outset, it had been recognised that disease and illness claims would require a very different approach. Before making a claim, a claimant or his legal representative may have to carry out additional investigations to establish exactly when and where somebody may have been exposed to factors that may give rise to an industrial disease. Often, an illness claim results in the need to contact a number of employers, possibly going back decades.

Whilst parties to a claim are encouraged to follow a laid down timetable, this may not always be possible (for example, if a claimant is suffering from Mesothelioma, the defendant is expected to treat his case with urgency and not to rely on the standard response times). As with the Personal Injury Protocol, the aim of the Disease Protocol is to resolve as many disputes as possible without the need to resort to litigation, and to encourage openness and timeliness.

The main stages of this protocol are outlined below. We have assumed here that the claim is related to an occupational disease, but similar procedures may apply if it is believed that the disease is caused by a product supplied or by occupation of particular premises.

- A potential claimant (or his solicitor) may write to a potential defendant advising that an investigation is being carried out to establish whether the disease was caused during the course of his employment with the potential defendant. Certain documents may be requested (such as personnel records and occupational health records).
- The copy records must be provided within 40 days of the request at no cost. If the information cannot be obtained within that time period, the claimant should be advised as soon as possible (not at the end of the 40 day period). An explanation should be given for the delay and a reasonable alternative time estimate provided. Failure to provide the records in a timely manner may lead the potential claimant to apply to the courts for an Order of Pre-Action Disclosure. In those circumstances, the defendant is likely to be ordered to pay the costs of the application.
- The potential claimant should also request records from his GP and other previous employers.
- Once these have been analysed in liaison with his legal advisor, he will make a decision on whether a claim should be made, and if so against whom.
- If a claim is not to be pursued, the potential defendant should be notified as soon as is practicable.
- If a claim is to be pursued, a formal letter of claim is then sent (in duplicate) to the defendant. The protocol stipulates the format that this letter must take, and what information should be included therein.
- The letter of claim must be acknowledged within 21 days. If you receive a letter of claim, you should seek advice from H. W. Wood Limited as to whether you should furnish a response, or whether your insurers will do so on your behalf.
- Your insurers have three months in which to investigate and to admit liability, or to deny liability (in whole or in part) and substantiate such a denial.

### **What action do you need to take?**

If you receive a letter requesting copies of the personnel records/occupational health records, you should forward a copy of the letter to H. W. Wood Limited in order that your insurers may be notified of a potential claim. You should not forward a copy of the personnel records to H. W. Wood Limited at the same time, as the documents may contain privileged information to which neither the insurers nor we have an entitlement without the potential claimant's prior authority.

If you receive a formal letter of claim, this should be forwarded to H. W. Wood Limited immediately and unanswered. You will be advised what further action is required of you after we have consulted with your insurers.

Throughout the process of the claim, from initial letter through to the final settlement, H. W. Wood Limited will provide guidance as to what information and documentation you will need to supply to insurers. In view of the very strict time scales, you should provide all such details as a matter of urgency.

### **Which insurers need to be notified?**

Most illness and disease claims allege that a claimant has been exposed to the cause of the illness/disease over a period of time. The majority of liability policies are on a "claims occurring basis" – i.e. insurers will pay for injuries caused whilst they provided cover, where liability is proven. This means that every insurer who provided liability cover during the period of alleged exposure will need to be notified, as each may be required to meet their own pro-rata proportion of the claim. For this reason, it is essential for you to retain your insurance records for a considerable length of time.

You are now under a legal obligation to retain all Employer's Liability Insurance certificates for a period of at least 40 years, to aid the identification of previous insurers. Similarly, if you take over or merge with another company, you should retain all certificates for that company for the same time period.

Although several insurers may be involved, the claim will usually be handled and co-ordinated by just one of your insurers (usually the last insurer to be on cover during the period of alleged exposure).

### **Statutory Limitation Period**

As with all injury claims, there is a limit to the amount of time that a claimant has in which to make a claim for illness or disease. A claimant must make a formal claim within three years of becoming aware that he was suffering from a disease or illness and the likely cause. If a claimant fails to make a claim within that time period, a court will not normally consider the matter, unless there are exceptional circumstances surrounding the delay.

This does mean that if a claim is brought very close to the end of the three-year limitation period it may not be possible for the claimant to comply fully with the new protocol. In such circumstances, the claimant must apply to the court for directions as to the timetable and form of procedure to be adopted, at the same time as he requests the court to issue proceedings. The court will then consider whether to order a stay of the whole or part of the proceedings pending compliance with the protocol.

## Deafness Claims

One of the most common types of “disease and illness” claim in the past has been in respect of deafness caused by exposure to excessive noise in the workplace. The new protocol will apply to these cases. It should be noted however that, if deafness has been caused by one specific incident (for example being in the proximity of a loud explosion on one particular day), this would still be handled using the existing personal injury protocol.

There is a presumption that, prior to 1964, an employer had no knowledge of the dangers of exposure to noise. Only employment periods from 1964 onwards are considered, when an industrial deafness claim is submitted.

## Providing Insurers with Information

As with all claims, a defendant will need to submit certain documentation to the claimant, even if such documentation may harm his defence.

The details that the insurer will need to supply the claimant will vary according to the exact type of illness or disease. You will be advised on a case by case basis as to what documentation and information you will need to supply. All documentation must be provided promptly, and a defendant is required by law to carry out a full (but “proportionate”) search. You will be required by the courts to sign a statement of truth, which confirms that all relevant documentation has been provided.

## Further Information

If you require further information, please contact the claims department at H. W. Wood Limited. We can supply full copies of the personal injury and disease & illness protocols should you require them, and also have a range of useful advice sheets. These sheets include further guidance on Industrial Deafness Claims and on what to do in the event of an accident at work.



This sheet has been produced for your general guidance only. It is not intended as an exhaustive document. For advice on individual matters or further information, please contact H. W. Wood Limited for assistance.