

## **MOJ STAGE DEFAULTS AND PREPARATION FOR STAGE 3 HEARINGS**

**By Andrew Mckie (Barrister at Law) – Clerksroom – March 2012**

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### **Introduction**

- The protocol for Low Value Personal Injury Claims in Road Traffic Accidents, applies to personal injury claims arising out of Road Traffic Claims in England and Wales, on or after 30 April 2010.
- It applies where the value of the claim is between £1,000 and £10,000. The value of the claim, is based upon the level of general and special damages, but excludes damage to vehicles and credit hire costs.
- Small claims worth less than £1000 and employers liability or public liability claims fall outside the protocol, as do claims involving complicating factors such as the death of a party or a protected party or a bankrupt claimant.

### **Stage 1 Exit Points.**

The following points are examples of how a claim, may leave the Low Value Personal Injury Claims Portal, at Stage 1.

If the defendant or defendant's insurer/ representative, fails to carry out the following actions, within the timescales specified below, the Claimant's Solicitor is advised to place an immediate notification in writing that the claim has left the process, and cite the section of the Protocol in support.

Where paragraph 6.15 applies, i.e the claims leaves the Portal, the claim will proceed under the Pre-Action Protocol for Personal Injury Claims starting at paragraph 3.7 of that Protocol (which allows a maximum of three months for the defendant to investigate the claim).

The full Protocol can be found at:- [http://www.justice.gov.uk/courts/procedure-rules/civil/protocol/prot\\_rta](http://www.justice.gov.uk/courts/procedure-rules/civil/protocol/prot_rta)

<b><u>Exit Points</u></b>	<b><u>How?</u></b>	<b><u>Section of Protocol in Support</u></b>
Stage 1	The defendant fails to complete the 'Insurer Response' section of the CNF ('the CNF response') and send it to the claimant within 15 days.	Paragraphs 6.11 and 6.15 (2) of the Protocol.
Stage 1	Where no insurer is identified and the claim falls to be dealt with by the MIB or its agents, the CNF response is not completed	Paragraphs 6.12 and 6.15 (2) of the Protocol.

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	and sent to the claimant within 30 days.	
Stage 1	The defendant makes an admission of liability but alleges contributory negligence (other than in relation to the claimant's admitted failure to wear a seat belt);	Paragraphs 6.15 (1) of the Protocol.
Stage 1	The defendant does not admit liability; or liability is denied	Paragraphs 6.15 (2) of the Protocol.
Stage 1	The defendant notifies the claimant that the defendant considers that –  (a) there is inadequate mandatory information in the CNF;	Paragraphs 6.15 (4) (a) of the Protocol.
Stage 1	If proceedings were issued, the small claims track would be the normal track for that claim.	Paragraphs 6.15 (4) (b) of the Protocol.
Stage 1	Except where the claimant is a child, the defendant must pay the Stage 1 fixed costs in rule 45.29 where –  (1) liability is admitted; or  (2) liability is admitted and contributory negligence is alleged only in relation to the claimant's admitted failure to wear a seat belt,  within 10 days after sending the CNF response to the claimant as provided in paragraph 6.11 or 6.13.  Where the defendant fails to pay the Stage 1 fixed costs (£400 plus vat and 12.5% uplift, if CFA), within the period specified in paragraph 6.18 the claimant may give written	Paragraphs 6.18 and 6.19 of the Protocol.

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	notice that the claim will no longer continue under this Protocol	
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### **Stage 2 Exit Points.**

The following points are examples of how a claim, may leave the Low Value Personal Injury Claims Portal, at Stage 2.

If the defendant or defendant's insurer/ representative, fails to carry out the following actions, within the timescales specified below, the Claimant's Solicitor is advised to place an immediate notification in writing that the claim has left the process, and cite the section of the Protocol in support.

**Claimants will note that many of the breaches, by the defendant insurer or representative, at Stage 2, allow the claimant to commence Part 7 proceedings.**

A copy of the Protocol can be found at:- [http://www.justice.gov.uk/courts/procedure-rules/civil/protocol/prot\\_rta](http://www.justice.gov.uk/courts/procedure-rules/civil/protocol/prot_rta)

<b><u>Exit Point</u></b>	<b><u>How?</u></b>	<b><u>Section of Protocol in Support</u></b>
Stage 2	<p>Where the claimant requests an interim payment of £1,000, the defendant should make an interim payment to the claimant. (The claimant must send the interim settlement pack, medical report and evidence of losses)</p> <p>The defendant must pay £1,000 within 10 days of receiving the Interim Settlement Pack.</p> <p><b>Where the defendant does not make the interim payment of £1000.00 the claimant may start proceedings under Part 7 of the CPR and apply to the court for an interim payment in those proceedings.</b></p>	Paragraphs 7.8 to 7.13 and 7.21 of the Protocol.
Stage 2	Where the claimant has requested an interim	Paragraphs 7.14, 7.21 and 7.22 of the Protocol.

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	<p>payment of more than £1,000 the defendant must pay –</p> <p>(1) the full amount requested less any deductible amount which is payable to the CRU;</p> <p>(2) the amount of £1,000; or</p> <p>(3) some other amount of more than £1,000 but less than the amount requested by the claimant,</p> <p>within 15 days of receiving the Interim Settlement Pack.</p> <p><b>Where the defendant does not make any interim payment, the claimant may start proceedings under Part 7 of the CPR and apply to the court for an interim payment in those proceedings.</b></p> <p>Where the defendant does make an interim payment, but the claimant is not content with the amount paid, the claimant may still start proceedings. However, the Court will order the defendant to pay no more than the Stage 2 fixed costs, where the Court awards an interim payment of no more than the amount offered by the defendant or the Court makes no award.</p>	
Stage 2	<b>The claim will no longer continue under this Protocol where the defendant gives notice</b>	Paragraphs 7.32 of the Protocol.

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	<p><b>to the claimant within the initial consideration period (or any extension agreed under paragraph 7.29) that the defendant</b></p> <p>–</p> <p>(a) considers that, if proceedings were started, the small claims track would be the normal track for that claim; or</p> <p>(b) withdraws the admission of causation.</p>	
Stage 2	<p>Within the initial consideration period (15 days) (or any extension agreed under paragraph 7.29) the defendant must either accept the offer made by the claimant on the Stage 2 Settlement Pack Form or make a counter-offer using that form.</p> <p><b><u>Where the defendant does not respond within the initial consideration period (or any extension agreed under paragraph 7.29), the claim will no longer continue under this Protocol and the claimant may start proceedings under Part 7 of the CPR.</u></b></p>	Paragraphs 7.31 and 7.33 of the Protocol.
Stage 2	<p>On receipt of a counter-offer from the defendant the claimant has until the end of the total consideration period (35 days in total) or the further consideration period to accept or decline the counter-offer.</p> <p>If settlement is agreed at stage 2, except where the</p>	Paragraphs 7.36 and 7.40 of the Protocol.

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	<p>claimant is a child or paragraphs 7.41 and 7.42 apply, the defendant must pay –</p> <p>(1) the agreed damages less any –</p> <p>(a) deductible amount which is payable to the CRU; and</p> <p>(b) previous interim payment;</p> <p>(2) any unpaid Stage 1 fixed costs in rule 45.29; (£400 plus vat and 12.5% uplift, if CFA)</p> <p>(3) the Stage 2 fixed costs in rule 45.29; (£800 plus vat and 12.5% uplift, if CFA)</p> <p>(4) the relevant disbursements allowed in accordance with rule 45.30; and</p> <p>(5) a success fee in accordance with rule 45.31 for Stage 1 and Stage 2 fixed costs,</p> <p>within 10 days of the end of the relevant period (usually but not always 35 days). <b><u>If they do not proceedings can be commenced under Part 7.</u></b></p>	
Stage 2	<p>Where the parties do not reach an agreement on –</p> <p>(1) the original damages</p> <p>(2) the original damages and, where relevant, the additional damages (ie,</p>	<p>Paragraphs 7.55, 7.61, 7.63 and 7.66 of the Protocol.</p>

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	<p>the matter needs to proceed to Stage 3)</p> <p>the claimant must send to the defendant the Court Proceedings Pack (Part A and Part B).</p> <p>Except where the claimant is a child the defendant must pay to the claimant –</p> <p>(1) the final offer of damages made by the defendant in the Court Proceedings Pack (Part A and Part B) Form less any –</p> <p>(a) deductible amount which is payable to the CRU; and</p> <p>(b) previous interim payment;</p> <p>(2) any unpaid Stage 1 fixed costs in rule 45.29; (£400 plus vat and 12.5% uplift, if CFA)</p> <p>(3) the Stage 2 fixed costs in rule 45.29; (£800 plus vat and 12.5% uplift, if CFA) and</p> <p>(4) the disbursements in rule 45.30(2) that have been agreed</p> <p>The defendant must pay the amounts in paragraph 7.61 and 7.62 within 15 days of receiving the Court Proceedings Pack (Part A and Part B) Form from the claimant.</p> <p><b>Where the defendant does not comply with</b></p>	
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	<b>this, the claimant may give written notice that the claim will no longer continue under this Protocol and start proceedings under Part 7 of the CPR.</b>	
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### **Other Possible Reasons to Take the Claim out of the Portal?**

- Where an offer made in the stage 2 settlement pack, is withdrawn, after the Total Consideration Period. (see paragraph 7.39 of the Protocol).
- Where the Court consider that the procedure is not appropriate (see PD 8B 7.2)
- Where a protocol offer is withdrawn, after proceedings are started (see PD 8B 10.1).

### **Stage 3 Hearing Preparation**

If the parties cannot agree settlement at Stage2, the matter will proceed to a Stage 3, written or oral hearing. The procedure is governed by Practice Direction 8B which can be found at:- [http://www.justice.gov.uk/courts/procedure-rules/civil/rules/pd\\_part08b](http://www.justice.gov.uk/courts/procedure-rules/civil/rules/pd_part08b)

I have set out some common issues one may encounter at a Stage 3 hearing and some practical steps which can be taken to resolve this issues:-

<b><u>Stage</u></b>	<b><u>Potential Issue</u></b>	<b><u>Preparation</u></b>
Stage 3	Proceedings must be commenced, on a Part 8 claim form and include all the information set out in PD Para 5.2. This will include the Claimant's indication as to whether they wish for a Stage 3, paper or oral hearing. (See Paragraph 11). An oral hearing will be held, if this is requested by either party.	<p>Once may wish to opt for an oral hearing, as opposed to a paper hearing.</p> <p>The difficulty for a claimant with a paper hearing, is lack of information before the Court to confirming the duration and severity of the claimant's injury, which would have previously been available with a disposal hearing, via the claimant's statement.</p> <p>The benefit of an oral hearing is that it allows the advocate to 'paint the picture' of the claimant's injury. Inferences can be</p>

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		<p>made from the papers, about the severity and duration of the claimant's injury, which may not be immediately apparent to the Judge, without the benefit of Counsel's submissions.</p> <p>An oral hearing, also allows the claimant's advocate, via oral submissions, to ensure the Judge has a full grasp of the issues, in relation to general and special damages, to ensure the correct award it made. This is particularly important where the claimant's and defendant's best offers are close, and oral submissions may tip the balance, in the claimant's favour.</p>
Stage 3	<p>The Part 8 Practice Direction does not provide any opportunity for further witness statements, to confirm the nature and progress of the claimant's injuries, after the medical report has been served.</p> <p><b>Paragraph 7.2 of the Protocol makes it clear that the claimant must ensure the factual accuracy of the report, as this cannot be challenged later.</b></p>	<p>To ensure that the claimant's general damages are correctly assessed, at the Stage 3 hearing, one may wish to adopt the following approach:-</p> <p>Invite the claimant into the office or make a telephone appointment to go through the medical report line by line, to ensure the accuracy of the medical report, before it is served, in the same level of detail that one would take a witness statement. All too often medical experts fail to address points or fail to record in detail the nature of symptoms, the progression of symptoms and effect of the injury on the claimant's home,</p>

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		<p>social or work activities.</p> <p>The quality of the medical experts and agencies varies enormously. Ensure the medical agencies and experts they instruct used to prepare reports, for MOJ proceedings, are the ones that prepare detailed and thorough reports, given there is no opportunity to provide a further witness statement from the claimant, for the purpose of the Stage 3 hearing.</p>
Stage 3	<p>The CPR Part A allows for explanatory notes to be added next to each head of loss claimed. <b><u>This is not evidence.</u></b></p> <p>PD 6.1 sets out the evidence the claimant must file with the claim form:-</p> <p>(1) the Court Proceedings Pack (Part A) Form;</p> <p>(2) the Court Proceedings Pack (Part B) Form (the claimant and defendant's final offers) in a sealed envelope. (This provision does not apply where the claimant is a child and the application is for a settlement hearing);</p> <p>(3) copies of medical reports;</p> <p>(4) evidence of special damages;</p>	<p>To ensure that the claimant's special damages are correctly assessed, at the Stage 3 hearing, one may wish to adopt the following approach. Ensure the following documents and evidence are submitted to the defendant at Stage 2:-</p> <p>Full documentary evidence to support all heads of loss.</p> <p>If the claim is unusually complex, consider obtaining a full witness statement from the claimant, to be served at stage 2, dealing with all the quantum issues.</p>

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	<p>(5) evidence of disbursements (for example the cost of any medical report) in accordance with rule 45.30(2); and</p> <p>(6) any notice of funding.</p> <p>There is no specific provision for witness statement at 6.1. The note states, 'Whether any other documents of the type referred to in para 6.1 have been sent to the defendant, will depend on the circumstances of the case'.</p> <p>PD paragraph 6.3 states the claimant must only file those documents in paragraph 6.1 where they have already been sent to the defendant under the RTA Protocol i.e at stage 2. Indeed PD paragraph 7.1 states the claimant may only rely upon the documents properly served.</p>	
Stage 3	<p>Medical experts will sometimes provide a prognosis which suggests that the claimant will recover within a range of dates:- i.e '9-12 months of the date of the accident' or the claimant 'will make a full recovery by/ within 18 months post accident'.</p> <p>The problem this presents is that the MOJ portal claim has now speeded up claims process. Some</p>	<p>To ensure that the claimant's general damages are correctly assessed, at the Stage 3 hearing, one may wish to adopt the following approach:-</p> <p>a) if the claimant appears to have a more serious injury, which may result in a long prognosis period i.e if an accident has occurred at high speed or the vehicle damage is very</p>

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	<p>claims are now being disposed of in a matter of months, from the date of the accident until settlement at stage 2 or 3, and in the absence of a witness statement from the claimant, the Judge cannot properly assess:-</p> <p>a) if it is, for example, a 9-12 month prognosis, whether the claimant recovered at month 9 or 12.</p> <p>b) in the case of a longer prognosis, and the low value claim process is started early on in the claim, how long it will take the claimant to recover?</p>	<p>extensive, one must urge causation in obtaining the medical report only a few weeks after the accident, given that, if say a claimant has an 18 month prognosis, and the medical report is commissioned and disclosed after say, 2 months, the Courts only reference point to assess the injury will be after two months, in the absence of a further statement from the claimant. It is difficult for the Judge, in this scenario to assess the recovery period of an 18 month prognosis period, with no information from the claimant, beyond the 2 month period.</p> <p>b) If the claimant's expert, suggests a bracket for recovery of say 9-12 months, it should not be assumed that the Judge will go for the top end of the bracket. The Judge may very well make an award at the lower to mid-range of the bracket. In the absence of a statement, saying that the claimant took 12 months to recover, a lower award may be likely. Claims handlers must be alive to this fact when placing a valuation upon general damages and the potential costs risk of failing to beat the defendant's best offer at the Stage 3 hearing.</p>
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### **How can Counsel assist with Stage 3 hearings?**

- a) The Stage 3 does not provide for recovery of Counsel's fees, save for an advice relation to an infant claim or a fixed fee for the advocate under CPR 45.29 of £250.00.
- b) Even though advice on quantum is no longer recoverable, it does not mean that the solicitors will no longer want an advice. There are Counsel who are prepared to vet offers, before claims proceed to stage 3.
- c) Arguably, it is better for cases to be argued, at a Stage 3 oral hearing, rather than leave it to Judges to make decision on paper. On balance, the claimant may have a better opportunity to secure a higher award for his general or special damages via oral submissions and this also means that there is an increased opportunity for the claimant to recover his success fee at the stage 3 hearing of £500 with 100% uplift on a CFA case, if he beats the defendant's best offer, as opposed to £250.00 with 100% uplift, on a CFA case for a paper hearing.

### **Any questions?**

Andrew Mckie is a Barrister at Clerksroom specialising in claimant and defendant personal injury, credit hire, employment, costs and fraud.

Andrew undertakes claimant and defendant instructions, for the following types of work:-

- All types of interlocutory hearings including case management conferences, allocation hearings, pre-trial reviews and applications.
- Multi track, fast track and small claims track, trials and disposal hearings.
- MOJ stage 3 hearings.
- Infant approval hearings.
- All types of written advice and pleadings.

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