



The Law Society

**PRE-ACTION PROTOCOLS FOR LOW VALUE PERSONAL  
INJURY EMPLOYER LIABILITY, PUBLIC LIABILITY AND  
RTA CLAIMS**

**Consultations by the Civil Procedure Rules Committee**

**RESPONSE BY THE LAW SOCIETY  
OF ENGLAND AND WALES**

supporting  
solicitors

**21<sup>st</sup> November 2012**

## **1 INTRODUCTION**

The Law Society is the representative body for over 155,000 solicitors in England and Wales. It negotiates on behalf of the solicitors' profession, lobbies regulators, Government and others. It also works closely with stakeholders to improve access to justice for consumers and businesses.

We welcome the opportunity to respond to these consultations and we have been assisted in doing so by members of the Law Society's Civil Justice Committee, all of whom specialise in civil dispute resolution. We are very keen to work further with the Ministry of Justice and the Civil Procedure Rules Committee on these issues.

We have combined our responses to these consultations into one document for ease of reference

Our comments on the proposed draft pre-action protocols are intended to be constructive and to aid the smooth transition of the reforms which are to be introduced on 1 April 2013. We take this opportunity to reiterate that the Law Society represents all solicitors and strives to protect access to justice for all, whether individuals or large corporations, who, for whatever reason, wish to rely on their basic rights to make or defend a claim in the civil courts.

It is clear from discussions we have had with our members, in the very brief period since the draft protocols have become available, that there is widespread discontent and surprise about the scale and speed of the changes which are being proposed and the impact it will have on their businesses. This is a general feeling which is being expressed by those solicitors who act for claimants and defendants. The major concern is, however, what many of our members consider to have been an inadequate consultation process.

The success of the current RTA portal process has been achieved because of the amount of involvement of all stakeholders and the negotiations which took place between them. We deeply regret that this has not happened in this case despite our suggestions to the contrary.

## **2 OVERVIEW**

The Law Society supports the principle of streamlining lower value personal injury claims for all those involved in the process, particularly the injured parties, in an effort to reduce costs and speed up the process as long as this is done in the interests of justice.

The current portal claims process for RTA claims up to a value of £10,000 has worked well since its inception on 30<sup>th</sup> April 2010. We are aware that there have been some problems with the system and occasions where there may have been abuse of procedures which have caused concern to genuine users of the portal. Fortunately, over the passage of time, these have, in the main, been rectified and we note that the two new proposed protocols have been drafted in an attempt to reduce further abuses or unintended consequences. For example, stage 1 costs will now only be payable within 10 days after receipt of the stage 2 settlement pack which we fully support.

## **(i) Staged Process**

We do have some concerns that the new RTA pre-action protocol has been drafted on the basis that it will apply to all RTA claims up to a value of £25,000. We consider that there is a case for the procedural and evidential requirements to be “staged”. For example, retain the current and simpler protocol provisions for claims up to £10,000 and extend those only for claims between £10,001 and £25,000. For example, no medical records or witness statements for the lower value claims in normal circumstances (see below).

The staging of the process would also simplify the issue of fixed costs as these could be calculated on the basis of 2 bands. The first would be the current fixed costs (subject to any revision by the Ministry of Justice) for RTA claims up to £10,000. The second rate, and consequently higher than the first, would be for the higher value claims within the process and where additional evidence, including medical records, are considered to be necessary.

We also suggest that the amount of interim payments is based on the estimated value of the claim.

These comments apply equally to the EL/PL pre-action protocol as we consider that they too would benefit from a similar staged process for claims below £10,000 and for those above that amount.

## **(ii) Medical Reports**

Both draft protocols allow for the obtaining of more than one medical report for all claims whereas in the current RTA protocol the “expectation” is for one medical report only. To maintain the simplicity of claims up to £10,000 we consider that the claimant should still only be expected to rely on one medical report in all RTA, EL and PL claims where the pre-action protocols apply. However, for claims over £10,000, the claimant should have the option to rely on more than medical report but only on the recommendation of the original or additional medical expert. This would also avoid arguments about whether or not the decision to obtain additional medical reports was reasonable.

In fact, the protocol should provide that at least one medical report should be obtained in all cases so as to avoid arguments about under settlement.

## **(iii) Medical Records**

There is a similar argument about the obtaining of medical records. Because of the amount of resources which were required by the NHS to provide medical records in all personal injury claims an agreement was reached with the Cabinet Office in 2006 about the provision of records. This agreement states: - *“There is a rebuttable presumption, agreed by the Law Society, Association of British Insurers, and the health sector that subject to the expert witnesses view, no patient records will be requested for claims below £10,000”*.

We therefore suggest that medical records should only be obtained in claims with a value of £10,000 or less at the express request of a medical expert. Due to the fact that claims over £10,000 will involve more serious/complex injuries then we consider that the obtaining of copy medical records should be the norm. Providing for this in the new pre-action protocols would, again, avoid arguments on the reasonableness or otherwise of incurring those costs and the protocols should state this.

#### **(iv) Witness Statements**

We believe that the original intention of the current RTA claims process up to £10,000 was that witness statements were unnecessary unless it was to prove pecuniary loss and that they are rarely used. However, we note that both draft protocols now include the provision for witness statements to be provided “*where reasonably required to value the claim*” (**RTA protocol 7.6B and EL/PL protocol 7.9**). We can see no reason why the rule should change for RTA claims below £10,000. There are also good grounds to argue that, for similar reasons, there should be no necessity to obtain witness statements in EL/PL claims up to a value of £10,000 although in EL disease claims witness statements may be necessary to assist the defendants with identifying the relevant employer and deciding issues of causation.

#### **(v) Interim Payments**

We are concerned that in the higher value claims a “mandatory” payment of £1000 in relation to general damages will be insufficient. Bearing in mind these are claims where liability has been admitted and damages will be paid to a claimant we consider that many claimants may struggle financially, especially in cases where disbursements, and in some cases solicitors’ costs, are being funded privately (e.g. no BTE or ATE cover, or where the solicitor is not acting on a CFA basis). We therefore suggest that a £1000 interim payment should remain as the minimum amount which should be paid in all RTA, EL and PL claims with a value up to £10,000. Where the claims are valued at between £10,000 and £15,000 the minimum interim payment should be £2,000. In claims valued between £15,000 and £25,000 the minimum interim payment should be £5,000.

#### **(vi) Settlement**

There are anomalies between the two draft protocols (**RTA 7.40 and EL/PL 7.43**) in respect of the payment of success fees and this needs clarifying. The draft Paragraph **EL/PL 7.43 (5) (a) and (b)**, which specifically refers to disease claims, should, suitably adapted, replace the draft Paragraph at **RTA 7.40 (5)**.

#### **(vii) Recoverable Benefits**

There are a number of references to recoverable benefits which are repayable to the Compensation recovery Unit and therefore, where, relevant, they are deductible from certain elements of the compensation payable to a claimant. However, in our opinion, neither of the draft protocols makes it sufficiently clear that relevant deductible benefits are on a “like for like” basis and therefore general damages for

pain and suffering are exempt from any deduction. The protocols, where relevant, should make it clearer that any relevant CRU deductible benefit can only be deducted from any like for like claim within the element of pecuniary loss. In this respect the proposed **RTA paragraph 7.56** should be moved to nearer the beginning of the protocol (see section 3(A)(j) below).

We note that there does not appear to be a similar provision in the EL/PL Protocol and consequently this should be added (see section 3 (B) (i) below) in order to avoid confusion and misunderstanding.

#### **(viii) Disease claims**

We have some serious concerns about the inclusion of non mesothelioma disease claims within this pre-action protocol claims process. We are advised by our members who represent both claimants and defendants in such claims that there is a very high risk that the majority of disease claims will fall outside this process because it will be impossible to comply with the various time limits. There are many factors which distinguish such claims from other personal injury claims. Some of these factors which can result in disease claims not being as straightforward as others due to increased difficulties are as follows:-

- there can be more than one insurer and more than one defendant who may be involved in the claim
- quantum can be unclear at the outset
- limitation periods can be an issue in “long tail” claims
- contributory negligence can be an issue in all types of disease claims
- immense difficulties in conceding causation without appropriate evidence
- the necessity in many claims to obtain and review occupational health records
- difficulties in identifying the appropriate and employer(s) and insurer(s)

The above list is not exhaustive.

We suggest that the inclusion of disease claims in this process be reviewed after a period of not more than 12 months from the date of commencement.

#### **(ix) Fixed Costs**

Whilst we appreciate that the issue of the fixed costs which will apply to “portal” claims are outside the scope of these consultations it is, nevertheless, relevant to mention them at this time.

We consider that the best way to achieve fairness for all involved in the process is for different costs to apply in relation to the value of the claim (i.e. staging). By this we mean that that the lower rate should apply to claims up to a value of £10,000 with a

higher rate applying to claims above that value. As such, the process for the lower value claims should therefore be kept as simple as possible which would be in accordance with the original principles which were agreed by all of the relevant stakeholders when they successfully negotiated the original RTA claims process which was implemented in April 2010.

Furthermore, until such times as full details of the proposed fixed costs for both RTA and EL/PL claims which are covered by the process are published we cannot comment on whether the reference to CPR rule 45.29 is the correct reference. We would point out that **EL/PL paragraph 4.4** as drafted is either incomplete or envisages that CPR rules relating to protocol fixed costs may be renumbered in due course. This needs to be clarified.

### **3 THE LAW SOCIETY'S RESPONSE**

#### **(A) RTA Pre-Action Protocol**

##### **(a) Paragraph 1.1A - Introduction**

We cannot see any reason why the effective date for calculating the "Protocol Upper Limit" should be 6<sup>th</sup> April 2013 if all other civil litigation costs and funding reforms are to be implemented on 1<sup>st</sup> April 2013. This could cause confusion. The effective date should therefore be amended to 1<sup>st</sup> April 2013. The Paragraph should be amended as follows:-

- 1.1A** (1) *The "Protocol upper limit" is—*
- (a) £25,000 where the accident occurred on or after 1 April 2013; or*
  - (b) £10,000 where the accident occurred before 1 April 2013, on a full liability basis including pecuniary losses but excluding interest.*
- (2) *Any reference in this Protocol to a claim which is, or damages which are, valued at no more than the Protocol upper limit, or between £1,000 and the Protocol upper limit, is to be read in accordance with sub-paragraph (1).*

##### **(b) Paragraph 4.1 (1) - Scope**

We cannot understand the rationale for stating that the protocol applies for road traffic accidents occurring on or after 30<sup>th</sup> April 2010. This Paragraph should be amended to set out transitional provisions for those claims where the cause of action occurred before the date of commencement of the revised protocols in April 2013. At that time there will, presumably, be many thousands of claims which will have commenced under the existing protocol procedures and those claims should continue under those procedures until conclusion. The Paragraph should be amended as follows:-

- 4.1** *This Protocol applies where—*
- (1) a claim for damages arises from a road traffic accident occurring on or after 1st April 2013;*

- (2) *the claim includes damages in respect of personal injury;*
- (3) *the claimant values the claim at no more than the Protocol upper limit and*
- (4) *if proceedings were started the small claims track would not be the normal track for that claim.*

*(Paragraphs 1.1(6) and 4.3 state the damages that are excluded for the purposes of valuing the claim under paragraph 4.1.)*

*(Rule 26.6 provides that the small claims track is not the normal track where the value of any claim for damages for personal injuries (defined as compensation for pain, suffering and loss of amenity) is more than £1,000.)*

**(New)**

**4.2** *The Pre-Action Protocol for Low Value Personal Injury Claims in Road Traffic Accidents which commenced on 30<sup>th</sup> April 2010 (updated on 15<sup>th</sup> May 2012) will continue to apply to all claims for damages arising from a road traffic accident occurring before 1<sup>st</sup> April 2013.*

Alternatively this could be added in the Protocol as a “transitional” provision.

**(c) Paragraph 6.6 – Completion of CNF**

The Law Society fully supports this amendment which will now require the claimant to either sign the CNF or authorise signing by the legal representative. It is hoped that this will avoid the duplication of claims which has been a problem in the past. For the sake of completeness, however, we suggest that this Paragraph should contain the same wording as the **EL/PL Paragraph 6.5**. This would be achieved by adding the following to the end of the paragraph:-

*“Part 22 of the CPR applies to statements of truth under this Protocol”.*

**(d) Paragraph 7.1A – Medical Reports**

Please refer to our comments in Overview at section 2 (ii) above.

We suggest that the Paragraph be amended as follows:-

**7.1A** *It is expected that in claims with a value of no more than £10,000 claimants will obtain one medical report, but additional medical reports may be obtained from other experts where the injuries require reports from more than one medical discipline and a medical expert has confirmed that. In claims with a value in excess of £10,000 additional medical reports may be obtained from other experts at the discretion of the legal adviser.*

**(e) Paragraph 7.2B – Medical Records**

Please refer to our comments in Overview at section 2 (iii) above.

We suggest that the Paragraph is amended as follows:-

**7.2B** *In claims with a value of no more than £10,000, it is expected that the medical expert will not need to see any medical records. In such claims medical records should only be obtained at the express request of the medical expert. In claims with a value in excess of £10,000 it is expected that medical records will be obtained due to the fact that such claims are likely to involve more serious and/or complex injuries.*

**(f) Paragraph 7.6B – Witness Statements**

Please refer to our comments in Overview at section 2 (iv) above.

We suggest that the Paragraph is amended as follows:-

**7.6B** *In most cases where the value of the claim does not exceed £10,000, witness statements, whether from the claimant or otherwise, will not usually be required. In cases where the value of the claim exceeds £10,000 one or more statements may, however, be provided where reasonably required to value the claim*

**(g) Paragraphs 7.8 and 7.13 – Interim Payments**

Please refer to our comments in Overview at section 2 (v) above.

We suggest the two Paragraphs are amended as follows:-

**Request for an interim payment**

**7.8** *Where the claimant requests an interim payment the defendant should make an interim payment to the claimant in accordance with paragraph 7.13.*

**Interim payment**

**7.13**

- (1) *Where paragraph 7.8 applies the defendant must pay the interim payment in accordance with paragraph 7.13 (2) within 10 days of receiving the Interim Settlement Pack.*
- (2) *The interim payments to be made in accordance with paragraph 7.13(1) are as follows:-*

- claim value –	- interim payment -
up to £10,000	£1,000
up to £15,000	£2,500
up to £25,000	£5,000



**(h) Paragraph 7.37(3) – Success Fees**

On the basis that success fees will no longer be recoverable from the defendant post 31<sup>st</sup> March 2013 and the fact that we have suggested it would be better to make provisions that the existing RTA protocol will apply to accidents which occurred pre 1<sup>st</sup> April 2103, **paragraph 7.37(3)** should be deleted.

If our suggestion that the protocol should state that the existing RTA protocol will apply to all RTA accidents occurring before 1<sup>st</sup> April 2013 is not accepted then **paragraph 7.37 (3)** as drafted should be amended to reflect the same wording as the EL/PL protocol as follows:-

- 7.37 (3)** *any success fee in accordance with rule 45.31 if—*
- (a) the conditional fee agreement was entered into before 1 April 2013; or*
  - (b) in the case of a collective conditional fee agreement, advocacy or litigation services were provided under the agreement in connection with the claim before 1 April 2013.*

*within 10 days of the end of the relevant period in paragraphs 7.28 to 7.30 during which the parties agreed a settlement.*

*(Rule 21.10 provides that the approval of the court is required where, before proceedings are started, a claim is made by a child and a settlement is reached. The provisions in paragraph 6.1 of Practice Direction 8B set out what must be filed with the court when an application is made to approve a settlement.)*

**(i) Paragraph 7.54 – Recoverable Benefits**

This paragraph relates to the application for a certificate of deductible benefits where the defendant does not have one which remains in force for at least 10 days after the date on which damages are agreed. The same provisions are contained at **EL/PL paragraph 7.44 and paragraph 7.45**. Whilst they both have the same intention and meaning both draft protocols should have the same wording for the sake of completeness. We therefore suggest that **RTA paragraph 7.54** should be amended as follows:-

- 7.54** *Paragraph 7.55 applies where, at the date of the acceptance of an offer in the Stage 2 Settlement Pack, the defendant does not have a certificate of recoverable benefits that will remain in force for at least 10 days.*

**(New)**

- 7.55** *The defendant should apply for a fresh certificate of recoverable benefits as soon as possible, notify the claimant that it has done so and must pay the amounts set out in paragraph 7.53 within 30 days of the end of the relevant period in paragraphs 7.28 to 7.30.*

**(j) Paragraph 7.56 – Deductible Benefits**

Please refer to our comments in Overview at section 2 (vii) above.

**RTA paragraph 7.56** states that “the deductible amount” should only be deducted from the personal injury damages. Assuming that this refers to the CRU deductible relevant benefits this paragraph is incorrect.

Firstly, this paragraph should be included much earlier in the protocol – we suggest after **RTA paragraph 6.13**. Secondly, as we have referred to previously (see Overview Section 2(vii) above), this is misleading in that the deductible amount should only be deducted from the claimants pecuniary losses on a like for like basis and not from the personal injury which we presume is intended to refer to general damages for pain and suffering.

**(B) EL/PL Pre-Action Protocol**

**(a) Paragraph 1.1 – Definitions**

**Paragraph 1.1 (12) (a)** is ambiguous as it refers to a public liability claim against a “person” only. This requires clarification to remove the ambiguity and we therefore suggest the following:

- 1.1 (12) ‘public liability claim’-
- (a) means a claim for damages for personal injuries arising out of a breach of a statutory or common law duty of care made against a person or organisation other than the claimant’s employer; but

**(b) Paragraph 4.3 – Scope**

As stated above at section 2 (viii) we do have some concerns about the effectiveness of the protocol for disease claims because of their additional complexity and the difficulties which can be encountered by insurers in identifying the relevant employer(s). To avoid incurring unnecessary costs and delay we suggest that the protocol should not apply to disease claims where more than one insurer may be involved.

We also consider that the EL/PL protocol should not apply in any claim where there is more than one defendant. We therefore suggest **EL/PL paragraph 4.3** is amended as follows:-

**4.3 (5)** *In the case of a disease claim, where there is more than one defendant and/or there is more than one insurer that has been identified as having provided indemnity cover in respect of the claim*

**New**

**4.3 (8)** *In any case where there is more than one defendant*

**(c) Paragraph 7.3 – Medical Reports**

Please refer to our comments in Overview at section 2 (ii) above.

We suggest that the Paragraph be amended as follows:-

- 7.3** *It is expected that in non disease claims with a value of no more than £10,000 claimants will obtain a medical report from one expert, but additional medical reports may be obtained from other experts where the injuries require reports from more than one medical discipline and a medical expert has confirmed that. In all disease claims and claims with a value in excess of £10,000 additional medical reports may be obtained from other experts at the discretion of the legal adviser.*

**(d) Paragraph 7.4 – Medical Records**

Please refer to our comments in Overview at section 2 (iii) above.

We suggest that the Paragraph is amended as follows:-

- 7.4A** *In non disease claims with a value of no more than £10,000, it is expected that the medical expert will not need to see any medical records. In such claims medical records should only be obtained at the express request of the medical expert. In all disease claims and other claims with a value in excess of £10,000 it is expected that medical records will only be obtained due to the fact that such claims are likely to be more serious and/or complex.*
- 7.4B** *The claimant must enclose with the medical report(s) sent to the defendant any medical records that have been obtained and which the medical expert(s) considers relevant. The medical expert should confirm within the report—*
- (1) the medical records that have been reviewed; and*
- (2) the medical records considered relevant to the claim.*

**(e) Paragraph 7.8 – Details of loss of earnings**

In order to govern behaviours and avoid delays in the process the case should fall out of the protocol claims process if a defendant in an employer's liability case fails to provide the required information within the stipulated time limit. The paragraph should be amended as follows:-

- 7.8A** *In an employers' liability claim, the defendant must within 20 days of the date of admission provide earnings details to verify the claimant's loss of earnings, if any.*
- 7.8B** *Where the defendant does not provide the information in accordance paragraph 7.8A the claim will no longer continue under this Protocol and the claimant may start proceedings under Part 7 of the CPR.*

**(f) Paragraph 7.9 – Witness Statements**

Please refer to our comments in Overview at section 2 (iv) above.

We suggest that the Paragraph is amended as follows:-

**7.9** *In most non disease cases where the value of the claim does not exceed £10,000, witness statements, whether from the claimant or otherwise, will not be, required. In all disease claims and all other claims where the value exceeds £10,000 one or more statements may, however, be provided where reasonably required to value the claim.*

**(g) Paragraphs 7.11 and 7.16 – Interim Payments**

Please refer to our comments in Overview at section 2 (v) above.

We suggest the two Paragraphs are amended as follows:-

**Request for an interim payment**

**7.11** *Where the claimant requests an interim payment the defendant should make an interim payment to the claimant in accordance with paragraph 7.16.*

**Interim payment**

**7.16** (1) *Subject to paragraph (2) below where paragraph 7.11 applies the defendant must pay the interim payment in accordance with paragraph 7.16 (3) within 10 days of receiving the Interim Settlement Pack.*

(2) *Sub-paragraph (1) does not apply in a respiratory disease claim unless there is a valid CRU certificate showing no deduction for recoverable lump sum payments.*

(3) *The interim payments to be made in accordance with paragraph 7.16(1) are as follows:-*

<i>- claim value –</i>	<i>- interim payment -</i>
<i>up to £10,000</i>	<i>£1,000</i>
<i>up to £15,000</i>	<i>£2,500</i>
<i>up to £25,000</i>	<i>£5,000</i>

**(h) Paragraph 7.40 – Settlement (Success Fees)**

Success fees will no longer be recoverable from the defendant post 31<sup>st</sup> March 2013 (see Sections 58 and 58A of the Courts and Legal Services Act - as amended by the

Part 2 Legal Aid and Sentencing and Punishment of Offenders Act 2012). However, in accordance with **EL/PL Protocol Paragraph 4.1 (1) (a)** success fees will be recoverable in disease claims after 1<sup>st</sup> April 2013 where a conditional agreement has been entered into and no letter of claim has been sent to the defendant prior to that date. To avoid confusion and misunderstanding we therefore suggest that **Paragraph 7.40 (3)** clarifies this by amendment as follows:-

- 7.40 (3)** *in disease claims, a success fee in accordance with rule 45.31(1) if—*
- (a) no letter of claim has been sent in accordance with paragraph 4.1 (1) (b); and*
  - (b) the conditional fee agreement was entered into before 1 April 2013; or*
  - (c) in the case of a collective conditional fee agreement, advocacy or litigation services were provided under the agreement in connection with the claim before 1 April 2013.*

*(Rule 21.10 provides that the approval of the court is required where, before proceedings are started, a claim is made by a child and a settlement is reached. The provisions in paragraph 6.1 of Practice Direction 8B set out what must be filed with the court when an application is made to approve a settlement.)*

**(i) Paragraphs 7.44 and 7.45 – Recoverable Benefits**

Please refer to our comments in Overview at section 2 (vii) and section 3 (A) (j) above.

We suggest that an additional paragraph is inserted in the EL/PL protocol to make it clear that defendants can only deduct relevant benefits on a like for like basis in respect of pecuniary losses and not from any damages for pain and suffering or loss of amenity.

The Law Society

21<sup>st</sup> November 2012.